Ménage À Trois in Antenuptial Agreements: Balancing the Interests of the Couple and the State

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And, for that dowry, I'll assure here of her widowhood, be it that she survive me, In all my land and leases whatsoever. Let specialties be therefore drawn between us, That covenants may be kept on either hand.[1]

INTRODUCTION

The antenuptial agreement is "a contract between prospective spouses prior to, in contemplation of, and in consideration of marriage . . . ." [2] Antenuptial agreements allow the engaged parties to substitute personally negotiated contractual terms for some or all of the contract terms imposed by law which naturally will arise once the parties become husband and wife.[3] Before marriage, the prospective spouses may contract for one or both of them to release or limit dower,[4] forced share [5] or intestate rights [6] in the estate of the other in the event one survives the other.[7] With respect to divorce, antenuptial contracts may waive specific provisions for alimony and property division and may attempt to limit support obligations upon separation, divorce, or even during the marriage.[8]

While the precise genesis of antenuptial agreements is uncertain,[9] these arrangements were surely recognized in Shakespeare's England [10] and early on by U.S. courts as contracts which deserved parity of treatment with other contracts founded upon a fiduciary relationship.[11] From a policy perspective, courts tended from the outset to favor the notion of prospective spouses contracting to forego or obtain property interests for themselves or their offspring.[12]

While the popular idea may once have been that antenuptial contracts were reserved for the rich and famous,[13] for older couples with considerable assets, or for couples where one or both parties had been previously married, the fact is that these agreements are proliferating among "ordinary people." [14] Four contemporary phenomena help explain the increasing popularity of these agreements.[15] First, modern couples desire to personalize marital contracts, thereby retaining their individual identities and tailoring the legal ramifications of the potential dissolution of their relationship to their unique circumstances. Second, couples object to the economic and legal incidents of marriage fixed by statute and judicial order. Third, couples are increasingly aware that marriage may not last "til death do us part" and, thus, they often seek to plan in advance under rational and considered circumstances before the tensions of divorce make those determinations difficult to negotiate. Finally, societal changes in earning potential, career choices, and property management make premarital contracting around financial issues more desirable to modern couples.

As popular and beneficial as antenuptial contracts may be, these agreements are inherently problematic.[16] Because they are in several respects different from ordinary contracts,[17] courts have subjected them to inconsistent and unpredictable treatment.[18] Although some states in recent years passed statutes concerning antenuptial contracts, the law of the antenuptial contract has evolved largely through judicial decision-making.[19]

The key legal issue is whether antenuptial agreements will be enforced upon dissolution of the marriage through either death or divorce. Enforceability currently depends on a number of factors, including statutory law, individual states' prevailing public policy, and the discretionary decision-making of judges in any particular jurisdiction: as the law evolves in a piecemeal fashion throughout the country, each jurisdiction establishes different standards for enforcement and determines the legal rights that can be altered.[20]

An integral part of the difficulty surrounding these contracts is the underlying reality that these agreements are not likely to be enforced until years after execution. Consequently, some courts review the substantive fairness of the agreement at the time of enforcement to determine whether changed circumstances have rendered the perhaps once valid antenuptial contract presently invalid. This phenomenon has been termed "the second look doctrine." [21] This doctrine describes the judicially created response applying a fairness review of antenuptial contracts from the perspective of the time of enforcement, rather than assessing the fairness of the document from the perspective of the time of creation, as the relevant reference point for review, or perhaps the doctrine takes both time frames into account.

This article [22] contends that an antenuptial contract should be invalidated only if it is deemed procedurally unfair or inadequate at its execution. After examining the historical background and philosophical underpinnings of the autonomous right to create antenuptial contracts, tracking the evolution in judicial thinking

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in the area, and critiquing the Uniform Premarital Agreement Act as it relates to support and property divisions, this article offers a proposal for drafting a procedurally enforceable antenuptial agreement. It concludes by advocating the adoption of a bright line standard for the judicial review of antenuptial agreements.

HISTORICAL BACKGROUND: CONTRACTS BETWEEN HUSBAND AND WIFE

The common law did not countenance a contract between a husband and wife. Under the legal fiction of coverture,[23] a "wife's legal identity was merged into that of her husband, and the law did not recognize one-party contracts." [24] Since antenuptial contracts came under the scope of this prohibition, their enforceability was a legal nullity.[25] Despite this seemingly formidable legal obstacle, parties industriously resorted to the trustee device to circumvent their inability to contract.[26] This device operated so that rather than the parties entering into a contract directly with each other, a trustee was named as a third party to the agreement.[27] In this way, antenuptial agreements were recognized and enforced.[28]

In the 19th century, the Married Woman's Property Acts [29] and various other state statutes altered the status of husband and wife by removing the disability of coverture, thereby enabling husbands and wives to contract freely with one another.[30] Two prohibitions nevertheless remained in force restricting the freedom of contract between husband and wife: a contract could not alter the essential elements of the marital relationship, and could not be made in contemplation of divorce, other than at the time of marital separation.[31]

Contracts Altering the Essential Incidents of Marriage

Under the traditional view of the marriage contract, there were two "essential obligations" [32] Which no agreement between parties could alter: the duty of the husband to support his wife, and the duty of the wife to serve her husband.[33] If a couple attempted to circumvent, or even modify, these essential obligations, courts typically voided the contract both because it was deemed violative of public policy and because there was said to be a lack of consideration for the so-called exchange.[34]

Contracts that waived the husband's support obligation were deemed by courts to be violative of public policy because they exposed society to the unwelcome prospect of assuming the husband's financial burden.[35] However, the courts were lax with regard to the disposition of marital property. Thus, for example, couples could agree to "transfer property, waive property rights in each other's estates, and provide for each other by will." [36]

Contracts in Contemplation of Divorce: The Inducement Theory

Courts historically have drawn a bright line between antenuptial agreements that speak to the property rights of prospective spouses upon death and those that attempt to provide for property divisions or alimony in the event of divorce. The former were favored and generally enforced; [37] the latter, under the "inducement theory," were generally condemned.[38] The inducement theory [39] is based on the idea that antenuptial agreements that contemplate divorce actually encourage marital dissolution and are, therefore, antithetical to the states' interest in preserving marriages.[40]

Judicial paternalism with respect to wives has also colored some courts' views of antenuptial contracts that contemplate divorce. If an unscrupulous bridegroom can induce his unsuspecting bride to agree to a premarital provision limiting his liability in the eventuality of divorce, then this man

> may inflict on his wife any wrong he might desire, with the knowledge his pecuniary ability would be limited. In other words, a husband could through abuse and ill treatment of his wife, force her to bring an action for divorce and thereby buy a divorce for a sum less than he would otherwise have to pay.[41]

Law and public policy rely on an aspect of inducement theory as a means of voiding antenuptial contracts that "invite[] dispute, encourage[] separation and incite[] divorce proceedings." [42] The argument proceeds as follows: [43] antenuptial agreement provisions in contemplation of divorce which stipulate property division and support may offer a spouse a less lucrative settlement than that spouse would obtain through court order. Therefore, the spouse with greater financial assets may be induced to act in a grossly abusive and deliberately intolerable fashion, armed with the knowledge that his or her financial liability is settled and insignificant compared to the capricious award a court might set. Conversely, the spouse with lesser financial assets may tolerate the abuse in order to avoid termination of the marriage and loss of financial security.

The inducement argument further contends that a husband has a duty to support his wife, which the wife should not be able to waive or minimize. The pretextual concern is that the wife may subsequently become a public charge. This argument is premised on a view of marriage as a commercial contract,[44] with women in an inherently unfair bargaining position.

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Since 1970, courts increasingly have reversed earlier presumptions and held that antenuptial contracts which contemplate support rights and property division in the event of separation and divorce are valid.[45] Courts are now recognizing that these agreements help to induce marriage rather than to encourage divorce.[46] This shift in judicial philosophy marks a significant departure from traditional public policy.

Traditional Arguments to Defeat Antenuptial Agreements

"The trend toward reason" [47] speaks to a change in society's attitude towards the preservation of marriage at all costs. This trend is manifested in judicial acceptance of antenuptial agreements. Recent cases rebut traditional notions concerning divorce by asserting that the rise in the incidence of divorce and the wide-spread adoption of no-fault divorce laws signal that the state's interest in the preservation of marriage likewise calls for a policy readjustment.[48] In fact, the advent of no-fault divorce laws [49] turns the inducement argument on its head because an antenuptial agreement which contemplates divorce no more encourages divorce than the no-fault divorce laws.[50]

With respect to the inducement theory, it has been noted that there is no "empirical showing of a causal relationship between these [antenuptial] agreements and divorce." [51] The inducement theory presumptively gives the wealthier party a financial incentive to divorce if an antenuptial agreement limits the support payments. However, a strong counter-argument is that the party with fewer assets has as strong an inducement to avoid divorce.[52]

Some commentators note that far from inducing divorce, antenuptial contracts actually inject a stabilizing element into the marital relationship.[53] Prospective support and property provisions have the distinct advantages of explicating in advance the rights and expectations of the parties; and those agreements which provide for division of property rights in the event of death have been said to be "*favored* by the law as conducive to marital tranquility." [54] In our society, where cohabitation is an increasingly attractive and popular alternative to marriage, the rights of a couple to tailor the legal structure of their relationship may advance and preserve the institution of marriage. These arguments go a long way towards upsetting the foundation upon which supporters of the inducement theory have erected their public policy rationalizations.

