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Should Marital Property Rights Be Inalienable?
Preserving the Marriage Ante

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1. According to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 90 (1st ed. 1993), ante means "a poker stake usually arbitrarily fixed and usually put up before the deal to build the pot." If a poker metaphor is applied to marriage, each prospective spouse anticipates that the other will invest 100% of his or her available "ante" or resources into the marriage "pool" to further the financial and emotional well being of the relationship. Ideally, couples play the marriage game not in the spirit of competition, but in the spirit of cooperation. Married couples may presume that any financial gain attributable to the marriage will be divided fairly between the parties if the game ends in divorce. Thus, premarital agreements are designed to skew the "ante" by allowing a party to limit or waive his or her contribution to the marriage pool.
I. INTRODUCTION

The intersection of family law and property law raises intriguing questions related to identifying and protecting marital property rights. For example, what characterizes an inalienable family law right? Many family law rights are deemed inalienable. Despite the wide array of inalienable rights in the area of family law, the future right to a share of marital property is generally alienable so long as

2. See infra pp. 427-30 discussing the definition of inalienable.

3. See infra pp. 432-35 discussing family law rights generally deemed inalienable, such as the right to seek a divorce.

4. This Article examines only the waiver of property rights arising out of marriage in the event of divorce. It does not examine the implications and viability of the premarital waiver of spousal survivorship rights in the event of death or the premarital waiver of spousal support, alimony, and counsel fees in the event of divorce because different legal considerations apply to the waiver of support and spousal survivorship rights. Considerations of earning capacity, childcare duties, need, and lifestyle should inform support determinations. Additionally, premarital agreements dealing only with spousal survivorship rights were historically less problematic to the courts because the parties entered into these agreements in contemplation of the death of one of them while married and living together and the adequacy of the provision to the surviving spouse under the agreement was subject to judicial review at the time of enforcement. See, e.g., In re Gelb's Estate, 228 A.2d 387, 371 (Pa. 1967) ("Whether claimant would have accepted the $15,000 decedent gave her, if she had known the true value of his estate at the time the antenuptial contract was executed, is not for us to conjecture. Suffice it to say, she relied upon his statement of his assets. Furthermore, in our opinion, $15,000 is not a proper settlement for a widow who has lived with her husband in her own home for three years, when his estate at the time of marriage and death..."
procedural fairness requirements are satisfied.\textsuperscript{5} If marital property rights were created by legislatures to achieve economic justice between divorcing parties, why is greater protection afforded to a tenant entering into a lease by the creation of an implied and inalienable warranty of habitability,\textsuperscript{6} than is afforded to an economically dependant spouse entering into marriage? Given the policy goals of promoting individual economic autonomy and reducing the number of adults and children receiving public assistance, why is the economically dependent spouse free to irrevocably waive the right to share in marital property without regard to the economic or social consequences? Perhaps the answer to this family law question depends upon whether traditional precepts of contract law or property law control the analysis. Contract precepts are founded upon the principle of individual autonomy. In contrast, property law precepts are founded upon the competing and antithetical principle that no individual's property rights are absolute, but are subject to limitation according to the best interests of the larger community.\textsuperscript{7}

Currently, premarital agreement property waivers are typically analyzed using a traditional contract analysis. If a property right\textsuperscript{8} analysis is substituted for a contract right analysis, to decide the validity of premarital property right waivers, a radically different result is attained. In short, waivers that might otherwise be valid as a matter of traditional contract precepts, are invalid according to property law precepts. Therefore, a property right analysis enriches the debate surrounding the validity of premarital property right waivers.

This article proposes that parties\textsuperscript{9} should be unable to waive or limit marital property rights\textsuperscript{10} before or during marriage. Instead, as

\textsuperscript{5}See infra pp. 416-27 discussing standards of validity and enforceability of premarital agreements in the United States.

\textsuperscript{6}See, e.g., Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1072 (D.C. Cir. 1970) (recognizing that every lease contains an implied warranty of habitability).

\textsuperscript{7}See, e.g., State v. Shack, 277 A.2d 369, 372 (N.J. 1971) (recognizing that no property right is absolute).

\textsuperscript{8}See Kojo Yelpala, Owning the Secret of Life: Biotechnology and Property Rights, 32 McGeorge L. Rev. 111, 162 (2000) (exploring the legal and philosophical roots of the principle that no property right is absolute).

\textsuperscript{9}The argument that marital property should be treated as inalienable and protected from premarital waiver is based upon the economic position of the parties and not upon gender. With respect to cohabitants, especially same-sex couples, the ability to contract remains of vital importance since these couples acquire no statutory rights if their relationship ends. Thus, contracts allow cohabitants to create enforceable economic understandings absent default statutory protection.

\textsuperscript{10}See Katharine B. Silbaugh, Marriage Contracts and the Family Economy, 98 Nw. U.L. Rev. 65, 133-34 (1998). Silbaugh argues that premarital agreements should be invalid and unenforceable, not based upon the theory of inalienability, but upon simple logic: to provide consistent treatment of rights relating to relation-
a matter of property law and theory, these inchoate\textsuperscript{11} marital property rights should be treated as inalienable,\textsuperscript{12} until they can be expressly identified, valued, and divided between the parties at the time of divorce.\textsuperscript{13}

This article is divided into five sections. Because the viability of inalienable marital property depends upon the continuation of marriage as a status, Part I of this article questions the continuing viability of marriage as a means of financial, familial, and social order. Part II of this article tracks the evolution of marital property in the United States and proposes that an inalienability rule reinvests the relationship of marriage with the economic consequences originally intended by state legislatures. Part III of this article examines the metamorphosis of premarital agreements contemplating divorce from legally void to valid, negating the potential value of marital property. Part IV of the article proposes that marital property should be deemed inalienable until divorce at which time such property can be identified, valued and distributed based upon the circumstances existing at the time of divorce. In conclusion, Part V of the article anticipates and addresses potential arguments favoring the continued alienability of marital property rights.

II. MARRIAGE: AN ENDANGERED STATUS?

Marriage, as an institution promoting individual and state values, is under attack. The United States Congress recently passed legislation permitting states to define marriage narrowly.\textsuperscript{14} In contrast, Vermont legislators recently passed a Civil Unions, Domestic Partnerships, and Reciprocal Beneficiaries Act,\textsuperscript{15} expanding the class of individuals entitled to spouse-like benefits. Fewer Americans marry and

\begin{itemize}
\item[11.] Marital property does not even exist until one of the parties seeks a divorce, at which time marital property springs into existence. See, e.g., Unif. Marriage & Divorce Act (1970) § 307 (amended 1973), 9A Part II U.L.A. 1 (1998). Thus, marital property rights are inchoate unless and until a divorce action is filed.
\item[12.] See infra text accompanying notes 137-41 (defining inalienability to apply to inchoate rights, such as the right to a share of marital property).
\item[13.] See infra text accompanying notes 111-16. This concerns the court's authority to review agreements for fairness at the time of divorce. A fairness requirement insures that any agreement reached by the parties is predicated upon the fair market value of existing marital property, taking into consideration the facts and circumstances that exist at the time of divorce.
\end{itemize}
those who do are postponing marriage. Some same-sex couples desire the right to marry. Divorce continues to stalk new marriages at the rate of approximately 43%. Now, approximately 28% of children in America are growing up in single parent households. The future for marriage is uncertain. Proponents of covenant marriage argue that the no-fault, easy-out legislation enacted in the last half of the 20th century throughout the country "threatens marriage itself."

Given public concern regarding the uncertain future of marriage in the United States, reform at the turn of the third millenium focuses on discouraging divorce and strengthening marriage. Implicit in this goal is the assumption that marriage is a good and beneficial relation-


19. The percentage of children living in a single parent home rose from 9% in 1960 to 28% in 1998. According to some sources, children who live in a "traditional nuclear family" are a minority. A web-cite supported by the Duquense University reports that of children between the ages of fourteen and eighteen:

Presently 6% of American children live with a single, never-married parent. 42% live in a traditional, nuclear family. 22% live in a second marriage, two-parent family. 6% live with a cohabiting couple. 21% live with a single parent. 3% live with a single, widowed parent. 40% or 25 million American children presently live without their father.


20. See Lynne Marie Kohm, A Comparative Survey of Covenant Marriage Proposals in the United States, 12 REGENT U. L. REV. 31, 39 (1999-2000). Covenant marriage is a statutory framework that allows couples to elect more stringent grounds to establish the right to divorce. Typically, the statute reintroduces the requirements that only an innocent and injured party who can establish marital fault is entitled to divorce. Arguably, the return to fault grounds undermines the policy of minimizing the emotional harm to each party caused by divorce. The logic of the legislation should be tested before it is adopted on a widespread basis. It is entirely possible that the divorce rate of covenant marriages will be lower because only those who would have remained married anyway opt in. It is also possible that the divorce rate among the covenant marriage group will not differ dramatically from the no-fault population; however, the process will be more acrimonious and costly than the no-fault process.


Although marriage is referred to as a contract, it is a contract *sui generis*. It is of indefinite length. In every state, either party, under a no-fault scheme, may unilaterally terminate the marriage without incurring damages in the traditional sense of the word. Marriage is a contract that requires physical, psychological, and emotional performance on a constant basis until the parties separate as a result of death or divorce. It requires two individuals to remain in a relationship recognizing that the future is unpredictable and that circumstances are likely to change substantially throughout the entire contract. Family law scholars stress the tension between viewing marriage as a contract and marriage as a status. The contract approach emphasizes individual satisfaction, while the status approach accentuates the obligations that marriage creates to the other spouse, to children of the marriage, and to the community.

Despite the tension and uncertainty described above, individuals continue to marry for a variety of different reasons. For example, many believe that marriage creates a stable family structure to raise children. Moral and religious beliefs also inform the decision to marry. For some, the emotional support and companionship offered by marriage may prompt union. Thus, the institution of marriage

23. See, e.g., Maynard v. Hill, 125 U.S. 190, 205 (1888) ("Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature."); see also Wis. Stat. § 765.001 (2001) ("Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always. The impairment or dissolution of the marriage relation generally results in injury to the public wholly apart from the effect upon the parties immediately concerned.")

24. See, e.g., Randall v. Kreiger, 90 U.S. 137, 147 (1874) ("Marriage is an institution founded upon mutual consent. That consent is a contract, but a contract *sui generis*. Its peculiarities are very marked. It supersedes all other contracts between the parties, and with certain exceptions, it is inconsistent with the power to make any new ones.") (second emphasis added); Carabetta v. Carabetta, 438 A.2d 109, 111 (Conn. 1980) ("Although a marital relationship is in its origins contractual, depending as it does upon the consent of the parties, 'a contract of marriage is *sui generis*. It is simply introductory to the creation of a status, and what that status is the law determines.'" (citation omitted)); see also David B. Cruz, *Just Don't Call it Marriage: The First Amendment and Marriage as an Expressive Resource*, 74 S. Cal. L. Rev. 925, 965 n.218 (2001) (describing the marriage contract as *sui generis*).

25. See CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW 469-79 (2d ed. 2000).


27. *Id.* at 114.


29. *Id.* at 1-16.

