Are Premarital Agreements Really Unfair?: An Empirical Study

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ARE PREMARITAL AGREEMENTS REALLY UNFAIR?: AN EMPIRICAL STUDY

Elizabeth R. Carter*

I. INTRODUCTION

Are premarital agreements categorically unfair? Critics argue that premarital agreements are coercive, one-sided, and designed to benefit the party in the economically superior bargaining position—usually the man.1 Although some more favorable views of premarital agreements have emerged in recent years,2 the belief that premarital agreements are categorically one-sided and designed to benefit the wealthy spouse persists.3

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1. See, e.g., Gail Frommer Brod, Premarital Agreements and Gender Justice, 6 YALE J.L. & FEMINISM 229, 234-35 (1994) (explaining that the purpose of premarital agreements is to prevent sharing and that “the economically weaker spouse necessarily suffers more harm than the economically superior spouse”); Leah Guggenheimer, A Modest Proposal: The Feminomics of Drafting Premarital Agreements, 17 WOMEN’S RTS. L.REP. 147, 150 (1996) (“[A] men are likelier to have more assets worth protecting, it is highly probable that they are the ones initiating and preparing wealth sheltering agreements.”).


3. See, e.g., Stephanie B. Casteel, Planning and Drafting Premarital Agreements, PRAC. TAX. L., Fall 2005, at 34 (“More and more, however, couples are entering into premarital agreements, not because of family businesses or wealth, nor because of a second marriage situation, but because one or the other has already accumulated substantial wealth or anticipates doing so during the marriage, and wishes to protect those earnings in light of the fact that the other spouse is
Courts, legislators, and scholars have often—too often in my view—relied on (unfounded) assumptions that premarital agreements are categorically unfair. The result, in many states, is a paternalistic system predicated on a near-religious belief that women who sign premarital agreements are uneducated, unsophisticated, economically dependent actors who need the state to protect them from the overreaching of their husbands and their own stupidity. That system is completely at odds with how most women view themselves and their marriages. It is also at odds with the changing role of marriage in our society and the demographics of the individuals who choose to marry. For the few women this paternalistic system might protect, it harms a great many more. It reinforces negative stereotypes about women. It erodes their personal autonomy by limiting their ability to make their own decisions about the meaning of marriage. When we refuse to enforce a premarital agreement because the wife is “economically inferior” to her spouse, we hold her spouse personally accountable for greater systemic gender inequities. That misplaced blame does little to advance the position of women or to promote marital sharing.

In support of their criticisms of premarital agreements, scholars look almost everywhere except the one place that really matters: the actual agreements. In the absence of useful empirical data, scholars have looked to reported appellate decisions, anecdotes, and practice guides for support. All of these sources tend to reinforce the negative stereotypes associated with premarital agreements and the couples who utilize them. Professor Brian Bix—who served as the reporter for the Uniform Premarital and Marital Agreements Act ("UPMAA")—notes that “[l]ittle useful data has been gathered regarding how many couples sign premarital agreements or the economic situation of the people who enter such agreements.” And yet, as he observes, “that has never stopped media or scholarly commentators from offering broad generalizations regarding who uses premarital agreements and why.” Indeed, many influential articles in the field underscore Professor Bix’s observation.

much less wealthy or does not anticipate having his or her own career.”); Stephen W. Schlissel & Jennifer Rosenkrantz, Prenuptial Agreements for the Golden Years, FAM. ADVOC., Winter 2002, at 28, 30 (“Typically, the wealthier spouse demands a prenuptial agreement because he or she has property to protect.”).


5. Id.

6. Professor Judith Younger relies on reported appellate court decisions to support the conclusion that premarital agreements are categorically unfair and one-sided. Judith T. Younger, Lovers’ Contracts in the Courts: Forsaking the Minimum Decencies, 13 WM. & MARY J. WOMEN & L. 349, 419-20 n.739 (2007). Professor Katharine B. Silbaugh, similarly claims (without citation) that “premarital agreements are overwhelmingly drafted in practice to benefit the person who has
Most scholars readily acknowledge (and complain about) the lack of useful empirical data. Professor Gail Frommer Brod notes that “[l]egal scholarship generally suffers from a deficit of empirical research” and that “the legal writing dealing with premarital agreements is no exception.”

In the absence of reliable data, the law has been shaped by scholarly reliance on assumptions, extrapolations, and stereotypes that might prove to be untrue. How might empirical research change our understanding of premarital agreements? After all, no law requires premarital agreements to be unfair. No law requires that couples with premarital agreements must be mismatched in terms of bargaining power. To the contrary, I have previously argued that couples who marry today are in a more equal bargaining position vis-à-vis each other than at any other point in history. I have also argued that, as a result of greater equality, the time has come to reevaluate our approaches to entering into and enforcing premarital agreements. This Article builds on my previous work and offers something that has been sorely lacking in the field of empirical data. This Article presents my initial findings of a study involving all of the premarital agreements between opposite-sex couples recorded in Jefferson Parish, Louisiana between January 1, 2013 and December 31, 2016—a total of 474 premarital agreements.

My findings cast considerable doubt upon many of the stereotypes about the parties that enter into premarital agreements. The quintessential stereotype of a couple with a premarital agreement is the rich businessman and his (much) younger “trophy” bride. For the couples in this study, however, large age discrepancies are the exception cash, to prevent what would otherwise become monetary sharing from occurring.” Katharine B. Silbaugh, Marriage Contracts and the Family Economy, 93 NW. U. L. REV. 65, 134 (1998). Professor Gail Frommer Brod, in another article critical of premarital agreements, asserts that “premarital agreements generally disadvantage women.... [because their] primary purpose ... is to protect the wealth and earnings of a prospective spouse from being distributed to the other spouse at death or divorce.” Brod, supra note 1, at 239. In support, she cites the anecdotes of a practitioner, a reported decision, and similar sources. Id. at 239 n.45-47.

7. Brod, supra note 1, at 240.
8. Carter, supra note 2, at 356 (“Women today are more evenly matched with their prospective spouses than at any other time in recent history.”).
9. Id. passim.
10. Same-sex marriage was not permitted in Louisiana until Obergefell v. Hodges. 135 S. Ct. 2584 (2015); The Freedom to Marry in Louisiana, FREEDOM TO MARRY, http://www.freedtomarry.org/states/louisiana (last visited Jan. 25, 2020). Therefore, the dates of the study largely excluded same-sex couples. I only encountered a couple of premarital agreements between same-sex couples—too few for any statistical analysis. Certainly, premarital agreements between same-sex couples are worthy of study. Hopefully, future years will yield a greater number of such agreements allowing for additional research.
11. Because the study involves human subjects, I sought and obtained the necessary Institutional Review Board permissions from Louisiana State University.
rather than the rule. We have long assumed that premarital agreements are most common in second marriages. Although that is generally true for the couples in this study, the reality is a good deal more nuanced. Moreover, nearly a quarter of the agreements in this study were entered into by two spouses with no prior marriages. Longstanding assumptions about substance and procedure are also challenged by my study. We have been suspicious of premarital agreements that are signed shortly before the wedding out of fear that they result from duress or coercion. Yet, the vast majority of the couples in this study signed their agreements shortly before their weddings. Is it not more likely that these couples procrastinated rather than coerced? We have long assumed that premarital agreements involve the waiver of property rights and spousal support by the poorer spouse for the benefit of the richer spouse. Again, the reality is much more complex. For instance, only thirty-eight percent of the premarital agreements in this study waived spousal support entirely.¹²

This Article continues in five parts. Part II provides some background on the study and summarizes the relevant areas of Louisiana law.¹³ Part III presents demographic data of the people who entered into premarital agreements including age at marriage, race, and political affiliation.¹⁴ Part IV presents procedural issues relating to the premarital agreements including the waiting period between the date an agreement was signed and the date the couple married.¹⁵ Part V presents data relating to the substance of the premarital agreements including how the agreements divide property and whether the agreements waive spousal support.¹⁶ Part VI concludes.¹⁷

II. BACKGROUND

A. Why Louisiana?

Certain features of Louisiana law and practice make it an opportune setting for studying premarital agreements. Most importantly, premarital agreements are routinely recorded in Louisiana¹⁸—a fact my colleagues in other jurisdictions sometimes find quite shocking. Only a handful of other states appear to even contemplate any legal benefit to recording

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¹². See infra Figure 23.
¹³. See infra Part II.
¹⁴. See infra Part III.
¹⁵. See infra Part IV.
¹⁶. See infra Part V.
¹⁷. See infra Part VI.
¹⁸. See infra Part II.A.1.
premarital agreements. Moreover, Louisianans apparently avail themselves of the benefits of recordation with more regularity and with more enthusiasm than couples in other states that allow recordation. Recorded documents in Louisiana (and particularly premarital agreements) often contain a variety of biographical details of the parties to the agreement. As a result, the documents readily lend themselves to empirical study.

1. Culture of Recordation

Louisiana has a culture of recordation that is somewhat unique to the state. This culture likely stems, in part, from the state’s civil law legal tradition. Although premarital agreements are not required to be recorded to be effective between the parties to the agreement, some additional legal benefits do accompany recordation. To be effective against third parties (such as creditors), a premarital agreement must be recorded in the appropriate parish land records. Louisiana is not the only state to contemplate recordation; some other community property jurisdictions take a similar approach. Recordation is contemplated in some non-community property jurisdictions as well.

Recordation can have additional non-legal benefits. For example, in a state like Louisiana where natural disasters are not uncommon, recordation can help guard against the loss of important documents and provide a cost-effective means of secure document storage. Similarly, recordation can guard against subsequent loss or destruction of the document by one of the parties. For whatever reason, Louisiana seems to have a legal and social culture that is more willing to record documents. Incredibly, during the course of this study I encountered a
number of self-prepared documents that—while utterly unenforceable in Louisiana—were still recorded by the parties who presumably did not have the advice of a lawyer or notary. This suggests to me that the average Louisianan may have some understanding that important legal documents are often recorded. My own personal experience as a Louisiana attorney also supports this conclusion.

2. Information Contained in Louisiana Appearance Clauses

Premarital agreements in Louisiana are required to be in the form of either an authentic act or an act under private signature duly acknowledged by the spouses.26 Generally, these form requirements mean that both spouses will execute the document before a notary public and two witnesses.27 As a matter of custom, both authentic acts and acts under private signature usually contain "appearance clauses."28 The appearance clause sets forth, among other matters, the full name of each party and the marital status of each party. There are a variety of reasons for the inclusion of the marital status language—some of which are legal, and some of which are merely customary practices.29 Although the omission of this information does not make an act invalid,30 notaries and attorneys are usually diligent in ensuring the information is included. Of course, parties entering into a premarital agreement ought to be (and presumably are) unmarried. As a matter of custom, however, appearance originally contemplated including these jurisdictions in the study. I soon realized, however, that the actual practice in these states was quite different. In the populous Harris County, Texas (where Houston is located), I could only locate about ten premarital agreements that were recorded each year (compared to around 100 in Jefferson Parish, Louisiana). Recordation rates also appeared low in Arizona. Additionally, abstracts were more often recorded. I came across a handful of abstracts in this study. However, under Louisiana law, recording an abstract is not always sufficient to provide the same legal benefits as recording the entirety of the premarital agreement.

