To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context

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TO HAVE AND TO HOLD, FOR RICHER OR RICHER:
PREMARITAL AGREEMENTS IN THE COMPARATIVE CONTEXT

By Margaret Ryznar * and Anna Stepień-Sporek**

I. INTRODUCTION

The premarital agreement,¹ which permits prospective spouses to plan for divorce, may well be the world’s most unromantic document. ² Envisioning the end of a marriage not yet begun, prospective couples must divide property not yet acquired. They must select a legal framework governing their marriage and divorce. Lawyers are often times invited to participate in the negotiations, fuelling prospective spouses in their demands. Unsurprisingly, therefore, many people prefer to avoid requesting a premarital agreement, despite the gains in judicial and social acceptance of such agreements.

However, odds do not favor lifelong marriages ³ and when divorce ensues, many people resent their divorce settlements.⁴ Premarital agreements will therefore always have an important role in many engagements, particularly when one of the partners has noteworthy assets. For example, Hollywood actress Catherine Zeta-

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¹ For a precise definition of the premarital agreement in United States law, see infra Part II. In Europe, the term “marital agreement” is used to describe both prenuptial agreements and antenuptial agreements, but not agreements made by spouses after a divorce. See Part III.
² Most unromantically, premarital agreements signal divorce to many prospective spouses. See, e.g., Darian M. Ibrahim, The (Not So) Puzzling Behavior of Angel Investors, 61 VAND. L. REV. 1405, 1441 (2008) (suggesting premarital agreements signal the possibility of divorce); Saul Leivmore, Norms as Supplements, 86 VA. L. REV. 1989, 2021 (2000) (suggesting premarital agreements signal distrust); Lior Jacob Strahilevitz, Reputation Nation: Law in an Era of Ubiquitous Personal Information, 102 NW. U. L. REV. 1667, 1718 (identifying, as a classic example of signaling behavior, the lack of a prenuptial agreement as a means of signaling love prior to a marriage).
⁴ See infra note 161.
Jones contracted with actor Michael Douglas for $2.8 million per year of marriage upon divorce, and if she proved his infidelity, for an additional $5 million. Meanwhile, the premarital agreement between actress Nicole Kidman and singer Keith Urban would pay Urban about $640,000 for every year that he spent with Kidman, unless he used illegal drugs during the marriage, in which case he would receive nothing.

These illustrations underscore the inordinate power of premarital agreements in the United States in shifting wealth between the spouses and discouraging undesirable marital behavior. They also symbolize, to people around the world, the typical use of the premarital agreement: to divide property upon divorce. The simplicity of this popular use, however, belies the complexity of premarital agreements. In essence, the premarital agreement circumvents the statutory default governing spouses’ marital and property rights and responsibilities not only during divorce or death, but also during the marriage. When these rights and responsibilities shift through legislation or case law, the premarital agreement also protects spouses from being governed by unexpected laws.

Premarital agreements are not without their problems, however. Their enforceability in the United States is subject to procedural and substantive review. They also universally raise public policy issues with regard to the meaning of fairness and the limits on freedom of contract. Such issues become heightened in the case of mobile couples, which include those who move both inter-state and internationally. Given these issues, it is beneficial to consider the premarital agreement in the comparative context. This

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7 One example of shifting divorce laws is England. Nonetheless, a recent survey found that currently only 2% of married and divorced people in the United Kingdom have prenuptial agreements. Divorce Lawyers Braced for Busiest Week Ever, TIMES ONLINE, January 5, 2009, available at http://business.timesonline.co.uk/tol/business/law/article5450552.ece.
8 See infra note 41.
9 International dating and marriage has been facilitated by online dating and mail-order-bride programs. Premarital agreements in such cases can be cruel. See, e.g., In re Marriage of Shirilla, 89 P.3d 1, 3-4 (Mont. 2004).
is particularly true as state courts and legislatures continue to encounter and address the unresolved issues surrounding premarital agreements.

Although England and the United States have similar approaches to such agreements, the meaning and consequences of premarital agreements in continental Europe markedly differ from the Anglo-American common law tradition, heightening the opportunity for a comparative study. While the European approach in itself also offers insight into the purpose, limits, and effects of premarital agreements, it is not as well-known—even to many Europeans—as the American approach, made so famous through Hollywood examples.

This Article therefore endeavors to consider and develop the notion of the premarital agreement in the comparative law context, addressing some of the universal issues surrounding premarital agreements, as well as the particular nuances of certain regulatory frameworks governing this type of agreement. Part II begins by exploring premarital agreements in American law, while Part III reviews the European approach to such agreements, focusing on Poland’s representative approach, but also considering that of France, Germany, and Switzerland. Part IV draws lessons from a comparison of the two approaches, concluding that much of the distinction between American and European law on premarital agreements stems from the differing limits placed on the prospective spouses’ freedom of contract. This Part also considers the ideal level of freedom of contract, as well as the ideal characteristics of the regulatory framework surrounding premarital agreements. Finally, this Part considers the popularity of such agreements, as well as the reasons underlying it.

II. PREMARITAL AGREEMENTS IN THE UNITED STATES

In the United States, family law has traditionally remained in the domain of the states. Therefore, American law on premarital agreements has developed independently in each state, whether by statute or case law. Even with the introduction of the Uniform Premarital Act, the law on premarital agreements is far from uniform and consistent.

Nonetheless, the development of the premarital agreement in the United States has been impressive since 1970, when courts began abandoning their public policy reasons against enforcing such
agreements.\textsuperscript{10} \textit{Posner v. Posner}\textsuperscript{11} became one of the first cases permitting the enforceability of premarital agreements in the 1970’s, while the Uniform Premarital Act prompted state legislatures to begin drafting statutes on the subject in the 1980’s.

Even today, however, premarital agreements are subject to certain procedural and substantive limits before a court will uphold their validity. Such agreements also raise important questions of fairness, which both American case and legislative laws have sought to resolve. Before turning to these questions, however, this Article reviews the meaning and brief history of premarital agreements in the United States.

\section*{A. Definition of Premarital Agreement}

At the outset, it is important to define the American premarital agreement, also known as a prenuptial agreement or an antenuptial agreement, because its meaning and consequences differ notably from marital agreements in Europe.\textsuperscript{12}

The Uniform Premarital Agreement Act defines a premarital agreement as “an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.”\textsuperscript{13} This definition, however, does not reflect the inordinate power of the premarital agreement, which permits prospective spouses to regulate


\textsuperscript{11} 233 So.2d 381 (Fla. 1970).

\textsuperscript{12} Continental Europe and the United States differ most in their approaches to premarital agreements, while England shares many similarities with the United States on the subject. \textit{See infra} Part III and note 91.

\textsuperscript{13} Uniform Premarital Agreement Act, §1.
their rights and responsibilities not only during divorce or death, but also during the marriage.

In the United States, spouses have significant freedom of contract when it comes to premarital agreements. Therefore, spouses can use the agreement to simply assign a piece of property to one of the spouses, such as a house. Spouses can also completely opt out of the default property distribution regime of their state, which would otherwise govern their property distribution upon divorce.

Specifically, each state has a default property distribution regime of either: 1) equitable distribution, which is a fair but not necessarily equal division between the spouses, and 2) community

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14 “Since [the mid-nineteenth century] an arrangement in advance regarding each spouse’s rights to the other’s estate at death has been an acceptable subject for a premarital agreement.” Smith, supra note 10, at 840. Estate planning should therefore carefully consider the property classifications created by a premarital agreement. Id. at 855.


17 For further discussion of the equitable distribution principle, see Margaret Ryznar, All’s Fair in Love and War: But What About in Divorce? The Fairness of
property, which often results in a roughly equal division of marital property between the spouses.\textsuperscript{18} Given their contractual freedom, if prospective spouses reside in an equitable distribution state, they may contract for a community property division. If they reside in a community property state, they are free to write a premarital agreement that would keep their property separate.\textsuperscript{19} Prospective spouses can also enter into a premarital agreement that changes the characterization of property that would be community under the state’s default regime.\textsuperscript{20}

The characterization of property is especially important in terms of determining which property one spouse’s creditors may collect. This is particularly true in community property states.\textsuperscript{21} A debtor’s marriage in an equitable distribution state has no impact on the creditor, unless the debt is incurred to buy household

\textit{Property Divisions in American and English Big Money Divorce Cases, __N.D. L\textsc{aw Rev.}__ (2010).}

\textsuperscript{18} In the community property regime, marriage is treated as a partnership in which property and debts acquired during the marriage belong to both spouses in equal, undivided shares. \textsc{William Q. de Funiak \& Michael J. Vaughn, Principles of Community Property} § 1 (2d ed. 1971). The community property approach to the distribution of property upon divorce is the default approach in only a minority of states, which currently consists of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. \textit{See generally Jeffrey G. Sherman, Prenuptial Agreements: A New Reason to Revive an Old Rule, 53 C\textsc{leveland L. Rev.} 359, 370 (2005-06). \textit{See also} Cal. Fam. Code § 2550-2556 (2007).}

\textsuperscript{19} \textit{See, e.g., Elia v. Pifer, 977 P.2d. 796, 806 (Ariz. Ct. App. 1998) (“We therefore conclude that a valid premarital agreement abrogating community property rights precludes a creditor of one spouse from proceeding against the separate property of the other spouse on a claim arising during marriage.”); Leasefirst v. Borrelli, 13 Cal.App.4th Supp. 28, 116 (1993) (holding that a third-party creditor will not be entitled to recover against former community assets transmuted into separate property by a premarital agreement). See also Smith, \textit{supra} note 10, at 836.}

\textsuperscript{20} \textit{Andrea B. Carroll, The Superior Position of the Creditor in the Community Property Regime: Has the Community Become a Mere Creditor Collection Device?, 47 S\textsc{anta Clara L. Rev.} 1 (2007).}

\textsuperscript{21} For background on when and how creditors can reach community property to satisfy the debts of one of the spouses in community property states, see Erik Paul Smith, Comment, \textit{The Uncertainty of Community Property for the Tortious Liabilities of One of the Spouses: Where Law Is Uncertain, There Is No Law}, 30 I\textsc{daho L. Rev.} 799 (1994). \textit{See also} Sarah Ann Smith, \textit{The Unique Agreements: Premarital and Marital Agreements, Their Impact upon Estate Planning, and Proposed Solutions to Problems Arising at Death}, 28 I\textsc{daho L. Rev.} 833 (1992) (analyzing the impact of premarital agreements under California law).
necessities. In a community property state, however, the creditor’s rights expand as a result of the debtor’s marriage: he can collect from the spouse’s resources brought into the marriage.