30. *Id.* at xvii.
survives as individuals marry, divorce, and remarry, pursuing what some sociologists characterize as serial monogamy.\(^{31}\)

In addition to improving the quality of life for spouses and children, marriage also creates a financial relationship between the spouses. As an incidence of marriage, parties owe to one another a mutual duty of support throughout the marriage. The economic rights of spouses are protected in the event of death or divorce by statutory law designed to achieve economic justice.\(^{32}\)

Finally, marriage promotes social order and other goals.\(^{33}\) The state regulates marriage, records marriage, and conditions numerous benefits upon the status of marriage.\(^{34}\) Thus, the state actively encourages parties to marry. Certainly the benefit of raising children in stable two-parent homes promises the state a better educated and perhaps more emotionally stable population in future generations.\(^{35}\) Furthermore, to the extent that marriage allows two individuals to experience life as meaningful and marriage as a lasting emotional and economic commitment, society as a whole benefits.\(^{36}\)

Statistics demonstrate that one consequence of serial monogamy is serial divorce. Divorce presents a host of problems to the individuals and to the state. Single parents struggle to raise children separately.\(^{37}\) Legal scholars continue to advocate divorce reform. Proposals range broadly from creating a security interest in the future

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34. See, e.g., Vermont Civil Unions, Domestic Partnerships and Reciprocal Beneficiaries Act, Vt. STAT. ANN. tit. 15, § 1204 (2000) (setting forth the rights afforded to spouses under Vermont law); see also Carl E. Schneider, The Channelling Function in Family Law, 20 HOFSTRA L. REV. 495, 496-98 (1992) (describing the rights acquired by spouses following marriage).
35. See LAURENCE D. HOUGLATE, FAMILY AND STATE 72 (1988) (proposing a two-track system of conjugal partnership agreements in which it is far more difficult to terminate a marriage with children, than a marriage without children).
36. See MILTON C. REGAN, JR., ALONE TOGETHER 188-92 (1999). Regan distinguishes between the “external stance” toward the claims and obligations triggered by marriage and the parallel but separate claims and obligations associated with the “internal stance” toward marriage. Regan argues that property distribution should focus on maintaining economic parity between the individuals following divorce, rather than the current focus on the equity of the property division.
earnings of the breadwinner spouse,\textsuperscript{38} to awarding back pay to the homemaker spouse,\textsuperscript{39} to returning to a fault divorce scheme.\textsuperscript{40} A panoply of remedies have been suggested to redress the economic disadvantages that follow for the divorced and economically dependant spouse, typically the primary caretaker of home and children, usually the wife.\textsuperscript{41} Given the increasing likelihood that first marriages will end in divorce, the economic rights afforded to married individuals, especially the rights of the future primary caretaker of children, take on added significance.

As it stands, primary caretakers of the home and children are disadvantaged when the statutory law enacted to protect them is implemented at divorce.\textsuperscript{42} In fact, society as a whole suffers the economic repercussions of needy single parents. Despite the likelihood of divorce and the inadequacy of statutory rights in place to protect divorcing parties, many individuals waive the economic rights arising out of marriage even before they wed.\textsuperscript{43} Scholars agree that the statutory marital property rights in place, prior to premarital waiver, are insufficient to achieve economic justice between divorcing spouses;\textsuperscript{44} nevertheless, many individuals substantially limit, or totally waive,
inchoate future property rights arising out of marriage by signing premarital agreements.

Instead of proposing remedies to be applied by the courts at the time of separation and divorce, this article focuses on the days and weeks before the marriage and questions the validity of the premarital waiver of future marital property rights pursuant to a private agreement between the parties. Despite the inadequacy of existing marital property law, most jurisdictions have embraced the contract approach to the validity of a premarital waiver of inchoate rights arising out of marriage. Perhaps this is another indirect result of the "equality revolution." Sameness in treatment, however, can further entrench existing inequalities. Expanding the analytical focus to include property precepts and acknowledging the tension between property rights of the individual and property rights of the community, refocuses the premarital agreement debate by staking the individual's interest in contracting freely against the community's interest in achieving a wide variety of public policy goals upon divorce. A property rights analysis can, perhaps, restore the economic consequences to the decision to marry, thus ensuring that only the financially committed marry and none are insulated from the economic consequences of marriage. Requiring parties to make contractual decisions regarding marital property contemporaneously with the divorce, should the marriage end in divorce, when marital property rights mature, fur-


46. See Silbaugh, supra note 10, at 120.

47. See Martha Albertson Fineman, The Illusion of Equality 32 (1991) (arguing that divorce reform has failed to achieve gender equality). The ease with which such rights may be waived by the economically dependant spouse, usually the woman, is perplexing, given the struggle to obtain gender equality in matters of property ownership and management in the United States. Fineman concludes that rule equality at the time of divorce disadvantages "women who must function in an unequal world, which requires that they meet greater demands with fewer resources." Id. at 176. Fineman notes that these egalitarian rules do not even serve well the middle and upper classes, much less the poor, non-traditional or otherwise "deviant" families. Id. at 30-31.

48. Id. at 32.

49. See Principles of Family Dissolution: Analysis and Recommendations § 7.02 cmt. c (Tentative Draft No. 4, 2000) (discussing the special circumstances surrounding family dissolution that require limits to the enforceability of contracts addressing family dissolution).
thers the explicit and implicit policy goals of divorce reform legislation.

III. MARITAL PROPERTY: LEGISLATIVE RECOGNITION OF THE CAPITAL OF MARRIAGE

The evolution of property rights afforded to married women upon divorce in the United States reflects at least two public policy goals: (1) to insure economic autonomy and fairness upon divorce and (2) to minimize the indigent former spouse's reliance upon the state for support. The rights afforded to women in the United States to own and manage property have slowly expanded over the past one hundred years. Prior to the 20th century, society and the laws that sustained it treated married women like children, operating under a gender disability that never abated. Thus, married women were deemed incapable of managing their own income and real property. While boys were more likely to be educated and were groomed to enter the public sphere of paid labor, girls were trained to enter the private sphere of unpaid household management, in which the wife owed to the husband a duty of domestic labor in return for the husband's support. Men held and controlled property individually and on behalf of their wives and children. Men controlled the income from such property. Men even controlled the outside income their wives managed to earn. In short, men controlled wealth.

In response to this injustice and even though women lacked the right to vote, the women's movement in the 19th century pressed for property reform that recognized a married woman's right to control her share of joint property. In 1860, New York passed a law granting to a married woman the right to control her own wages. Thereafter,
property reform legislation, which expanded married women’s property rights, spread throughout the country as each state adopted a form of the Married Women’s Property Act, thereby granting the status of property owner to married women in the context of the common law title regime. Even after the enfranchisement of women in 1920, little changed to improve the economic condition of married women. Property continued to be divided by title. Men, the economically independent partners to the marriage, continued to control their income, the acquisition of assets, and the title to the assets.

The need for property reform grew, as the state’s interest in marriage spilled over into divorce. It was not until the 1960’s, however, that economic inequity following divorce spurred divorce property law reform in the United States. In response to the economic injustice created by distributing property according to title at the time of divorce, a second wave of property reform swept the country in the 1960’s introducing no-fault divorce. No-fault divorce granted to married individuals the right to divorce without evidence of marital fault. This legislation rejected the title regime and created marital capital in

57. See Homer H. Clark, Jr., The Law of Domestic Relations in the United States 290 n.4 (1988) (setting forth a comprehensive, if not exhaustive, list of the statutory citations to these laws in the fifty states.)
58. See Joseph R. Long, A Treatise on the Law of Domestic Relations § 126 (3d ed. 1903). Long writes, “In most, if not all of the states, statutes secure to a married woman some or all of the property belonging to her at the time of the marriage or thereafter acquired.” Id. at 205.
59. U.S. Const. amend. XIX.
60. See Wardle, supra note 22, at 796 (discussing why no-fault divorce reform failed women).
61. See Judith Areen, Family Law 350-71 (4th ed. 1999) (Common fault grounds typically include cruelty, adultery, and desertion.).
62. See Hernando De Soto, The Mystery of Capital 7-8, 226 (2000). De Soto describes capital as an idea that is recognized through a legal system that defines and protects property interests and allows owners to leverage their property interests. De Soto argues that the inability of the poor in Central and South American countries to access capital entrenches the divide between the rich and the poor, creating a “bell jar” around the already wealthy elite who transform capital into additional property regularly. Id. at 66-67. According to De Soto, one way to foster capitalism is to centralize and simplify the bureaucratic procedures needed to establish property ownership, to begin legal businesses, and to continue legal businesses as Western countries have done. Id. at 62. De Soto might agree that the creation of marital property is yet another example of the West’s willingness to create and leverage capital. The value of the tangible and intangible contributions of each spouse to a marriage becomes relevant to courts only in the event of divorce when such contributions are valued and divided between the parties to achieve a fair result. Thus, both spouses are assured an equitable share of the marital capital in the form of marital property. De Soto calls for governments to lift the “bell jar of property apartheid,” by assigning value to intangible assets. Id. at 67. Arguably, premarital agreements “introduce ‘capitalist apartheid’ into the institution of marriage creating another ‘bell jar’ that should also be lifted.” Id.
the form of marital property, typically defined to include all property acquired by either party during the marriage without regard to title.

Following California's lead, states across the nation passed no-fault divorce reform to achieve economic justice between divorcing parties. Arguably, divorce reform reflected a legislative attempt to protect personal liberty by providing economic autonomy to both parties, thus reducing the probability that one party to a divorce might become dependent upon state aid.

For example, the policy underlying the Pennsylvania 1980 Divorce Code, as set forth in the statute, expressly states that the new law is designed to "achieve economic justice" between divorcing spouses. The Pennsylvania statute defines the property rights acquired by married parties, in the event of separation or divorce, to include: the right to an equitable share of all marital property; the right to spousal support and continued health insurance coverage during coverture; the right to alimony following divorce; and the right to counsel fees, costs, and expenses.

The creation of marital property arguably served two ends. Reformers sought to protect personal liberty through economic security and to prevent the economically dependent spouse, and any children in the custody of that spouse, from becoming dependent on state and federal aid. Thus, the divorce reform legislation both maximized personal liberty through financial independence and minimized the public's financial obligation to support divorced spouses and children. A majority of the states enacting reform went even further and required not equal, but equitable distribution to correct economic inequity at the time of divorce. Clearly, the legislation rejected the title

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63. See AREEN, supra note 61, at 371-79.
64. 23 PA. CONS. STAT. ANN. §§ 3101-3500 (West 2000).
65. Id. For example, §307A of the Uniform Marriage and Divorce Act, authorizes a court to equitably apportion “the property and assets belonging to either or to both [spouses] however and whenever acquired.” Alternative section 307B mandates a court to “assign each spouse’s separate property to that spouse” and to divide community property “in just proportion.”
66. See UNIF. MARRIAGE AND DIVORCE ACT (1970) §307 (amended 1973), 9A Part II U.L.A. 1 (1998). Under the section 307 of the Uniform Marriage and Divorce Act, an equitable share is to be determined by the court based upon a wide variety of factual considerations designed to enable the court to achieve economic justice. The factors include the court's assessment of the ability of the party to acquire assets in the future and to become self-supporting.
68. See JOHN RAWLS, A THEORY OF JUSTICE 60-65 (1971). The unequal division of marital property finds theoretical support in the writing of John Rawls: "All social values – liberty and opportunity, income and wealth, and the bases for self-
regime and created for each party a cognizable property interest in the assets acquired during the marriage by either party without regard to title.\footnote{69}