A second argument for invalidating antenuptial agreements is based upon the rationale that these contracts "commercialize the marriage relation." [55] This argument appears to be pretextual, and may be adequately addressed with the response presented above.[56] One supporter of antenuptial agreements has noted that the "essence of an interspousal contract is the effort by the spouses to articulate and negotiate their expectations of individual behavior within a framework of shared marital goals . . . ." [57] Another supporter refutes this commercialization argument by pointing to empirical evidence which belies a causal relationship between antenuptial contracts and breakdown of marriages in community property states, arguing that, similarly, there is no causal connection between marriage breakdowns and the ability to create enforceable antenuptial contracts.[58]

A third argument advances the idea that antenuptial contracts interfere with the husband's support duty.[59] This argument envisions a "parade of horribles," whereby unscrupulous husbands attempt to contract out of their full support obligations, and naive and dependent wives in turn fall indigent, reduced to turning to private or state charitable institutions for food, support, and shelter. Additionally, it is argued, women will be undercompensated for their traditional noneconomic services performed during the marriage, namely, homemaking and childrearing.[60] A responding argument is that by ensuring a fair procedure for the creation of antenuptial contracts, states may adequately guard against these horribles: the more economically dependent spouse will have both full and adequate disclosure of the wealthier spouse's assets and the benefit of the advice and counsel of an attorney whose primary function is the negotiation and execution of antenuptial agreements.

A final rationale for disfavoring antenuptial contracts subsumes three ancilliary objections and can be broadly termed the "inherently unfair" [61] argument. First, the usually long period of time between the creation of the antenuptial contract and its enforcement can transform an originally fair contract into an unreasonable one due to changed circumstances. Two realities obviate this problem. First, couples can mutually reform or revoke the antenuptial contract should it no longer meet their needs. Second, the original antenuptial contract can provide for contingencies or can by its own terms provide for judicial discretion for unforeseeable circumstances as an essential provision of the agreement. This latter point also serves to refute the second objection as well, namely, that "any enforceable antenuptial contract deprives the trial judge of his discretionary power to create equity between the parties." [62] The third objection states that these types of contracts are unfair because women are usually the economically dependent party and thus have "less business acumen and less bargaining strength than their male counterparts." [63] This last objection can be summarily dismissed by recognizing that the fair and full disclosure process, coupled with representation by an attorney who possesses business acumen and bargaining strength, will safeguard the more dependent party's interests.

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PROCEDURAL FAIRNESS IN A CONFIDENTIAL RELATIONSHIP

If the parties can demonstrate that the antenuptial agreement was executed in accordance with prescribed procedural standards, then the courts need not look to see if the agreement is substantively fair at the time the marriage ends. There is no justification for intruding into the contract and taking a "second look" at the agreement under any pretextual rationalization.

Courts frequently have relied on the "confidential relationship" concept [64] to justify launching into a paternalistic review of antenuptial agreements that would be unacceptable in ordinary contract cases. The confidential relationship concept is a key distinguishing feature of familial contract jurisprudence which, as one scholar has noted, "stand[s] halfway between the general contract law standards and traditional family law standards." [65] There are two historical explanations for this "doctrinal tool to police unfairness in agreements between [prospective] spouses." [66] Courts review antenuptial contracts more stringently because they are sensitive to the greater risk of fraud or unconscionability that may attend the negotiation of theme contracts.[67] Courts also are alert to the possibility that a contractual bargain cemented at one time may produce hardship for one or both parties due to unforeseeable exigencies in the future.[68]

Fraud and Unconscionability

The fraud and unconscionability strands of the confidential relationship doctrine arose from the states' self-imposed duty to shield "defenseless" wives from domineering husbands.[69] This stereotypical and sexist view of the spousal relationship envisioned that a man, highly skilled in financial and business affairs, would be tempted to take unfair advantage of his economically daft fiancee on the eve of their wedding — a time of trust when the veil of love can overshadow a woman's business acumen (assuming she had any in the first place).

Despite the normal remedies for voiding contracts negotiated through fraud, duress, or undue influence, courts considered contracts between intimate parties sufficiently ripe for potential subterfuge to justify employing the confidential relationship doctrine to thwart the antenuptial contract, or to subject it to particularly rigorous scrutiny. "Whereas [c]ontract law standards typically require great deference to the private choices and decisions of the contractors, . . . a [vigorous review including] substantive review [for fairness] of the contract is characteristic of areas dominated by public policy, such as family law . . . [but which is] atypical for contract law." [70]

This argument is obsolete. Modern women may no longer be automatically assumed to be in an inferior bargaining position vis-a-vis their prospective mates. Second, modern procedural safeguards insure that both parties fully understand the legal consequences of their antenuptial pact.[71] In this regard, insofar as the confidential relationship doctrine is invoked to impose " 'an affirmative duty upon each spouse to disclose his or her financial status, as a condition to enforcement," [72] then this use of the doctrine is consistent with the rights of the parties to contract fully and freely as equal and consenting adults.[73]

Changed Circumstances

Courts often take a second look at antenuptial contracts because even the most fairly negotiated contracts, hammered out with full and fair disclosure and independent legal representation, can become unfair as time passes or as unforeseen contingencies arise. In these circumstances, courts have often, in the interest of equity, reformed the antenuptial agreements to strike an equitable readjustment of the parties' rights.[74] While one might find it difficult to argue against this superficially reasonable approach to righting a perceived wrong, this approach ignores overarching principles of contract law and its attendant guarantees of reliance, enforceability, and even personal liberty to make a bad bargain.[75] The advantage of the "equitable" approach is outweighed, in this context, by the need to maintain the integrity of contract law.

A hypothetical may be helpful to illustrate this point. An affluent surgeon with a long and sunny future enters into an antenuptial agreement with his fiancee, providing that he will pay her $200,000 per year in the event of divorce. The couple marry; the wife foregoes her career. They move into a $2,000,000 estate and have two children within the next three years. The husband is then involved in an accident and loses the use of his right hand. He becomes acutely depressed. His wife sues for divorce. Invoking the doctrine of unfairness due to changed circumstances, a court could modify or nullify the support provision.

Now consider a variation of this hypothetical. The doctor and his wife divorce after three years and the doctor abides by the $200,000 per year support agreement. But then the doctor remarries, has two children with his new wife and adopts her two children from a previous marriage. He appeals to the court to reduce his support payments due to changed and unforeseeable circumstance. In this case, a judge, relying on family law standards of review, may well lower the support payments.

What these scenarios depict is that hard cases do make bad law — difficult, even wrenching, human situations often lead to paternalistic resolutions when judges confront two parties who had entered into good-faith contracts which provide for unforeseeable

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future contingencies. In the first hypothetical, both general contract and family law would likely reach a similar resolution, using an impossibility of performance rationale to modify the support provision. In the second, it is likely that general contract and family law would reach different resolutions: general contract principles would dictate that the doctor honor the original agreement, while soft family law principles would allow for modification of the original contract. Furthermore, the scenarios depict the great deal of discretion judges may exercise in family law situations, in contrast to general contract law cases. However, judges should not be permitted to be third party reformers of the contract. Rather, the appropriate antidote for unfairness is to expressly account for unforeseeability in the terms of the contract itself. A requirement of procedural fairness, at the time of execution, whereby each party to the contract has full and reciprocal knowledge of the nature and extent of property held by the other, removes the need and the basis for courts to engage in after-the-fact reformation.

PHILOSOPHICAL UNDERPINNINGS OF PATERNALISM

A full discussion of the normative question [76] of whether courts should have the ability to reform all or any part of an antenuptial contract at the time of enforcement requires an examination of the historical foundations of paternalism and its application to the family law area.