Premarital agreements or matrimonial agreements, if after wedlock, can therefore impact how property is held during the marriage and its effect on third persons, such as creditors. This is particularly important in the nine community property states, and, to give notice to creditors, sometimes these agreements must be recorded to be binding on third parties. Nonetheless, as the vast majority of states utilizes equitable distribution as a default, and therefore creditors cannot access the property of the debtor’s spouse, the premarital agreement in the United States typically has the most significance not on the spouses’ property holdings during marriage, but upon divorce, when the agreement governs its terms.

Logically, premarital agreements can be drafted to either significantly favor or disfavor the more vulnerable spouse upon divorce. For example, a housewife can include a provision that if her spouse is unfaithful, and therefore caused the divorce, he must pay her a significant portion of the assets. On the other hand, a significantly lower-income spouse can contract to keep only her minimal financial marital contributions, leaving the other spouse with the bulk of assets. Premarital agreements can also be drafted

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22 “In many noncommunity property states, a nonearning spouse also may incur debts for which the earning spouse is liable. Under the doctrine of necessaries, the earning spouse is responsible for payment of expenses incurred by the nonearning spouse for those things that are necessary for the family.” Susan Kalinka, Taxation of Community Income: It Is Time for Congress to Override Poe v. Seaborn, 58 L.A.L.R. 73, 94 (1997). “Necessity” is determined by examining factors such as the spouses’ means, social position, and circumstances. Id.
23 Carroll, supra note 20, at 29. See also Lisa R. Mahle, A Purse of Her Own: The Case Against Joint Bank Accounts, 16 TEX. J. WOMEN & L. 45, 78-79 (“Since creditors can potentially garnish all community property in a joint account, in community property states when a creditor of one spouse wants to garnish a joint account, courts must first determine whether the money in the account is community property, separate property or joint tenancy property.”).
24 Carroll, supra note 20, at 32; see also infra Part IV.B.
26 See supra note 5 and accompanying text.
more neutrally towards both parties, so that each maintains some significant assets.

It is important, however, to distinguish the premarital agreement from the separation agreement, which permits already married spouses to contract the terms of their divorce. Cohabiting couples, meanwhile, may not enter into premarital agreements, which become effective only upon marriage.\(^{27}\)

Another important distinction for the purposes of this Article is that between premarital agreements and postmarital agreements—a distinction that does not clearly exist in the European countries considered in Part III. Postmarital, also known as postnuptial, agreements are similar in substance and procedure to premarital agreements, except that they are concluded after a marriage. They are used to change provisions in the premarital agreement, or if not already covered by a premarital agreement, to make initial provisions, during the marriage, on the rights and responsibilities of the parties upon divorce or death. Therefore, the most noteworthy difference between premarital agreements and postmarital agreements is their timing in relation to the marriage.

The premarital agreement is thus an important type of agreement with the power to govern a marriage and potential divorce. The terms, meaning, and consequences of such agreements in the United States have further been clarified through judicial and legislative law, considered next.

B. A Brief History of the Premarital Agreement

Among the most important milestones in the evolution of the American premarital agreement are *Posner v. Posner*,\(^ {28}\) the first notable judicial recognition of the enforcement of premarital agreements, and the Uniform Premarital Act, an influential draft of statutory law on the subject.

1. Case Law

*Posner v. Posner*\(^ {29}\) is often cited as the first case upholding the validity of premarital agreements, making Florida the first state

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\(^{27}\) For a survey of the law on property distribution following an unsuccessful cohabitation, see Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1391 (2001).

\(^{28}\) 257 So.2d 530 (Fla. 1972).

\(^{29}\) Id.
to recognize such agreements. In its opinion, the Posner court noted the artificial distinction in other states’ case law that skirted the issue of the validity of prenuptial agreements, but permitted spouses to contract their own property settlements under narrow circumstances. The court also took “judicial notice of the fact that the ratio of marriages to divorces has reached a disturbing rate in many states.” Therefore, the court concluded that premarital agreements may be upheld under certain conditions, so long as they were subject to changed conditions.

The Posner court also noted the differing viewpoints of the judges it overruled in the case, whose views summarized the predominant stances on premarital agreement at the time. These views were that 1) the trial court need not be bound by premarital agreements, though they be permissible, 2) premarital agreements be void on public policy grounds, and 3) premarital agreements be as binding on the trial court as an agreement settling one spouse’s property rights upon the death of the other spouse. In overruling the lower court judges, Posner marked the shift from a judicial preference of voiding premarital agreements to a policy that recognized premarital agreements as binding.

Although most states acknowledged the enforceability of premarital agreements soon after Posner, state courts continued to play a significant role in defining the appropriate parameters for premarital contracting. For example, the Supreme Court of Ohio has outlined procedural safeguards in Gross v. Gross, while a

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30 Id. at 384.
31 Id.
32 Id.
33 See, e.g., Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990) (finding that a less deferential approach to the enforcement of premarital agreements would entail “[p]aternalistic presumptions and protections [sheltered] women from the inferiorities and incapacities which they were perceived as having.”).
34 See, e.g., Bakos v. Bakos, 950 So. 2d 1257 (Fla. Dist. Ct. App. 2007) (deciding that a premarital agreement signed the day before a wedding was voidable, but aggrieved party may ratify it); Chubbuck v. Lake, 635 S.E.2d 764 (Ga. 2006) (finding that a premarital agreement was void and unenforceable when it failed to meet the statutory requirement that it be witnessed by two people); Seherr-Thoss v. Seherr-Thoss, 141 P.3d 705 (Wyo. 2006) (determining that the laws governing the enforceability of contracts also govern premarital agreements).
35 464 N.E.2d 500, 502 (Ohio 1984) (“[Premarital] 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
Massachusetts court recently found that pregnancy does not negate a bride’s free will to enter into a premarital agreement. In Rhode Island, both parties need not have counsel in order for a premarital agreement to be valid. In New Jersey, the doctrine of equitable estoppel cannot be used to validate an otherwise invalid agreement.

However, states eventually became clearly divided on certain issues, such as the formalities that must attend such agreements and whether parties could contract on the issue of spousal support. These inter-state inconsistencies were most problematic for mobile couples. The Uniform Premarital Act, considered next, therefore aimed to remedy some of these inconsistencies.

2. Statutory Law

The National Conference of Commissioners on Uniform State Laws promulgated the Uniform Premarital Agreement Act (“UPAA”) in 1983 to provide a uniform law on premarital agreements. Approximately half of American states have now adopted some variation of the UPAA.

One of the most important characteristics of the UPAA is its strong support of the freedom of contract. Section 3 of the Act lists several topics a premarital agreement may cover, including property rights, spousal support, and the choice of law governing the

understanding of the nature, value and extent of the prospective spouse’s property; and (3) if the terms do not promote or encourage divorce or profiteering by divorce.”).

38 In re Estate of Shinn, 925 A.2d 88 (N.J. 2007).
39 Uniform Premarital Agreement Act, § 2 cmt.
40 Id.
41 Such movement often triggers conflicts of law issues. The Uniform Premarital Act, which permits prospective spouses to select “the choice of law governing the construction of the agreement,” was specifically drafted to address “[t]he problems . . . exacerbated by the mobility of our population.” Uniform Premarital Act, §3, cmt and Prefatory Note. See also infra note 43.
agreement. Significantly, this list is not exhaustive and parties may contract on any topic not in violation of either a public policy principle or a criminal statute. The only topic explicitly forbidden from premarital contracting is child support that adversely affects the child, although many child-related provisions are typically considered to be against public policy as a general rule.

Enforcement of premarital agreements is considered in section 6 of the UPAA. This section provides that a premarital agreement is not enforceable against the spouse who did not execute the agreement voluntarily. The premarital agreement is also not enforceable if it was unconscionable when executed and the spouse 1) was not provided fair disclosure of the other spouse’s financial details, 2) did not waive the right to receive such disclosure, and 3) did not have adequate knowledge of those financial details. Therefore, a person with knowledge of his spouse’s financial status or reason to know of it, coupled with voluntary execution, cannot contest the premarital agreement. Similarly, a person who waived knowledge of these financial details and voluntarily executed the agreement is bound by it.