To the extent that a legally protected right promotes the individual's economic autonomy, it arguably constitutes "new property."\footnote{70} Marital property is a unique property interest created by state legislatures and designed to achieve economic justice. Marital property rights ripen at the time of separation or divorce. The intangible status of marriage creates tangible marital property rights arising from the economic and non-economic contributions of both parties. The creation of marital property reflects the property precept that no property right is absolute and all marital property is held subject to the best interests of the community, including both the married community and the public.\footnote{71}

In summary, marital property reform in the second half of the 20th century exemplified a legislative recognition of the relationship between economic security and personal liberty.\footnote{72} Marital property is a state-created property interest designed to fairly redistribute property acquired during the marriage between divorcing spouses. Marital property embodies the principle that no property right is absolute, but is always subject to limitation in furtherance of the best interests of the greater community. The right to share in all property acquired during the marriage, without regard to title, is inextricably connected to principles of fairness, promotes individual autonomy, and reduces the risk that divorce will create single parent households dependent upon state aid. If we accept that marital property was created by legislatures to redress economic inequality at the time of divorce, then the right itself is wrapped in an immutable cloak of public policy that cannot be pierced merely by invoking the private right to contract. Any attempt to contractually waive a future interest in marital property should, instead, be analyzed using property precepts reinforced

\footnote{69. While historically, the propertied person was typically the male, such assumptions are no longer supported. In fact, affording inalienability status to marital property advances the policy interests of economic fairness and individual liberty without regard to gender.}

\footnote{70. See Charles A. Reich, The New Property, 73 YALE L.J. 733 (1964). Reich encouraged society to "build an economic basis for liberty" that would allow the individual and society to "change, to grow, and to regenerate" by creating new concepts of property. \textit{Id.} at 787. It follows that the no-fault divorce reform legislation can be considered as one form of the new property envisioned by Reich.}

\footnote{71. See Mary A. Throne, Pension Awards in Divorce and Bankruptcy, 88 COLUM. L. REV. 194, 195-96 (1988) (discussing policy goals of equitable distribution reform).}

\footnote{72. See Reich, \textit{supra} note 70, at 771. Reich describes the role of private property as one of "maintaining independence, dignity, and pluralism in society" and one that "affords day-to-day protection in the ordinary affairs of life." \textit{Id.}}
by the policy goals of fairness and economic autonomy underlying marital property.\textsuperscript{73}

IV. MARITAL PROPERTY: PREY TO PRIVATE RIGHT TO CONTRACT PRECEPTS

Prompted, perhaps by the expanded definition of property subject to division upon divorce and the rising tide of failed marriages, many affianced individuals began to require signed premarital agreements releasing or limiting the intended’s future marital property rights as a pre-condition of marriage,\textsuperscript{74} thus frustrating the legislative intent of the no-fault divorce reform legislation.\textsuperscript{75}

The hard fought battle to create marital property rights was dealt a staggering blow by the wave of judicial cases, following the enactment of divorce reform, enforcing limitations and waivers of inchoate future marital property rights.\textsuperscript{76} Although courts across the country

\textsuperscript{73} See generally Judith T. Younger, Marital Regimes: A Story of Compromises and Demoralization Together with Criticism and Suggestions for Reform, 67 CORNELL L. REV. 45 (1981).

\textsuperscript{74} See Sanford N. Katz, Marriage as Partnership, 73 NOTRE DAME L. REV. 1251, 1258-59 (1998). Formerly, estate attorneys might have recommended premarital agreements only to clients with children from a previous marriage who desired to remarry. Now that individuals are postponing marriage, many have established retirement funds and other investments earned prior to marriage that they desire to shield from spousal claim. Some may be unaware that, in most jurisdictions, these assets remain separate property so long as they are not transferred into joint name or otherwise transmuted.

\textsuperscript{75} Contrary to the goal of achieving economic equality between divorcing spouses, premarital agreements are more likely to benefit men than women. See Atwood, supra note 45, at 154 (concluding that “because of women’s inferior earning capacity in the market place, the persistence of gendered division of labor in the home, and the consequent disparity in economic bargaining power between men and women, the strict enforcement of prenuptial agreements is more likely to disadvantage wives than husbands”).

\textsuperscript{76} A survey of the relevant cases in Massachusetts and Florida demonstrates the relative scarcity of litigation surrounding premarital agreements related to divorce prior to divorce reform and the surge in such litigation following divorce reform, especially in jurisdictions in which premarital agreements were enforced without regard to fairness at the time of enforcement. In Massachusetts, a “second look” state, divorce reform was enacted in 1974. Between 1946 and 1974, a total of 28 years, only 3 divorce cases also raised issues related to the validity of a premarital agreement. Between 1974 through 2002, a total of 28 years, 10 reported divorce cases also addressed the validity of a premarital agreement in relationship to divorce. In contrast, consider Florida’s statistics: Florida courts determine the validity of premarital agreements according to traditional contract precepts. Florida adopted divorce reform legislation in 1971. Between 1940 and 1971, a total of 31 years, only 11 divorce cases also raised issues related to the validity of a premarital agreement in relationship to divorce. Between 1971 through 2002, a total of 31 years, 82 reported divorce cases also addressed the validity of a premarital agreement under Florida law. The astonishing increase in the number of premarital agreements litigated in divorce actions in Florida, a
embraced the private right to contract as the basis for enforcing premarital agreements so long as minimum procedural fairness requirements were satisfied, none of the courts addressed the question of whether marital property rights were immutable and thus inalienable until mature. Arguably, marital property should be afforded the greatest amount of protection available under law based upon society’s interest in promoting marriage, promoting economic fairness between the parties upon divorce, promoting individual economic autonomy, and preventing former spouses from becoming dependent upon the state.

Despite the safety net afforded by marital property to protect the economically dependent spouse from financial disaster upon divorce, some partners choose to marry without incurring the financial obligations that would otherwise attach. Following the no-fault divorce reform movement, more individuals executed premarital agreements contemplating divorce. With little apparent debate, courts applied traditional contract principles, to the exclusion of property principles, to determine the validity and enforceability of premarital agreements. Courts embraced a freedom to contract model, rejected the former black letter law that all premarital agreements dealing with rights in the event of divorce were invalid, and overlooked the argument that in fact marital property rights should be inalienable until mature. Premarital property waivers were enforced as a matter of course without even considering the property precepts supporting the initial divorce reform legislation: no property right is absolute and all marital prop-

77. In fact, scholars reasoned that only spousal rights with respect to property owned prior to marriage could be shielded from the default rules. See Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87, 88 n.10 (1989) (“In the law of divorce, for example, wealth accrued before marriage is allocated according to default rules that can be altered in pre-nuptial agreements, while income earned after marriage is immutably divided.”). In fact, in many states, rights related to both income earned and property acquired during the marriage can be protected from spousal claim through a premarital agreement and are, thus, mutable.

78. See Reich, supra note 70, at 773. Reich warned against the abuse of the private property defense when it is used as a “cloak” to disguise “the exercise of arbitrary private power over other human beings . . . . The only dependable foundation of personal liberty is the economic security of private property.” See Reich, supra note 70, at 773 (quoting Walter Lippmann, The Method of Freedom 101 (1934)). Thus, premarital agreements arguably undermine the public good by returning the burden of support to the state, even though the default rule requires the burden to borne first by the spouse. Thus, principles of private property ownership are elevated above the principles grounding divorce reform. See also Throne, supra note 71, at 195.
Part III of this Article, examining the rise of traditional contract precepts to decide the enforceability of premarital agreements, is further sub-divided into three parts. First, section A examines the rise of premarital agreements as an antidote to marital property rights. Second, section B presents a comprehensive overview of the different standards employed by American courts to decide the validity and enforceability of premarital agreements. Finally, section C examines the inequity created by enforcing premarital agreements according to traditional contract precepts.

A. Although Historically Invalid, Premarital Agreements Contemplating Divorce Are Now Valid

Despite the sui generis nature of marriage as a contract and the unique roots of marital property, a legislatively created property right, courts have enforced marital property right waivers according to traditional contract precepts. Under a traditional contract approach, courts embraced and applied procedural fairness requirements to guard against fraud, duress, and undue influence at the time of execution. This approach protects the present economic liberty interests of both parties at the expense of the future economic liberty interest of the financially dependent party, the party who can least afford it.

A comparison of the differing standards employed by the courts to decide the validity of premarital agreements under Massachusetts law, Florida law, and Pennsylvania law reveals the breadth of responses by courts initially called upon to decide the enforceability of marital property right waivers in premarital agreements. An examination of Massachusetts law regarding the validity and enforceability of premarital agreements illustrates the metamorphosis of premarital agreements from void to valid. In Osborne v. Osborne, the court addressed the question of first impression: was a premarital agreement divesting a spouse of the right to claim a share of property that would otherwise be marital property valid under Massachusetts law. Previously, Massachusetts courts had held in dicta that “a contract tending

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79. The decision to treat inchoate property rights as inalienable until mature elevates the individual's right to personhood above the individual's right to contractual autonomy. See Note, Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers, 99 Harv. L. Rev. 1936, 1944 (1986); see also, Anthony T. Kronman, Paternalism and the Law of Contracts, 92 Yale L.J. 763, 779-86 (1983).

80. See Note, Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers, supra note 79, at 1945.

to divest a husband of any obligation incidental to his marriage" would be invalid.

In rejecting this assertion, the Osborne court characterized premarital agreements as a vehicle to settle property rights and, in keeping with the no-fault divorce scheme, held that parties could, prior to marriage, settle their property rights in the event that their marriage should end in divorce. The decision to recognize premarital contracts as valid was tempered by the added requirements that: (1) the agreement must be fair and reasonable at the time of enforcement, (2) the agreement will be subject to judicial modification at the time of enforcement, and (3) if the agreement is "so unreasonable as to be unenforceable on grounds of public policy," it will be held invalid.

The Osborne court relied in part upon the benchmark case of Posner v. Posner, Florida's leading premarital agreement case. In Posner, the Florida Supreme Court held that "[premarital] agreements settling alimony and property rights of the parties upon divorce ... should no longer be held to be void ab initio as 'contrary to public policy.'" The Posner court held that such agreements are enforceable if they meet the same standards of fairness imposed by preexisting common law controlling premarital agreements contemplating the death of the spouse. Even the Posner court, however, expressly preserved the trial court's right to adjust alimony provisions based upon the changed circumstances of the parties at the time of the divorce and after the divorce. Intriguingly, Florida courts held inalienable the right to spousal support during coverture. Thirty years later, the Belcher court's preservation of the right to spousal support during coverture survives in Florida and raises important questions regarding the premarital waiver of, not just support during coverture, but

82. Id. at 815; see also Long, supra note 58, at 218 n.78 (citing Coles v. Hurt, 75 Va. 380 (1881), for the proposition: "Whenever a peculiar status is assigned by law to the members of any particular class persons ... no one belonging to such a class can vary, by any contract, the rights and liabilities incident to this status. If he could, his private agreements would outweigh the law of the land. Coverture is such a status.").

83. Osborne, 428 N.E.2d at 816.

84. The court's willingness to independently review the substantive fairness of a premarital agreement represents the minority position. See infra Appendix A, tables IV and V demonstrating that only nine states permit the court to review the conscionability of agreements and only nine states permit the court to review the substantive fairness of a marital property waiver under a premarital agreement.

85. 428 N.E.2d 810.

86. 233 So. 2d 381 (Fla. 1970).

87. Id. at 385.

88. Id. This standard required either an adequate provision determined by the circumstances existing at the time of execution or a full and fair financial disclosure.