26. LA. CIV. CODE ANN. art. 2331 (2019). For additional description of the formalities required under Louisiana Law in order to create a valid premarital agreement, see infra notes 28-29.
27. Id. arts. 1833, 1836.
28. See, e.g., KATHY D. UNDERWOOD, LOUISIANA NOTARY HANDBOOK § 6:7 (2019-2020 ed.) ("[T]he information given to identify a party to an act is commonly referred to as the 'appearance clause.' In addition to the name of the appeurer and his marital status, the party's domicile and permanent mailing address must be given.").
29. See, e.g., LA. CIV. CODE ANN. art. 3352 (2019) (listing the information required in order to document recorded acts, such as "the full name, domicile, and permanent mailing address of the parties, [and] the marital status of all of the parties," among other requirements); LA. STAT. ANN. § 35:11(B) (2019) ("A declaration as to one's marital status in an acquisition of immovable property by the person acquiring the property creates a presumption that the marital status as declared in the act of acquisition is correct."); see also ROBERT C. LOWE, LOUISIANA PRACTICE SERIES: LOUISIANA DIVORCE § 4:25 (2019 ed.); DAVID L. SIGLER ET AL., LOUISIANA PRACTICE SERIES: ESTATE PLANNING IN LOUISIANA § 5:199 (2018-2019 ed.); UNDERWOOD, supra note 28, § 6:7-9 (acknowledging that there is no single way in which an appearance clause must be written, but nevertheless providing suggested formats).
30. LA. CIV. CODE ANN. art. 3352 (2019).
clauses in Louisiana often recite each party’s entire marital history (including the names and causes of termination of each previous marriage)—not just the current marital status. Many of the premarital agreements included in this study included complete marital histories.

B. Why Jefferson Parish?

Premarital agreements (like many other records) are recorded at the parish level rather than the state level in Louisiana. Initially, I had hoped to look at the three most populous parishes in Louisiana—East Baton Rouge, Jefferson, and Orleans. Looking at all three parishes has some obvious benefits—including more racial and economic diversity. Unfortunately, certain technological and political obstacles made it too challenging to include East Baton Rouge Parish and Orleans Parish in this study. At the time of the study, the online records system in East Baton Rouge was based on an outdated and unreliable Internet Explorer platform. Since I had previous experience with this system and knew about its problems, I did not pursue seeking complimentary access from the East Baton Rouge Clerk of Court. Orleans Parish presented a different problem. The Clerk’s office was willing to provide me with complimentary access—but that access did not include the ability to save or print documents. The cost of saving and/or printing documents was cost prohibitive. I hope that the Orleans Parish Clerk of Court will revisit this decision in the future. Jefferson Parish did not present these same challenges. The online records system in Jefferson Parish is fairly user friendly and the Clerk’s office was willing to provide me with complimentary access with the ability to save and print documents as needed.

C. The Data Set

The data in this study come from all of the premarital agreements between opposite-sex couples recorded in Jefferson Parish, Louisiana between January 1, 2013 and December 31, 2016—a total of 474 premarital agreements. Of those 474 premarital agreements, 249 of them


32. In Jefferson Parish, the population per the 2010 Census was 432,552. The population estimate for 2018 was 434,051. Quick Facts: Jefferson Parish, Louisiana, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/jeffersonparishlouisiana (last visited Jan. 25, 2020).

purported to recite the complete marital history of both spouses. One advantage of limiting the study to these particular years and to Jefferson Parish is that I was not involved in the preparation of any of the premarital agreements in this study—thus mitigating the influence my own legal work might have had on the study. There are some important limitations to the data. First, there may be couples who entered into premarital agreements that, for whatever reason, elected not to record their premarital agreements. Second, I attempted to locate every premarital agreement recorded during this time period using filters and search options available on the Jefferson Parish online records system. It is possible that some documents were missed because they were incorrectly filed or labeled when they were recorded or because of some other error. Additional limitations relating to individual data points are discussed in more detail in Part III.34

D. Summary of Louisiana Law

Louisiana has a legal tradition that is quite different from many other American states—a tradition that may impact the study and its applicability in other jurisdictions. This Subpart briefly describes and summarizes the Louisiana law insofar as it is relevant to this study.

1. Louisiana’s Community Property System

Louisiana is one of nine community property states in the United States.35 Spouses in community property jurisdictions might be more (or less) incentivized to enter into premarital agreements than their counterparts in separate property states. Certainly, there are some features of the Louisiana community property system that may provide additional incentives for some spouses to enter into premarital agreements. First, Louisiana adheres to a managerial system with respect to debts and the rights of creditors.36 From the perspective of a creditor, it is irrelevant whether a debt is a community debt or a separate debt. The creditor may seek satisfaction of his debt from the entirety of the community property and all of the separate property of the spouse that incurred the debt.37 This rule is incredibly favorable to creditors—including the Internal Revenue Service and creditors in bankruptcy
proceedings.\textsuperscript{38} Spouses in Louisiana may avoid the application of this rule quite easily. To do so, spouses simply need to enter into a valid marriage contract and record it in the appropriate parish records.\textsuperscript{39}

Second, Louisiana is a "Spanish Rule" jurisdiction, meaning that income and gains from separate property are ordinarily classified as community property in Louisiana.\textsuperscript{40} In the "American Rule" jurisdictions, the rule is the exact opposite—income and gains from separate property remain separate property. In Louisiana, spouses can modify or eliminate the application of the Spanish Rule through a marriage contract or through a unilateral declaration filed by the spouse whose property is affected.\textsuperscript{41} A spouse with substantial separate property may wish to have a premarital agreement to preserve the income and gains from her separate property for herself.

2. Louisiana's Laws Governing Premarital Agreements

Due to its unique legal and cultural heritage, Louisiana has recognized the validity and enforceability of premarital agreements for more than three hundred years.\textsuperscript{42} This experience stands in stark contrast to other American jurisdictions, which largely began to allow marriage contracts in the 1970s and 1980s.\textsuperscript{43} Louisiana's historical acceptance of premarital agreements could provide additional incentives for couples to enter into premarital agreements. Perhaps Louisiana's longstanding legal endorsement of premarital agreements provides some measure of social acceptance of such agreements that is not present in other jurisdictions.

Louisiana allows marriage contracts to be entered into either before or during the marriage.\textsuperscript{44} Premarital agreements and postmarital agreements are subject to slightly different procedural rules. Specifically, postmarital agreements generally require court approval to be enforceable.\textsuperscript{45} Otherwise, the rules governing premarital and postmarital agreements are essentially the same in Louisiana. The present study is limited to premarital agreements.

The rules governing the substance of Louisiana premarital agreements are largely comparable to those in other jurisdictions.

\textsuperscript{38} See Carter, supra note 2, at 366-67.
\textsuperscript{39} See LA. CIV. CODE ANN. art. 2332 (2019).
\textsuperscript{40} See id. art. 2339. For a discussion of the history of the Spanish community property system, see generally Paul H. Due, \textit{Origin and Historical Development of the Community Property System}, 25 LA. L. REV. 78 (1964).
\textsuperscript{41} See LA. CIV. CODE ANN. art. 2339 (2019).
\textsuperscript{42} See Carter, supra note 35, at 217.
\textsuperscript{43} See, e.g., UNIF. PREMARRITAL & MARITAL AGREEMENTS ACT 1-2 (UNIF. LAW COMM’N 2012).
\textsuperscript{44} See LA. CIV. CODE ANN. art. 2329 (2019).
\textsuperscript{45} See id.
Spouses are free to enter into marriage contracts with respect to "all matters that are not prohibited by public policy." 46 The Uniform Premarital Agreement Act ("UPAA") similarly allows spouses to contract with respect to any matter "not in violation of public policy or a statute imposing a criminal penalty." 47 Some other aspects of Louisiana law, however, are quite different from the UPAA and the law of other American jurisdictions.

a. Form, Capacity, and Conscionability

Marriage contracts in Louisiana must be executed in the form of an "authentic act" or in the form of "an act under private signature duly acknowledged by the spouses." 48 These forms are somewhat unique to civil law jurisdictions. An authentic act is a "writing executed before a notary public or other officer authorized to perform that function, in the presence of two witnesses, and signed by each party who executed it, by each witness, and by the notary public before whom it was executed." 49 Similarly, an act under private signature duly acknowledged usually requires that both spouses sign an acknowledgment before a notary public and two witnesses. 50 Practically speaking, both forms usually require that the document (or the acknowledgment) be signed by both spouses before a notary public and two witnesses. 51 The better (and more common) practice in Louisiana is to execute premarital agreements as authentic acts. 52 Louisiana—like some other civil law jurisdictions—tends to place a heavier emphasis on compliance with form than some common law jurisdictions. 53 Failure to comply with these form requirements will render the contract utterly unenforceable. 54

46. Id.
49. Id. art. 1833.
50. See id. art. 1836.
51. See id. arts. 1833, 1836.
52. Authentic acts are difficult to challenge. Id. art. 1835 ("An authentic act constitutes full proof of the agreement it contains, as against the parties, their heirs, and successors by universal or particular title."). Additionally, if the premarital agreement contains provisions that donate property from one spouse to the other then the document must be in the form of an authentic act. Id. art. 1541 ("A donation inter vivos shall be made by authentic act under penalty of absolute nullity, unless otherwise permitted by law.").
53. Compare Rush v. Rush, 2012-1502 (La. App. 1 Cir. 3/25/13); 115 So. 3d 508, 512 (holding that even though parties executed the matrimonial agreement by private act prior to their marriage, it was not valid because they did not perfect all of the required elements of form under Louisiana law), with Dornemann v. Dornemann, 850 A.2d 273, 285 (Conn. Super. Ct. 2004) (finding under Connecticut law that although defendant failed to sign the premarital agreement, the agreement was nonetheless valid).
54. See Acurio v. Acurio, 2016-1395 (La. 5/3/17); 224 So. 3d 935, 938-40 (holding that "for
As in other states, parties entering into premarital agreements in Louisiana must do so freely and voluntarily and they are presumed to have done so. A party may later seek to invalidate an agreement by proving that his consent was not free. "Consent may be vitiated by error, fraud, or duress." Similar grounds exist for challenging marriage contracts in most common law jurisdictions. Relatively few reported decisions show spouses successfully challenging agreements on these grounds in Louisiana.