Although the UPAA is a source of some guidance, the law on premarital agreements remains in the realm of the states and any generalization is therefore difficult. Nonetheless, it is a fair observation that all American premarital agreements provide

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44 Uniform Premarital Agreement Act, § 3 cmt.

45 Id.

46 For constructive criticism of section 6’s enforcement provision in the UPAA, see Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act,* 19 J. LEGIS. 127 (1993). Meanwhile, section 7 of the Uniform Premarital Agreement Act governs enforceability of agreements in marriages that were subsequently determined to be void.

47 Uniform Premarital Agreement Act, § 6.

48 Id.

49 Id. § 6 cmt.

50 Id. There is an additional provision that bars enforcement of a premarital agreement to the extent that it would force the lower income spouse onto welfare. Id. at §6(b).
prospective spouses significant contractual freedom and are generally enforceable unless they fail judicial review.\textsuperscript{51}

\section*{C. Theoretical Underpinnings}

The modern premarital agreement is rooted in contract law theories.\textsuperscript{52} Parties to a premarital agreement, viewed as independent negotiators,\textsuperscript{53} have almost full discretion over the contents and scope of their agreement, enabling them to dictate the terms of their divorce absent any enforceability issues.\textsuperscript{54} This is particularly important for community property states such as California, where parties may waive their rights to share property.\textsuperscript{55}

Many commentators have noted that marriage itself has evolved from a relationship based on status to one regulated by contract.\textsuperscript{56} This shift from marriage as regulated by the state to marriage as determined by the private ordering between parties has been called the privatization of family law.\textsuperscript{57}

\begin{itemize}
  \item \textsuperscript{51}See infra Part II.D.1.
  \item \textsuperscript{52}\textquotedblleft[\textit{A} premarital agreement is a contract. As required for any other contract, the parties must have the capacity to contract in order to enter into a binding agreement.	extquotedblright Id. §2, cmt. The UPAA also draws upon contract and commercial law for the standard of unconscionability. Id. §6, cmt.
  \item \textsuperscript{54}See infra Part II.D.1.
  \item \textsuperscript{55}See supra Part II.A.
  \item \textsuperscript{56}Scott & Scott, supra note 53, at 201. Marriage as status means, in essence, that family law automatically bestows a set of rights and obligations upon people who are marrying, which can be altered only by divorce, not by mutual agreement. For an excellent discussion of the interplay between marriage as status and marriage as contract, see Lisa Milot, \textit{Note, Restitching the American Marital Quilt: Untangling Marriage from the Nuclear Family}, 87 VA. L. REV. 701 (2001) and Cynthia Starnes, \textit{Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation under No-Fault}, 60 U. CHI. L. REV. 67 (1993). For a description of freedom of contract in covenant marriage, a more binding form of marriage available in a few states, see Margaret Brining, \textit{Contracting Around No-Fault Divorce}, in \textit{Fall and Rise of Contract}, supra note 53, at 275.
  \item \textsuperscript{57}Id. at 203. It is important to note here, however, that there is a major distinction between 1) marital behavior being governed by contract and 2) divorce being governed by contract. This Article limits itself to considering agreements in the case of divorce. See, e.g., Marsha Garrison, \textit{Marriage: The Status of Contract}, 131 U. PA. L. REV. 1039 (1983), reviewing \textit{Lenore J. Weitzman, The Marriage Contract} (1981).
\end{itemize}
However, there are obvious distinctions between contracts and premarital agreements, casting doubt on whether contract law is an apt framework for premarital agreements. 58 Most problematically, the bargaining process in the marital context is not at arm’s length, but “may be afflicted by unreflective love, even infatuation.” 59 Additionally, the characteristics of marriage, so dependent on life circumstances and children, are sufficiently unique to prevent the blind application of pure contract principles. 60 Nonetheless, premarital agreements are often defended on partnership principles as well. 61 There are inconsistencies, however, in the notion that premarital agreements inherently advance the prospective spouses’ equality. Specifically, a court’s ability to invalidate a premarital agreement suggests that one of the partners is too weak to contract. 52 Conversely, if a court upholds skewed premarital agreements, then spouses may bargain for unequal treatment. Therefore, it has been suggested that premarital agreements must move in the direction of dividing property equally, or else they are at odds with the view of marriage as a partnership. 63 This proposition, however, would defeat the entire purpose of a premarital agreement, which is to provide parties a method of contracting around defaults. Therefore, it is not entirely clear whether premarital agreements enhance or undermine the idea of

59 Michael J. Trebilcock, Marriage as a Signal, in Fall and Rise of Contract, supra note 53, at 254. For the argument that premarital contracting creates greater equality of bargaining power than either intramarital or postmarital bargaining, see id.
61 See, e.g., Uniform Premarital Agreement §6 cmt, which prioritizes protecting spouses “against overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other.” (Emphasis added).
62 This recalls the days when women could not legally contract. See, e.g., Poole v. Perkins, 101 S.E. 240 (Va. 1919).
63 Developments in the Law—The Law of Marriage and Family, supra note 60, at 2096 (“[D]efense to freedom of contract in antenuptial agreement law is undesirable. [A]cknowledgment of the partnership conception of marriage demands that parties desiring to execute antenuptial agreements approximate the fifty-fifty division implicit in the partnership approach or stand prepared to prove the agreements’ substantive fairness at the time of divorce.”).
marriage as an equal partnership. They can certainly be used by parties to effectively do either, depending on the terms of the agreement.

Although both the partnership and contractual frameworks thus have flaws when applied to the marital context, they have underpinned and legitimized premarital agreements nonetheless. As a result, couples have benefited from the opportunity to contractually circumvent judicial and statutory defaults in the case of divorce.

D. **Enforceability**

Section 6 of the Uniform Premarital Agreement Act, and corresponding state statutes, govern the enforceability of premarital agreements. However, it is the courts that are the ultimate arbiters of whether a particular premarital agreement governs the terms of divorce. The issue of enforceability therefore arises most frequently following a court’s procedural and substantive review of a premarital agreement.

1. **Judicial Review**

In order to be upheld by the court, a premarital agreement must survive substantive and procedural review. Occasionally, these separate inquiries are blurred. In other words, if the substance of the agreement appears fair to the court, defects in the bargaining process are of less importance. However, if the agreement seems particularly unfair to one spouse, courts will more closely examine the procedures surrounding its execution.

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64 See supra Part II.B.2.
65 See, e.g., Uniform Premarital Agreement Act, §6(c) (“An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.”).
66 Some commentators have warned that enforcement of premarital agreements must be done carefully so as to not disadvantage women. See, e.g., Atwood, supra note __.
67 For the argument that courts rarely invalidate procedural and substantive review of premarital agreements, see Younger, supra note 46. One commentator suggests that the procedural and substantive fairness protections in premarital agreement law reflect each state’s view of the appropriate balance between individual autonomy and state oversight of premarital agreements. McLaughlin, supra note 43, at 853.
68 Younger, supra note 10, at 356-57.
69 Id.
In terms of substantive review, courts have departed from the standard unconscionability doctrine by which commercial contracts are evaluated. Instead, judges often examine the fairness of the premarital agreement at the time of divorce. Furthermore, certain topics fall outside the scope of permissible contracting for public policy reasons, including a child’s religion, child custody, visitation, or child care payments.

Meanwhile, the test for procedural fairness focuses on the parties’ conduct in obtaining the premarital agreement. First, each party must have voluntarily entered into the agreement, absent fraud, overreaching, sharp dealing, or duress. Additionally, at the time the parties entered into the agreement, disclosure of each party’s

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71 But see Lane v. Lane, 202 S.W.3d 577 (Ky. 2006) (finding that although public policy does not render antenuptial agreements per se invalid, such agreements may be analyzed by courts as unconscionable). See also supra notes 52 and 65.

72 Servidea, supra note 70, at 540-41.

73 I. Glenn Cohen, The Right Not to be a Genetic Parent?, 81 S. Cal. L. Rev. 1115, 1169 (2008). See also Eric A. Posner, Family Law and Social Norms, in FALL AND RISE OF CONTRACT, supra note 53, at 256 (“Aside from the restrictions on termination provisions in prenuptial agreements, potential mates cannot bind themselves legally to marriages in which spouses’ domestic, financial, and sharing obligations are specified by contract. Polygamous and same-sex marriages are prohibited. These laws are not default rules, but restrictions on freedom of marital contract . . .”). For the argument that courts should lift restrictions on marital contracting to obtain less paternalistic and more efficient results, see Milot, supra note 56. Other scholars have similarly argued for even greater contractual freedom. See, e.g., Krauskopf & Thomas, Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support, 35 Ohio St. L.J. 558 (1974); Marjorie Maguire Shultz, Contractual Ordering of Marriage: A New Model for State Policy, 70 Calif. L. Rev. 204 (1982). But see Sally Burnett Sharp, Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom, 132 U. Pa. L. Rev. 1399 (1984) (arguing that absolute freedom of contract may hinder fair results upon divorce).


75 Younger, supra note 10, at 357.

76 Id.

77 See, e.g., Estate of Hollett, 834 A.2d 348 (N.H. 2003).
financial status is required. Significant departure from these accepted procedural practices provide the courts with an opportunity to circumvent premarital agreements in resolving the parties’ divorce.