Paternalism

Paternalism concerns "compelling a decision on the ground that it is in the beneficiary's best interest." [77] Judicial decisions can be described as paternalistic when a contract term is either imposed or invalidated, despite the contrary intention of the parties.[78] One scholar has recently commented on the growing and widely shared antipaternalist strain in the late 20th century, arguing that "in a society committed to the value of self-determination, courts should be reluctant to act for paternalist reasons . . . ." [79]

Philosophers since John Stuart Mill [80] have underscored the

> value of personal autonomy as essential to the development of our individual faculties and as indispensable to the respect that each of us hopes and expects to receive from others . . . . [T]he very ability to choose — which necessarily implies the ability to make poor choices by some objective standard — is critical to the growth of our diverse intellectual, emotional and volitional capacities. Indeed, given the range of possible choices and preference, an individual is likely to have a better idea than anyone else of how a particular choice fits his circumstances and goals.[81]

Duncan Kennedy [82] has written prolificly and persuasively on the topic of paternalism in the sphere of contracts. He points to many of the philosophical "sources available to judges who have to define a content for [their] paternalist obligations." [83] One major justification is that people need to be protected from themselves. "Human finitude and normative error are the major sorts of personal imperfections: human beings have limited capacities to understand, to reason, and to *predict,* and they do not always know or choose the risks that under some moral theory they ought to prefer." [84]

One way courts perform paternalistically is via a "filling-in function . . . the decision-maker [becomes involved] in substantive choices about just how much duty one party owes another . . . . The decision-maker will have to refer to some conception of the morality of the particular situation." [85] Finally, Kennedy acknowledges that "the overall direction of the law is no more that of self-reliance than it is that of making everyone the beneficiary of everyone else's fiduciary concern." [86]

The inherent conflict between couples' desires to freely contract with respect to the terms of their marriage, and the states' interest in "protecting" the contracting parties can be viewed against this philosophical backdrop. While public policy restrictions on the ability of private parties to create private contracts [87] have relaxed in recent years, states have not foresaken their role as third parties to marriages. In an age of increasing personal liberty, the second look doctrine is a current attempt to reaccommodate the states' interest via judicial intervention; as such, the doctrine should be viewed as another stage in an impending phase-out of paternalistic intrusion into private contracts between intimate parties. Given the procedural safeguards of full and fair disclosure and independent legal counsel, the only rational course for states and courts to pursue is to accord antenuptial contracts the same standard of review as other types of general contracts. The traditional paternalistic role of states and courts in this area of contract law is now unwarranted and obsolete.[88]

Philosophical Foundations of Family Law

The normative issue of whether courts should be able to reform private contracts, has been termed the "private power conferring" function of law.[89] One author, Houlgate,[90] has developed an analytical framework, based on ethical and philosophical principles, applying this analysis to family law. Houlgate adopts a hybrid mix of ethical theories as the starting

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point for his analysis of human behavior, laws and policies.[91]

Although he ultimately rejects "natural rights" theory as a "pervasive" [92] but "flaw[ed]" [93] theory for family law application, Houlgate duly credits the great influence natural rights theories have had on the development of American family law. Houlgate aptly identifies the inherent irony embodied in the natural rights theory. On the one hand, "natural" means "independent of societies, laws, customs, and conventions." But by "rights" is meant something that *depends* on societies, laws, customs, and conventions for their very existence: [94]

> Natural rights theory takes the liberty of individuals as primary .... [It is] not only primary, it is a basic right .... John Locke (1632-1704) argued that "the state all men are naturally in [is] a state of perfect freedom to order their actions and dispose of their possessions and persons, as they think fit." To say that we have "perfect freedom" to do these things is to say that this is our right. This freedom or right is understood as natural, since it is independent of the laws and customs of particular societies. We possess them because of our nature as human beings and not because of our varying circumstances and degrees of virtue and merit.[95]

Marriage: From Status to Status-Contract

Sir Henry Sumner Maine [96] is often cited for his observation that the "movement of the progressive society has ... been a movement *from status to contract*." [97] In the 19th century, contract was viewed as the liberating vehicle for transporting individuals away from status-based institutions.[98] "The law of contracts embodied values of freedom, equality, self-government and legal competence." [99]

One family law scholar, Weitzman,[100] has observed that marriage has not progressed from status to contract. She views marriage as still entrenched in a status mode, in which rights and obligations flow from one's position, rather than having advanced to a contract mode in which parties may freely negotiate their rights and obligations as individuals and as a couple. Weitzman argues that marriage has only progressed from status to a status-contract: [101]

> [W]hile individuals who enter marriage have the same freedom of choice that governs entry into other contractual relations, once they make the decision to enter, the contract analogy fails, because the terms and conditions of the relationship are dictated by the state. The result is that marital partners have lost the traditional privileges of status, and, at the same time, have been deprived of the freedom that contract provides.[102]

Because "contract" implies rigid, arm's length, commercial bargaining, many view the notion of private contracts between spouses as antithetical [103] because marriage connotes an intimate and trusting relationship. What they often overlook is that marriage is an implicit contract imposed by law.[104] The implied contract is unusual in several respects: it is unwritten; its sanctions are not articulated; its provisions are usually unknown to the affected parties; and it is a contract of adhesion in the sense that the parties may not be able to opt out of any or all of its terms. Typically, couples only begin to learn about the state-created marriage contract when they begin to disagree about their individual obligations or the marriage breaks down. Certainly, advancing the rights of individuals to create antenuptial contracts arrived at through a prescribed procedural process will go a long way towards advancing progressive society's interest in moving away from status and toward contract in the institution of marriage.

CASE LAW SURVEY

Several principles can be derived from recent case law to illustrate the modern trend of judicial review of antenuptial agreements.[105] First, these cases reject the traditional rule that all antenuptial agreements in contemplation of divorce are automatically void as against public policy. Now, if these agreements can survive the general contract tests for unconscionability, fraud, duress, nondisclosure or misrepresentation, they are likely to be given at least judicial recognition. Second, these cases implicitly equate contracts that contemplate divorce with those that contemplate death, thus allowing prospective spouses to contract for alimony payments as they had previously provided for property division. Finally, and perhaps most significantly, courts have moved antenuptial contracts closer to the realm of general contract law.

Seven cases [106] illustrate the judicial "trend toward reason." [107] These cases address and redefine the permissible sphere within which a couple may realign the traditional legal incidents of marriage and their relative economic obligations and expectancies upon dissolution of the marriage.

Case Highlights

Posner v. Posner [108] involved Sari, a 27-year-old saleswoman, and Victor, a divorced, considerably older millionaire. Their five-year courtship was punctuated with lavish trips, expensive gifts, and Victor's payment of Sari's rent. In response to Victor's reluctance to remarry because of the prospect of reducing his fortune, Sari proposed an antenuptial agreement under which she would receive $600 per month in alimony in the event of divorce. When the parties

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sought a divorce five years after the wedding, Sari sued for a larger support award.

In this landmark case, the Florida Supreme Court boldly announced that Florida's recent liberalization of divorce laws required a concomitant change in the judicial treatment of antenuptial agreements which sought to provide for support and property rights of the divorcing couple. The court reversed the traditional assumption that agreements in contemplation of divorce tended to facilitate divorce by humorously noting that this was no more likely to be the case than antenuptial contracts in contemplation of death tend to facilitate death.[109] The court went on to pioneer the trend that "such agreements should no longer be held to be void *ab initio* as 'contrary to public policy.' " [110]

The court added two caveats. First, the antenuptial agreement must meet the scrutiny of fairness and adequacy tests.[111] Second, the agreement would be deemed valid only insofar as "conditions existing at the time the agreement was made." [112] A Florida statute then in effect [113] authorized courts to modify support payments which the parties had agreed to if there was a change in circumstances or if the husband's financial status changed since the execution of the agreement.

In *Volid v. Volid,*[114] a 60-year-old grandfather married a 40-year-old schoolteacher. Their antenuptial agreement stipulated that if the couple were to divorce within three years, the husband would pay the wife a single settlement totalling $50,000. If the marriage lasted beyond three years, the lump-sum payment would increase to $75,000. The marriage lasted just over three years and the court upheld the contract provision.

The court, in affirming this contract, rejected two familiar judicial reasons for invalidating agreements in contemplation of divorce. The court noted that the husband did not seek to circumvent his support obligation; rather, he made a generous settlement.[115] Second, the court stated that "a contract which defines the expectations and responsibilities of the parties promotes rather than reduces marital stability" [116] and furthermore, "public policy is not violated by permitting these persons prior to marriage to anticipate the possibility of divorce and to establish their rights by contract." [117] The court also insisted on familiar procedural safeguards — full knowledge and the absence of fraud, duress, or coercion.

In a third case, *Buettner v. Buettner,*[118] an antenuptial agreement provided that, in the event of divorce, the wife would receive the marital home, all the household goods and furnishings, and $30,000 to be paid out at a rate of $550 per month over five years. After only five months of marriage, the husband filed for divorce and sought to invalidate the agreement. He won the support of the trial court: the wife was awarded a dining room set, a couch, and a $2000 settlement to be paid out over 12 months. The Nevada Supreme Court upheld the original agreement, echoing the *Posner* and *Volid* courts in concluding that support and property rights provisions in antenuptial agreements which contemplate divorce are no longer void as contrary to public policy. The *Buettner* court, however, reserved the right to invalidate antenuptial agreements if their enforcement would result in harshness. "[A]ntenuptial agreements concerning alimony should be enforced unless enforcement deprives a spouse of support that he or she cannot otherwise secure. A provision providing that no alimony shall be paid will be enforced unless the spouse has no other reasonable source of support." [119]

Unander v. Unander [120] announced that marital partners are entitled to the same freedom of contract as other contracting parties and, moreover, prospective spouses need to be secure "in the knowledge that their bargain is as inviolate as any other." [121]

Perhaps the most far reaching of the cases, in that it departs from traditional public policy, is *Marriage of Dawley.*[122] An unwed schoolteacher became unexpectedly pregnant. She and the father planned a short-term marriage to preclude her from losing her job because of her illegitimate pregnancy. The couple signed an antenuptial agreement which provided: (1) the husband would support the wife and her child from a prior relationship for a minimum of 14 months; (2) the husband would support the child until the child attained the age of majority; (3) income acquired by each spouse during the marriage would be held separately; and (4) the couple mutually disclaimed all rights to the property of the other, including community property rights. Instead of lasting 14 months, the marriage endured for approximately eight years. During this time, the spouses carried out their reciprocal promise regarding maintenance of separate property. At the time of the divorce, the wife challenged the antenuptial agreement on the ground that the absence of support payments to her would constitute a violation of public policy.