Several features of Louisiana law are, however, quite different from the law in other American jurisdictions. First, Louisiana does not generally recognize the common law doctrine of unconscionability as grounds for invalidating a contract. In contrast, unconscionability plays an important role in the UPAA and in the laws of most other states. Under the UPAA, a finding of unconscionability coupled with either (1) the failure to provide adequate financial disclosure, (2) waiver of such disclosure, or (3) actual or constructive knowledge of the other party's financial picture will render a premarital agreement invalid. A number of jurisdictions enacted this part of the UPAA as written. Other jurisdictions modified the UPAA language in a manner that increased the significance of a finding of unconscionability—making it an

purposes of La. Civ. Code art. 2331, an act under private signature must be duly acknowledged prior to the marriage to be fully perfected and given legal effect").

55. See La. Civ. Code ANN. art. 2328 cmt. b (2019) (stating that "[a] matrimonial agreement is governed by the rules of conventional obligations unless otherwise provided [by law]").

56. Id. art. 1948.

57. See, e.g., UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 9(a)(1) (UNIF. LAW COMM'N 2012).

58. See generally Christopher K. Odinet, Commerce, Commonality, and Contract Law: Legal Reform in a Mixed Jurisdiction, 75 La. L. Rev. 741 (2015) (acknowledging Louisiana's reluctance to codify the doctrine of unconscionability, but nevertheless arguing that Louisiana courts weave it into their jurisprudence).

59. Section 6 of the Uniform Premarital Agreement Act provides:
(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:
(1) that party did not execute the agreement voluntarily; or
(2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
(ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
(iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.


60. See, e.g., DEL. CODE ANN. tit. 13, § 326 (2019); IDAHO CODE § 32-935 (2019); NEB. REV. STAT. § 42-1006 (2019); N.M. STAT. ANN. § 40-3A-7 (2019); S.D. CODIFIED LAWS § 25-2-21 (2019).
independent basis for invalidating an agreement—regardless of the adequacy of financial disclosure. Unconscionability also plays a role in non-UPAA jurisdictions.

Some jurisdictions limit the unconscionability analysis to whether agreements were unconscionable when they were executed. More recently, some jurisdictions have authorized courts to review agreements for undue hardship at the dissolution of the marriage. The doctrine of lesion serves a somewhat analogous function in Louisiana contract law. However, lesion is not usually applicable to premarital agreements. Courts in Louisiana generally have no ability to refuse to enforce premarital agreements that the court deems to be unfair or one-sided (unless they result from fraud, error, or duress). In a sense, spouses in Louisiana are freer to enter into unfair and one-sided contracts and to have those agreements enforced than spouses in other American jurisdictions. This is in part because in many jurisdictions the enforceability and/or the conscionability of a premarital agreement hinges on the parties’ advance knowledge of each other’s assets and liabilities. Louisiana has no comparable requirements.

Finally, many jurisdictions either require or strongly favor access to independent legal representation. Although the UPAA does not expressly require independent legal representation, the opportunity to seek independent counsel is an important consideration in many UPAA states. Many courts view the opportunity to consult with independent legal counsel as an important factor in determining whether the agreement was entered into voluntarily. Some states specifically address access to independent counsel in their premarital agreement statutes. In Connecticut, for example, a premarital agreement is not

61. See, e.g., CONN. GEN. STAT. § 46(b)-36(g) (2019); IOWA CODE § 596.8 (2019); NEV. REV. STAT. § 123A.080 (2019); N.D. CENT. CODE § 14-03.2-08 (2019).
63. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 9(f)(1) (UNIF. LAW COMM’N 2012) and accompanying comments.
64. Id. § 9(f)(2) cmt. 15 (suggesting a “substantial hardship” standard “for states that wish to include a ‘second look,’ considering the fairness of enforcing an agreement relative to the time of enforcement”).
66. UNIF. PREMARITAL AGREEMENT ACT § 6, 9C U.L.A. 43 (2001); Carter, supra note 2, at 370-72; see supra notes 58-62 and accompanying text.
67. See, e.g., Mamot v. Mamot, 813 N.W.2d 440, 447-49 (Neb. 2012) (noting that a lack of a sufficient opportunity to consult with independent counsel is a factor suggesting an agreement was not signed voluntarily); In re Estate of Lutz, 563 N.W.2d 90, 98 (N.D. 1997) (“We agree with the view that lack of adequate legal advice to a prospective spouse to obtain independent counsel is a significant factual factor in weighing the voluntariness of a premarital agreement. Indeed, adequate legal representation will often be the best evidence that a spouse signed a premarital agreement knowingly and voluntarily.”).
enforceable "if the party against whom enforcement is sought proves that ... [s]uch party was not afforded a reasonable opportunity to consult with independent counsel." A similar approach is seen in several other states as well as in the UPAA. Louisiana is somewhat different. Louisiana does not require access to or actual separate legal representation for spouses who enter into premarital agreements. Lack of independent representation (or access to such representation) is occasionally mentioned as a factor in cases relating to fraud or duress. However, the factor is generally less significant than in other jurisdictions. Not only is access to separate legal representation not required in Louisiana, spouses are sometimes jointly represented in their premarital agreements (by either an attorney or a non-attorney notary).

b. Substance of Premarital Agreements: Property Rights

Louisiana couples have considerable freedom to modify the default rules of community property. A premarital agreement might expand the types of property classified as community property, it might narrow the types of property classified as community property, or it might reject the community property regime entirely. The UPAA contains a similarly broad grant of authority with respect to property rights.

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69. Carter, supra note 2, at 374.
70. See, e.g., McAlpine v. McAlpine, 96-1032 (La. 9/3/96); 679 So. 2d 85, 94 (Johnson, J., concurring and dissenting in part) (upholding a premarital agreement even though "Mrs. McAlpine was presented with this pre-nuptial agreement one week prior to the wedding" and "[n]either Mr. McAlpine who is an attorney, or his attorney who drafted the document suggested to Mrs. McAlpine that she obtain legal counsel"); Vogt v. Vogt, 02-0066 (La. App. 5 Cir. 10/29/02); 831 So. 2d 428, 431 (upholding agreement where husband was not represented and noting that Mr. Vogt "was, at best, careless in his attitude regarding the entire legal proceedings, and even if he did not read the agreement, it was his obligation to do so. A person signing a written contract is presumed to know its contents and cannot avoid its obligations by contending that he did not read it, that no person explained it to him, or that he did not understand it.").
71. A number of agreements in this study clearly involved joint representation. For another example of joint legal representation under Louisiana law, see Olson v. Olson, 48,968 (La. App. 2 Cir. 4/23/14); 139 So. 3d 539, 544 (finding that there was no ethical problem with attorney representing both spouses in a marriage contract they entered into during marriage and upholding the validity of the agreement). It should also be noted that, due to Louisiana's civil law heritage, Louisiana notaries provide important legal functions—including preparation of a variety of legal documents. See Underwood, supra note 28, § 2:3.
c. Substance of Agreements: Inheritance Rights

Spouses cannot "renounce or alter the marital portion" in Louisiana. The marital portion is, roughly, Louisiana's equivalent of a spousal elective share statute. Louisiana's prohibition on waiver or modification differs from the approach taken in other states. Many jurisdictions do allow the elective share to be waived in a premarital agreement.

d. Spousal Support

Louisiana, like most states, allows spouses to waive or modify final periodic spousal support (sometimes called "permanent alimony" or "post-divorce alimony") in their premarital agreements. Louisiana does not, however, permit modification or waiver of interim spousal support (sometimes called "interim alimony," "interim spousal support," or "alimony pendente lite"). A number of other states take a similar approach and prohibit waiver or modification of interim spousal support.

e. Some Nuances of Recordation

As discussed above, premarital agreements are only effective towards third parties if they are duly recorded. Premarital agreements are recorded at the parish level (rather than state level) and it is not uncommon for an agreement to be recorded in more than one parish. Multi-parish recording is often a necessity. The Louisiana Civil Code provides that agreements are "effective toward third persons as to immovable property [real property], when filed for registry in the conveyance records of the parish in which the property is situated and as to movables [personal property] when filed for registry in the parish or parishes in which the spouses are domiciled." Spouses who want to obtain the maximum benefits of recordation should record their premarital agreement in any parish where one of them has established a domicile and in any parish in which either one of them owns real estate. If a spouse acquires real estate in a new parish at any point during the

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74. LA. CIV. CODE ANN. art. 2330 (2019).
76. LA. CIV. CODE ANN. art. 116 (2019); Carter, supra note 2, at 361.
77. See e.g., McAlpine v. McAlpine, 96-1032 (La. 9/3/96); 679 So. 2d 85, 90.
78. Carter, supra note 2, at 361.
79. LA. CIV. CODE ANN. art. 2332 (2019).
80. Id.
marriage, he ought to record the premarital agreement in that parish—
even if it has already been recorded in another parish. Similarly, spouses
who change their domicile during marriage or who move to Louisiana
from some other state during marriage ought to record their agreement in
their new parish of domicile even if the agreement has already been
recorded in some other parish.

III. DEMOGRAPHICS

The following Subparts summarize the various demographic
markers of the parties who entered into premarital agreements in
Jefferson Parish. Criticisms of premarital agreements are often based
on an underlying assumption that the spouses are in fundamentally
unequal bargaining positions and that the inequity usually benefits the
man. As I have discussed in my previous research, the demographics of
marriage changed considerably over the course of the past century and
spouses have greater parity than ever before. Even if true equality is
elusive, I argued that concerns about bargaining inequity are no longer
sufficiently supported by the demographic data. Yet, the belief that
premarital agreements are unfair persists. Even in the face of well-
documented changes to the marriage landscape, critics continue to
assume that the couples (and particularly the women) who enter into
premarital agreements do not reflect that progress. Are their
assumptions correct? In other words, how similar (or dissimilar) are the
couples who marry generally to the couples who marry and enter into
premarital agreements?