2. Formulaic Premarital Agreements

The question of enforceability plagues not only procedurally and substantively complicated agreements, but also simple ones. Any internet search reveals pre-made, premarital agreement packages that allow the prospective spouses to sign formulaic contracts without spending money on attorneys’ fees. Ultimately, form premarital agreements are not inherently more or less enforceable than those contracts drafted by lawyers. They are subject to the same procedural and substantive limitations as any other premarital agreement, becoming a reliable option for divorce planning.

There are certainly advantages and disadvantages to an increased use of such unsophisticated premarital agreements. On the one hand, without lawyers, prospective spouses may not know the depth and scope of potential negotiations, lessening their bargaining

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78 See, e.g., Blige v. Blige, 283 Ga. 65, 656 S.E.2d 822 (2008) (holding that both parties entering into an antenuptial agreement must provide a full and fair disclosure of all material facts); Friezo v. Friezo, 914 A.2d 533 (Conn. 2007) (determining that disclosure requirements for a premarital agreement are satisfied when the parties disclose a general approximation of their income, assets, and liabilities).

79 For a good review of the complex financial issues that must be considered by a premarital agreement, see David M. Johnson, Complex Financial Issues in Family Law Cases, 37-OCT COLO. L. REV. 53 (2008).

80 For examples of companies that sell asset protection in marriage, see http://prenuptialagreementform.com (form premarital agreements for $29 on sale) and http://www.legalformsbank.biz/premarital.asp (same for $9.95). However, legal aid lawyers may be available to draft premarital agreements as well. Andrew Blair-Stanek, Comment, Defaults and Choices in the Marriage Contract: How to Increase Autonomy, Encourage Discussion, and Circumvent Constitutional Constraints, 24 TOURO L. REV. 31, 43 n.57 (2008).

81 See, e.g., Uniform Premarital Agreement Act, §6 cmt. (“Nothing in Section 6 [regarding enforcement] makes the absence of independent legal counsel a condition for the unenforceability of a premarital agreement. However, the lack of that assistance may well be a factor in determining whether the conditions stated in Section 6 may have existed (see, e.g., Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla. 1962))”). This UPAA provision would most likely be applicable to cases wherein only one of the parties was assisted by independent legal counsel.
power. On the other hand, inexpensive premarital agreements allow spouses of even the most modest means to plan for divorce.\textsuperscript{82} Furthermore, because one side does not outmatch the other in legal power, perhaps the spouses achieve a greater equality in such negotiations.

In many ways, the formulaic premarital agreement parallels the holographic will. Similar public policy reasons permit both, centering on the autonomy of the individual to dispose of his own property. Furthermore, the do-it-yourself premarital agreement symbolizes the preference of the American philosophy for nearly complete freedom of contracting, permitting prospective spouses to enter into an agreement uninfluenced by judicial or legislative preferences.\textsuperscript{83} This cornerstone of American philosophy, so favorable to the freedom of contract, in fact drives many of the distinctions between American and European law on the subject of premarital agreements.

In sum, Americans may utilize the premarital agreement to avoid judicial and statutory defaults in their states, enjoying significant freedom of contract. This force of the premarital agreement has been effectively developed over the past several decades, resulting in an important role for premarital agreements in many Americans couples’ engagements. Interestingly, however, premarital agreements have a longer history in many European countries, acquiring significantly different consequences and meaning, which are considered next.

III. EUROPEAN LAW ON MARITAL AGREEMENTS AS EXEMPLIFIED BY POLAND

Europe generally does not share American law’s distinction between premarital and postmarital agreements. Instead, both types of agreements are treated as one contract: the marital agreement. The marital agreement may be concluded either before or after marriage.

\textsuperscript{82} Somewhat counterintuitively, those of modest means may most need premarital agreements because marriages are often vulnerable to dissolution when the spouses encounter financial trouble.
\textsuperscript{83} But see supra notes 67 and 73.
This Part analyzes the approaches to marital agreements in Europe, focusing on France, Germany, Poland, and Switzerland. The Polish approach is given more in-depth treatment, not only because it is representative of the others, but also because it illustrates the differences from the American approach.

These legal systems have at least a few issues in common that are worth mentioning at the outset. Under the French Code Civil, the German BGB, the Swiss ZGB, and the Polish Kodeks Rodzinnny i Opiekuńczy, there are a few optional systems of matrimonial property law aside from the statutory system (regime) governing the marriage. As a rule, spouses may modify the standard statutory regime that would apply to their matrimonial relations by means of a marital agreement. Importantly, spouses are not obliged to choose any specific contractual system and can avoid at least some of the consequences of the standard matrimonial regime. Nonetheless, spouses do not have unrestricted autonomy with regard to their matrimonial property law in any of the countries considered, nor is entering into a marital agreement popular.

A. Various European Countries’ Approaches

At the beginning of this Part, it should be mentioned that prospective spouses in many European countries resist premarital or marital agreements because they think that such documents are only important upon divorce, when they establish the consequences of divorce. Therefore, spouses often do not conclude such agreements because they want to underscore that they are not going to divorce. Such an opinion of marital agreements derives from American movies and news regarding the divorces of celebrities. Very rarely, however, is the situation of these divorcing celebrities analyzed within a larger context and within the legal circumstances that are

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84 “Comparisons among [England, France, Germany, and the United States] continue to seem fruitful, not only because of the great influence their legal systems exert in the civil and common law worlds, but also because each has generated a rich assortment of legal and social science materials.” MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 3 (1989).
87 In France, for example, only 10% of spouses decide to conclude a marital agreement, and they do so mostly when important assets or second marriages are involved. See CAROLYN HAMILTON & ALISON PERRY, FAMILY LAW IN EUROPE 261 (2002).
specific to the United States, which is understandable because the main aim of movies is not to teach.

Nonetheless, the result is that the opinion of marital agreements in Europe is built upon the false conviction that marital agreements in Europe have the same consequences as in the United States, when in fact the meaning and consequences of such agreements in Europe differ from those in the United States. In Europe, the regime choice made by the spouses in a marital agreement mainly impacts how property is held or administrated during the marriage and which property is available to creditors of one spouse. While the rules of distribution of property upon divorce are also determined by the chosen regime, spouses can modify them only in a very narrow way through the marital agreement.

Therefore, among the most important points to initially consider is that the marital agreement has a different meaning in Europe than in the United States, and differing meanings within Europe as well. In certain European countries, sometimes even all of the contracts between spouses are called marital agreements. The permissible scope of the agreement also differs from European country to country. In some countries, a marital agreement concerns only the relations between spouses, while in others, the agreement may regulate the consequences of a spouse’s death. In some countries, furthermore, there are only a few models of property regimes from which spouses may choose. In other countries, spouses are not obliged to follow the statutory models of the regimes and have more freedom with regard to the content of their marital agreements.

Nonetheless, two fundamental approaches to marital agreements can be distinguished in Europe. According to the first

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88 This is a very important point given the current process of unification and harmonization in the field of family law. See, e.g., E. Örücü, A Family Law for Europe: Necessary, Feasible, Desirable?, in PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE 551 (Katharina Boele-Woelki ed., 2003) [hereinafter PERSPECTIVES].

89 See § 1217 ABGB (the Austrian Civil Code).

90 Austria and France serve as examples of such countries.

91 These remarks concern only continental Europe because the English approach to marital agreements is similar to the American one. See, e.g., N. Lowe & R. Kay, The Status of Prenuptial Agreements in English Law – Eccentricity or Sensible Pragmatism?, in FAMILY FINANCES 395-413 (Bea Verschraegen ed., 2009) [hereinafter FAMILY FINANCES].
one, the marital agreement is a kind of general agreement, constructing the rules of the classification of property and the relations of the spouses, but on the other hand, not regarding any particular property. The second approach is based on the rule that each contract between spouses is a marital agreement, even if it concerns only certain chattels belonging to one spouse.

1. France

The meaning of the term “marital agreement” is quite broad in France. It covers not only the agreements in which spouses choose their matrimonial regime, but also the contracts regarding every chattel belonging to at least one spouse. Spouses are free to regulate the rules concerning the management of their property and are entitled, by any kind of agreement, to modify the statutory community property regime.

There are a few models of property regimes known by the Civil Code in France: separation of property, separation in acquisition, universal community, and community of movables and acquisitions. Spouses may choose among these in their marital agreements, but are prohibited from electing former types of marital regimes, such as, for example, the dotal system.

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93 See art. 1497 Code Civil (French Civil Code).
94 In this regime, spouses hold property separately.
95 In this regime, spouses behave as if they were married under the regime of separation of property. At the dissolution of the regime, each spouse receives half of the value of the net acquisitions belonging to the patrimony of the other spouse. During the planning of this regime, there was a proposal to use this regime as the standard statutory regime, but the legislator abandoned this idea after seeing society’s negative attitude towards the regime. See C. Döbereiner in Eherecht in Europa 513 (Rembert Suess & Gerhard Ring, eds., 2006).
96 In this regime, “the community includes not only the acquets and gains of the marriage, but also any property brought into the marriage by either spouse.” Carroll, supra note 20, at 27. However, property that is separate by its nature (property mentioned in art. 1404 Code Civil) does not fall into community property, unless otherwise stipulated.
97 This system is similar to limited community. The key characteristic of this system is that immovables are not part of the common property of spouses.
98 The dotal system was in force during medieval times and, in some areas, later. It was also recognized by Roman law. In this system, the wife was typically given with a dower, which was administrated by her husband during the marriage and was given her back upon the death of her husband. Being a former property
If the spouses were married without any provision concerning matrimonial property law, the default statutory system of a limited community property is applied. In this system, only property acquired during the marriage is held in common, although gifts and inheritances acquired during the marriage are the separate property of each spouse. Community property belongs to both spouses jointly and is administrated by them. Each spouse is able to make acts of ordinary administration of community property. Important transactions relating to this kind of property, however, need the consent of both spouses.