Three years prior to *Dawley,* the California Supreme Court had insisted that antenuptial agreements "*must* be made in contemplation that the marriage relation will continue until the parties are separated by death." [123] The *Dawley* court pronounced a new test: did the objective language of the contract itself promote divorce? [124] The courts' attention should be directed not to the "subjective contemplation of the parties, but to the objective terms of the contract, and the effect of those terms in promoting the dissolution of the marriage." [125] The effect of the case was to disavow the dictum of earlier cases that antenuptial agreements were invalid as against state policy unless the parties subjectively contemplated a lifetime marriage.[126] Henceforth, only when the actual terms of the agreement "induce the destruction of a marriage that might otherwise endure" [127] will the court invalidate those offensive provisions. The court also rejected a

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test they characterized as inherently vague,[128] which linked the validity of an antenuptial agreement to the subjective contemplation of the parties, because the contracting parties, as well as others dealing with the contracting parties, would not be able to rely on the agreement.[129]

The sixth case, *Rosenberg v. Lipnick*,[130] involved a 59-year-old widow who signed a prenuptial agreement with a 70-year-old widower. The agreement provided that the wife would receive $5000 in lieu of dower or other rights if she survived her husband; the husband waived any claim to the wife's estate. Prior to signing the agreement, the prospective wife asked her brother, who was an attorney, to review the agreement. He counseled her to inquire into the extent of her prospective husband's assets, indicating that the provision might be inadequate. Ignoring his recommendations, she signed the agreement without knowledge of her future husband's worth. The husband died after 17 years of marriage with an estate worth approximately $119,000. The wife brought an action against the decedent's estate seeking invalidation of the agreement and further seeking her statutory share of his estate plus a widow's allowance.[131]

Validating the antenuptial agreement and refusing to grant, the factfinders relied on the well-established rule enunciated in *Wellington v. Rugg*.[132] For over half a century, *Wellington* stood for the following propositions: (1) parties to an antenuptial agreement occupy a confidential relationship and are bound to act fairly and in good faith in their mutual dealings; [133] (2) however, a husband's "simple failure" [134] to voluntarily disclose the extent of his assets prior to entering into an antenuptial agreement is an insufficient basis for invalidating an agreement; and (3) the spouse seeking invalidation of an agreement carries the burden of demonstrating fraud.[135]

The *Rosenberg* court abandoned the *Wellington* rule prospectively, holding that henceforth, two parties would be under a duty of full disclosure of their respective assets.[136] In dicta, the court tacked on other relevant factors which it might consider in passing on the validity of antenuptial agreements. First, the court may assess whether the agreement contains fair and reasonable provisions for the complaining party measured at the time of execution.[137] Second, the court may inquire whether the complaining party was fully informed of the prospective spouse's assets prior to signing the contract, or whether the party "had, or should have had, independent knowledge of the other party's worth." [138] Third, the court may look to the terms of the agreement to ascertain whether the complaining party expressly waived marital rights.[139] Fourth, the court may weigh in factors such as the spouses' respective worth, ages, intelligence, literacy, business acumen, and prior family ties or obligations.[140] The court's overarching message significantly advanced liberty and reliance interests:

> The right to make antenuptial agreements settling property rights in advance of marriage is a valuable personal right which courts should not regulate destructively. Neither should the exercise of that right be looked upon with disfavor. Thus, we recognize that antenuptial agreements must be so construed as to give full effect to the parties' intentions . . . ." [141]

What *Rosenberg* did for antenuptial agreements in contemplation of death, *Osborne v. Osborne* [142] did for agreements in contemplation of divorce. This 1981 case was the first in which the Massachusetts Supreme Judicial Court examined the validity of an antenuptial contract and its attempt to provide for the mutual legal and financial rights of divorcing spouses. In *Osborne*, the parties met and decided to marry while both were in medical school. The groom had no noteworthy assets, the bride was an heiress to a $17,000,000 family fortune, largely held in trust. Just hours before the wedding, the couple executed an antenuptial agreement which provided that neither spouse would claim an interest in the other's property upon death or divorce. A complete schedule of the bride's current and future assets was attached to the agreement.

The *Osborne* court upheld the agreement, analyzing a three factor test to determine the extent to which antenuptial agreements would be given prospective effect. "Fair disclosure" [143] rules outlined in *Rosenberg v. Lipnick* provide the standard for analyzing fairness of the agreement at the time the agreement is executed. However, the courts will take a second look at the fairness and reasonableness of the support and property divisions at the time of entry of the divorce judgment nisi [144] and a judge may modify the provisions at this point.[145] Lastly, certain contract provisions [146] may be so offensive to public policy as to prohibit their enforcement.

Standards for Judicial Review

In the past two decades, couples have gained considerable ground in their ability to exercise freedom of contract. Yet, the post-*Posner* cases leave unanswered one critical question: will courts retain the discretionary right to take a second look at the substantive fairness of individual antenuptial contracts? There is a substantial body of commentary,[147] case law,[148] and legislation [149] that supports the second look doctrine. On a practical level, the doctrine may be viewed as a safety valve with which the courts may, in appropriate cases, relieve parties from hardships due to changed circumstances. On a theoretical level, the doctrine can be perceived as an entrenched public policy attempt by the state to remain an omnipresent third party to marriages. This doctrine persists despite the evolving body of law that appears to favor marital partners'

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freedom to contract around their support and property rights.

UNIFORM PREMARITAL AGREEMENT ACT

In July, 1983, the Uniform premarital Agreement Act [150] was approved and endorsed for enactment in all states.[151] As of 1988, 11 states [152] had adopted the Act in some form. While the Act is comprehensive in scope, only sections relevant to the issues considered in this Note are addressed here.[153]

The Act was developed, in part, in response to the legal inconsistencies wrought by state-by-state doctrinal development. The Act also responds to the needs of modern couples who neither occupy nor typlify traditional husband-wife roles.[154] It was specifically intended to correct a situation in which, despite a long and healthy legal history, antenuptial agreements continue to suffer from "a substantial uncertainty as to the enforceability of all, or a portion, of the provisions of these agreements and a significant lack of uniformity of treatment of these agreements among the states." [155]

In large measure, the Act accomplishes its goals by providing for freedom of contract as well as flexibility [156] and uniformity. The Act is liberal and comprehensive in extending parties the freedom to contract with respect to any property belonging to either or both parties whenever and wherever that property is obtained and located.[157] The contract can contemplate divorce, death or any other happenstance.[158] Either spouse can choose to modify or waive spousal support [159] or death benefits.[160] The contract can provide for the choice of law to prevail in construing the agreement.[161] In the broadest provision of all, the parties can contract with respect to "any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty." [162]

Yet what the Act gives on the one hand, it takes away with the other — and takes away in an internally inconsistent manner. Section 3 of the Act grants the contracting parties almost unlimited freedom to waive or modify property or support rights. But §6 brings the court back into the picture as the omnipresent third party to what is, by definition, a two-party contract.

In form, the Act does three things right in §6: (1) it borrows a general contract term, "unconscionability," [163] to review a family law contract; (2) it states that the apt time to assess whether the contract is unconscionable is at the time the agreement is executed; and (3) it provides for procedural fairness.[164]

Unfortunately, in substance, the Act also does three things wrong in §6. First, looking beyond the express terms of "unconscionable when it was executed," [165] the Act authorizes the court to take a second look to assess the substantive effect of waiver or modification of spousal support provisions. This is a direct contradiction to fixing the point of review at the time of creation of the contract. The Act commits a second error when it provides for a substantive fairness review of economic adequacy by the judge when the prior subsection insists upon a procedural fairness review and further provides for the possibility of waiver if done voluntarily and with full and adequate disclosure.

The third way the Act falls short is in applying a second look/substantive fairness review only where spousal support is waived or diminished in the event of divorce. Judicial review does not extend to property provisions, which certainly can have as great an impact on causing one spouse to seek public assistance as can inadequate support payments. Furthermore, the Act fails to provide for review of agreements waiving spousal rights and property arrangements that take effect upon the death of a spouse.

Drafting An Enforceable Antenuptial Agreement

Despite recent advances, antenuptial agreements are plagued by uncertainty. Courts retain broad discretion over agreements, and even comprehensive "solutions" like the Uniform Premarital Agreement Act are seriously flawed. A contracting couple's only defense is careful drafting: while the parties to the contract do not have ultimate control over the enforceability of their antenuptial contract, they can exercise independent and "complete control over the circumstances surrounding execution of the agreement as well as its contents." [166] With that in mind, the following suggestions [167] are presented.

First, both parties should obtain independent legal counsel to represent their interests and, perhaps, to act as active negotiators or stand-by arbitrators. At the very least, legal counsel should be retained to review the final document and a statement should be made in the contract to the effect that each party obtained legal counsel. Attorneys should include their signatures in the document.