A. Age

Demographics suggest that women are in a more equal bargaining
position with their male spouses than in the past for a variety of
reasons—including age. As I explained in my previous work, "[t]hose
couples who do marry today are older, better educated, and closer in age
than in years past." Although we know this to be true for marriage
generally, we do not know whether that pattern remains true for couples

81. See infra Parts III, IV.
82. Carter, supra note 2, at 356-58.
83. Id.
84. See, e.g., Brian Bix, Supporting Premarital Agreements, JOTWELL (Dec. 13, 2016),
https://family.jotwell.com/supporting-premarital-agreements (reviewing Carter, supra note 2, and
stating, "[a]lthough a growing number of couples have comparable income and education levels,
there remains the distinct possibility that a significant portion (even if not a majority) of premarital
agreements may involve significant imbalances in sophistication and bargaining power.").
85. Carter, supra note 2, at 357.
86. Id.
who enter into premarital agreements. The stereotype of the couple who enters into a premarital agreement is quite different from the ordinary couple who marries—it almost always involves an older and wealthier man coercing his young bride into signing away her rights. This stereotype has clearly influenced legal thought and the law itself. Professor Brod notes that “[t]his popular stereotype may be rooted in the reality that, among remarried couples, there may be a great age disparity, with the husband considerably older than the wife.” In Professor Brod’s view, this age disparity may very well translate into other markers of bargaining inequity such as “wealth, income, and business experience.”

1. Methodology

To begin my study, I determined the approximate ages of the parties to each agreement at the time of their marriage. Louisiana premarital agreements often recite the anticipated date of marriage. I used that date to record the year of the marriage. Of course, not all documents included this information. Those that did not include the information were not counted. I also eliminated nine documents where the couples married before 2013. I did this to better compare the age trends of the couples in the premarital agreements to the more general data set forth in Figure 1 below. Even if counted, those nine documents would have had a negligible effect on the data.

I determined the ages of the spouses by looking at voting records on Lexis People Finder—which generally includes a year of birth. There are some limitations to this data. First, as discussed in more detail in Part III.B, below, there are some problems with looking to voting records for

87. When Hugh Hefner passed away at the age of ninety-one, it was revealed that, due to a premarital agreement, his thirty-one-year-old widow would only receive a small fraction of his $43 million estate. Nicole Moschella, *Hugh Hefner’s Wife, Crystal Harris, Signed ‘Ironclad’ Prenup, Report Says*, AJC (Sept. 28, 2017), https://www.ajc.com/news/national/hugh-hefner-wife-crystal-harris-signed-ironclad-prenup-report-says/maJtGCgsrwabKsu2DWoeK. It has also been rumored that President Donald Trump was pleased when he signed his premarital contract with Melania Knauss, who is twenty-four years his junior, because “she agree[d] with it” and knew he had to have it. Ellen Cranley, *Trump Has Been Married 3 Times—Here’s What We Know About His Prenups*, BUS. INSIDER (June 4, 2019), https://www.businessinsider.com/donald-trump-prenup-melania-everything-we-know-2019-4#donalds-third-marriage-was-to-slovenian-melania-knauss-on-january-2-2005-11; see also Brod, *supra* note 1, at 243 (explaining that, at least in the context of remarriages, the wife is more likely to be harmed by premarital agreements because the husband “may be considerably older and wealthier than his prospective wife, and therefore he has greater bargaining power in negotiating a premarital agreement”).


89. See id.

information. Those problems (which largely relate to race and national origin) are probably less of an issue when trying to gather information relating to age. Second, I calculated ages without regard to the day and month of birth or the day and month of marriage because the voter registration information on Lexis only listed the year of birth. As a result, all ages are approximate and may be off by a year. Third, I observed that the year of birth contained within the Lexis voting records was sometimes off by one year (but by no more than one year). As illustrated in the Figures that follow, I was able to obtain ages for more couples than I was prior marital history. I located age information for 298 couples. Of those, I had prior marital history information for 173 couples.

2. Data

Figure 1: Median Age at First Marriage (All Couples in Louisiana)

<table>
<thead>
<tr>
<th>Year</th>
<th>Male</th>
<th>Female</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>29.0</td>
<td>27.1</td>
</tr>
<tr>
<td>2014</td>
<td>29.7</td>
<td>28.1</td>
</tr>
<tr>
<td>2015</td>
<td>29.3</td>
<td>27.4</td>
</tr>
<tr>
<td>2016</td>
<td>29.8</td>
<td>27.5</td>
</tr>
</tbody>
</table>

Figure 2: Age at Marriage of Couples in Study (298 Total Couples)

<table>
<thead>
<tr>
<th>Statistic</th>
<th>Male</th>
<th>Female</th>
</tr>
</thead>
<tbody>
<tr>
<td>Median</td>
<td>48</td>
<td>49</td>
</tr>
<tr>
<td>Mean</td>
<td>48</td>
<td>44</td>
</tr>
<tr>
<td>Oldest Individual (Age of Spouse in Parenthesis)</td>
<td>89 (81)</td>
<td>81 (89)</td>
</tr>
<tr>
<td>Youngest Individual (Age of Spouse in Parenthesis)</td>
<td>24 (22)</td>
<td>21 (26)</td>
</tr>
</tbody>
</table>

91. See infra Part II.B.  
92. To test the accuracy of the date of birth in Lexis, I entered information for myself, my spouse, and a few other individuals whose dates of birth I know. I observed that, sometimes, the voter registration information on Lexis indicated a year of birth that was either a year before or a year after our actual dates of birth. Other information—like that relating to gender, race, and political affiliation—was always correct.  
93. See infra Figure 3.  
94. See infra Figure 6.  
Figure 3: Distribution of Age at Marriage of Husband for All Couples in Study (298 Individuals)

Figure 4: Distribution of Age at Marriage of Wife for All Couples in Study (298 Individuals)
Figure 5: Age at Marriage Sorted by Prior Marital History for all Couples in the Study

<table>
<thead>
<tr>
<th>Marriage History</th>
<th>Number of Couples</th>
<th>Male (median)</th>
<th>Male (mean)</th>
<th>Female (median)</th>
<th>Female (mean)</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Prior Marriages</td>
<td>39</td>
<td>31</td>
<td>33</td>
<td>30</td>
<td>30</td>
</tr>
<tr>
<td>Prior Marriage(s) for One Spouse</td>
<td>41</td>
<td>41</td>
<td>42</td>
<td>37</td>
<td>39</td>
</tr>
<tr>
<td>Prior Marriage(s) for One or Both Spouses</td>
<td>134</td>
<td>52</td>
<td>53</td>
<td>49</td>
<td>49</td>
</tr>
</tbody>
</table>

Figure 6: Additional Statistics for Age at Marriage of All Couples in the Study (298 Total Couples, 173 Total Couples with Prior Marital History Information)

<table>
<thead>
<tr>
<th></th>
<th>All Couples (298)</th>
<th>First Marriage for Both (39 of 173)</th>
<th>First Marriage for One (41 of 173)</th>
<th>Prior Marriage for one or both (134 of 173)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Couples with Older Male</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of Couples</td>
<td>211</td>
<td>30</td>
<td>26</td>
<td>87</td>
</tr>
<tr>
<td>Percentage of All Couples</td>
<td>71%</td>
<td>77%</td>
<td>63%</td>
<td>65%</td>
</tr>
<tr>
<td>Average Number of Years Older Than Spouse</td>
<td>6</td>
<td>4</td>
<td>6</td>
<td>8</td>
</tr>
<tr>
<td>Couples with Older Female</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of Couples</td>
<td>62</td>
<td>7</td>
<td>11</td>
<td>35</td>
</tr>
<tr>
<td>Percentage of All Couples</td>
<td>21%</td>
<td>18%</td>
<td>27%</td>
<td>26%</td>
</tr>
<tr>
<td>Average Number of Years Older than Spouse</td>
<td>4</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Same Age Couples</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of Couples</td>
<td>25</td>
<td>2</td>
<td>4</td>
<td>12</td>
</tr>
<tr>
<td>Percentage of All Couples</td>
<td>8%</td>
<td>5%</td>
<td>10%</td>
<td>9%</td>
</tr>
</tbody>
</table>
Figure 7: Distribution of Age Difference Where Husband Is Older than Wife

Figure 8: Distribution of Age Difference Where Wife Is Older Than Husband
3. Discussion

On the whole, those couples who entered into premarital agreements are older than those couples who entered into first marriages in Louisiana during the same time period. As shown in Figure 1 and Figure 2, couples who entered into premarital agreements had a median age that was about twenty years older than all individuals entering into their first marriages in Louisiana during the same time period. This finding was not surprising. Many couples entering into premarital agreements had been married previously and, therefore, tended to be older than couples entering into first marriages.

Figure 5 shows ages for couples based on previous marriage history. Not surprisingly, couples where neither spouse had a prior marriage tended to be younger than couples where one or both spouses had prior marriages. Interestingly, couples with no prior marriages were about the same age as the general population statistics for first marriages in Louisiana. As shown in Figure 1, the median age at first marriage in Louisiana was about 29-30 for men and 27-28 for women. As shown in Figure 5, the median ages for couples with no prior marriages who had premarital agreements was 31 for men and 30 for women. Although this is slightly older than the census data, I do not believe it is a significant distinction—particularly considering the limitations of the age data I collected for couples in the study.

May-December romances appear to be the exception rather than the rule. The stereotype of the older man demanding a premarital agreement from his younger bride is simply not well supported by the data. Figures 6 through 8 look at the age disparities between the couples in the study. The age disparity between couples in all categories was generally modest—and this was particularly true for couples where the marriage was a first marriage for one or both of them. Still, as illustrated by Figure 7, a fair number of men married women who were at least a decade younger. These relationships and premarital agreements raise interesting questions that are deserving of further study.

96. See supra Figure 1.
97. See supra Figure 5.
98. See supra Figure 1.
99. See supra Figure 5.
100. A May-December romance is a term used for two people who are romantically involved that have a "considerable age difference." Cheryl Bond-Nelms, Do May-December Romances Work, AARP (Sept. 8, 2017), https://www.aarp.org/home-family/friends-family/info-2017/age-differences-between-couples-fd.html.
101. See supra Figures 6, 8.
102. See supra Figure 7.
B. Prior Marriage History

Many scholars have assumed that premarital agreements are more common in second marriages.\textsuperscript{103} I decided to test some aspects of this assumption by considering the marital histories of the parties in the study. Because I do not have population-wide marriage statistics, however, some useful comparisons are not possible in this study.

1. Methodology
Of the 474 premarital agreements in this study, 249 premarital agreements purported to recite the entire marital history of both spouses, including the cause of dissolution of any previous marriages. That information is summarized and analyzed in Figures 9 and 10 below.\textsuperscript{104} There are not many limitations to this particular data set. It is conceivable (but relatively unlikely) that some individuals were dishonest about their prior marital history. It is also conceivable (but relatively unlikely) that the premarital agreements that did not include the entire marital history of the spouses included couples whose prior marital histories were somehow quite different from the couples whose agreements included their prior marital histories.