89. Id. at 387.

90. See Belcher v. Belcher, 271 So. 2d 7 (Fla. 1972).

91. Id. at 9.
also the waiver of future property rights arising out of marriage. Arguably, all future economic rights arising out of marriage should be inalienable until the time of separation or divorce because the state legislatures have mandated that these rights be determined on a case-by-case, fact-driven basis. Some scholars argue that the right to contractually resolve economic issues related to divorce should be disallowed entirely, even at the time of separation or divorce.

The shift from the property right approach to a contract analysis to determine the validity and enforceability of premarital agreements previously deemed void as against public policy swept the country. For example, in 1990, the Pennsylvania Supreme Court overruled its prior common law standard and held that courts must use traditional contract law to decide the validity and enforceability of premarital agreements. This was in sharp contrast to the minority position allowing judicial review of the substantive fairness of property waivers in premarital agreements at the time enforcement is sought, a standard embodied by the Osborne case. In Simeone, the court addressed the validity of a premarital agreement entered into in 1975, before the enactment of the Pennsylvania 1980 Divorce Code, as amended. Although the court retained the “full and fair disclosure” analysis, it

92. Florida's preservation of the right to spousal support during coverture is unusual. For a survey of the validity of premarital agreements contemplating divorce in the United States, see Robert Roy, Annotation, Enforceability of Premarital Agreements Governing Support or Property Rights upon Divorce or Separation as Affected by Circumstances Surrounding Execution: Modern Status, 53 A.L.R. 4th 85 (1987); Robert Roy, Annotation, Enforceability of Premarital Agreements Governing Support or Property Rights upon Divorce or Separation as Affected by Fairness or Adequacy of Those Terms: Modern Status, 53 A.L.R. 4th 161 (1987).

93. Given the broad discretion afforded to the trial court to identify, marshal, value and equitably divide marital property, based on the specific circumstances existing at the time of divorce, the court is called upon to do justice between the parties based upon the surrounding circumstances. Thus, the premarital waiver of marital rights creates a paradox by allowing parties to waive future rights that do not yet exist without any of the information deemed vital by the legislature to obtain a fair and impartial division of marital property.

94. See Bryan, supra note 42, at 1156, 1170. Bryan argues: “many women and children needlessly live impoverished lives after divorce” and that judges should retain continuing jurisdiction to review the substantive fairness of property settlement agreements without regard to the passage of time. Id. at 1170.

95. See Long, supra note 58, § 101. “At common law, the husband and wife become, by marriage, one person; that is, the legal existence of the wife is suspended during the marriage, or merged into that of the husband, under whose wing or cover she is, whence is called a ‘femme covert,’ and her condition during marriage is called ‘coverture’.” Id. at 167.

96. In no case did a court invalidate a premarital agreement on the basis that the inchoate marital property rights released under the agreement are inherently inalienable until mature.

97. Simeone v. Simeone, 581 A.2d 162 (Pa. 1990) (overruling the prior standard requiring full and fair disclosure or judicial review to determine that the provision in the agreement was adequate at the time of execution).
abolished any judicial inquiry into the reasonableness of the agreement:

There is no longer validity in the implicit presumption that supplied the basis for [our] . . . earlier decisions. Such decisions rested upon a belief that spouses are of unequal status and that women are not knowledgeable enough to understand the nature of contracts that they enter. Society has advanced, however, to the point where women are no longer regarded as the "weaker" party in marriage, or in society generally. Indeed, the stereotype that women serve as homemakers while men work as breadwinners is no longer viable . . . . Nor is there viability in the presumption that women are uninformed, uneducated, and readily subjected to unfair advantage in marital agreements.

Thus, under Pennsylvania law, premarital agreements are valid in the event of divorce, without regard to fairness, so long as the circumstances surrounding execution satisfied traditional contract principles and the agreement was executed with the benefit of full and fair financial disclosure.

The Simeone court expressly refused to require parties entering into a premarital agreement to obtain independent legal counsel. The Simeone decision clearly represented the new trend in premarital agreement law whereby couples may replace the default statutory divorce rules with an individualized contract.

Premarital agreement law evolved independently from jurisdiction to jurisdiction. Massachusetts, at one end of the continuum, represents one of the most activist jurisdictions because courts will analyze the substantive fairness of the agreement at the time enforcement is sought. Pennsylvania, at the other end of the spectrum, is a model of judicial restraint because courts will not pass on the substantive fairness of the agreement, either at the time of execution or at the time of enforcement so long as there is sufficient evidence of adequate disclosure. Florida, in the middle of the spectrum, exemplifies a moderate approach because courts will analyze the substantive fairness of the agreement at the time of execution to determine its enforceability absent evidence of full financial disclosure or an adequate provision.

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98. Id. at 165.
99. Id. at 166. The utility of independent counsel to insure fair dealing is limited because of the difference in bargaining power between the parties. See Atwood, supra note 45, at 130 n.15 (citing Patricia A. Cain, Feminist Legal Schooling, 77 IOWA L. REV. 19, 23-24 (1991).
B. The Majority of Jurisdictions Enforce Premarital Agreements Contemplating Divorce as a Matter of Freedom of Contract Without Regard to Property Law and Society's Interests

The Uniform Premarital Agreement Act [hereinafter U.P.A.A.], like the Pennsylvania standard, adopts a heightened contract approach to decide the validity of marital property rights. The U.P.A.A. requires a party to prove that an agreement is unconscionable and was entered into without full financial disclosure before the court may invalidate a property waiver provision in an agreement. Thus, the traditional contract defense of unconscionability alone is not enough to set aside a premarital agreement under the U.P.A.A. As long as the parties exchange full financial disclosure before the agreement is signed, any property right waiver is valid and enforceable, even if unconscionable. The U.P.A.A. permits a court to review conscionability only in cases where the parties did not exchange full and fair disclosure.

Guided by the model statute, many courts applying common law have adopted the freedom of contract analysis. This analysis focuses solely on procedural safeguards and deems the substance of premarital agreements to be outside the scope of judicial review so long as disclosure is complete. Again, the common law result is that unconscionable agreements are enforceable so long as financial disclosure is sound.

A survey of the standard to determine the validity and enforceability of premarital agreements across the United States reveals the prevalence of the contract approach to decide the validity of premarital property waivers. Twenty-two states have adopted the standard language of the U.P.A.A. relating to enforcement and require the party challenging the agreement to prove it is both unconscionable and that it was executed without adequate financial disclosure. Only Rhode Island requires the party challenging the validity and enforceability of the agreement to prove the agreement was unconscionable, signed without the benefit of adequate financial disclosure, and involuntarily entered into, thus adding two additional hurdles to the traditional contract defense of unconscionability. Additionally, ten

102. See SCHNEIDER & BRINIG, supra note 25, at 464-68 (providing examples of the remaining difficulties presented by the contracts approach).
105. See U.P.A.A. § 6, 9C U.L.A. 39 (2001); see infra Appendix A, table II.
106. See infra Appendix A, table I.
jurisdictions enforce premarital agreements according to common law, traditional contract principles, except that the defense of unconscionability is overcome by full financial disclosure. Thus, in these thirty-two states and the District of Columbia, careful clients with competent counsel may disregard the substantive fairness of the marital property provision in the agreement.

The remaining states have adopted a variety of contract-based approaches to decide the enforceability of premarital agreements. For example, eight states have adopted a statute that preserves the traditional contract approach to evaluate the validity of a premarital agreement, including the defense of unconscionability, and some have even created additional protections for the dependent spouse, such as the right to consult with independent counsel. The remaining ten states employ a common law standard to determine enforceability and treat premarital agreements as contracts sui generis. The courts in these jurisdictions require traditional contract safeguards, financial disclosure, and analyze the substantive fairness or conscionability of the agreement at the time enforcement is sought.

C. The Trend to Enforce Premarital Agreements Contemplating Divorce, as a Matter of Freedom of Contract, Without Regard to Property Law and Society’s Interests, Creates Inequity

In contrast to the traditional contract approach to premarital agreement property waivers, the minority approach obligates the court to analyze not only procedural fairness of agreements, but substantive fairness as well. This alternative requires the court to assess the soundness of the premarital bargain at the time enforcement

107. See infra Appendix A, table III.
108. The uncertainty of the enforceability of these agreements across state lines creates yet another argument for a uniform rule that the future right to share in marital property is inalienable until the right matures upon separation or divorce.
109. See infra Appendix A, table IV. These jurisdictions afford greater protection to the financially dependent spouse by maintaining the contractual defense of unconscionability.
110. See infra Appendix A, table V. By adding financial disclosure to the traditional contract requirements that the agreement be voluntary, fraud-free, duress-free, conscionable, and, in some cases, fair at the time of enforcement, the courts in these jurisdictions recognize that premarital agreements are sui generis and require financial disclosure to insure a knowing waiver by the economically dependent spouse.
111. See infra Appendix A, table V. Under this common law approach, combining procedural and substantive safeguards, premarital agreements are reviewed for fairness, or at least conscionability, at the time of enforcement. Thus, the court, not the parties, decides the fairness of the agreement based upon the circumstances existing at the time enforcement is sought.
is sought. Only eighteen jurisdictions in the United States permit courts to set aside an agreement because it is unconscionable or unfair.112 In only nine states, Georgia, Kentucky, Massachusetts, Michigan, Minnesota, New Hampshire, Oklahoma, South Carolina, and Wisconsin, are courts empowered to review agreements for substantive fairness.113 In each of these nine states, the substantive fairness of the property waiver is determined at the time the agreement is enforced based upon the circumstances existing at the time enforcement is sought.

In summary, in forty-one states and the District of Columbia enforce premarital property waivers without regard to the substantive fairness of the premarital property waiver as long as full disclosure was exchanged before the premarital agreement was executed.114 Of these forty-one jurisdictions and the District of Columbia, only nine jurisdictions are empowered to set aside an agreement because it is unconscionable.115 In the remaining thirty-two jurisdictions and the District of Columbia, the defense of unconscionability may be overcome by providing adequate financial disclosure, thus entirely shielding the substantive fairness of the agreement from judicial review, even if the agreement is unconscionable.116

Clearly, over the past thirty years, there has been a shift in society's willingness to allow the principle of freedom of contract to overcome the countervailing principle that the state, as an interested third party to any marriage, will not enforce premarital agreements because to do so would violate public policy.117 Premarital property distribution agreements that previously would have been deemed invalid and unenforceable as a matter of public policy are now deemed outside the sphere of court supervision and control. Thus, the freedom of contract ethos has replaced the public policy ban with little controversy or fanfare. No court or legislation, however, has expressly addressed the fundamental question underlying all premarital property waivers: can a party legally waive the right to equitable distribution or community division of marital property even though marital property cannot be identified or valued until the time of separation and divorce? The implicit assumption that the future right to share in marital property may be released prior to divorce is problematic for several reasons.