Second, attorneys should advise clients about the uncertainty that exists in the law and about the need to build in flexible provisions in case their intentions are frustrated at the time of judgment.

Third, whenever possible, the agreement should be created and executed a reasonable period of time in advance of the actual wedding date to obviate defenses of duress or coercion — not to mention to promote the interests of marital harmony.

Fourth, a careful analysis of the parties' respective financial circumstances should be performed. Whenever possible, the agreement should contain a flexible payment schedule, which can automatically adjust to shifting circumstances.[168]

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Fifth, full, accurate and detailed financial disclosure should be insisted upon by both parties. In addition, the agreement should contain a statement by each party to the effect that he or she understands the financial circumstances of the other and agrees that the provisions of the agreement are fair and that the agreement is being entered into voluntarily.

Sixth, a schedule of assets and liabilities representing each party's full and accurate financial picture should be attached to the agreement to aid the court in procedural review. Each party should sign and date his or her respective schedule and each schedule should state that it is a full and accurate representation of that party's financial status.

Seventh, if either party intends voluntarily to waive his or her marital rights relating to support, property or intestacy, that party should explicitly state so in the agreement, and should include an explanation for what a court may, on second look, term an "unfair" or "unconscionable" provision.

Eighth, the agreement should provide for the choice of law to govern to prevent forum shopping.

Ninth, if the agreement contains provisions in contemplation of divorce, the agreement should include language to the effect that it is intended to survive a divorce judgment as an independent contract between the parties.

Finally, the parties may want to mollify the effects of a judicial reformation of their agreement by providing that in the event that unforeseeable circumstances make enforcement of the agreement unduly harsh, the reviewing court should fashion an equitable result in the spirit of the particular provision.[169] This is analogous to a trust provision instructing a trustee to provide for various contingencies on behalf of beneficiaries.

CONCLUSION

"At its best, marriage is a voluntary sharing, and at least it is a legal commitment of support." In any event, marriage is a status which carries rights and imposes duties. In the last 20 years, the state has come a long way in allowing parties to modify these rights and duties through the mechanism of private antenuptial contracts.

While freedom of contract is a basic and essential liberty — a "natural right" — in our legal system, the state continues to insist on carving out a special role for itself. In the sphere of antenuptial agreements, states are generally abandoning their moral and social strangleholds and are no longer insisting on " 'til death do us part" marriages; yet, states are continuing to secure an economic foothold to the extent that judges invalidate an otherwise valid contract to ensure that dependent ex-spouses do not become a drain on the state coffers. At bottom in the debate surrounding antenuptial contracts is the question of whether two consenting adults can freely contract away their rights in each other's estates and can rely on the effectiveness of their bargain — be it wise or foolish. If freedom of contract is to be more than an empty platitude in the evolving area of domestic relations law, antenuptial agreements — which represent a progressive and significant aspect of domestic relations law — must be reviewed by the same standards applied to general contracts. Just as the contracting rights of marital partners have advanced in the eyes of the law, domestic relations deserve to be elevated to the status of general contract law, out from under the paternalistic grasp of judges employing protective principles.

This article proposes a bright line standard of review. If the court determines that contracts were executed under conditions of procedural fairness, that should be the end of the inquiry. Traditional family law standards of review can be invoked for those contracts which fail to withstand procedural scrutiny. This approach promotes both freedom of contract and judicial efficiency. The model series of practical suggestions detailed above, which if followed, would largely obviate the need for judicial invalidation of antenuptial agreements.

If parties could count on courts invalidating antenuptial contracts only if there was unconscionability in the creation of the agreement, and limiting their unconscionability inquiry to defects in procedural process, freedom of contract for prospective spouses would be sound and intact. But courts have implicitly taken upon themselves the lofty task of balancing the relative importance of contractual freedom with the economic hardship resulting from a bad bargain. As with other liberties we hold dear, costs, burdens, and consequences ensue from the freedom to contract. Some bad bargains may be the price society has to pay for the freedom of contract between mature and knowledgeable parties who happen to want to marry. Until now, the court placed its heavy paternalistic thumb on the distributive scale of justice, and freedom of contract lost in the weighted imbalance. Until such time as a Uniform Premarital Agreement Act which approaches a Lockean ideal model whereby prospective spouses could attain "perfect freedom to order their actions and dispose of their possession and persons, as they think fit," [170] antenuptial agreements will continue to present challenges and uncertainties for the couple, for the practitioner, and for the state.

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FOOTNOTES

* Acknowledgement for the title of this paper is credited, in part, to Zabel & Frunzi, *Menage A Trois in Premarital Agreements,* 126 Tr. & Est. 32 (June 1987).

[1] W. Shakespeare, Taming of the Shrew, Act 2, Scene I.

[2] Green & Long, *Marriage and Family Law Agreements* 102 (1984).

[3] Rutkin, "When Prenuptial Contracts are Challenged in Court," 6 Family Advocate 18 (1984).

[4] Dower refers to a common law concept which entitled the wife, if she survived her husband, to a life estate in one-third of all the property of which her husband was seized at any time during the marriage. Dower was an inchoate interest which could not be defeated by the husband's will, by his *inter vivos* conveyances (unless the wife consented), or by the husband's creditors. Scoles & Halbach, Jr., *Problems and Materials on Decedents' Estates and Trusts,* 89 (4th ed. 1987).

[5] Forced Shared refers to a protection for surviving spouses which exists in almost all noncommunity property states. This statutory forced heirship entitles surviving spouses to a specified share of the decedent's estate, despite any provisions to the contrary in the decedent spouse's will. *Id.*

[6] Intestate Rights refers to the share of the estate that the widow(er) receives upon the decedent spouse's death in the absence of a valid will, or if a will fails to completely dispose of the estate. Statutes in each state promulgate a pattern of intestate succession under which the intestate property will pass. Commonly, a surviving spouse takes only one-third of the estate. This share may be increased if there are no living descendants. In community property states, intestate statutes usually provide different treatment for separate and community property.

Under the Uniform Probate Code §2-102, the surviving spouse gets: (1) the whole estate if there are no surviving parents or children of the decedent; (2) the first $50,000 plus one-half the balance of the intestate estate, if there are surviving parents but no children; (3) the first $50,000, plus one-half the balance of the intestate estate if there are surviving children (all of whom are children of the surviving spouse as well); and (4) one-half of the intestate estate if any of the surviving children are not children of the surviving spouse. *See generally id.* at 45-49.

[7] Haskell, "The Premarital Estate Contract and Social Policy," 57 N. C. L. Rev. 415, 417 (1979).

[8] *Id.* One author surveyed case law, categorizing typical antenuptial contract provisions as follows: (1) the party filing for divorce agrees to waive interests and claims in property and alimony; (2) mutual waivers without regard to which party files for divorce; (3) provisions stating that if the marriage dissolves in divorce, the wife will receive a set sum of money in lieu of both alimony and all her statutory rights in her husband's property; (4) a trust provision stipulating that upon marriage, the fund's income will flow to the wife with the corpus to be directed to her when the husband dies; however, if the marriage ends in divorce, the corpus will instead return to her husband. Gamble, "The Antenuptial Contract," 26 U. Miami L. Rev. 692, 704 n.46 (1972).

[9] *See* Green & Long, *supra* note 2, at 109. *But see* Younger, "Perspectives on Antenuptial Agreements," 40 Rutgers L. Rev. 1059, 1060 (1988).

[10] *See* W. Shakespeare, *supra* note 1.

[11] Green & Long, *supra* note 2, at 111.

[12] *Id.* at 111 (citing the Supreme Court of Indiana in *McNutt v. McNutt,* 116 Ind. 545, 19 N.E. 115, 121-22 (1888)): "Reason and authority are both in favor of a liberal construction of these contracts, for their purpose is to prevent strife, secure peace, adjust rights, and settle the question of marital rights in property. From the earliest years of the law, the courts of chancery, respecting the iron rules of the common law, have favored contracts of this character, and this rule of equity has been grafted into the body of American jurisprudence . . . Measuring this contract by the rules of law, reading it by the light of the attendant circumstances, and looking to the object the parties intended to accomplish, there can be no doubt as to the effect that should be given its provisions."

See also id. at 101 (quoting *In re Appleby's Estate,* 100 Minn. 408, 418, 111 N.W. 305, 307 (1907)): "[Antenuptial agreements] are matters of history, and have been upheld and sustained by the courts from the earliest times. They are not against public policy, but, on the contrary, are regarded with favor, as being conductive to the welfare of the parties and subservient to the best purposes of the marriage relation, and are uniformly sustained when free from fraud . . . ."

[13] Younger, *supra* note 9, at 1060. Jacqueline Kennedy and Aristotle Onassis, Joan Collins and Peter Holm readily come to mind and have received widespread media attention for their creation of antenuptial agreements.

[14] *Id.* (citing "Prenuptial Pacts Rise, Prenuptial Trust Falls," The N.Y. Times, Nov. 19, 1986, at Y 17-18, col. 1).

[15] Some of the rationales are set forth in Wadlington, *Cases and Other Materials on Domestic Relations,* 1114-15 (1984).