2. Data
Figure 9: Summary of Marriage History of Individuals in the Study (249 Couples)

<table>
<thead>
<tr>
<th>Number of Previous Marriages</th>
<th>Number of Men</th>
<th>Percentage of Men</th>
<th>Number of Women</th>
<th>Percentage of Women</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>91</td>
<td>37%</td>
<td>91</td>
<td>37%</td>
</tr>
<tr>
<td>1</td>
<td>105</td>
<td>42%</td>
<td>113</td>
<td>45%</td>
</tr>
<tr>
<td>2</td>
<td>40</td>
<td>16%</td>
<td>36</td>
<td>14%</td>
</tr>
<tr>
<td>3</td>
<td>9</td>
<td>4%</td>
<td>9</td>
<td>4%</td>
</tr>
<tr>
<td>4</td>
<td>4</td>
<td>2%</td>
<td>0</td>
<td>0%</td>
</tr>
</tbody>
</table>

\textsuperscript{103} See, e.g., Brod, supra note 1, at 242-43 (stating that “many (if not most) premarital agreements are made before a remarriage”); Casteel, supra note 3, at 34 (“For a variety of reasons, parties to a marriage find themselves wanting to alter the rights which otherwise attend their status as husband and wife. This appears to be especially true for persons remarrying after a prior union has been dissolved by death or divorce.”); Angela Marie Caulley, Policing the Prenup: When Love at First Sight Deserves a Second Look, 39 WOMEN’S RTS. L. REP. 1, 8 (2017) (“Premarital agreements are commonly used in marriages between couples if there is a significant asset disparity, a second marriage for one or both of the parties, a previous family court involvement for one or both of the parties, or when one party seeks to secure a family asset or business.”); Guggenheimer, supra note 1, at 149 (“It is anticipated that second marriages are more likely to utilize premarital agreements because of the desire to protect children from a prior marriage.”).

\textsuperscript{104} See infra Figures 9, 10.
3. Discussion

Prior marriage does appear to be correlated with entering into a premarital agreement—but the picture is complex. Slightly more than half of the premarital agreements in the study (51%) involved couples where both parties had been previously married. The remaining couples were a different story. About a quarter (24%) of the premarital agreements involved couples where neither spouse had been previously married. This number was higher than I had anticipated—and I suspect that I am not alone. About 26% of couples involved marriages where one spouse had been married previously and the other spouse had not been married previously. Interestingly, the numbers were evenly split along gender lines—31 couples had a previously married woman and 31 couples had a previously married man.

Quite a few individuals in the study took an old adage to heart: “If at first you don’t succeed, try, try again.” As shown by Figure 9, many individuals had considerable prior marriage experience. Men slightly outperformed women in this respect (or underperformed, depending on your viewpoint). Of all the men in the study, 22% had been married two or more times before (compared to 18% of women). Astoundingly, four men had been married four previous times—making the marriage contemplated by their premarital agreements their fifth

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105. See supra Figure 10.
106. See supra Figure 10.
107. See supra Figure 10.
108. See supra Figure 10.
109. THOMAS H. PALMER, TEACHER’S MANUAL: BEING AN EXPOSITION OF AN EFFICIENT AND ECONOMICAL SYSTEM OF EDUCATION, SUITED TO THE WANTS OF A FREE PEOPLE 223 (1840).
110. See supra Figure 9. It is important to note that some of the percentage categories in the figures contained in this Article include percentage totals that add up to a little more or a little less than 100%. For example, the “Percentage of Men” category in Figure 9 totals to 101%. Similarly, Figure 20 features a category that adds up to 99%, and Figure 21 features a category that totals 101%. See infra Figures 20, 21. These results are not due to error, but rather, are due to the fact that the percentage in each category was rounded to the nearest whole number.
111. See supra Figure 9.
Although they are outliers, those four couples are especially interesting for their diversity. The first couple consisted of a man with two predeceased spouses and two divorces and a woman with one predeceased spouse. The second couple consisted of a man with four prior divorces and a woman with one divorce and one predeceased spouse. The third couple consisted of a man with four prior divorces and a woman with one prior divorce. Incredibly, the fourth couple consisted of a man with four prior divorces and a woman with no prior marriages. That couple, however, did not live up to the May-December romance stereotype. To the contrary, the wife was approximately 64 at the age of marriage and the husband was approximately 65.

C. Race and Ethnicity

Recent research has shown a widening racial gap in marriage rates and marriage stability. Yet, research has also shown increasing rates of interracial and interethnic marriages. I wanted to see how these patterns might play out in the premarital agreement context. I obtained race and ethnicity information for many of the couples studied and report those findings below. Unfortunately, as discussed above, I was unable to use the records in the more racially diverse parishes of East Baton Rouge and Orleans. I also lack comparative population-wide marriage data in Jefferson Parish. Given the lack of useful comparative data and some additional limitations of the data (discussed below), I am hesitant to draw conclusions from my findings at this juncture.

1. Methodology

I obtained the race and ethnicity information used in this study from voter registrations as summarized on Lexis. Of the 474 couples in the study, I obtained race and ethnicity information for 403 men and 401 women. This data has a number of important limitations. First, not everyone who is eligible to vote registers to do so. Racial and/or ethnic patterns in voluntary voter registration may impact my data. Second, not all Louisiana residents are even eligible to register to vote. Non-citizens are excluded from voting (and several of the premarital agreements in this study clearly involved at least one non-citizen spouse). Convicted

112. See supra Figure 9.
felons also face voting obstacles in Louisiana. Generally, any person who has been previously incarcerated for a felony within the preceding five years is ineligible to register to vote. Given Louisiana’s extraordinary incarceration rates (particularly of African-American men), it is possible that the data I obtained is skewed for failing to account for people who are excluded from registering to vote.

Additional limitations result from the manner in which race and ethnicity information is solicited on voter registration forms in Louisiana. The current voter registration form offers the following designations for voters to select from: White, Black, Asian, Hispanic, American Indian, and Other. A mixed race and/or mixed ethnicity individual might not see an option with which he or she identifies. Comparison of the data to the population generally is also difficult because (as illustrated by Figure 11) the Census solicits race and ethnicity information in a more complex and nuanced manner.

2. Data

Figure 11: Race/Ethnicity of Population in Jefferson Parish (2019)

<table>
<thead>
<tr>
<th>Race/Ethnicity</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>White Alone</td>
<td>65.3%</td>
</tr>
<tr>
<td>Black or African American Alone</td>
<td>28%</td>
</tr>
<tr>
<td>American Indian Alone</td>
<td>0.6%</td>
</tr>
<tr>
<td>Asian Alone</td>
<td>4.2%</td>
</tr>
<tr>
<td>Native Hawaiian and Other Pacific Islander Alone</td>
<td>0.1%</td>
</tr>
<tr>
<td>Two or More Races</td>
<td>1.7%</td>
</tr>
<tr>
<td>Hispanic or Latino</td>
<td>14.9%</td>
</tr>
<tr>
<td>White Alone (not Hispanic or Latino)</td>
<td>52.3%</td>
</tr>
</tbody>
</table>

116. Id. § 18:102.
117. Id.
119. Louisiana Voter Registration Application, LA. ST. DEP’T, https://www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/ApplicationToRegisterToVote.pdf (last updated June 2019).
120. Quick Facts: Orleans Parish, Louisiana, supra note 32.
Figure 12: Race/Ethnicity of Individuals in the Study (403 Males and 401 Females)

<table>
<thead>
<tr>
<th>Race</th>
<th>Male</th>
<th>Female</th>
</tr>
</thead>
<tbody>
<tr>
<td>White (Total)</td>
<td>322</td>
<td>323</td>
</tr>
<tr>
<td>White (Percentage)</td>
<td>78%</td>
<td>81%</td>
</tr>
<tr>
<td>Black (Total)</td>
<td>41</td>
<td>43</td>
</tr>
<tr>
<td>Black (Percentage)</td>
<td>10%</td>
<td>11%</td>
</tr>
<tr>
<td>Hispanic (Total)</td>
<td>15</td>
<td>17</td>
</tr>
<tr>
<td>Hispanic (Percentage)</td>
<td>4%</td>
<td>4%</td>
</tr>
<tr>
<td>Asian (Total)</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td>Asian (Percentage)</td>
<td>2%</td>
<td>&lt;1%</td>
</tr>
<tr>
<td>American Indian (Total)</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>American Indian (Percentage)</td>
<td>&lt;1%</td>
<td>&lt;1%</td>
</tr>
<tr>
<td>Other (Total)</td>
<td>16</td>
<td>12</td>
</tr>
<tr>
<td>Other (Percentage)</td>
<td>4%</td>
<td>3%</td>
</tr>
</tbody>
</table>

3. Discussion
As discussed above, I am hesitant to draw any conclusions about the race and ethnicity information given the limitations of the data. I hope, however, that this area will be a fruitful area of future scholarship.

D. Political Affiliation
I did not originally set out to study political affiliation. Because the information was readily available on Lexis, however, I decided to gather the data and report on it in the hopes that it may be of interest to other researchers or that it may be useful in the future.

1. Methodology
I obtained political affiliation from voter registrations as summarized by Lexis. This data also has a number of limitations. First, some individuals might have changed their political affiliation between the date of their marriage and the date of the study (I examined only the most recent voting records). Second, some people are excluded from the voting process in Louisiana (as discussed above).121 These excluded individuals may share ethnic and/or racial characteristics that might also

121. See supra notes 115-17 and accompanying text.
impact their political affiliations.\textsuperscript{122} Finally, the political affiliation options that are contemplated by the Louisiana voter registration form are somewhat inconsistent with the information obtained from Lexis. Louisiana currently allows the following designations on its voter registration forms: Democrat, Green, Independent, Libertarian, Republican, No Party, and Other.\textsuperscript{123} However, I did not see any parties who were listed on Lexis as Libertarian, Independent, or Green. Perhaps none of the individuals in this study selected one of those options. I assume that Lexis includes those designations under Lexis’ “Other” designation—but I was unable to confirm this assumption.

The usefulness of this data is also limited by the lack of comparative data from other parishes—particularly Orleans Parish. This point is illustrated in Figure 13.\textsuperscript{124} Moreover, actual voting patterns within the various parishes are more complex than indicated by voter registration designations.\textsuperscript{125}

2. Data

Figure 13: Political Affiliation of All Registered Voters by Parish on December 1, 2016\textsuperscript{126}

<table>
<thead>
<tr>
<th>Parish</th>
<th>Republican</th>
<th>Democrat</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>East Baton Rouge</td>
<td>28%</td>
<td>48%</td>
<td>24%</td>
</tr>
<tr>
<td>Jefferson</td>
<td>31%</td>
<td>41%</td>
<td>28%</td>
</tr>
<tr>
<td>Orleans</td>
<td>11%</td>
<td>64%</td>
<td>25%</td>
</tr>
</tbody>
</table>

\textsuperscript{122} See supra Part III.C.1.