Importantly, when the record of marriage mentions that a marital agreement has not been made, the spouses will be deemed with regard to third parties to have been married under this default statutory regime. However, this rule is not applied if spouses have declared, in the transaction entered into with a third party, that they had made a marial agreement.

The freedom of contract in the field of marital agreements is very well-developed in French law, especially when compared to the other European countries considered. In their marital agreements, spouses in France can choose one of the property regimes mentioned by the Civil Code, but may also modify the rules of these regimes. Furthermore, spouses can mix different regimes and are even able to establish new regimes that are not recognized by the law. Unlike the other European countries examined here, spouses in France are also able to make provisions for what should happen upon their death. Spouses may also opt for universal community, which is not popular in Europe.

regime, however, it is not currently mentioned by Civil Code and therefore may not be chosen by spouses today.

Some authors translate the name of this regime as the community of ownership of matrimonial property. See HAMILTON & PERRY, supra note 87, at 260.

Art. 1395 Code Civil.


See HAMILTON & PERRY, supra note 87, at 135.

This kind of provision may not necessarily be involved in every case, as, for example, when certain property cannot be disposed of freely. See HAMILTON & PERRY, supra note 87, at 261.

In this regime, “the community includes not only the acquets and gains of the marriage, but also any property brought into the marriage by either spouse.”
However, there are some limitations on this freedom of contract. For example, the marital agreement cannot be against public order (public morals). Furthermore, spouses are not able to modify the rules of the so-called primary regime (régime primaire) and the statutory order of successions. Spouses are also not allowed to derogate from the rules with regard to parental authority or guardianship. Finally, they may not derogate from the duties and rights which result from marriage.

In France, marital agreements should be concluded before wedlock. During the marriage, the marital agreement is immutable (principe d’immutabilité). However there is an exception to this rule: spouses can change their financial relations after two years of their present regime. In any case, the marital agreement should be agreed upon before a notary and approved by the court. The marital agreement is enforceable after the decision of the court and has effect on third persons three months after mention of it has

Carroll, supra note 20, at 27. This prohibition in other countries is explained by the nature of some rights, the subject of which can only be one person.

105 See art. 1387 Code Civil.
106 This is a catalogue of rules regarding the rights and duties of spouses from which no derogation may be made. This compulsory regime is laid down by the Civil Code. Its provisions regard, for example, the financial contribution of spouses to household expenses, to the upbringing of children, as well as to the family home.
107 Art. 1389 Code Civil.
108 Art. 1388 Code Civil.
109 It was introduced in the 1960’s. See C. Döbereiner in EHERECHT IN EUROPÄ, supra note 95, at 509.
110 It must be demanded that the change of a matrimonial regime be made “in the interest of the family.” See art. 1397 Code Civil.
111 The court referenced here is the court of the spouses’ domicile.
112 This means that spouses are able to rely on the provisions of the marital agreement in limiting their ownership in certain property, particularly when it comes to the creditors of one spouse. These provisions therefore actually determine the scope of property available to creditors. This issue is particularly important in countries where the community of property is the statutory regime. In this regime, the creditor of one spouse typically has recourse against the community property. But if the spouses limited the community property through a marital agreement, the rights of the creditor would be restricted. On the other hand, if a creditor has recourse only against the separate property of the spouse who is the debtor, and the spouses extend the community property, the creditor’s position is weaker. In this case, the creditor has recourse only against the separate property, such as when, for example, the debt regards the separate property of the spouse or the contract was concluded without the consent of the other spouse.
been entered into the margin of both copies of the record of marriage.\textsuperscript{113} Spouses should make a suitable motion to enter information about their marital regime into the record of marriage.

The marital agreement should be concluded by prospective spouses or by spouses, even if one of them has not gained full legal capacity. A minor who obtained consent for contracting into the marriage may enter into marital agreements. The minor must then be assisted by the person who is authorized to give consent for the marriage. An adult in guardianship or curatorship may enter into matrimonial conventions if he is assisted by those who must consent to his marriage. The spouses can also give the power of attorney to an agent who will conclude the marital agreement acting on his or her behalf.

It is very important that the parties be simultaneously present and that the marital agreement be made with the consent of both spouses or their agents.\textsuperscript{114} As has been mentioned, the marital agreement needs to be in the form of a notarial deed. The notary public delivers to the spouses a certificate which confirms that the agreement has been concluded. This certificate must be lodged with the officer of civil status before the celebration of the marriage.

Finally, in their marital agreements, spouses can introduce some provisions in case of one spouse’s death. Specifically, they can decide that the surviving spouse be authorized to receive from the common property either a specified sum, a specified property in kind, or a specified quantity of a determined kind of property.\textsuperscript{115} Such a provision does not affect the rights of the surviving spouse under inheritance law. Expenses arising during the marriage can also be allotted to each spouse by a marital agreement.\textsuperscript{116}

2. Germany

\begin{itemize}
  \item Art. 1397 Code Civil.
  \item Art. 1394 Code Civil.
  \item Art. 1515 Code Civil.
  \item According to art. 214 of the Civil Code, when spouses do not regulate this matter, they should contribute to marriage expenses in proportion to their respective means.
\end{itemize}
According to German law, spouses\textsuperscript{117} conclude a marital agreement (Ehevertrag) so as to regulate their financial relationships. This definition of marital agreement is quite broad and therefore the source of some doubts. For example, it is not clear whether contracts made between spouses in order to transfer ownership of a certain part of their property should be treated as marital agreements.

The marital agreement can introduce a marital regime or change the rules of the regime chosen by the spouses. This means that the marital agreement is a special kind of tool used to decide the financial consequences of marriage and the relations between spouses.\textsuperscript{118} Through it, spouses may choose from the contractual property regimes in Germany, which include separation of property\textsuperscript{119} and community of property.\textsuperscript{120}

If the spouses have not concluded a marital agreement, they remain in the default statutory regime, which is community of surplus (Zugewinngemeinschaft). This name is misleading, however, because it is actually a regime based on separation of property during the marriage, with the surplus divided at the end of the marriage.\textsuperscript{121} If the spouses decide not to contract around this default statutory regime, they are free to make some changes. They can eliminate some of the restrictions regarding the transfer of certain assets or

\textsuperscript{117} Only spouses can be party to these agreements. If there are other people party to the agreement, it does not qualify as a marital agreement. See Joachim Gernhuber & Dagmar Coester-Waltjen, Familienrecht 345 (2006).

\textsuperscript{118} See R. Kenzleiter in Müncher Kommentar zum Bürgerlichen Gesetzbuch, Familienrecht 521 (Kurt Rebmann & Franz Jürgen Säcker eds., 1989); Gernhuber & Coester-Waltjen, supra note 117, at 348. It should be emphasized that different contracts between spouses such as, for example, donation or loan contracts are not marital agreements and are governed by the general rules of BGB (German Civil Code), instead of by the provisions regarding marital agreements.

\textsuperscript{119} Separation of property is a regime in which spouses hold their property separately.

\textsuperscript{120} See § 1414-1415 BGB. Community of property is a regime in which there are three groups of assets: community property, the property of the wife, and the property of the husband. This Part of the Article uses the term “community of property” to describe this specific property regime and the term “community property” to describe the property that belongs to both spouses in this regime.

\textsuperscript{121} See G. Brudermüller in Bürgerliches Gesetzbuch 1640 (Palant ed., 2007). When analyzing this regime and its rules, one can come to the conclusion that it should actually be called the sharing of accruals or the community of increase. See Gerhard Robbers, An Introduction to German Law 283 (2006).
change the rules concerning the equalization of accruals that determine the division of the surplus.

Meanwhile, if the spouses contract into the community property regime, they are able to establish the rules on the composition of each spouse’s separate capital and community property. They can also change the rules of management of the community property, as well as the rules regarding the division of common property.\textsuperscript{122}

Generally, there is some freedom of contract in marital agreements in Germany, but spouses must choose one of the regimes stated in the Civil Code.\textsuperscript{123} It is also possible to modify some of the statutory rules, but only within certain limits established by law. Spouses are not allowed to introduce any regime known by foreign law that is not recognized by German law.\textsuperscript{124} It is also forbidden to mix different regimes. Such limited freedom of contracting in marital agreements is justified by the desire for certainty of business and the guarantee of formality.

In Germany, the marital agreement can be concluded by spouses or prospective spouses. If a spouse does not have full legal capacity, German law is more restrictive than French law. A prospective spouse with limited legal capacity must be assisted by his or her legal representative and, in certain circumstances, must have the approval of the court (Vormundschaftsgericht). The marital agreement can be concluded by a proxy, but both parties to the agreement must be present in front of the notary public.\textsuperscript{125} As in French law, the marital agreement should be made before a notary, but the approval of a court is not necessary in the case that it needs to be changed. Marital agreements can be subject to a time clause.