As the foregoing discussion suggests, the traditional contract approach to the drafting and enforcing of premarital agreements

112. See infra Appendix A, tables IV and V.
113. Id.
114. See infra Appendix A, tables I-V.
115. See infra Appendix A, tables IV and V.
116. See infra Appendix A, tables I, II, and III.
presumes without question that marital property rights may be waived before they mature. A second criticism is that premarital contracts are highly impersonal, while marriage, by definition, is highly personal. In many cases, the marriage is conditioned upon the execution of an agreement designed to limit or entirely waive the future right to share in marital property.118 The very process of negotiating a limitation on rights that do not ripen unless and until the parties divorce eschews the spirit of a perpetual partnership that requires, by definition, good faith, cooperation, and trust in exchange for a spirit of enlightened self-interest, thus commercializing marriage.119 Finally, traditional contract analysis certainly promotes freedom to contract, but also intensifies the existing economic advantages and disadvantages between the parties and fails to take into account the important public policy interest underlying the creation of marital property rights: to achieve economic justice.120

Specifically, a premarital agreement that requires a future spouse to limit or waive his or her interest in property acquired during the marriage is problematic without three categories of critical information needed to accurately assess the costs and benefits of the waiver: (1) the identity of marital property that the parties would acquire, but for the agreement, (2) the value of this property, and (3) the then-existing circumstances at the time of divorce. In equitable jurisdiction states, a family court judge is required to consider similar factors in equitably dividing marital property when the marriage is deemed irretrievably broken. These factors include: the personal circumstances of each party, the separate property owned by each, the earning potential of each, each party’s economic and non-economic contributions to the acquisition of marital property, a party’s role as primary caretaker of minor children, the likelihood that a party will inherit wealth in the future, and any other relevant factors based on the existing circumstances at the time of separation and divorce.121

118. See DeMatteo v. DeMatteo, 762 N.E.2d 797 (Mass. 2002) (involving a marriage conditioned upon execution of premarital agreement where future husband’s estate was valued between $83 million and $108 million and the prospective spouse disclosed a net worth of less than $5,000).


120. See SCHNEIDER & BRING, supra note 25, at 464-68.

These statutory factors demonstrate that marital property distribution decisions are ideally based on current and accurate property values, taking into consideration the unique circumstances of each case in equitable distribution states. In community property states, once the court has identified and valued the property to be distributed, the property is divided equally between the parties, thus achieving a rough economic justice.

In contrast, the premarital waiver of the future right to share equitably, or at least equally, in the property acquired during the marriage is made without any clear understanding of the identity and value of the marital property that would otherwise be subject to equitable division upon divorce. Equally important and consistently overlooked is the benefit of a series of projections of the fair market value of the potential marital property interests that the spouse is asked to waive based on a variety of economic scenarios.\(^{122}\)

Perhaps the most troubling aspect of premarital agreements is that a spouse is required to irrevocably limit or waive the right to share in marital property without regard to the circumstances at the time of divorce. Thus, vital information about each party's health, employment, earnings, earning capacity, and the separate property owned by each party at the time of divorce is unavailable, as is information about the division of uncompensated household duties and childcare duties, if any. The absence of this material information presents serious questions regarding the validity and enforceability of premarital property interest waivers.\(^{123}\)

Members of the American Law Institute have also struggled with the requisite degree of protection to afford to marital property rights. The ALI is currently developing rules for a comprehensive uniform law dealing with family law. Chapter 7 deals with the validity and enforceability of marital agreements. These include agreements executed in contemplation of marriage, during marriage, and agreements between cohabitants.\(^{124}\) The revised uniform law attempts to redress

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122. Although speculative, perhaps rough estimates using a variety of criteria to estimate the potential value of the future rights released might provide more relevant information than does disclosure of the value of the assets and liabilities of the propertied party at the time of the marriage.

123. The inequity is heightened by the conviction of the majority of couples who marry that their marriage will not end in divorce. See Atwood, supra note 45, at 134 n.31 (citing Lynn Baker & Robert Emery, When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage, 17 LAW & HUM. BEHAV. 439 (1992). The policy concerns that arise at divorce do not apply to premarital agreements waiving rights in the event of death at a time when the parties are married and living together because the natural impulse is to provide by will for a spouse; however, similar concerns could arise in situations in which the parties separate prior to the death of the economically independent spouse.

124. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, §7.01 (Tentative Draft No. 4, 2000). Not all jurisdictions apply the same
the potential inequalities associated with premarital agreements. With respect to changed circumstances, between the time of execution of the agreement and enforcement, Section 7.02\textsuperscript{125} includes the following clause limiting the validity and enforceability of a premarital agreement subject to: “constraints that recognize competing policy concerns and limitations in the capacity of the parties to appreciate adequately, at the time of the agreement, the impact of its terms under different life circumstances.”\textsuperscript{126}

Section 7.05 of the proposed uniform law also embodies changes designed to further secure procedural fairness at the time of execution. The taint of coercion is addressed by requiring that all agreements be executed at least thirty days before the parties’ marriage and that both parties have the opportunity to consult legal counsel. To avoid overreach, the proposed statute setting forth the requisites of an enforceable agreement requires that agreements concluded without the assistance of separate counsel must state in language “reasonably understandable,” the “nature of any rights . . . arising at dissolution . . . altered by the contract” and stating that the interests of the spouses with respect to the agreement may be adverse.”\textsuperscript{127} This section also places the burden to establish that the agreement was voluntarily executed on the party seeking to enforce it under section 7.05(2). The proposed contract exit clause, embodied in Section 7.02, coupled with the procedural fairness requirements contemplated by Section 7.05,\textsuperscript{128} reflect the overarching concerns for individual economic autonomy and fairness with respect to the division of marital property upon divorce.

Clearly, drafters of Chapter 7 of the proposed uniform law recognize that the fairness concerns related to changed circumstances cannot be adequately protected until the parties decide to divorce. Such a look-back provision necessarily insures that property division will be negotiated at the time of the divorce and based upon the economic circumstances existing at the time of divorce, including the identity and value of marital property. Thus, marital property rights, even if the subject of a premarital agreement, are not fully alienable until the

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\textsuperscript{125} PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.02 (Tentative Draft No. 4, 2000).  \\
\textsuperscript{126} Id.  \\
\textsuperscript{127} Id. at § 7.05(3)(c)(i)-(ii).  \\
\textsuperscript{128} PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.05 (Tentative Draft No. 4, 2000).
\end{flushright}
rights mature at the time of divorce, according to section 7.02 of the *Principles of the Law of Family Dissolution: Analysis and Recommendation*.

The look-back provision justifiably limits the individual's freedom to contract because no property right is absolute, but is held subject to the best interests of the community. The drafters assert that the special state interest in family dissolution distinguishes the enforcement of premarital agreements from other business contracts. Thus, states are free to require more assurance that a marital agreement was knowingly executed and, though valid when executed, may limit or reject marital agreements as contrary to public policy at the time enforcement is sought due to changed circumstances. The drafters also assert that agreements are more likely to be fair when drafted against the backdrop of judicial review for fairness at the time of enforcement.

The proposed revisions to the U.P.A.A. currently under consideration by ALI members of the Family Law Committee clearly reflect the struggle between contract law and property law in relationship to family economics upon divorce. Thus, the special statutory requisites of drafting an enforceable agreement, coupled with the second look privilege afforded to the court, render marital property rights inalienable until divorce. As a consequence, the utility of premarital agreements generally under the Chapter 7 revisions is uncertain.

In summary, using a property rights focus to analyze the validity of premarital agreements leads to several conclusions. First, marital property embodies the traditional precept that no property right is absolute. Second, the propertied individual's interests, promoted by the premarital agreement, consistently conflict with the interests of the dependent spouse. Finally, the propertied individual's interest in obtaining a marital property right waiver further conflicts with the public's interest in promoting the economic liberty upon divorce of not just one spouse, but of both spouses. Protecting a future spouse's freedom to contract before marriage may, therefore, prove less urgent than protecting a future spouse's freedom to contract at the time of separation and divorce when marital property can be accurately iden-

129. See also, *Regan*, supra note 36, at 166-68 (explaining that the rhetoric of property tends to conceptualize autonomy as focusing on independence as opposed to interdependence and recognition of mutual obligation).

130. See Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 *Colum. L. Rev.* 931 (1985). In this article, Rose-Ackerman categorizes a variety of restrictions on ownership and then sets forth her own theory to justify limitations on private ownership.

131. In cases where no conflict exists at the time of marriage, postponing the property distribution until separation or divorce should logically lead to the same result envisioned by the parties when they married, so long as there has been no material change in circumstances that would alter either party's expectation or reliance interests.
tified and valued, furthering the economic liberty interests of both spouses.  

Given the competing policy interests of freedom to contract and placing limits on property ownership, perhaps it is time to examine a third approach to the validity and enforceability of premarital agreements: an inalienability analysis springing from traditional property law precepts and divorce reform goals embodied in the no-fault divorce movement.

V. MARITAL PROPERTY: THE ARGUMENT FOR INALIENABILITY

Divorce reform legislation created marital property, community property, and other economic rights arising out of divorce. These statutes enhanced the rights of the economically dependent spouse. As divorce reform legislation swept the country, an industry of premarital agreements blossomed in response.  

Prior to divorce reform, lawyers typically recommended premarital agreements only to those with children from a prior marriage in an effort to protect the estate from claim by a surviving spouse. Following the advent of divorce reform, lawyers began to market premarital agreements to individuals marrying for the first time to protect a family business, a past or future inheritance, or the acquired assets of individuals who marry later in life.

Uninformed by a property right analysis that marital property rights should be treated as inalienable until the rights can be identified, valued, and divided, courts enforced premarital property waivers based on contract theory. Arguably, the contract approach undermines marital property reform in contravention of the stated goal of

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132. See Fineman, supra note 47, at 33-35. Fineman argues that the shift in family law to focus on equality was “in fact antirevolutionary – operating to undermine the fledgling potential for freedom that newly won economic opportunities, coupled with the ability to leave unsatisfactory marriages, presented to women.” Id. at 33. Fineman also stresses that “to impose sameness of treatment, particularly within the context of family laws, simply perpetuates inequality.” Id. at 35.

133. In addition to the premarital agreement drafting boom, a litigation boom has followed. See supra note 76 (regarding the increase in premarital agreement litigation following divorce reform).

134. See Principles of the Law of Family Dissolution: Analysis and Recommendations § 7.01 cmt. a (Tentative Draft No. 4, 2000). Historically, United States courts enforced premarital waivers only in the context of waiving the spousal survivorship rights of a widow with respect to an elective share claim and other statutorily created rights. Courts viewed the premarital agreements limiting or waiving the right to marital property as contrary to sound public policy for a variety of reasons, including the assumption that such agreements lack adequate consideration and encourage divorce.

achieving economic justice between divorcing parties. Because courts and legislatures adopted the right to contract rubric, without a careful property counter-analysis, premarital agreements are consistently enforced across the nation without regard to the economic consequences of such enforcement.

If a property law analysis is substituted for into the right to contract analysis, and if we agree that no property right is absolute, but is always subject to limitation by the countervailing interests of the community, the validity of a premarital waiver of future economic rights acquired by parties following marriage becomes tenuous. In fact, strong policy arguments arise to treat such rights as inalienable until these rights can be identified, valued, and divided at the time of separation or divorce.