Another practitioner has offered the following reasons for prospective spouses to seek a prenuptial agreement: (1) to protect preexisting assets from estate claims; (2) to protect income and assets, acquired both before and during the marriage, in case of divorce; (3) to prearrange the economic partnership between the future spouses; (4) to firmly fix economic rights and obligations after marriage between the prospective spouses (sometimes including the contribution of each spouse to expenses and tax obligations); (5) to protect family businesses, professional practices and pensions; and (6) to assure fair and equal treatment of children from previous marriages. Kemper, "Not Cast in Stone," 6 Family Advocate 9 (1984).

[16] *See generally* L. Weitzman, *The Marriage Contract,* 353-59 (1981).

[17] *See* Younger, *supra* note 9, at 1061-62.

[18] *See* Haskell, *supra* note 7, at 415.

[19] *Id.*

[20] George, "Marching to a Single Beat," 6 Family Advocate 25 (1984). It is important to note that the antenuptial agreement may also impact on the liberty of a spouse to dispose of property through his/her will. For example, in *Dubin v. Wise,* 41 Ill. App. 3d 132, 354 N.E. 2d 403 (1976), the husband contracted in a prenuptial agreement to leave one-fourth of his property to his wife under his will. The husband subsequently made *inter vivos* gifts of substantial property to his sons. The court held these *inter vivos* transfers to be a breach of an implied term of the prenuptial agreement that the husband would deal with his property in good faith and that these extensive gifts of property to the sons "constituted a fraud implied in law upon the vested contractual right of . . . [the wife] under the agreement . . . ." *Id.* at 354 N.E. 2d at 411. Because the court found that the promisee/wife under the antenuptial contract had an interest in the *inter vivos* gifts and that the promisor/husband intended to subvert the prenuptial contract, the wife was able to recover one-fourth of the property transferred to the sons.

[21] I wish to credit Attorneys Ronald Witmer, Michael Fay, and Jennifer Snyder of Hale & Dorr, Boston, Massachusetts for coining this phrase in the context of antenuptial contracts and for sharing their thoughts, experience and insights on antenuptial contracts with me.

[22] This article is limited to a discussion of support and property divisions occasioned by death or divorce and will not address other possible uses of antenuptial contracts, *e.g.,* (1) contracts for personal services; (2) decisions concerning child custody, support, or upbringing; (3) career issues; (4) regulation of sexual aspects of the marriage; and (5) daily living provisions.

[23] *See* Weitzman, *supra* note 16, at 338 (citing *U.S. v. Yazell,* 382 U.S. 341, 361 (1966) (Black J., dissenting)).

[24] *See* Green & Long, *supra* note 2, at 111.

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[25] *See* Weitzman, *supra* note 16, at 338.

[26] Lindey, *Separation Agreements and Ante-Nuptial Contracts*, §90, at 90-28 (1985).

[27] *Id.*, at 3-11 (1985).

[28] Lindey, *supra* note 26, at 90-28.

[29] The Married Women's Property Acts gave married women the same ability to contract for their real and personal property enjoyed by unmarried women. *See generally* Cunningham, W. Stoebuck, & D. Whitman, *The Law Of Property*, 79-82 (1984).

[30] Green & Long, *supra* note 2, at 111.

[31] Weitzman, *supra* note 16, at 338.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 338-39.

[35] *Id.* at 339, citing the case of *Eule v. Eule*, 24 Ill. App. 3d 83, 320 N.E. 2d 506 (1974) (holding that a wife's waiver to financial support on the event of separation or divorce is invalid as the husband was legally obliged to support the wife in the event of marital dissolution).

[36] *Id.* at 341.

[37] *Posner v. Posner*, 206 S. 2d 416, 417 (Fla. Dist. Ct. App. 1968), rev'd, 233 So. 2d 381, 383 (1970).

[38] Some courts invalidate the entire prenuptial agreement as void against public policy, while other courts sever only the provisions applicable to divorce and uphold the rest of the contract. *See* Green & Long, *supra* note 2, at 131.

[39] *See, e.g., Fricke v. Fricke*, 257 Wis. 124, 42 N.W. 2d 500 (1950), *infra* notes 42, 44.

[40] *See* Lindey, *supra* note 26, at 90-33. *See also Posner v. Posner*, 206 So.2d 416, 417 (Fla. Dist. Ct. App. 1968), rev'd, 233 So.2d 381 (Fla. 1970). *See generally* Annotation, "Setting Aside Antenuptial Contract or Marriage Settlement on Ground of Failure of Spouse to Make Proper Disclosure of Property Owned," 27 A.L.R. 2d 432 (1981) (Supp. 1988); Annotation, "Validity, Construction, and Effect of Provision in Antenuptial Contract Forfeiting Property Rights of Innocent Spouse on Separation or Filing of Divorce or Other Matrimonial Action," 57 A.L.R. 2d 942 (1958); Annotation, "Duty of Husband to Support Wife as Affected by Antenuptial Contract," 98 A.L.R. (1935); Annotation, "Validity of Antenuptial Agreement, or 'Companionate Marriage' Contract, Which Facilitates or Contemplates Divorce or Separation," 70 A.L.R. 826 (1931). *See also In re Duncan Est.*, 87 Colo. 149, 152, 285 P. 757, 757 (1930) (antenuptial contract, which provided for $100 a year in support payments to the wife in the event of an uncontested divorce without alimony, was called a "wicked device" and "an attempt . . . to legalize prostitution").

[41] Lindey, *supra* note 26, at 90-34 (quoting *Crouch v. Crouch*, 385 S.W. 2d 288, 293 (1964)).

[42] *Fricke v. Fricke*, 257 Wis. at 126, 42 N.W.2d at 502.

[43] This discussion is directly culled from Green & Long, *supra* note 2, at 132-33.

[44] In *Fricke v. Fricke*, *supra* note 39, 42 N.W. 2d at 501, the Supreme Court of Wisconsin emphasized that despite the fact that "unusual circumstances have caused a marked increase in the divorce rate [this] changes our attitude toward the marital relation and its obligations, nor should it encourage the growth of a tendency to treat it as a bargain with as little concern and dignity as is given to the ordinary contract." *See also Parniawski v. Parniawski*, 33 Conn. Supp. 44, 45, 359 A.2d 719, 721 (1976) (to allow transactions in which husbands and wives enter into contracts with one another "would inject a disturbing influence of bargain and sale into the marriage relationship and induce a separation rather than a unity of interest").

[45] *See infra* text accompanying notes 105-107.

[46] *See, e.g.*, Note, *Gross v. Gross*, "Antenuptial Agreements in Ohio — Enforceable Upon Divorce," 12 Ohio N.U.L. Rev. 153, 161 (1985).

[47] Note, "Public Policy, The Courts, and Antenuptial Agreements Specifying Alimony," 23 U. Fla. L. Rev. 113, 120 (1970).

[48] *See Volid v. Volid*, G. Ill. App. 3d 386, 391, 286 N.E. 2d 42, 47 (1972) (public policy is not violated by antenuptial agreements in contemplation of divorce if the contract is entered into with full knowledge and without fraud, duress, or coercion); *Unander v. Unander*, 265 Or. 102, 105, 506 P.2d 719, 721 (1973) (signaling recognition of the need for a change in societal attitude in noting that "the adoption of the 'no fault' concept of divorce is indicative of the state's policy . . . that marriage between spouses who 'can't get along' is not worth preserving. We believe a marriage preserved only because good behavior by the husband is enforced by the threat of having to pay alimony is also not worth preserving . . ."). *See also, Posner, supra* note 40, at 384 (stating "we know of no community or society in which the public policy that condemns a husband or wife to a lifetime of misery as an alternative to the opprobrium of divorce still exists. And a tendency to recognize this change in public policy and to give effect to the antenuptial agreement of the parties relating to divorce is clearly discernible").

[49] The first no-fault divorce law was passed in California in 1969. By 1980, only Illinois and South Dakota had not promulgated a no-fault option for divorce. Weitzman, *supra* note 16, at 3.

[50] Green & Long *supra* note 2, at 136. *See also* Clark, "Antenuptial Contracts," 50 U. Colo. L. Rev. 141, 149. The author notes that in those states adopting no-fault divorce provisions, "there is no longer as much reason as formerly to be hostile to agreements which facilitate divorce. By adopting this ground for divorce these states have recognized that nothing is to be gained by trying to hold spouses together when in fact their marriage has broken down. The antenuptial agreement in such states can hardly be more conducive to divorce than the divorce grounds themselves."

[51] Note, "Antenuptial Contracts Contingent Upon Divorce Are Not Invalid Per Se," 46 Mo. L. Rev. 228, 230 (1981) (hereafter note, "Antenuptial Contracts Contingent Upon Divorce." *See also* Evans, "Antenuptial Contracts Determining Property Rights Upon Death or Divorce," 47 UMKC L. Rev. 31, 48 (1978): "[C]ourts have seldom examined the agreement or circumstances of the case to determine whether the contract did in fact encourage the parties to divorce. Logic does not dictate that an agreement which *provides* for divorce necessarily *promotes* divorce. The courts have made this causal connection and have turned a sound public policy concern into a hard and fast rule which is clearly unjustified" (emphasis in original).