The marital agreement should be registered in a special register. Such a register is kept by a court (Amtsgericht) and called the register of marital regimes (Güterrechtsregister). The registration has a constitutive meaning, making the marital agreement

\textsuperscript{122} See § 1474 BGB.
\textsuperscript{123} See, e.g., Gerhard Hohloch, Familienrecht 244 (2002); Thomas Rauscher, Familienrecht, 211-12 (2001).
\textsuperscript{125} § 1410 BGB.
enforceable against third persons from the day of its registration. This duty of registration guarantees that third persons know the financial situation of the parties to their contracts, which includes the property arrangements made in the marital agreement between the spouses that would impact the scope of property available to the creditors of one of the spouses. The motion to register the marital agreement can be made by either spouse. The basis for the motion is the valid marital agreement.

Due to this registration, third persons are protected. They can rely on the fact that the spouses are in the regime mentioned in the register. If they are not mentioned because they have changed the regime but their marital agreement has not been published in the register, third parties are not affected. Finally, the register is public and each person who is interested can access it without providing a reason.

3. Switzerland

Another example of European regulation of martial agreements is found in Swiss law, which treats the marital agreement as a special kind of contract concluded by spouses or prospective spouses in order to choose or modify their marital regime. In such agreements, spouses are free to introduce general rules regarding the classification of their property and to modify the rules of their marital regime. Spouses are also able to choose their marital regime or change it within the limits introduced by law.

The standard, default statutory regime is the deferred community of acquisitions (Errungenschaftbeteiligung). In this regime, each spouse has his or her separate property during the marriage and, upon divorce, there is a distribution of goods. Spouses who decide to remain in this standard statutory regime are

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126 See ROBBERS, supra note 121, at 283.
127 Only in a few situations is the registration made ex officio. For further details, see GERNHUBER & COESTER-WALTJEN, supra note 117, at 356.
128 It does, however, take effect between spouses.
130 Id. at 136-37.
132 For more details, see, for example, Anna Stępień-Sporek, Sharing of Accruals as the Best Solution for Marriage? in FAMILY FINANCES, supra note 91, at 371.
free to change the rules of the classification of property. Importantly, if they are entrepreneurs, spouses can choose which property will receive income from their commercial activities. They can also change each other’s shares in acquisitions.\textsuperscript{133}

Spouses can also contract around this default and chose a separate property regime or one of a few types of community property.\textsuperscript{134} If community of property is the regime chosen by the spouses, they can decide that their community property will consist only of accruals. They can also establish the rules concerning shares in common property.\textsuperscript{135} However, there is a catalog of marital agreements introduced by law and it is forbidden to create regimes containing only certain elements of these different regimes.\textsuperscript{136}

The marital agreement (Ehevertrag) can be concluded by spouses during a marriage or by prospective spouses (Brautleute) before wedlock. In order to conclude a valid marital agreement, spouses must possess legal capacity and the contract must be publicly authenticated.\textsuperscript{137} Importantly, the marital agreement can be changed at any time during marriage.\textsuperscript{138} Contrary to German law, there is no special register in which information concerning marital regimes is published. Such information, however, can be mentioned in a commercial register.

\textbf{B. The Polish Approach}

The main subject of the European Part of this Article is Poland’s approach to the issue of marital agreements. Polish law is interesting because of two reasons. First, the Polish approach is different from the American one in many respects. Second, Poland’s present regulation of marital agreements is quite new and was influenced by the above mentioned regulations, which have longer traditions and are well-established.\textsuperscript{139} Nonetheless, the concept of the

\footnotesize{\textsuperscript{133} See art. 216-217 ZGB.  
\textsuperscript{134} HAMILTON & PERRY, supra note 87, at 670.  
\textsuperscript{135} See HAUSHEER, GEISER, & KOBEL, supra note 129, at 136-137.  
\textsuperscript{136} S. Wolf & I. Steiner in EHERECHT IN EUROPÄ, supra note 95, at 1137.  
\textsuperscript{137} See art. 184 ZGB.  
\textsuperscript{138} S. Wolf & I. Steiner in EHERECHT IN EUROPÄ, supra note 95, at 1138.  
\textsuperscript{139} It is worth noting that from 1918, when Poland regained its independence, to the end of 1946, German law was in force in west and north Poland and the source of civil law in the central part of Poland was the Napoleonic Code, which was replaced by the civil code of the Kingdom of Poland based on the Napoleonic Code. From 1836 to 1918, the matrimonial law in central Poland was regulated by}
marital agreement has quite a long history in Poland, especially when compared with the American history of premarital agreements. Even in communist times, Polish law guaranteed spouses the possibility of opting out of the standard statutory regime.\textsuperscript{140}

Marital agreements in Poland are special treaties for spouses.\textsuperscript{141} According to Polish law, the marital agreement (umowa majątkowa małżeńska, intercyza) is a contract concluded by spouses or prospective spouses in which their property is regulated in a different way than from the default statutory regime. The marital agreement also organizes the property of the spouses and dictates the ownership of each spouse as a rule in the future.\textsuperscript{142} The essence of marital agreements is that they classify property after the agreement comes into force. However, it is also possible to conclude an agreement in which spouses divide their common property. In such a case, it is unclear whether this agreement can be treated as a marital agreement because it concerns the previous property, not the property which will be purchased in the future.\textsuperscript{143}

In Poland, freedom of contract in regards to marital agreements is limited. Such limitations are justified by the aim for certainty of transactions, equity for spouses, and protection of family interests.\textsuperscript{144} Spouses are free to introduce regimes named in art. 47 § 1 k.r.o.,\textsuperscript{145} but their freedom is confined to the systems provided by provisions imposed by the tsarist authorities. For further background, see Andrzej Mączyński, The Influence of European Family Law on the Family Law of Countries Aceding to the EU. The example of Poland, in PERSPECTIVES, supra note 88, at 239.

\textsuperscript{140} See DOMINIK LASOK, POLISH FAMILY LAW 91 (1968).

\textsuperscript{141} See Andrzej Dyoniak, Pojęcie i Ważność Małżeńskiej Umowy Mątkowej, Studia Prawnicze no 4, p. 115 (1983).


\textsuperscript{143} MAŁGORZATA ŁAŃCZKOWSKA, OSTUNKI MAJĄTKOWE MIĘDZY PRZEDSIĘBIORCA I JEGO MAŁŻONKIEM W ŚWIETLE USTROJU WSPÓŁNOŚCI USTAWOWEJ 65 (2006). The author suggests that in such a case, there are actually two different agreements and only one of them can be classified as a marital agreement.

\textsuperscript{144} See JERZY IGNATOWICZ & MIROSŁAW NAZAR, PRAWO RODZINNE 181 (2006).

\textsuperscript{145} Kodeks rodzinny i opiekuńczy – The Family and Guardianship Code of 25th February 1964 - Dz. U. nr 9, poz. 59 with amendments. It came into force on 1\textsuperscript{st} January 1965.
When the circumstances causing the mandatory regime have ceased, spouses who were in the mandatory regime can decide to reinstate the previous regime or choose one of the regimes mentioned in art. 47 § 1 k.r.o. The spouses cannot introduce any other regime apart from those regimes authorized by law.

If spouses do not choose another regime through their marital agreement, the default statutory regime is community of property. More specifically, the default statutory regime in Poland is limited community of property, similar to that of French law. This means that there are three types of assets in the marriage: the community property, the separate property of the wife, and the separate property of the husband. Both spouses own community property jointly, whether or not the property has been purchased jointly or separately. If in this regime, however, spouses cannot change the rules concerning the management of property. This prohibition is in force for both the standard statutory regime of community of property and the contractual extended or limited community of property. Spouses are not allowed to modify the rules of the primary regime and the rules concerning the liability of spouses.

This statutory default of limited community of property is problematic, especially when either one or both of the spouses decide to start a commercial activity. The rules of management and liability for debts can make it difficult to be a married entrepreneur or even a shareholder, increasing the importance of having alternate systems into which spouses may contract by means of a marital agreement. Nonetheless, not many spouses choose an alternative contractual regime.

Some commentators criticize this limited freedom. For example, Tomasz Sokołowski suggests that it is paradoxical that the freedom of contract was greater before 1950, yet Polish legislators have not decided to reintroduce that solution. The author stresses that greater freedom of marital agreements has been introduced in, for example, the Czech Republic and Russia. See Sokołowski, supra note 101, at 31.

For further background on this property system in Poland, as well as on the separation of property, see Elżbieta Skowronska-Bocian, Family and Succession Law, in INTRODUCTION to POLISH LAW 85, 96-98 (Stanisław Frankowski ed., 2005).

To contractually expand or limit community property, couples simply designate more or less of their property as community property. See also infra note 152.

For more details, see ANNA STĘPIEŃ-SPOREK, DZIAŁALNOŚĆ GOSPODARCZA Z UDZIAŁEM MAŁŻONKÓW (2009).
If the spouses decide to extend community property through their marital agreement, however, they are not able to choose a universal community property and at least some chattels must belong to the separate property of each spouse, which is a group of chattels that cannot be part of community property. These are enumerated in art. 49 k.r.o. Spouses are not allowed to extend the scope of community property to embrace inalienable rights, compensations for personal injury, or material damage or claims for remuneration for work or personal services outstanding at the time of the marriage. If the spouses decide on a contractual community of property (extended or limited), the rules of administration of community property from the statutory regime are applied. The agreement may have a provision for unequal division of common property upon the end of the regime.