The legal definition of an inalienable right differs dramatically from context to context. In broad terms, alienability can mean any restriction on the transferability, ownership, or use of an entitlement. Black's Law Dictionary defines the term "inalienable right" as: "[a] right that cannot be transferred or surrendered; esp[ecially], a natural right such as the right to own property." In Market Inalienability, Margaret Jane Radin acknowledges several meanings of this concept. She addresses the concept of market inalienability as it applies to the inability of the individual to sell a commodity, such as blood or babies, legally. Other scholars have used the term "inalienability" to refer to future rights that can be waived only at the time such rights are mature and exercisable. Therefore, if future marital property rights can only be identified and accurately valued at the time the marriage is dissolved and if those rights are deemed "inalienable," it follows that no individual should be permitted to waive mari-

136. See Reich, supra note 70, at 772 (observing that property, like the Bill of Rights, "represents a general long range protection of individual and private interests, created by the majority for the ultimate good of all . . . "). According to Reich, property and liberty are inseparable. Id.
137. See Yelpaala, supra note 8, at 161-62.
138. See Rose-Ackerman, supra note 130, at 931.
141. Id.
142. See Carl H. Coleman, Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes, 84 Minn. L. Rev. 55, 98 (1999). Coleman focuses on the difficulty of accurately assessing the impact of a release of rights to fertilized embryo if such release is given in advance of the time of implantation or destruction, that is before the decision to destroy or create life is exercised. In fact, he suggests that it "may be impossible to make a knowing and intelligent decision to relinquish a right in advance of the time it is to be exercised." Id.
The concept of inalienability has been generally explored in relationship to contract rights. Calabresi and Malamed in their pivotal article redefining the "cathedral" of property and liability rules,\textsuperscript{143} proposed a two-prong analysis to determine whether an entitlement, defined as any interest protected by the state,\textsuperscript{144} should be regarded as inalienable. Subsequently, Kronman proposed that paternalistic limitations on the right to contract can be divided into three groups: (1) limitations to further economic efficiency and distributive fairness, (2) limitations to protect personal integrity and autonomy, and (3) limitations that reflect sound moral judgment.\textsuperscript{145}

\section*{A. Inalienability promotes economic efficiency and achieves distributive justice goals because it reduces the economic burden of divorce on the public and advances the interests of the economically dependent spouse}

Whenever the waiver or relinquishment of rights potentially creates substantial costs to third parties, the transaction may be forbidden by the state.\textsuperscript{146} Calabresi and Malamed use the example of banning land sale to a polluter as a more cost-effective approach than legally forcing the polluter to bear the cleanup costs.\textsuperscript{147} Thomas Hudson cites the example of the immutable rule that disallows the limitation of tort liability by contract.\textsuperscript{148} According to Hudson, efficiency principles assign the costs associated with negligent conduct to the individual, rather than to the public.\textsuperscript{149} Another example of paternalistic inalienability is the implied warranty of habitability owed by all landlords to all tenants. This warranty may not be disclaimed because it seeks to "shift control over housing from one group (landlords) to another (tenants)" to achieve a minimum level of safety and sanitation in the rental market.\textsuperscript{150} Thus, the concept of economic efficiency

\textsuperscript{144} \textit{Id.} at 1111-15. First, the authors considered the economic efficiency of inalienability, including both the costs and benefits to society and the morality concerns embodied in self-paternalism and true paternalism. Second, the authors considered the distributive consequences of inalienability in terms of the group that gains from the inalienability rule and the group that loses. \textit{Id.}
\textsuperscript{145} Kronman, \textit{supra} note 79, at 765.
\textsuperscript{146} See Calabresi & Malamed, \textit{supra} note 143, at 1111.
\textsuperscript{147} \textit{Id.}
\textsuperscript{149} \textit{Id.} at 344.
\textsuperscript{150} Kronman, \textit{supra} note 79, at 772.
empowers the state to limit the individual's right to contract to preserve shared resources, to prevent foreseeable injury, and to protect public safety and sanitation.

Distributive justice concerns also arise when courts are called upon to enforce premarital agreements that deprive the economically dependent spouse of an equitable or at least equal share of the property acquired during the marriage. Possibly, an unemployed dependent spouse could be rendered homeless at the time of separation and divorce because the spouse had waived the right to the division of the property acquired by the parties during the marriage. The situation could be further exacerbated if the spouse was ill or handicapped. The consequences might be even more grave if the parties have minor children at the time of separation and divorce. Thus, there are clear public policy considerations rendering premarital waivers of inchoate marital property rights invalid and unenforceable. The potential cost to the state in housing, welfare, medical benefits, and other social services bolsters the case for treating marital property as inalienable.

In addition to the specific distributive justice concerns, inalienability has a more generalized distributive impact. It will make richer the class that can precondition marriage upon the waiver of inchoate marital rights\(^\text{151}\) and it will make poorer those who are required to part with an equitable share of the property he or she accumulated during the marriage without regard to title.\(^\text{152}\) Thus, if the state exercises its power to protect the interests of the economically vulnerable party at the time of divorce, it achieves equity in the case at hand and protects the economically dependent group from harm should the marriage end in divorce.\(^\text{153}\)

B. Inalienability promotes personal integrity by fostering the economic autonomy of the economically dependent spouse

Inalienable marital property rights were created by legislatures not only to attain distributive fairness goals by eliminating a potential group of financially dependent individuals, but also to protect personal integrity. One way to protect the personal integrity of both parties to a marriage is to link the valid waiver of marital property rights to the circumstances existing at the time of waiver. Kronman argues that the concept of personal autonomy requires the state to safeguard not only the individual's freedom to contract, but also the individual's

\(^{151}\) See Calabrasi & Melamed, supra note 143, at 1114.

\(^{152}\) See id.

right to (1) make life-altering decisions contemporaneously and (2) to be free from coercion.\textsuperscript{154}

Treating marital property rights as inalienable balances the state's interest in protecting the right to contract and the right to make life-altering decisions freely and contemporaneously. First, the inalienability rule permits marital property waivers only at the time of separation or divorce, thus uniting in time the waiver of rights and the existing circumstances. Second, the threat of canceling the wedding and ending the relationship, absent premarital waiver of the future right to share in marital property, is eliminated. Clearly, the taint of coercion is lessened and the goal of fairness is furthered when parties waive marital property rights based on the circumstances existing at the time the waiver is implemented at separation and divorce.

An inalienability rule also recognizes the relationship between economic opportunity and individual autonomy. Kronman uses the example of the prohibition against self-enslavement to demonstrate the policy goal of protecting personal integrity.\textsuperscript{155} Similarly, Reich stresses the importance of financial independence to personal liberty.\textsuperscript{156} More recently, Mary Ann Glendon noted that at-will termination has become less of a threat as the workplace has become more secure, but "termination at-will continues to disadvantage more than ever . . . the unpaid labor force, namely homemakers."\textsuperscript{157}

Kronman, Reich, and Glendon each affirm the vital connection between economic opportunity and individual autonomy. An alienability rule protects both the individual's right to contract without unnecessary state interference and the individual's right to "access to economic opportunities and resources that makes non-demeaning, self-fulfilling life choices a realistic possibility."\textsuperscript{158} Marital property, created by the state, was designed to secure personal autonomy and economic independence for both divorced parties. Given the special relationship between individual autonomy and economic opportunity, treating marital property as inalienable until mature fosters individual autonomy while limiting, but not eliminating, the individual's freedom to contract.

\textsuperscript{154} See Coleman, \textit{supra} note 142, at 94; see also Kronman, \textit{supra} note 79, at 763 n.1.
\textsuperscript{155} Kronman, \textit{supra} note 79, at 775.
\textsuperscript{156} See Reich, \textit{supra} note 70, at 772-74.
\textsuperscript{158} See MICHAEL J. TREBILCOCK, \textit{THE LIMITS OF FREEDOM OF CONTRACT} 243 (1993) (emphasizing that some contract doctrines redistribute resources and promote autonomy values).
C. Inalienability reflects sound moral judgment because it allows life-altering decisions to be made contemporaneously and protects the financially dependent party from coercion

Inalienability of inchoate marital property rights reinforces the status of marriage as a just and fair commitment with economic consequences. In addition to the economic costs associated with the premarital waiver of inchoate marital economic rights, such a waiver may also create what Calabresi and Malamed refer to as external costs that are impossible to value and are thus called "moralisms." In some instances, moralisms alone may render a right inalienable. Prohibiting the sale of slaves, the sale of babies, and the sale of tissue and organs are examples of inalienability rules. These rules are based upon the collective judgment that such sales attack personhood. Often when moralisms are at the root of the external costs, the transaction is outlawed and the right in jeopardy of limitation or waiver is deemed inalienable. Therefore, as a matter of moralism and sound judgment, it may be advisable to postpone the waiver of inchoate marital property rights until divorce when such rights are more appropriately identified, valued, and divided. Such a limited alienability rule protects those of inferior wealth, inferior knowledge and understanding of the likely increase in value of such property, inferior knowledge of the other individual's potential to acquire new property in the future, and inferior earning potential, to whom a fiduciary obligation is arguably owed.

D. Many family law rights are consistently treated as inalienable

Many rights related to family law are already afforded the protection of inalienability and can be viewed along a continuum. Some rights can never be waived. One example is the inalienability of the right to seek a divorce. Designed to protect individual freedom and personal integrity, this right preserves each individual's independent right to decide if his or her marriage has become irretrievably bro-

159. Calabresi & Melamed, supra note 143, at 1111-12.
160. Id. at 1112-14 and accompanying notes 42-48.
161. See Calabresi & Malamed, supra note 143, at 1112-14 and accompanying footnotes.
162. Id. at 1112. Short of inalienability, Kronman recognizes the utility of "cooling off" periods to protect individuals from the consequences of rash and ill-considered decisions. Kronman, supra note 79, at 788.
Another example is a provision contained in some protection from abuse statutes that requires the district attorney to prosecute abusers over the abused spouse's objection. Thus, these statutes recognize the spousal right to be free from battery as inalienable.

Further along the continuum are rights that can be released, but only contemporaneously at the time they would otherwise mature. One example relates to the relinquishment of parental rights in custody matters. Under most state laws, the release cannot be signed until after the birth of the child and in many jurisdictions there is an additional waiting period designed to insure a knowing and intelligent release of parental rights. In fact, there are at least two different types of marital property rights that courts do not deem mature until after divorce: (1) pensions not yet in pay status and (2) stock options that have been granted but cannot yet be exercised due to the applicable holding period or other conditions.

With respect to stock options and pension interests, the law recognizes a marital right to share in an asset that is not yet fully mature. This lack of maturity carries with it the risks attendant to predicting

164. Kronman, supra note 79, at 775; see also id., at 789 (observing that minors are prohibited from releasing the defense of minority to avoid an otherwise valid contract).


166. Coleman, supra note 142, at 91-92 (detailing the logic behind the waiting period).

167. See, e.g., Berrington v. Berrington, 598 A.2d 31 (Pa. Super. Ct. 1991), aff'd, 633 Pa. 589 (Pa. 1993). Marital property portions of employee-spouse's pensions may be distributed by "immediate offset method" under which the non-employee spouse receives immediate distribution of marital assets to provide him or her with equitable share of pension even though pension itself will not actually be received by the employee spouse until some time in the future, or the "deferred distribution method," requiring the court to retain jurisdiction and distribute pension benefits as of benefit determination date. The trial court must weigh the advantages and disadvantages of each method of distribution according to the facts of each case in order to determine which method best effects economic justice between the parties. In cases where the valuation of a marital pension interest is uncertain, deferred distribution of the asset is appropriate. Id.

168. See, e.g., Fisher v. Fisher, 769 A.2d 1165, 1169 (Pa. 2001) In comparing the results of the immediate offset method and the deferred distribution method, the court noted, Unlike the "deferred distribution" method, the second approach has the commendable quality of finality because it makes a final disposition at the time of distribution, and need not take account of future fluctuations in stock prices or other contingencies which may affect the value on the dates when the stock options may be exercised. On the other hand, the immediate offset method requires that the value of the asset be known. We have determined supra that no value for unvested stock options can be established without unjustifiable assumptions which render the value impermissibly speculative. This approach, therefore, is not viable in this case.