[52] Green & Long, *supra* note 2, at 135. Many of the restrictions on the ability of husbands and wives to contract were aimed at protecting wives. Yet, some scholars insist that "the principles developed to protect marriage and family as an institution are the most sex discriminatory in all of law." *See* Krauskopf & Thomas, "Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support," 35 Ohio St. L. J. 558, 558, (1974).

[53] *See, e.g.*, Note, "Antenuptial Contracts Contingent Upon Divorce," *supra* note 55, at 231-32; Green & Long, *supra* note 2, at 136.

[54] Note, "Antenuptial Contracts Contingent Upon Divorce," *supra* note 55, at 231.

[55] *Id.*

[56] *See supra* text accompanying notes 50-54.

[57] Note, "Interspousal Contracts: The Potential for Validation in Massachusetts," 9 Suffolk U.L. Rev. 185, 204 (1974).

[58] Note, "Antenuptial Contracts Contingent Upon Divorce," *supra* note 55, at 231. At least one author suggests that the theory behind why some community property states enforce antenuptial contracts is that the state will step in and regulate property interests only if the spouses expressly fail to do so. *Id.* at 231 (quoting W. DeFuniak, *Principles of Community Property*, §59 at 116 (2d ed. 1971)).

[59] Note, "Antenuptial Contracts Contingent Upon Divorce," *supra* note 55, at 231-32.

[60] *Id.*

[61] *Id.* at 232-33.

[62] *Id.* at 232. For judicial opinions welcoming antenuptial agreements, *see Marschall v. Marschall*, 477 A. 2d 833, 838-

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39 (1984): "To the extent that parties who are about to marry make rational attempts to guard against what their intelligence (and sometimes their experience) tells them is an unpleasant but all too real possibility [*i.e.*, divorce], ... [antenuptial agreements] should be encouraged .... Voluntary agreements regarding matrimonial differences are highly desirable and make a major contribution to the fulfillment of the 'strong public policy favoring stability of arrangements' .... Thus to the extent the parties have developed comprehensive and particularized agreements responsive to their particular circumstances, such arrangements will be entitled to judicial deference and [will] greatly assist the judiciary in the discharge of its supervisory role in such matters."

[63] Note, "Antenuptial Contracts Contingent Upon Divorce," *supra* note 55, at 232.

[64] *See generally* Sharp, "Fairness Standards and Separation Agreements A Word of Caution on Contractual Freedom," 132 U. of Pa. L. Rev. 1399, 1414-1424 (1984). Professor Sharp eloquently defined the concept as follows: "The confidential relationship concept lies at the heart of the traditional system of 'protective' principles in domestic law. It stems from the almost unique community of interests in marriage, the degree of mutual trust and confidence between the parties, and the resulting expectation that one spouse will act in the other's best interest. The extraordinary nature of the husband-wife relationship, however, creates extraordinary opportunities for abuse of the relationship, and domestic law principles have long sought to protect against that potential for abuse."

See also Martin v. Farber, 510 A. 2d 608, 612 (1986), quoting *Bass v. Smith,* 189 Md. 461, 469, 56 A.2d 800, 804 (1948): "In order to establish the existence of a confidential relationship, it must be shown that one party is under the domination of another, or ... [that] the circumstances [are such that] ... [one] party is justified in assuming that the other will not act in a manner inconsistent with his or her welfare." The *Martin* court went on to state that the presumption flows from the existence of a confidential relationship that the inferior party placed his or her confidence in the dominant party and that the dominant party has profited through fraud, undue influence, superiority or abuse of the confidential relationship. The dominant party thus has the burden of showing, by clear and convincing evidence, that the bargain was both fair and reasonable. *Id.* at 612.

[65] Weitzman, *supra* note 16, at 345.

[66] Sharp, *supra* note 64, at 1414 n.61.

[67] *See generally* Weitznan, *supra* note 16, at 344-46.

[68] *Id.* at 346-47.

[69] *See* Sharp, *supra* note 64, at 1414. At least one court considered the possibility of reversal of traditional sex-stereotyped roles: "If the prospective husband is a commonplace and elderly drab and the prospective bride a worldly-wise and winsome young woman the rule [concerning burden of proof in invalidating prenuptial contracts] should be applied, if at all, with caution." *DelVecchio v. DelVecchio,* 143 So. 2d 17, 21 (1962).

[70] Weitzman, *supra* note 16, at 345.

[71] *See infra* text accompanying notes 167-169.

[72] Weitzman, *supra* note 16, at 345.

[73] *See Unander v. Unander,* 506 P.2d 719, 721 (Ore. Sup. Ct. 1973) (declaring that people need "to be able to freely enter into antenuptial agreements in the knowledge that their bargain is as inviolate as any other").

[74] *See, e.g., Buettner v. Buettner,* 89 Nev. 39, 505 P.2d 600 (1973).

[75] Weitzman, *supra* note 16, at 359.

[76] "Normative questions about family law are questions about the morally justifiable relationships that can exist between the state and the family." Houlgate, *Family and State* 9 (1988).

[77] Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power," 41 Md. L. Rev. 563, 625 (1982).

[78] Shapiro, "Courts, Legislatures, and Paternalism," 74 Va. L. Rev., 519, 534-35 (1988) (citing Kennedy, *supra* note 77, at 624-31).

[79] Shapiro, *supra* note 78, at 521.

[80] Mill, *On Liberty,* (Himmelfarb ed. 1982) (1st ed. 1859). John Stuart Mill may be counted among the earliest of anti-paternalists: "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good ... is not a sufficient warrant." *Id.* at 68.

Present-day philosophers echo similar anti-paternalist sentiments. *See, e.g.,* J. Feinberg, *Harm to Self* (1986); D. Van DeVeer, *Paternalistic Intervention* (1986). *See also* King, *Melville W. Fuller, Chief Justice of the United States, 1888-1910* 90 (1950) (quoting Fuller: "Paternalism, with its constant intermeddling with individual freedom, has no place in a system which rests for its strength upon the self-reliant energies of the people").

[81] Shapiro, *supra* note 78, at 546.

[82] Kennedy, *supra* note 77.

[83] *Id.* at 631.

[84] *Id.* at 632 (emphasis added).

[85] *Id.* at 637.

[86] *Id.* at 638.

[87] Constitutional decisions have challenged the state's exercise of plenary control over marriage. *See, e.g., Griswold v. Connecticut,* 3 81 U.S. 479 (1965) (recognizing that the marital relationship lies within the constitutionally protected zone of privacy); *Loving v. Virginia,* 388 U.S. 1, 12 (1967) (stating that it may no longer be "assumed that states have autonomy over rules and law governing marital status").

[88] Some scholars have come to view "judicial review as an unnecessary vestige of a paternalistic legal system that simultaneously creates undue opportunities for excessive subjectivity in the exercise of judicial discretion and undermines the reasonable expectations of the parties in the finality of their agreements." *See* Shapiro, *supra* note 78, at 1403.

[89] Houlgate, *supra* note 76, at 7. The author classifies laws according to their various functions. The private power-conferring function of law enables private parties to legally effect private arrangements by specifying what procedures must be followed and by signaling the legal status that will be assigned to these private arrangements. Laws related to antenuptial agreements would fall within the scope of this classification. Houlgate credits R. Summers, "The Technique Blement of Law," Calif. L. Rev. 59, 733-51 (1971) for part of the creation of this classification system.

[90] Houlgate, *supra* note 76.

[91] *Id.* at 11. Houlgate provides an overview of two overarching categories of ethical principles: teleological — those principles that "tell us that our basic obligation is to do what will promote the good, have the best consequences, or maximize utility" (*id.* at 11) — and deontological — those principles that "inform us that our duty is to do that which is inherently fair or just or right, as determined either by direct consideration of the act itself and its situation of itself, or by reference to some formal principal ...." *Id.*

[92] Houlgate, *supra* note 76, at 2l.

[93] *Id.*

[94] *Id.* at 23.

[95] *Id.* at 21.

[96] Sir Henry Sumner Maine, *Ancient Law* (1970).

[97] *Id.* at 141.

[98] The 19th century conception of marriage is one example of a status-based institution. The wife's condition during the marriage was called her *coverture.* The effect of being a *femme-covert* was that the married woman could not exercise control over her real or personal property; she could not contract; and she could not sue or be sued. Her wages, if any, were the property of her husband. Her children, upon divorce, went to her husband's custody. If a woman committed a criminal act in front of her husband, she was absolved of criminal liability under the legal fiction that she was acting

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under her husband's direction, A wife was also subject to her husband's control over her physical person in that she had to acquiesce to his sexual advances and she was subject to her husband's right to exercise physical restraint against her. *See generally* Weitzman, *supra* note 16, at 1-3.

[99] *Id.* at XX (quoting Selznick, *Law, Society, and Industrial Justice* 53 (1969)).

[100] *See generally* Weitzman, *supra* note 16, at XV-XX.

[101] *Id.* at XX.

[102] *Id.*

[103] This discussion is culled from Weitzman, *supra* note 16, XV-134.

[104] *Id.* at XV-XV.