According to 47 § 1 k.r.o., spouses can extend or limit community property, or choose separation of property or the sharing of accruals. If they decide to choose extended or limited

150 In this regime, all property is owned by the wife and husband in common.
151 The end of the community regime is upon divorce, legal separation, nullity of marriage, the introduction of another property regime, the death of a spouse, or in situations when the compulsory regime is applied. The compulsory regime is the separation of property. For further information about the compulsory regime, see, for example, M. Sychowicz in KODEKS RODZINNY I OPIEKUŃCZY. KOMENTARZ 289-302 (H. Ciepła, B. Czech, T. Domińczyk, S. Kalus, K. Piasecki, & M. Sychowicz eds., 2006) [hereinafter KODEKS RODZINNY].
152 See supra note 148. The majority of authors are of the view that it is not possible to extend and simultaneously limit community of property. Instead, the spouses should choose the limited community property or the extended community property. See Józef Stanisław Piatowski in SYSTEM PRAWA RODZINNEGO I OPIEKUŃCZEGO 514 (1985); M. Sychowicz in KODEKS RODZINNY, supra note 151, at 267; Dyonik, Zakres Swobody, supra note 142, at 72; G. Bieniek, Umowne ustawy majątkowe, Rejent no 9, p. 114 (2005). There is a contrary opinion, but it is the minority. See Tomasz Sokolowski, Intercyza Łącząca Postanowienia Rozszerzające i Ograniczające Wspólność Mątajkową, Gdańskie Studia Prawnicze no 4, 762-72 (2005).
153 In this regime, spouses hold their property separately.
154 This regime is similar to the German and Swiss statutory regimes, as well as to the French deferred community (separation of acquisitions). The general rule of this regime is that during marriage, each spouse is the sole owner of his or her separate property. Upon termination of the regime, the surplus of separate property of both spouses is divided. For further details, see Anna Stepień-Sporek, Rozdzielność Mążatkowa z Wyrównaniem Dorobków, Państwo i Prawo no 7, 73-85 (2008).
property, spouses can establish that in the case of the liquidation of community of property, the fractions of each spouse will differ. By choosing the sharing of accruals, spouses can also change the rules of calculation of accruals.

Therefore, the marital agreement regulates the spouses’ property during the duration of the chosen agreement. Spouses are free to conclude different contracts, but only a few of these are considered marital agreements because marital agreements must fulfill certain conditions. For example, marital agreements must take a special form. When spouses wish to change their matrimonial regime (either the statutory standard regime or the contractual regime), a notary must be involved. In order to be valid and enforceable, the marital agreement must be laid down in a notarial instrument.

Contrary to American law, the circumstances regarding the formation of the marital agreement are not as important and are taken into account in only a few cases. For example, Polish law does not pay much attention to the fair disclosure of each spouse’s financial details. However, the general rules concerning defects of a will are applied to marital agreements, i.e., the spouse should not be mistaken, under threat, or in a state of mind excluding the conscious making or expressing of the contract.

In Poland, marital agreements can be concluded by both spouses and prospective spouses. If the marital agreement is concluded by prospective spouses, it will not come into force unless they are married. If a prospective spouse or a spouse does not have full legal capacity, the consent of the legal representative is necessary, as is the consent of the court.\footnote{See Andrzej Dyoniak, 
\textit{Pojęcie i Ważność}, supra note 141, at 134-35.} However, the marital agreement can also be concluded by a proxy. The form of the power of attorney is essential. It should be given in notarial deed because marital agreements require such a form. If the marital agreement is to be concluded by prospective spouses, the name of the other party (the other prospective spouse) should be mentioned in the document of the power of attorney.

The marital agreement takes effect between the parties from the moment it has been concluded, or else at the moment established by the spouses. During the marriage, the marital agreement can be
changed as often as the spouses desire to change their financial relationships. A similar rule characterizes German and Swiss law.\textsuperscript{156}

The marital agreement in Poland has effects in relation to third parties if they are informed of the agreement and of the regime chosen by the spouses. This rule is essential. The regime can affect creditors, who are protected by the above mentioned rule. If the spouses have failed to inform third parties, the marital agreement does not have any effect on these third parties. In practice, this kind of situation is very common. Third persons who are not aware of the existence of the marriage contract may assume that the spouses are married under the statutory system.

In Poland, there is no special register of marital agreements. Information about marital agreements, however, can be put into commercial registers such as the Krajowy Rejestr Sądowy, the register of companies and stocks, or Ewidencja Działalności Gospodarczej, the register of individuals who are entrepreneurs.

\section*{IV. A Comparative Study}

While European countries may differ slightly in their approaches to marital agreements, they all differ markedly from the American approach.\textsuperscript{157} These various contrasts illustrate the range of prospective spouses’ possibilities in premarital contracting, as well as the options that legislatures have in terms of regulating premarital agreements. A comparison of these varying approaches to premarital agreements also offers important insights regarding the autonomy of parties, the possible characteristics of premarital agreements, and the popularity of such agreements, as well as the reasons underlying it.

\subsection*{A. Autonomy of the Parties}

While matrimonial property law is codified in many European countries, usually in national civil codes, Americans’ strong freedom of contract typically overcomes state legislation on the issue. Americans are therefore not restricted to the property regimes laid out in statutes—community property or equitable distribution—and they may choose a property regime not recognized


\textsuperscript{157}Only continental Europe, which abides by the civil law system, differs markedly from the United States. English common law is similar on this subject. \textit{See supra} note 91.
by the law. In fact, they may even import into their agreements any of the European property systems, such as a system of accruals.\footnote{See supra Part III.}

Meanwhile, Europeans are often limited to selecting one of the property regimes statutorily permitted in their countries. They may therefore avoid the statutory default, but nonetheless must select one of the regimes recognized by the law. Only occasionally may the spouses alter the rules of those systems.

Americans therefore enjoy more autonomy in premarital contracting relative to Europeans. These differing levels of autonomy in marital contracting prompt the question of whether, and how much, contractual autonomy is desirable. On the one hand, autonomy may be inherently desirable, particularly to Americans. The general notion espoused by American law is that people should be able to manage their property as they choose,\footnote{See, e.g., Shaffer v. Shaffer, 733 P.2d 1013, 1016 (Wash. Ct. App. 1987) (“Because of this new freedom for marital partners to divide their property as they see fit, the old rule allowing the court to disregard the property division made by the parties in their [separation] agreement if the division does not conform to the trial court’s view of an equitable property division, no longer is appropriate.”). See also Melvin A. Eisenberg, The Theory of Contracts, in THE THEORY OF CONTRACT LAW 206, 223 (Peter Benson ed., 2001) (“Autonomy theories of contract are based on the concept that allowing an individual to freely own and dispose of property and freely exercise his will to make choices concerning his person, labor, and property, is a value that is paramount.”).} which also justifies the significant freedom provided to people in the contracting of their wills.\footnote{See, e.g., Trent J. Thornley, Note, The Caring Influence: Beyond Autonomy as the Foundation of Undue Influence, 71 IND. L.J. 513, 516 (1996) (“The freedom of testamentary disposition is a basic principle of property law. Though not a constitutional right, many states recognize freedom of testation as a deeply ingrained tradition in our society.”). See also supra Part II.D.2.} Furthermore, limited contractual autonomy is criticized as, inter alia, being paternalistic and less efficient.\footnote{See supra notes 70 and 73.}

The flipside, however, is that American courts must occasionally find a premarital agreement substantively unenforceable, particularly when one party’s imaginative contracting significantly disadvantages the other. In the European countries considered, meanwhile, marital agreements will rarely be substantively or procedurally unenforceable because they must adhere to strict statutory requirements in the first place. Furthermore, European spouses cannot introduce their own regime,
but instead must select one of the statutory systems, other than the default, recognized by the law. As the Polish approach illustrates, European courts may therefore be slower to find procedural defects in marital agreements.

Accordingly, there may be a relationship between contractual autonomy and the risk of the agreement’s unenforceability. In other words, the less formulaic the premarital agreement, the more opportunity for a judicial declaration of unenforceability. In the quest for the right legislative framework to regulate premarital or marital contracting, then, the task becomes to find the right balance between autonomy and the risk of unenforceability.

However, complete autonomy may nonetheless be prioritized because it would permit prospective spouses to choose their own level of risk regarding the enforceability of their agreements. Of course, permitting spouses to have complete contractual autonomy, thereby permitting them to choose their agreement’s risk of unenforceability, requires somewhat perfect information. Prospective spouses must not only know that straying from formulaic premarital agreements increases their agreements’ risk of unenforceability, but they must also be aware of the advantages and disadvantages of choosing particular property regimes and contractual provisions. A lawyer representing each side could help assure this.