Id. The court then ordered the stock options be divided according to the method of deferred distribution. Id.
the future value of any asset.169 Because of the importance of accurate valuation to the overall equitable distribution process, courts have developed special rules regarding such marital assets. For example, many courts retain continuing jurisdiction over marital pensions not yet in pay status.170 Likewise, stock options that have been granted, but have not reached maturity also present a thorny valuation issue. Under the tag of “delayed distribution,” courts can retain jurisdiction and divide the options in the future after they vest.171 Delayed distribution is often ordered since the price of the stock as of a future date determines the value, if any, of the option.172 As with pensions, courts are wary of arbitrarily assigning value to stock options that remain unexercised.173 In many cases, courts retain jurisdiction to divide marital stock options upon maturity or divide the options in kind, thus splitting the risk proportionately between the divorcing parties.174 Given the state’s special interest in promoting marriage, preserving the family, and discouraging divorce, the inchoate right to share in marital property should be protected until the property can be contemporaneously identified, valued, and divided just as divorce courts retain continuing jurisdiction over immature marital pension and stock option rights.

In the instances cited above, the degree of alienability of a right is predicated upon the belief that the waiver decision should be made, if at all, contemporaneously and should take into account the circumstances existing at the time the right is mature. The same defects that prevent accurate valuation of future pension payments and of immature stock options175 also compromise a future spouse’s ability to make an informed decision regarding the likely financial impact of a premarital waiver of future marital property rights.

Thus, uncovering and applying the property theory underlying existing inalienable family rights demonstrates that traditional contract protections are insufficient to protect vital marital property rights. Linking property distribution to the circumstances existing at the time of divorce insures a more equitable result.176 Inalienability fosters the economic independence of both parties. Inalienability pro-

169. The court is faced with a problem quite similar to the one encountered by a future spouse who is required to waive the right to marital property before it can be identified or valued.
170. See, e.g., Berrington, 598 A.2d at 35-36.
171. See, e.g., Fisher, 769 A.2d at 1169.
173. Id. at 255-56.
174. Id. at 285 n.187 (citing In re Marriage of Moody, 457 N.E.2d 1023, 1026-27 (Ill. App. Ct. 1983)).
175. See Rosettenstein, supra note 172, at 245-56.
176. See Rosettenstein, supra note 172, at 260.
motes the underlying moralism that personal liberty requires, while economic liberty can best be protected by allowing individuals to make life-altering decisions contemporaneously. Therefore, legislatures and courts should reexamine the validity and enforceability of the premarital waiver of marital property rights and adopt, instead, a property law analysis rendering marital property rights inalienable until the parties divorce, thus rearming the institution of marriage with economic consequences.

VI. NEW MARITAL PROPERTY: IN DEFENSE OF INALIENABILITY

If the inalienability of marital property is entertained, there must be some consideration of the legal policies eschewed and the legal interests compromised by the shift. The most obvious criticism of inalienability is that it interferes with personal autonomy and the freedom to contract because it eliminates an individual's right to knowingly accept risk.

Although the inalienability rule interferes with the freedom of contract rule, premarital agreements, like the contract of marriage itself, are *sui generis* contracts. The assumption that the benefit of the bargain is based upon adequate consideration does not withstand scrutiny. Thus, the procedural fairness requirements of full disclosure and even the right to consult independent counsel cannot create the conditions necessary for a truly knowing waiver. According to Hudson, rather than imposing such requirements, courts should adopt "a contract theory based on individual rights [that] may imply certain substantive restrictions on the scope of legally permissible agreements." Additionally, Radin observed, "[I]t is not satisfactory to think that marketing whatever one wishes defines freedom. Nor is it satisfactory to think that a theoretical license to acquire all objects one desires defines freedom." If we accept that contract theory is based upon the voluntary and informed consent of the parties and is reinforced by each party's right to rely upon courts to enforce the private promise, then only alienable rights are the proper subject of contract. For example, while an individual may initially agree to a slave-like relationship, the individual retains the right to revoke the

177. One scholar based his defense of alienability on the presumption that the transaction will move the property from a lower to a higher value. Clearly this assumption cannot be tested at the time the agreement is signed, but rather only at the time of separation or divorce. Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 971-72 (1985).
180. Trebilcock, *supra* note 158, at 244.
consent at any time and no court has authority to enforce the promise because it infringes upon an inalienable right.\textsuperscript{181}

A second response to the paternalism critique is that treating marital property rights as inalienable is no more paternalistic than treating them as alienable.\textsuperscript{182} Treating marital rights as inalienable denies the wishes of the present self and allows the future self to exercise the decisionmaking power at a time that is close in proximity to the time when the rights become ripe.\textsuperscript{183} Arguably, the right of the present self to irrevocably waive future inchoate rights should be rejected in favor of the future self's power to make the same decision at the time the rights ripen with more perfect information. Kronman wrote, "[a] person who would give away too much of his own liberty must be protected from himself, no matter how rational his decision or compelling the circumstances."\textsuperscript{184}

Some might argue that we are treating affianced couples as if they are temporarily incapacitated\textsuperscript{185} by their approaching nuptials. Why treat the couple differently than any other cohabiting couple? The answer flows clearly from the legislated property rights arising out of marriage designed to ensure a just division of assets if the timeless contract proves short-lived.

In addition to unwarranted interference with the freedom to contract if property rights are deemed inalienable, some consideration should be afforded to the impact of alienability on the institution of marriage. It is possible that some individuals will chose not to marry absent the protection of a premarital agreement. Some will choose the option of an early exit from a faltering marriage rather than devote additional time and emotional energy to reviving the relationship absent a premarital agreement. At the same time the cost of these potentially lost or abbreviated marriages must be weighed against the benefit to the individuals and to society at large when marital property is identified, valued, and distributed at the time of separation or divorce. As to those who desire a premarital agreement to protect premarital property from claim, in most jurisdictions, this property is not considered marital property unless it is commingled with marital funds or placed in the joint names of the parties. Thus, this concern can be addressed through sound bookkeeping.

\textsuperscript{181} Hudson, \textit{supra} note 148, at 351.

\textsuperscript{182} See Note, \textit{Rumpelstiltskin, supra} note 80, at 1945.

\textsuperscript{183} See id. at 1946.

\textsuperscript{184} See Kronman, \textit{supra} note 79, at 775.

\textsuperscript{185} But see Atwood, \textit{supra} note 45, at 135 n.34 (citing \textit{STEPHEN SUGARMAN \& HERMAN HILL KAY, DIVORCE REFORM AT THE CROSSROADS} 142 (1990) (arguing that the romanticized ideal of love renders it difficult for engaged couples to engage in "hard-headed business bargaining").
It is possible that some children from prior marriages will deem the law to be punitive as to children from first families. Arguably, children from prior relationships are protected in the event of divorce because only property acquired during the marriage is subject to equitable distribution.\(^\text{186}\) Thus, default property distribution statutes balance the competing interests of a subsequent spouse and children from a prior marriage by defining marital property to exclude property owned by a party prior to marriage.

Others might suggest that the response of inalienability sweeps too broadly and that some middle ground might better serve the interests of the parties and the public. One alternative is to require a substantive fairness review based upon the circumstances existing at the time enforcement is sought. To the extent a spouse believes the requested waiver to be fair, it seems only just that the continuing fairness be tested at the time the waiver is implemented. Theoretically, this should result in a property distribution award quite similar to the one envisioned by the default statute.

Another intriguing idea is to limit the term of such contracts to a more foreseeable period, such as five years, at which time the contract terminates leaving the parties free to renegotiate should they so desire. Barbara Stark developed a similar proposal in a recent article and presented a menu of three potential agreements for future spouses to choose from: (1) gender equality, (2) relationship model, and (3) custom model.\(^\text{187}\) The agreement decided upon would be subject to an automatic sunset provision, requiring the parties to renegotiate within a specified period. Stark further posits that there should be some minimum level of fairness built into each agreement. Stark sidesteps the thorny problems related to a consistent definition of minimum fairness guidelines and the question of when fairness is relevant, at execution, at dissolution, or both. Stark's proposal at least limits the term of premarital contracts. It does not, however, permit the parties to make contractual decisions based upon the circumstances existing at the time marital property rights ripen. Thus, her proposal limits, but does not eliminate, the problem inherent in entering into agreements determining marital property rights without the vital details of the identity and value of the marital property and the circumstances of the parties at dissolution.

In keeping with the policy underlying the elective share statutes in place to protect the surviving spouse's economic welfare, legislatures could determine an inalienable right to receive a minimum percentage


of marital property due to a spouse at the time of separation and divorce, affording the spouse an election to proceed under the agreement or to take the minimum share. This would introduce a prima facie standard of fairness against which all premarital agreements would be judged. Of course, this legislative standard could be avoided by an enforceable choice of law provision and raises forum shopping concerns. This approach is also costly because it would require case by case review of premarital agreements at the time of divorce and the minimum percentage is an arbitrary one that is not sensitive to factual differences. Thus, a minimum percentage rule is less satisfactory than the inalienable rule.

VII. CONCLUSION

In summary, property law in relationship to marriage and divorce can be characterized as evolving to achieve economic justice and fairness. For example, in response to the inequity created by treating married women as wards of their husbands, property law evolved to recognize the rights of married women to own property. In response to the inequity of dividing property based upon title at the time of divorce, legislatures created marital property, property identified by timing of acquisition, rather than by title, to be divided equitably, or at least equally upon divorce. Predictably, inequity has again arisen as individuals seek to escape this newer regime of marital property and to return to the title regime of property by conditioning marriage upon signing a premarital agreement. Most jurisdictions employ a traditional contract analysis to decide the validity of premarital agreements despite the acknowledged purpose of the contract: to skew the marital ante by limiting or eliminating the economically dependent spouse's right to create and share in marital property.

A contract analysis of the validity of premarital agreements fails the individuals, the family, and society. A contract analysis cannot account for the unavailability of three types of material information: (1) the identity of the marital property, (2) the value of the marital property, and (3) the circumstances existing at the time of separation and divorce. This precise information is, by definition, unavailable to the parties before they marry. Moreover, this is the precise information that a court is mandated to consider in dividing marital property upon divorce.

In contrast, a property analysis resulting in the conclusion that marital property rights cannot be waived until mature, in the event of separation and divorce, furthers a variety of public policy interests. The inalienability rule reduces the economic burden on the public by preserving marital property for division between the parties in the event the marriage fails. The inalienability rule advantages the economically dependent spouses at the expense of the wealthier spouses,
thus having a distributive justice impact. The inalienability rule protects the economic autonomy of the individual and permits parties to make life-altering decisions contemporaneously, with the benefit of all relevant information. The inalienability rule promotes the interests of fairness and justice. Finally, the inalienability rule reinvests the decision to marry with the economic consequences envisioned by state legislators.