\textsuperscript{123} Louisiana Voter Registration Application, supra note 119.

\textsuperscript{124} See infra Figure 13.

\textsuperscript{125} See Ron Faucheux, Looking at Louisiana’s Changed Electorate, ADVOCATE (Feb. 16, 2017), https://www.theadvocate.com/baton_rouge/opinion/article_0a511a32-f3a9-11e6-b4ab-dbdfb5d12969.html.

Figure 14: Political Affiliation of People in the Study
(401 Male, 398 Female)

<table>
<thead>
<tr>
<th>Political Affiliation</th>
<th>Male</th>
<th>Female</th>
</tr>
</thead>
<tbody>
<tr>
<td>Republican (Total)</td>
<td>211</td>
<td>196</td>
</tr>
<tr>
<td>Republican (Percentage)</td>
<td>53%</td>
<td>49%</td>
</tr>
<tr>
<td>Democrat (Total)</td>
<td>88</td>
<td>106</td>
</tr>
<tr>
<td>Democrat (Percentage)</td>
<td>22%</td>
<td>27%</td>
</tr>
<tr>
<td>Other (Total)</td>
<td>14</td>
<td>16</td>
</tr>
<tr>
<td>Other (Percentage)</td>
<td>3%</td>
<td>4%</td>
</tr>
<tr>
<td>None Declared (Total)</td>
<td>86</td>
<td>80</td>
</tr>
<tr>
<td>None Declared (Percentage)</td>
<td>21%</td>
<td>20%</td>
</tr>
</tbody>
</table>

3. Discussion

It is difficult to know what, if any, conclusions can be drawn from this data. The parties who entered into premarital agreements in Jefferson Parish were more likely to be registered as Republicans than registered voters in Jefferson Parish in general. However, I am cautious in drawing any conclusions from that observation for the reasons described previously. Relatedly, it is possible that some individuals in the study do not actually vote in Jefferson Parish. As discussed in Part II.D.2.e, there are reasons for a spouse to record a premarital agreement in a parish other than the one in which he or she is registered to vote. Moreover, political affiliation is so often related to other important demographic factors (like race, ethnicity, gender, and socioeconomic class) that it is difficult to draw conclusions based solely on political affiliation.

IV. PROCEDURAL ISSUES

A. Time Between Signing and Wedding

Some courts have expressed concerns about premarital agreements that are signed shortly before the wedding date. Rationales usually

127. See supra Figures 13, 14.
128. See supra Part II.D.2.e.
relate to the voluntariness or free consent of one of the parties to the contract. If an agreement is presented shortly before the wedding, the other party may not have a reasonable opportunity to review it and/or to seek independent legal representation. A prospective spouse may feel coerced to sign the agreement or risk the social embarrassment of having the wedding called off. Scholars have expressed similar concerns. Professor Judith Younger reviewed a number of appeals decisions involving contested premarital agreements and observed:

The litigated cases reveal a recurring pattern: the prospective spouse with the greater assets and earning power wants the agreement, has it drafted by his lawyer, and presents it to the other spouse very close to the time of the impending marriage, when her mind is on wedding preparations and she has little patience for unromantic legal documents. More often than not the proposed agreement is accompanied by an ultimatum that if she does not sign it, the would-be husband will cancel the wedding. She signs it, and when the relationship deteriorates, the voluntariness of the agreement often becomes an issue.

Without a doubt, some of the reported appeals decisions involve abhorrent behavior on the part of the husband. But, does that mean that this conduct is commonplace? Are the litigated cases really representative of the behavior of most parties who enter into premarital agreements? Do prospective husbands routinely surprise their brides with documents accompanied by a coercive ultimatum? Or, do couples usually discuss the need for and terms of an agreement in a collaborative manner before having the document prepared?

In light of the concerns borne out in the cases, some scholars have advocated for minimum waiting periods for premarital agreements. Professor Thomas Oldham proposed a rule “that the agreement not be

130. Mamot, 813 N.W.2d at 452.
132. Younger, supra note 6, at 423 (footnote omitted).
133. See, e.g., Marriage of Bays, 2004 WL 171626, at *1, *3 (discussing that husband apparently presented his bride with an agreement five days before the wedding without any prior discussion of a premarital agreement, immediately took her to the notary to execute the document, and was dishonest with her about the contents and meaning of the document); Moore v. Moore, 383 S.W.3d 190, 194 (Tex. App. 2012) (explaining that husband apparently tried to conceal the agreement, then lied to his bride and told her that her attorney had approved of the agreement and that she should sign it).
signed until seven days after the *first draft* is presented."

The American Law Institute ("ALI") proposes that premarital agreements be signed at least thirty days before marriage. The idea has also gained footing in a couple of states. Minnesota requires that a premarital agreement "be entered into and executed prior to the day of the solemnization of marriage." California requires that for any agreements executed between January 1, 2002 and January 1, 2020, a party have "not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed." To put these concerns and suggestions for reform into better context, I gathered data on the duration of time between the signing of the premarital agreement and the date of the marriage.

1. Methodology
Many premarital agreements in Louisiana recite both the anticipated date of the marriage and the date of execution of the document. A sizable number of the premarital agreements in the study included both dates—356 of the 474 total documents. The Subpart below summarizes and illustrates that data.

2. Data

Figure 15: Duration Between Date of Execution of Premarital Agreement and Date of Wedding

<table>
<thead>
<tr>
<th>Total Documents</th>
<th>356</th>
</tr>
</thead>
<tbody>
<tr>
<td>Median Number of Days</td>
<td>42</td>
</tr>
<tr>
<td>Mean Number of Days</td>
<td>22</td>
</tr>
<tr>
<td>Shortest Number of Days</td>
<td>0</td>
</tr>
<tr>
<td>Longest Number of Days</td>
<td>356</td>
</tr>
</tbody>
</table>


139. *See supra* Part IV.A.2.
Figure 16: Distribution of Premarital Agreements Based on Number of Days Between Signing and Marriage

3. Discussion

The early bird may get the worm, but procrastinators get premarital agreements. As shown by Figure 16, many couples wait until the last minute to sign their premarital agreements. Specifically, 64% of couples signed their premarital agreements within fourteen days of their anticipated wedding date; 53% signed their premarital agreements within nine days of their anticipated wedding date; and 33% signed their premarital agreements within four days of their anticipated wedding date. Eleven couples in the latter category signed their premarital agreements on the same day as their weddings.

It is impossible to tell from the premarital agreements in this study when couples actually began the process of drafting and discussing their premarital agreements. It seems unlikely, however, that more than half of the premarital agreements were sprung on unsuspecting spouses nine or fewer days before their wedding ceremonies. The more likely explanation is that many couples simply procrastinate.

140. See supra Figure 16.
141. See supra Figure 16.
The likelihood of pervasive procrastination has important implications for courts and lawmakers. We should not automatically assume that a premarital agreement signed shortly before the wedding was presented in a coercive manner. For example, the ALI recommendations seem unduly burdensome in light of the data. The ALI suggested an approach where the rebuttable presumption that parties entered into a premarital agreement freely only applies if (among other things), the agreement “was executed at least 30 days before the parties’ marriage.” But, only 21% of the premarital agreements in this study would benefit from that presumption, leaving the vast majority of agreements more readily open to challenge.

B. Validity of Documents

Defects in form are fatal to the enforceability of premarital agreements in Louisiana. As discussed above, this view is consistent with Louisiana’s civil law tradition and is sometimes at odds with the approach in other American jurisdictions. Most form defects are readily apparent from the face of a document itself. After I noticed that a few documents utterly failed to comply with the Louisiana form requirements, I decided to collect data regarding the validity of all of the documents in the study so that I might later see if there were any commonalities among invalid documents and/or the couples with invalid documents.

1. Methodology

I reviewed each premarital agreement in the study and assessed its compliance with the requisite requirements of form for premarital agreements in Louisiana. I placed documents into one of four categories. I categorized agreements that appeared valid on their face as “Valid Agreements.” I categorized agreements that appeared invalid on their face as “Invalid Agreements.” A few agreements were peculiar enough that it was difficult for me to decide if they were valid or invalid. I categorized those as “Agreements with Borderline Validity.” Finally, I categorized a few agreements as “Unknown Validity.” This category included a few Louisiana premarital agreements that appear to be extracts of the actual agreements. This category also included some agreements that were executed pursuant to the laws of other states. The category includes two documents that appear to be valid Louisiana premarital agreements executed in other countries (Jamaica and

143. See supra Part II.D.2.a.
I categorized these as “Unknown Validity” simply because I am unsure whether the foreign officials who signed these documents are the equivalent of a Louisiana notary public. Finally, the “Unknown Validity” category includes one document that appears to be an Islamic marriage contract that was executed in Louisiana (but in Arabic).

I further categorized the twenty documents in the “Invalid Agreements” category and the “Agreements with Borderline Validity” category according to the reason for the (suspected) invalidity. Those documents fell in one of two categories. The first category of documents appeared to be self-prepared forms from various online companies that were modeled on the UPAA. The second category of documents had defects that appear to be the result of attorney or notary error (or outright incompetence).

2. Data
Figure 17: Summary of Validity of Premarital Agreements in the Study

<table>
<thead>
<tr>
<th>Type of Agreement</th>
<th>Number of Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Number of Agreements</td>
<td>474</td>
</tr>
<tr>
<td>Valid Agreements</td>
<td>443</td>
</tr>
<tr>
<td>Invalid Agreements</td>
<td>11</td>
</tr>
<tr>
<td>Agreements with Borderline Validity</td>
<td>9</td>
</tr>
<tr>
<td>Unknown Validity (Extracts and Non-Louisiana Agreements)</td>
<td>11</td>
</tr>
</tbody>
</table>

Figure 18: Reasons for Invalidity or Borderline Invalidity of Premarital Agreements in the Study

<table>
<thead>
<tr>
<th>Reason for Invalidity (or Borderline Validity)</th>
<th>Number of Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parties Used an Online Form or UPAA Form</td>
<td>14</td>
</tr>
<tr>
<td>Attorney or Notary Prepared Document Incorrectly</td>
<td>6</td>
</tr>
</tbody>
</table>

3. Discussion

Louisiana premarital agreements must be in the form of an authentic act or an act under private signature duly acknowledged by the spouses. Both forms require the signatures of both spouses, the signatures of two witnesses, and the signature of a notary. The vast majority of the premarital agreements in this study appeared to have been executed in compliance with the requisite form. As shown in

144. See supra notes 48-52 and accompanying text.
145. See supra notes 27, 49-50 and accompanying text.
Figure 17, however, twenty documents fell into the Invalid Agreements and Agreements with Borderline Validity categories. Figure 18 further classifies the Invalid Agreements and Agreements with Borderline Validity according to the reason for the (suspected) invalidity. Fourteen of those documents appear to be designed to comply with the UPAA rather than Louisiana law—despite indicating that Louisiana law should govern the document. In most cases, I believe the parties obtained the documents through online services such as rocketlawyer.com and lawdepot.com. These companies sell legal documents directly to consumers and/or purport to assist non-lawyer consumers with preparing their own legal documents. These documents are poorly suited to Louisiana law and are not usually set up to be executed as authentic acts or acts under private signature duly acknowledged. The documents (and the companies that offer them) raise challenging and interesting issues—some of which I hope to explore further in the future.