[105] These ideas are credited to Weitzman, *supra* note 16, at 351-52.

[106] Weitzman highlights five of these cases for their significance in the evolution of antenuptial contracts case law.

[107] *See supra* note 47.

[108] 233 So.2d 381 (Fla. 1970), rev'd on other grounds on rehearing, 257 So.2d 530 (1972). At rehearing, the prenuptial agreement was held to be void because the wife did not have full knowledge of her husband's assets at the time the agreement was executed.

[109] *Id.* at 383-84.

[110] *Id.* at 385.

[111] These tests include "full, fair and open" financial disclosure. *DelVecchio v. DelVecchio,* 143 So.2d 17, 21 (Fla. 1962). The *DelVecchio* court announced that a valid antenuptial agreement should either contain a fair and reasonable provision for the wife-to-be; or there should be full and frank disclosure of the prospective husband's worth prior to entering a contract; or, she should at least have a general and approximate knowledge of his worth. Furthermore, she must sign the agreement freely and voluntarily. It is preferable for each party to have competent and independent legal advice. The parties should have an understanding of what rights are being waived by the agreement. *Id.* at 20-21.

[112] *Posner, supra* note 108, at 385.

[113] Fla. Stat. §61.14 (1973).

[114] 6 Ill. App. 3d 386, 286 N.E. 2d 42 (1972).

[115] 6 Ill. App. 3d at 390, 286 N.E. 2d at 45.

[116] 6 Ill. App. 3d at 391, 286 N.E. 2d at 46.

[117] 6 Ill. App. 3d at 391-92, 286 N.E. 2d at 47.

[118] 89 Nev. 39, 505 P.2d 600 (1973).

[119] 89 Nev. at 45, 505 P.2d at 604.

[120] 506 P.2d 719 (Ore. Sup. Ct. 1973).

[121] *Id.* at 721.

[122] 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976).

[123] *Marriage of Higgason,* 10 Cal. 3d 476, 485, 516 P.2d 289, 295, 110 Cal. Rptr, 897, 903 (1973).

[124] *Marriage of Dawley,* 17 Cal. 3d at 346, 551 P.2d at 325, 131 Cal. Rptr. at 5.

[125] 17 Cal. 3d at 350, 551 P.2d at 328, 131 Cal. Rptr. at 8.

[126] 17 Cal. 3d at 352, 551 P.2d at 329, 131 Cal. Rptr. at 9 (expressly overriding *Marriage of Higgason, supra* note 123.)

[127] 17 Cal. 3d at 358, 551 P.2d at 333, 13 Cal. Rptr. at 13.

[128] 17 Cal. 3d at 352, 551 P.2d at 329, 13 Cal. Rptr. at 9.

[129] *Id.*

[130] 377 Mass. 666, 389 N.E. 2d 385 (1979).

[131] The widow complained that the $5000 payment was grossly inadequate in relation to the amount to which she would otherwise have been entitled if she had not signed the antenuptial agreement. 377 Mass. at 669, 389 N.E. 2d at 387.

[132] 243 Mass. 30, 136 N.E. 831 (1922).

[133] 243 Mass. at 35-36, 136 N.E. at 833-34.

[134] 377 Mass. at 667, 389 N.E. 2d at 386.

[135] The *Wellington* court held that substantive unfairness would not be adequate grounds for invalidation of the agreement; full-fledged fraud must be proven. *See Rosenberg,* 377 Mass. at 669, 389 N.E. 2d at 387. The wife could have inquired or investigated into the extent of the prospective husband's holdings. In this regard, the *Rosenberg* court noted that Massachusetts stood alone in setting the standard of fraud as the requisite cause for invalidation of antenuptial agreements. In confidential relationships, "[t]he burden is not on either party to inquire, but on each to inform for it is only by requiring full disclosure of the amount, character, and value of the parties' respective assets that courts can ensure intelligent waiver of the statutory rights involved." *Id.*, 377 Mass. at 670, 389 N.E. 2d at 388.

[136] 377 Mass. at 671, 389 N.E. 2d at 388.

[137] 377 Mass. at 672, 389 N.E. 2d at 388.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] 377 Mass. at 673, 389 N.E. 2d at 389.

[142] 428 N.E. 2d 810 (1981).

[143] *Id.* at 816.

[144] The divorce judgment shall stand as valid and operative unless the party affected by it shall demonstrate to the court, within a prescribed period of time, cause as to why the judgment should not stand. *Black's Law Dictionary* 757 (5th ed. 1987).

[145] The scope of judicial discretion is left vague here. The court points out two relatively extreme instances that would justify court interference through the mechanism of modification, *i.e.,* if one spouse is or may become a public charge or a minor child's custody provision would not serve that child's best interest. However, it is very unclear, and it remains speculative, how much modification latitude judges can employ in less compelling instances.

[146] Such a provision might be one in which a spouse would be compensated for initiating the divorce action.

[147] *See, e.g.,* Clark, *supra* note 50, at 151 (stating that the only logical course is to adopt a rule whereby antenuptial agreements will only be enforced if the agreement provides adequately for the parties in light of the circumstances existing both at the dates of execution and enforcement).

[148] *See, e.g., Gross v. Gross,* 11 Ohio St. 3d 99, 110-11, 464 N.E. 2d 500, 510 (1984) (maintenance provision was unconscionable because the wife's standard of living had risen to a lavish level since the execution of the antenuptial contract); *Martin v. Farber,* 68 Md. App. 137, 510 A. 2d 608, *cert. denied,* 308 Md. 237, 517 A.2d 1120 (1986) (antenuptial agreement was valid where a husband waived his rights to the wife's property, but the court imposed a constructive trust on the wife's estate to the extent the husband had directly contributed his wages to her savings).

[149] *See, e.g.,* Unif. Premarital Agreement Act §6(a)(2) and (b), 9(B) U.L.A. 376 (1983); N.Y. Dom. Rel. Law §236(b)(3); N.D. Cent. Code §§14-03.1 - 06(1)(b), (2), - .03.1-0.7 (Supp. 1987).

[150] Uniform Premarital Agreement Act, 9B U.L.A. 369 (1983) (hereafter Act).

[151] George, "Marching to a Single Beat," 6 Family Advocate 25 (1983-84).

[152] The 1988 Cumulative Pocket Part to 9B U.L.A. lists the following 11 states: Arkansas, California, Hawaii, Maine, Montana, New York, North Dakota, Oregon, Rhode Island, Texas, and Virginia.

[153] The discussion will focus on "Enforcement," the text of which is reproduced in full below.

§6. Enforcement

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

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

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

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

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

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

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

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

[154] The drafters explicitly recognized that there is a steady increase in the numbers of marriages between parties previously married and the numbers of marriages in which both parties intend to continue pursuing careers. *See* Act at 9B U.L.A. 369, Prefatory Note (1983).

[155] *Id.*

[156] *Id.* at §5, providing that after the marriage takes place, the couple is free to amend or revoke the agreement, without consideration, if such alteration is in writing and is signed by both parties.

[157] *Id.* at §3(a)(1).

[158] *Id.* at §3(a)(3).

[159] *Id.* at §3(a)(4).

[160] *Id.* at §3(a)(6).

[161] *Id.* at §3(a)(7).

[162] *Id.* at §3(a)(8).

[163] *Id.* at §6(b) comment (quoting the Commissioner's Note to Section 306 of the Uniform Marriage and Divorce Act).

Subsection (b) undergirds the freedom allowed the parties by making clear that the terms of the agreement respecting maintenance and property disposition are binding upon the court unless those terms are found to be unconscionable. The standard of unconscionability is used in commercial law, where its meaning includes protection against one-sidedness, oppression, or unfair surprise (see Section 2-302, Uniform Commercial Code), and in contract law .... Hence the Act does not introduce a novel standard unknown to the law. In the context of negotiations between spouses as to the financial incidents of their marriage, the standard includes protection against overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other. In order to determine whether the agreement is unconscionable, the court may look to the *economic circumstances of the parties resulting from the agreement,* and any other relevant evidence such as the conditions under which the agreement was made, including the knowledge of the other party. If the court finds the agreement not unconscionable, its terms respecting property division and maintenance may not be altered by the court at the hearing (emphasis in original).

[164] *Id.* at §6(a)(2)(i), (ii), and (iii).

[165] *Id.* at §6(a)(1).

[166] *See* Younger, *supra* note 9, at 1090.

[167] Special thanks to Ronald Witner, Senior Partner, Hale & Dorr, Boston, Massachusetts, for providing the benefit of his wisdom and experience. Most of these suggestions are credited to him.

[168] These shifting circumstances might include health, marriage length, likelihood of substantial inheritances and the prospective of having children.

[169] It is an excellent idea to provide for the contingency of fluctuating assets, the cornerstone of the unconscionability problem. This problem can be attended to by expressing a support payment or property division as a or property division as a percentage of a party's assets.

See Moore, "The Enforceability of Premarital Agreements Contingent Upon Divorce," 10 Ohio N.U.L. Rev. 11, 18 (1983). According to Moore, if the breadwinner became disabled, then the obligation to provide support payments could be commensurately decreased by an prescribed percentage.

[170] *See supra* text accompanying note 95.