Therefore, in light of the legislative intent supporting the creation of marital property rights, and the public policy interests promoted by marital property, spousal rights to marital property should be inalienable unless and until the parties' marriage ends in divorce.
### APPENDIX A

#### Table I
Jurisdictions that Have Adopted a Form of the Uniform Premarital Agreement Act and Require Involuntariness and Unconscionability and Inadequate Disclosure to Invalidate a Property Waiver

<table>
<thead>
<tr>
<th>State</th>
<th>Citation</th>
<th>Effective Date</th>
<th>Standard of Enforceability as to Property Waiver</th>
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#### Table II
Jurisdictions that Have Adopted a Form of the Uniform Premarital Agreement Act and Typically Require Unconscionability and Inadequate Disclosure to Invalidate a Property Waiver

<table>
<thead>
<tr>
<th>State</th>
<th>Citation</th>
<th>Effective Date</th>
<th>Standard of Enforceability as to Property Waiver</th>
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<td>State</td>
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<tr>
<td>Tennessee</td>
<td>TENN. CODE ANN. § 36-3-501 (2001).</td>
<td>1980</td>
<td>Must be executed freely, knowingly, and in good faith, absent duress or undue influence. TENN. CODE ANN. §36-3-501 (2001). See also Randolph v. Randolph, 937 S.W.2d 815, 817 (Tenn. 1996) (holding that proponent of agreement must establish full financial disclosure or independent knowledge).</td>
</tr>
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Table III
Jurisdictions Enforcing Premarital Property Right Waivers
According to Common Law Contract Precepts Without Regard to
Substantive Fairness and Typically Requiring Financial Disclosure

<table>
<thead>
<tr>
<th>State</th>
<th>Standard of Enforceability as to Property Waiver</th>
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<tbody>
<tr>
<td>1. Alabama</td>
<td>“Party seeking enforcement of the agreement must show consideration was adequate and that the entire transaction was fair, just, and equitable from the other person's point-of-view, or agreement was voluntarily reached, with competent independent advice, and general knowledge of that party's financial interests and approximate value.” Roberts v. Roberts, 802 So. 2d 230, 233 (Ala. Civ. App. 1996) (citing Barnhill v. Barnhill, 386 So. 2d 749, 733 (Ala. Civ. App. 1980)).</td>
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<td>4. Louisiana (silent as to financial disclosure)</td>
<td>Matrimonial agreements establishing a regime of separate property or modifying or terminating the legal regime are valid and enforceable subject to the same grounds for rescission as other contracts: capacity, consent, error, fraud, and duress. McAlpine v. McAlpine, 679 So. 2d 85, 93 (La. 1996).</td>
</tr>
<tr>
<td>5. Maryland</td>
<td>Nonmoving party must have actual knowledge or adequate disclosure of rights waived; including both the value of real and personal property. Absent such disclosure and absent a fair and proportionate allowance, fraud will be presumed. The party seeking to enforce the agreement must prove it was voluntarily entered with full knowledge of its meaning and effect. Harbom v. Harbom, 760 A.2d 272 (Md. Ct. Spec. App. 2000).</td>
</tr>
<tr>
<td>6. Mississippi</td>
<td>Agreement must be executed with the benefit of financial disclosure and is subject to the same rules of construction and interpretation that apply to contracts generally. Smith v. Smith, 656 So. 2d 1143, 1147 (Miss. 1995).</td>
</tr>
<tr>
<td>7. Ohio</td>
<td>Agreements are valid and enforceable (1) if they have been entered into freely without fraud, duress, coercion, or overreaching; (2) if there was full disclosure, or full knowledge and understanding of the prospective spouse's property; and (3) if the terms do not promote divorce. Gross v. Gross, 464 N.E.2d 500, 506 (1984).</td>
</tr>
<tr>
<td>9. Washington</td>
<td>“Fair and reasonable provision for party not seeking enforcement or full and fair disclosure, absent any traditional contract defenses and with the benefit of independent counsel when necessary.” In re Marriage of Matson, 730 P.2d 666, 670 (Wash. 1986).</td>
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### Standard of Enforceability as to Property Waiver

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<th>State</th>
<th>Standard of Enforceability as to Property Waiver</th>
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<tr>
<td>10. Wyoming</td>
<td>&quot;General contract principles are applicable to premarital agreements. Absence of detailed financial disclosure will not void the agreement, but a fair disclosure of the nature and amount of assets renounced is necessary.&quot; Laird v. Laird, 597 P.2d 463, 468 (Wyo. 1979) (citing In re Ward's Estate, 285 P.2d 1081-84 (Kan. 1995)).</td>
</tr>
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### Table IV

*Jurisdictions Enforcing Premarital Property Right Waivers Based Upon a Statutory Scheme Permitting Courts to Determine Conscionability/Fairness*

<table>
<thead>
<tr>
<th>State</th>
<th>Citation</th>
<th>Effective Date</th>
<th>Standard of Enforceability as to Property Waiver</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Connecticut</td>
<td><strong>CONN. GEN. STAT. §§ 46b-36a to 46b-36j (Supp. 2003).</strong></td>
<td>1995</td>
<td>Involuntary or unconscionable as a matter of law, at execution or enforcement, or inadequate financial disclosure, or inadequate opportunity to consult independent counsel. <strong>CONN. GEN. STAT. 46b-36g (Supp. 2003).</strong></td>
</tr>
<tr>
<td>2. Indiana</td>
<td><strong>IND. CODE §§ 31-11-3 to 31-11-10 (1997).</strong></td>
<td>1997</td>
<td>Involuntary or unconscionable at execution. <strong>IND. CODE § 31-11-8 (1997).</strong></td>
</tr>
<tr>
<td>3. Iowa</td>
<td><strong>IOWA CODE §§ 596.1 to 596.12 (2001).</strong></td>
<td>1992</td>
<td>Involuntary or unconscionable at time of execution or unfair and unreasonable disclosure. <strong>IOWA CODE § 596.8 (2001).</strong></td>
</tr>
<tr>
<td>4. Minnesota</td>
<td><strong>MINN. STAT. § 519.11 (1990 &amp; Supp. 2003).</strong></td>
<td>1979</td>
<td>Premarital agreements shall be valid and enforceable if (a) there is a full and fair disclosure of the earnings and property of each party and (b) the parties have had an opportunity to consult with legal counsel of their own choice. <strong>MINN. STAT. § 519.11 (1990 &amp; Supp. 2003); Petty v. Reese, No. C8-98-1576, 1999 WL 261952 (Minn. App. Ct. 1999) (holding that the court has a limited power to review substantive fairness at time the agreement is enforced).</strong></td>
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<td>5. Nevada</td>
<td><strong>NEV. REV. STAT. §§ 123A.010 to 123A.100 (2001).</strong></td>
<td>1989</td>
<td>Involuntary or unconscionable at time of execution or inadequate disclosure. <strong>NEV. REV. STAT. § 123A.080 (2001).</strong></td>
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<td>South Carolina</td>
<td>S.C. CODE ANN. § 20-7-473 (Law Co-op. Supp. 2002).</td>
<td>1986</td>
<td>Antenuptial contracts are presumptively fair and equitable so long as (1) voluntarily executed, (2) both parties separately represented by counsel, and (3) the parties exchanged full financial disclosure. S.C. CODE ANN. § 20-7-473 (4) (Law Co-op. Supp. 2002). See also Hardee v. Hardee, 558 S.E.2d 264, 268-69 (S.C. Ct. App. 2001) (using three part test: (1) was the agreement obtained by fraud, duress, mistake, misrepresentation, or nondisclosure of present facts; (2) agreement is conscionable; (3) have the facts and circumstances changed so as to make enforcement unfair or unreasonable).</td>
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### Table V

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<thead>
<tr>
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<tbody>
<tr>
<td><strong>Georgia</strong></td>
<td>Three criteria used to determine enforceability: (1) was the agreement obtained through fraud, duress, mistake, misrepresentation, or nondisclosure of facts; (2) is the agreement unconscionable; and (3) have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable. Allen v. Allen, 400 S.E.2d 15, 16 (Ga. 1991) (citing Scherer v. Scherer, 292 S.E.2d 662, 666 (Ga. 1982)).</td>
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<tr>
<td><strong>Kentucky</strong></td>
<td>Three criteria used to determine enforceability: (1) was the agreement obtained through fraud, duress, mistake, misrepresentation, or nondisclosure of facts; (2) is the agreement unconscionable; and (3) have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable. Blue v. Blue, 60 S.W.3d 585, 588 (Ky. Ct. App. 2001) (citing Gentry v. Gentry, 798 S.W.2d 928, 936 (Ky 1990)).</td>
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<td><strong>Massachusetts</strong></td>
<td>Agreement must be executed with fair disclosure, voluntarily, and must be fair and reasonable at the time enforcement is sought, with “fair and reasonable requiring a lesser showing of inappropriateness than unconscionability.” Upham v. Upham, 630 N.E.2d 307, 310-11 (Mass. App. Ct.1994) (citing Osborne v. Osborne, 428 N.E.2d 810, 816 (Mass. 1981)).</td>
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<tr>
<td><strong>Michigan</strong></td>
<td>Three criteria used to determine enforceability: (1) was the agreement obtained through fraud, duress, mistake, misrepresentation, or nondisclosure of facts; (2) is the agreement unconscionable; and (3) have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable. Booth v. Booth, 486 N.W.2d 116, 118 (Mich. Ct. App. 1992).</td>
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<td><strong>Missouri</strong></td>
<td>Agreement must be voluntary, executed with benefit of full disclosure, and must be conscionable at the time enforcement is sought. King v. King, 66 S.W.3d 28, 36 (Mo. Ct. App. 2001) (citing Miles v. Werle, 977 S.W.2d 297, 301 (Mo. Ct. App. 1998)).</td>
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<tr>
<td><strong>New Hampshire</strong></td>
<td>Premarital property waivers are governed by the same rules of construction as apply to other contracts. MacFarlane v. Rich, 567 A.2d 585, 588 (N.H. 1989) (citing Griswold v. Heat Corporation, 229 A.2d 183, 186 (N.H. 1967)). Additionally, the court imposed three standards of fairness: (1) the agreement was not obtained through fraud, duress, or mistake or through misrepresentation or nondisclosure of a material fact; (2) the agreement is not unconscionable; and (3) the facts and circumstances have not changed to render the agreement unenforceable. Id. at 589.</td>
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<tr>
<td><strong>New York</strong></td>
<td>Antenuptial property distributions will only be set aside if unconscionable. Conscionability is determined at the time enforcement is sought. Pennise v. Pennise, 466 N.Y. Supp. 2d 631, 634 (N.Y. Sup. Ct. 1983).</td>
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<td>8. Oklahoma</td>
<td>Agreements will be enforced if they are freely entered absent fraud, duress, or coercion and executed with the benefit of full, fair, and frank disclosure. Taylor v. Taylor, 832 P.2d 429, 430-31 (Ok. Ct. App. 1991) (citing In re Estate of Burgess, 646 P.2d 623, 626 (Ok. Ct. App. 1982)). Additionally, the agreement must be just and equitable in light of the circumstances existing at the time that enforcement is sought. Manhart v. Manhart, 725 P.2d 1234, 1238 (Okla. 1986).</td>
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<tr>
<td>9. Vermont</td>
<td>Premarital agreements must be executed freely, voluntarily, and with fair disclosure of each party’s financial status. The substantive provisions must be conscionable at the time enforcement is sought and may not render the spouse a public charge or provide a standard of living far below that enjoyed during marriage. Bassler v. Bassler, 593 A.2d 82, 87 (Vt. 1991).</td>
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<td>10. West Virginia</td>
<td>Premarital agreements must be executed willingly and knowingly under circumstances free of fraud, duress, or misrepresentation. Agreements must be conscionable at the time enforcement is sought and courts may consider changed circumstances. Gant v. Gant, 329 S.E.2d 106, 115-16 (W. Va. 1985).</td>
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