The remaining six documents had missing signatures. In most cases these omissions appear to be the result of some error on the part of the scrivener—presumably a notary and/or attorney. These documents raise their own unique issues and serious questions about notary/attorney competence and potential liability. These issues are likewise deserving of future exploration and consideration.

V. SUBSTANCE OF PREMARITAL AGREEMENTS

A. Property Ownership

Some scholars object to premarital agreements on the grounds that they are one-sided and seek merely to preserve the wealth of the wealthier spouse to the detriment of the poorer spouse. Unfortunately, I was unable to determine whether the spouses did, in fact, have a significant disparity in wealth. That underlying assumption is one that ought to be explored further in the future—but it was beyond the scope of this study. This study does, however, offer some insight to property-

146. See supra Figure 17.
147. See supra Figure 18.
148. See supra Figure 18.
150. See supra Part III.A.
related content of premarital agreements. In particular, I was able to determine the extent to which couples entirely rejected the community property regime.

I was also able to determine whether the premarital agreements that opted out of the community property laws contemplated the sharing of assets in some manner other than community property. In Louisiana, the fact that a couple has a separate property regime does not mean that they cannot share ownership of assets as co-owners. I have personally prepared a number of premarital agreements for couples who rejected the community property regime because of concerns about creditor rights or a desire for greater flexibility and autonomy in deciding which assets to share. In preparing these premarital agreements, I generally include provisions stipulating that certain assets (particularly those that are jointly titled) will be deemed to be co-owned by the spouses in equal shares (but not as community property). A number of the premarital agreements in this study included similar provisions. The lack of such provisions, however, does not preclude spouses from, in fact, jointly owning property. But, inclusion of such provisions might serve as some indication that the spouses intend to jointly own some of their property.

1. Methodology

I reviewed and analyzed the substance of each premarital agreement in the study. I placed each premarital agreement into one of three categories based on the agreement’s treatment of the default community property regime. The “Separate Property Regime” category consists of agreements that entirely rejected the community property regime in favor of a separate property regime. Many of these were consistent with the rules governing the separate property regime in the Louisiana Civil Code. Some had minor variations on that system. The “Modified Regime” category consists of agreements that did not entirely reject the community property regime. Premarital agreements in this

151. Generally, premarital agreements in Louisiana make it clear if they are electing a separate property regime. For example, I have included the following language in some premarital agreements:

Appearers agree that they shall be separate in property in all respects and that the legal regime of the community of acquets and gains as provided by Louisiana law, or the marital or community property law of any other jurisdiction, shall not exist between the

Appearers. Appearers agree that no community property shall exist between them.

Similarly, one Louisiana practice guide offers the following language:

The parties hereto shall be separate in property. As authorized by Articles 2328 and 2329 of the Louisiana Civil Code, they hereby formally renounce those provisions of the Louisiana Civil Code that establish the legal regime of a community of acquets and gains between husband and wife, and establish in its place a regime of separation of property.

SIGLER ET AL., supra note 29, § 5:199.
category stipulated that at least some assets would be community property. The “Other” category consists of premarital agreements that do not fall neatly within the other two categories. Some of these agreements were governed by the laws of other states. Some of these agreements are extracts of Louisiana agreements. Some of these agreements are self-prepared documents from online services. This category also included the agreements that contemplated that the spouses would own community property. Because sharing of property is already contemplated by the community property regime, it would be somewhat unusual to also include a joint ownership provision relating to separate property.

I also reviewed each premarital agreement in the study to determine whether the agreement contemplated that the spouses might jointly own property in some manner other than as community property. Again, I placed each premarital agreement into one of three categories based on whether the agreement contained a provision relating to shared assets. The “Joint Assets Provision” category consists of all premarital agreements that contain a provision contemplating the co-ownership or sharing of property even though it is not classified as community property. These provisions usually look pretty similar. The “No Joint Assets Provision” category consists of the agreements that do not contain such a provision. The “Other” category consists of premarital agreements that do not fall neatly within one of the other two categories. Again, these documents included extracts of Louisiana premarital agreements, agreements governed by the laws of other jurisdictions, and self-prepared documents.

152. For example, I have used the following language:

Nothing contained in this Contract shall prevent the Appearers from acquiring property jointly as co-owners or other comparable joint or concurrent owners of property. If Appearers acquire property jointly, Appearers shall have and enjoy all of the rights afforded to co-owners in indivision under Louisiana (or other applicable) law, including the right to provoke a partition of co-owned property. Appearers shall be presumed to own any jointly held property or jointly titled property as co-owners in indivision with equal shares, unless otherwise agreed by the Appearers in a writing signed by both parties.

Similarly, one Louisiana practice guide offers the following language:

Nothing contained in this contract shall be construed to prevent the parties from voluntarily acquiring any property in both their names in the manner provided for in this paragraph. In the event, but only in the event, that the parties, during their marriage, acquire immovable (real), movable (personal), or mixed properties in both names, or when they signify in writing before any acquisition that the properties shall be jointly owned property, or when property is given to the parties jointly as joint property, such property shall be jointly owned property, and shall be governed by the Louisiana law of co-ownership, as now written or amended in the future, irrespective of where any such property is located.

LOWE, supra note 29, § 4:25.
2. Data

Figure 19: Property Provisions in All Premarital Agreements in the Study (474 Agreements)

<table>
<thead>
<tr>
<th>Category</th>
<th>Number of Agreements</th>
<th>Percentage of Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Separate Property Regime</td>
<td>408</td>
<td>86%</td>
</tr>
<tr>
<td>Modified Regime</td>
<td>46</td>
<td>10%</td>
</tr>
<tr>
<td>Other</td>
<td>20</td>
<td>4%</td>
</tr>
</tbody>
</table>

Figure 20: Property Provisions by Marital Status (249 Agreements)

<table>
<thead>
<tr>
<th>Marital History</th>
<th>Separate Property Regime</th>
<th>Modified Regime</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wife</td>
<td>Husband</td>
<td>Number</td>
<td>Percent</td>
</tr>
<tr>
<td>Previously Married</td>
<td>Previously Married</td>
<td>Number</td>
<td>Percent</td>
</tr>
<tr>
<td>No</td>
<td>No</td>
<td>48</td>
<td>80%</td>
</tr>
<tr>
<td>No</td>
<td>Yes</td>
<td>27</td>
<td>87%</td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
<td>25</td>
<td>80%</td>
</tr>
<tr>
<td>Yes</td>
<td>Yes</td>
<td>115</td>
<td>91%</td>
</tr>
</tbody>
</table>

Figure 21: Joint Asset Provisions in All Premarital Agreements in the Study (474 Agreements)

<table>
<thead>
<tr>
<th>Category</th>
<th>Number of Agreements</th>
<th>Percentage of Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Joint Asset Provision</td>
<td>179</td>
<td>38%</td>
</tr>
<tr>
<td>No Joint Asset Provision</td>
<td>245</td>
<td>52%</td>
</tr>
<tr>
<td>Other</td>
<td>50</td>
<td>11%</td>
</tr>
</tbody>
</table>

Figure 22: Joint Asset Provision by Marital Status (249 Agreements)

<table>
<thead>
<tr>
<th>Marital History</th>
<th>Joint Asset Provision</th>
<th>No Joint Asset Provision</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wife</td>
<td>Husband</td>
<td>Number</td>
<td>Percent</td>
</tr>
<tr>
<td>Previously Married</td>
<td>Previously Married</td>
<td>Number</td>
<td>Percent</td>
</tr>
<tr>
<td>No</td>
<td>No</td>
<td>21</td>
<td>35%</td>
</tr>
<tr>
<td>No</td>
<td>Yes</td>
<td>15</td>
<td>48%</td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
<td>11</td>
<td>35%</td>
</tr>
<tr>
<td>Yes</td>
<td>Yes</td>
<td>65</td>
<td>51%</td>
</tr>
</tbody>
</table>
3. Discussion

The vast majority of couples in the study (86%) opted for a separate property regime, as shown by Figure 19. Far fewer (10%) contemplated owning at least some community property. These numbers did not particularly surprise me. If a couple desired the default Louisiana community property rules to apply, then there would be little reason to enter into a premarital agreement. Parties who enter into premarital agreements likely do so, in part, to reject the default rules. What did surprise me, however, was the frequency and specification of some modifications to the separate property regime contemplated by the Louisiana Civil Code. Coding the data in this category proved to be the most difficult. Couples struck a number of interesting arrangements—a topic I plan to explore further in future writing.

The majority of the couples in the study (52%) did not include joint asset provisions in their premarital agreements, as shown by Figure 21. A significant portion of the couples (38%), however, did include such provisions. As discussed above, couples are usually free to jointly own assets as co-owners even if they do not have a community property regime and it is not necessary for them to so specify in their premarital agreements. When spouses do contemplate sharing assets in their premarital agreements, however, it may be an indication that they do not entirely reject the notion that marriage is an economic partnership. That so many couples did, in fact, contemplate sharing assets in their premarital agreements suggests that some concerns expressed by critics may not be rooted in reality.