Another problem of unbounded autonomy of marital contracting, however, is that the courts must continually determine the enforceability of each individual agreement before applying its provisions to a divorce. Scant judicial resources must therefore be spent, despite the American judiciary’s traditional reluctance to meddle in family matters.162

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162 Divorcing spouses may therefore be surprised by a court’s initial interventions. In such cases, men may feel burdened by the financial obligations imposed only upon divorce. As the courts do not typically become involved in the financial arrangements of intact families, permitting spouses to determine their own responsibilities during marriage. See, e.g., Kilgrow v. Kilgrow, 107 S2d 885 (Ala. 1985); State v. Rhodes, 71 NC 453 (N.C. 1868). Meanwhile, women often struggle to keep their households running on a reduced income after a divorce. In 1993, the mean income for divorced American mothers was $17,859, while for divorced fathers it was $31,034. Arthur B. LaFrance, Child Custody and Relocation: A Constitutional Perspective, 34 U. LOUISVILLE J. FAM. L. 1, 6 (1996). But see Kelly Bedard & Olivier Deschênes, Sex Preferences, Marital Dissolution, and the Economic Status of Women, XL THE JOURNAL OF HUMAN RESOURCES 411.
Therefore, keeping prospective spouses informed of their options and expending judicial resources to monitor premarital agreements are the hidden costs to a high level of autonomy in premarital contracting, as illustrated by the American approach to premarital agreements. Nonetheless, every jurisdiction, whether American state or European country, must choose its own balance among these factors and costs.

B. Potential Characteristics of Premarital Agreements

In searching for an appropriate regulatory framework for premarital contracting, as well as the proper content of such agreements, it is also instructive to analyze the desirability of the differing approaches to these agreements, such as the freedom of contract permitted.\textsuperscript{163}

For example, some of the European countries considered permit, or even require, the registration of marital agreements in order to protect third parties. This registration aims to give creditors notice as to which assets are available for collection. There is a similar requirement in some American community property states for the recordation of separation of property agreements.\textsuperscript{164} To give adequate notice to creditors, the agreement binds the spouses once executed, but binds third-party creditors only if recorded.\textsuperscript{165}

Such registration indeed serves an important, albeit lesser-known, purpose of premarital agreements—to organize how the spouses hold their assets during the marriage. If spouses hold their property differently from the statutory default, it is only fair to give notice of this arrangement to the third parties who potentially rely on the spouses’ property holdings in, for example, extending credit. A third party would be most disadvantaged by a couple secretly opting out of a community property default. In such a case, the third party would ordinarily expect all of the marital assets to be held by each spouse, when in reality, each spouse holds smaller assets separately. As already mentioned, however, only a minority of American states utilizes community property as the default system, whereas many European countries use this as their statutory

\textsuperscript{163} See supra Part III.A.
\textsuperscript{164} Carroll, supra note 20, at 32.
\textsuperscript{165} Id.
default. Therefore, public registration of marital agreements is significantly more relevant in the European context. Americans, meanwhile, value the strict privacy of premarital agreements. This effectively reduces third parties’ ability to rely on such agreements. In this way, American premarital agreements are often limited to affecting only the married couples party to the agreements.

Finally, in many European countries, prospective spouses must adhere to particular formalities in order to conclude a legally enforceable premarital agreement, such as signing the agreement in front of a notary. There is no such definitive list of requirements in the United States, although a court may subsequently analyze the procedural fairness of the agreement when called upon to enforce the document. The level of required formality will therefore inevitably vary from jurisdiction to jurisdiction as each adopts a particular balance between permitting contractual autonomy and protecting the parties from fraud.

Therefore, choices must be made not only within premarital contracting, but also within the different regulatory frameworks for such agreements. In choosing the appropriate model, each jurisdiction and couple must therefore weigh the attendant costs of their choices.

C. Popularity of Premarital Agreements

Premarital agreements are more popular in the United States than in Europe, but not overwhelmingly popular in either. In the United States, however, the use of premarital agreements tripled between 1978 and 1988 alone. Guggenheimer, supra note 25, at 151. “Although it is difficult to get statistics on premarital agreements, it appears that 5% to 10% of couples marrying for the first time and 20% of remarried couples now enter into premarital agreements.” Brian McDonald, Address to the Western Trial Lawyers Association (June 2005) (transcript available at http://74.125.95.132/search?q=cache:zRAszVYsTLEJ:www.spomcman.com/doc/PREMARTIAL%2520AGREEMENTS.doc+statistics+on+premarital+agreements&cd=3&hl=en&ct=clnk&gl=us). Meanwhile, only 2% of English couples marrying seek a premarital agreement. Divorce Lawyers Braced for Busiest Week Ever, TIMES ONLINE, January 5, 2009, available at http://business.timesonline.co.uk/tol/business/law/article5450552.ece. In France, only 10% of spouses conclude a marital agreement, and they do so mostly when
may be several explanations for this current lack of popularity in premarital contracting on both continents. Many commentators suspect, however, that the agreements’ popularity will increase in the near future.\footnote{170}{Premarital agreements are gaining popularity as more people become conscious of the extensive financial rights and obligations arising out of a marriage, and the increasing statistical chance that any marriage will end in divorce.” In the Matter of the Marriage of Leathers, 789 P.2d 263, 265, n.5 (Or. 1990) (quoting 12 ABA Family Advocate, No. 3, 54-55 (Winter 1990)). See also Jennifer Kim, Contesting the Enforceability of a Premarital Agreement, 11 J. CONTEMP. LEGAL ISSUES 133, 133 (2000); Jennifer L. McCoy, Comment, Spousal Support Disorder: An Overview of Problems in Current Alimony Law, 33 Fla. St. U. L. REV. 501, 523 (2005).}

Importantly, premarital agreements in the United States do not necessarily need to be drafted by the higher income prospective spouse, who stands to lose most in a divorce, to avoid an unfavorable statutory default. This is because the higher income earner would prefer an equitable distribution regime, which often results in an unequal distribution, to a community property one, which often results in an equal division of assets.\footnote{171}{For further background on the relationship between equitable distribution and community property regimes and their European counterparts, see Carroll, supra note 20, at 1.} However, most American states use equitable distribution as the default, mooting the need to alter this regime through a premarital agreement. Many European countries, on the other hand, have a statutory default of some type of community property.

Nonetheless, Americans may use premarital agreements to regulate many of their rights and responsibilities during marriage and divorce, particularly in regards to particular assets they own. Premarital agreements are especially useful to prospective spouses who fit a particular profile. For example, people with children from previous marriages may choose to protect their financial futures by virtue of a premarital agreement.\footnote{172}{Guggenheimer, supra note 25, at 151-52.} People may also utilize such agreements when they are skeptical of the institution of marriage because of their own, or their parents’, failed marriages.\footnote{173}{Id.} Premarital agreements may also be more common among
prospective spouses with significant income or age disparities.\footnote{174} Prospective spouses may also choose to keep their property separate by such agreements so that one can use only his portion in paying off debts.\footnote{175} Finally, when one partner expects to inherit significant money or a family business, she may decide to request a premarital agreement.\footnote{176}

Still, premarital agreements are not frequently used in either Europe or the United States, with most commentators estimating that less than 10\% of any of these populations use such agreements.\footnote{177} In Europe, this may be due to a potential misunderstanding of the role of the premarital agreement, which most Europeans associate with American celebrity divorces,\footnote{178} although the meaning and consequences of premarital agreements in Europe differ from those in the United States.\footnote{179} In the United States, meanwhile, the limited use of the premarital agreement may be due to Americans’ rather unrealistic sense of optimism regarding their marriages.\footnote{180} This, as well as the need to protect children from a previous marriage,\footnote{181} may also explain why many people are more likely to seek premarital agreements upon second and subsequent marriages. Nonetheless, many prospective spouses are currently choosing not to pursue the benefits offered by premarital contracting, although this may change in the near future.

\section*{V. Conclusion}

In sum, the premarital agreement permits prospective spouses around the world to circumvent their jurisdiction’s judicial and statutory defaults in organizing the terms of their marriage and

\footnote{174} Id.  
\footnote{175} Id.  
\footnote{176} Id.  
\footnote{177} See supra note 169.  
\footnote{178} See supra Part III.A. This may also be because the average premarital agreement is highly confidential. Guggenheimer, supra note 25, at 153.  
\footnote{179} See supra Parts II and III.  
\footnote{180} For the argument that most couples are overly optimistic about their marriages, see Margaret Brining, Contracting Around No-Fault Divorce, in FALL AND RISE OF CONTRACT, supra note 53, at 276 and Sean Hannon Williams, Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use, 84 Notre Dame L. Rev. 733, 757-61 (2009).  
\footnote{181} Gail Frommer Brod, Premarital Agreements and Gender Justice, 6 Yale J.L. & FEMINISM, 229, 238-39 (1994).
potential divorce. To achieve this force in the United States, the premarital agreement has particularly undergone significant development over the course of the past few decades.

Although the history of the premarital agreement is relatively short compared to its European counterpart, however, Americans have quickly achieved an unparalleled level of freedom in marital contracting. This heightened freedom of contract has become one of the most significant differences between the European and American approaches to such agreements. Further comparative analysis of these various approaches suggests that the level of autonomy in marital contracts implicates the risk of the agreement’s unenforceability by the courts. Moreover, a comparative study offers some insights into improving the regulatory frameworks governing these agreements, as well as the reasons behind people’s reluctance to use such agreements.

Although the premarital agreement has therefore attained significant stability and enforceability in countries around the world, issues surrounding such agreements undoubtedly remain. Specifically, premarital agreements in the United States are subject to procedural and substantive review. They also raise universal public policy issues concerning the meaning of fairness and the limits on freedom of contract, which increase in the case of mobile couples. As state courts and legislatures continue to encounter and address these issues, they may greatly benefit from a comparative study of such agreements.