The data reveal some interesting patterns with respect to property provisions and prior marriage history—particularly the husband’s prior marriage experience. Given the gendered nature of divorce outcomes, it is not entirely surprising to see some correlations between gender, prior marriage experience, and the substance of the premarital agreements. When both spouses were previously married, they were the most likely to opt for a separate property regime. As Figure 20 shows, 91% of these couples opted for separate property regimes. Yet, those couples were also the most likely to include joint asset provisions in their agreements. That is not surprising—joint asset provisions are somewhat unusual in premarital agreements that contemplate a modified community property regime. They make more logical sense in agreements that opt for a separate property regime and, therefore, I would expect the group with

153. See supra Figure 19.
154. See supra Figure 19.
155. See supra Figure 21.
156. See supra Figure 21.
157. See supra Figure 20.
the highest percentage of separate property agreements to also have the highest percentage of joint asset provisions. As Figure 22 shows, 51% of those couples included joint asset provisions in their agreements. Couples with previously married husbands and previously unmarried wives showed similar patterns.158 Figure 20 shows that 87% of those couples opted for separate property regimes and Figure 21 shows that 40% of those couples included joint asset provisions.159

Couples where the husband did not have prior marriage experience exhibited slightly different patterns. As Figure 20 shows, 80% of couples with previously unmarried spouses and 80% of couples with a previously married wife and previously unmarried husband opted for a separate property regime.160 These two groups were the most likely (17% and 16%, respectively) to opt for some modified community property regime.161 As shown in Figure 22, they were also the least likely to include joint asset provisions (only 35% of couples in each group included such provisions).162 Again, this is not surprising. It makes logical sense that the groups with the highest percentage of agreements modifying the community property regime would also have the lowest percentage of joint asset provisions.

B. Spousal Support

Scholars have expressed a variety of concerns about premarital agreements that modify or waive spousal support. Professor Younger viewed court enforcement of waivers as evidence of “a lamentable disregard for the spouse who, in the interest of the relationship, gives up the production of income to devote herself to the joint family enterprise.”163 In Professor Younger’s view, spousal support waivers unfairly leave the wife “to carry the whole financial risk when the marriage fails.”164 Her objections are predicated on several factual assumptions (such as gendered responsibility for uncompensated child rearing during the marriage, absence from the workforce, and one-sided property provisions) that may or may not be accurate. Professor Brod shared many of these views and assumptions.165 Professor Charlotte Goldberg, writes that “fairness demands different treatment of spousal

158. See supra Figure 22.
159. See supra Figures 20, 21.
160. See supra Figure 20.
161. See supra Figure 20.
162. See supra Figure 22.
163. Younger, supra note 6, at 421-22 (footnote omitted).
164. Id. at 422.
165. See Brod, supra note 1, at 234-35.
support from property rights because of the unpredictability of the spouses' economic circumstances at the time of dissolution."\textsuperscript{166}

In response to these concerns, some courts and legislatures have pushed back against the enforceability of spousal support waivers. The UPAA, for example, allows courts to override the provisions of a premarital agreement that address spousal support if the agreement "causes one party to the agreement to be eligible for support under a program of public assistance."\textsuperscript{167} The UPMAA takes the same approach.\textsuperscript{168} California will not enforce provisions in premarital agreements relating to spousal support "if the party against whom enforcement of the spousal support provision is sought was not represented by independent counsel at the time the agreement containing the provision was signed, or if the provision regarding spousal support is unconscionable at the time of enforcement."\textsuperscript{169} Some courts have also endorsed a more vigorous review of spousal support waivers in the interest of fairness.\textsuperscript{170} Iowa, by statute, outright prohibits the enforcement of provisions in premarital agreements that adversely affect the right of a spouse to claim spousal support.\textsuperscript{171}

I have challenged some of these views and their underlying assumptions previously.\textsuperscript{172} We simply did not know whether couples, in fact, routinely waive their rights to spousal support in their premarital agreements. In fact, no rule requires waiver. No rule demands that marriage always involve the union of an economically superior spouse with an economically dependent spouse. To the contrary, recent marriage trends suggest increasing economic parity between spouses.\textsuperscript{173} Even when there is an economically inferior spouse, pursuing a spousal support claim is not without its own risks and societal stigma.\textsuperscript{174} An economically inferior spouse may be better protected by negotiating the terms of a spousal support award in advance in a premarital agreement.

1. Methodology

I placed each premarital agreement in the study into one of four categories based on the agreement’s treatment of final periodic support. The “Spousal Support Waived” category consists of agreements in

\textsuperscript{166} Charlotte K. Goldberg, "If It Ain’t Broke, Don’t Fix It": Premarital Agreements and Spousal Support Waivers in California, 33 LOY. L.A. L. REV. 1245, 1256 (2000).
\textsuperscript{167} UNIF. PREMARITAL AGREEMENT ACT § 6(b), 9C U.L.A. 49 (2001).
\textsuperscript{168} UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 9(e) (UNIF. LAW COMM’N 2012).
\textsuperscript{169} CAL. FAM. CODE § 1612 (West 2019).
\textsuperscript{170} See Oldham, supra note 135, at 100-03.
\textsuperscript{171} Carter, supra, at 361-62.
\textsuperscript{173} See id. at 356.
\textsuperscript{174} See id. at 362.
which both parties entirely waived any rights they might have to final periodic support. The "Spousal Support Not Waived" category consists of agreements that did not address spousal support. By remaining silent, parties to these agreements opted into the default Louisiana laws regulating spousal support. The "Spousal Support Modified" category consists of agreements that modified the default rules in some manner other than complete waiver. Finally, the "Other" category consists of agreements that did not obviously fall into one of the other categories. Documents in this category included extracts of Louisiana premarital agreements, agreements governed by the laws of other jurisdictions, and some self-prepared documents.

Some agreements—particularly those in the "Spousal Support Waived" category—purported to waive interim spousal support as well as periodic spousal support. I did not collect data on interim spousal support waivers because they are not enforceable in Louisiana (a fact many waivers actually acknowledge). At least one Louisiana practice guide suggests including a waiver of interim spousal support (despite its unenforceability) and the practice appears to be common.175

2. Data

Figure 23: Spousal Support All Couples (474 Agreements)

<table>
<thead>
<tr>
<th>Category</th>
<th>Number of Agreements</th>
<th>Percentage of Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spousal Support Waived</td>
<td>180</td>
<td>38%</td>
</tr>
<tr>
<td>Spousal Support Not Waived</td>
<td>259</td>
<td>55%</td>
</tr>
<tr>
<td>Spousal Support Modified</td>
<td>24</td>
<td>5%</td>
</tr>
<tr>
<td>Other</td>
<td>11</td>
<td>2%</td>
</tr>
</tbody>
</table>

Figure 24: Spousal Support By Marriage History (249 Agreements)

<table>
<thead>
<tr>
<th>Marital History</th>
<th>Waived</th>
<th>Not Waived</th>
<th>Modified</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wife Previously Married</td>
<td>Husband Previously Married</td>
<td>Number</td>
<td>Percent</td>
<td>Number</td>
</tr>
<tr>
<td>No No</td>
<td>16</td>
<td>27%</td>
<td>39</td>
<td>65%</td>
</tr>
<tr>
<td>No Yes</td>
<td>17</td>
<td>55%</td>
<td>12</td>
<td>39%</td>
</tr>
<tr>
<td>Yes No</td>
<td>7</td>
<td>23%</td>
<td>22</td>
<td>71%</td>
</tr>
<tr>
<td>Yes Yes</td>
<td>65</td>
<td>52%</td>
<td>30</td>
<td>39%</td>
</tr>
</tbody>
</table>

175. See, e.g., Lowe, supra note 29, § 4:25.
3. Discussion

Contrary to popular belief, more than half of the premarital agreements in this study (55%) did not waive or modify spousal support, as shown by Figure 23. The percentage of agreements with waivers (38%), however, is sizeable. I had hoped (but did not expect) to see more modifications (rather than waivers) of the default rules. Modification provides an opportunity for creative and individualized approaches to marriage dissolution. Relatively few premarital agreements (24 agreements, 5% of the total) modified the default rules. The substance of the modifications that I did see, however, are interesting and deserve consideration in future scholarship.

The data reveal some interesting patterns that align with the patterns seen above in the section on property provisions. Those patterns are more pronounced with respect to spousal support. As Figure 24 illustrates, the husband’s prior marriage correlated with an increased likelihood of spousal support waiver. Premarital agreements between previously married men and previously unmarried women were the most likely to waive spousal support (55%).

Agreements between couples where both spouses had prior marriage experience were similarly likely to waive spousal support—52% of those agreements contained waivers. In contrast, waiver was less likely if the man had not been previously married. Only 27% of previously unmarried couples waived spousal support. The couples that were the least likely to waive spousal support were the couples where the woman had been previously married, but the husband had not been. Only 23% of these couples waived spousal support in their premarital agreements.

Like the data relating to property provisions, the spousal support data suggest that spousal support may be linked in some ways to the gender and the prior divorce experiences of the individual parties to each marriage. Comparing two ostensibly similar groups further highlights the apparent issues that are at play. Sixty-two marriages were a first marriage for one spouse and a remarriage for the other spouse. The numbers were split evenly along gender lines: thirty-one marriages were the first marriage for the wife and a remarriage for the husband; thirty-

176. See supra Figure 23.
177. See supra Figure 23.
178. See supra Figure 23.
179. See supra Figure 24.
180. See supra Figure 24.
181. See supra Figure 24.
182. See supra Figure 24.
183. See supra Figure 24.
184. See supra Figure 24.
185. See supra Figure 24.
one marriages were a remarriage for the wife and a first marriage for the husband.\textsuperscript{186} Their approaches to spousal support, however, were at the opposite ends of the spectrum. Those couples with a remarried woman were the least likely to waive spousal support (23% waived spousal support; 71% did not waive spousal support).\textsuperscript{187} Those couples with remarried men, in contrast, were the most likely to waive spousal support (55% waived spousal support; 39% did not waive spousal support).\textsuperscript{188} Again, this might reflect the prior experiences of divorced individuals with the gendered-nature of spousal support awards.

VI. CONCLUSION

Are premarital agreements categorically unfair? A sizeable body of scholarly thought is premised on underlying assumptions of unfairness—in the bargaining process itself, in the content of premarital agreements, and in their enforcement. Relying on assumptions of unfairness, many scholars have argued against the enforcement of premarital agreements, for increased "protections" (or, as I see them, barriers) for the parties entering into premarital agreements, and for greater court authority to disregard agreements that courts deem unfair. Critics of premarital agreements usually say that their concerns are borne out of concern for the wellbeing of women who too disproportionately suffer the economic harms of marriage and divorce. In the absence of an enforceable premarital agreement, however, a divorcing woman is thrown at the mercy of the very same state laws, judges, and legislators that have so often helped to perpetrate those harms in the first place. Surely a premarital agreement—if drafted thoughtfully—could provide a better outcome?

As many scholars have noted, their key premise—the assumption that premarital agreements are unfair—was never supported by reliable empirical data because no such data existed. This study is an important first step in determining whether that assumption of unfairness is correct. Although limited in many ways, the study does cast doubt on long-held beliefs about premarital agreements and demonstrates the importance of further research in the field.

\textsuperscript{186} See supra Figure 24.
\textsuperscript{187} See supra Figure 24.
\textsuperscript{188} See supra Figure 24.