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Heather Mahar

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Harvard Law School
Cambridge, MA 02138

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Why Are There So Few Prenuptial Agreements?

Heather Mahar*

Abstract

Why do individuals usually fail to employ prenuptial agreements to govern the terms of their marriages despite the potential value of such agreements? In seeking an answer, this paper first explains that there is no legal obstacle that prevents prenuptial agreements; these agreements are usually enforced by the courts. The paper then discusses two major explanations for the paucity of prenuptial agreements: underestimation of the value of prenuptial agreements, especially due to false optimism that marriages will last; and a belief that discussing prenuptial agreements would signal uncertainty about marriage. The paper reports on and analyzes a survey undertaken by the author that strongly supports these two explanations for the lack of prenuptial agreements.

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I. Introduction

Contracts are employed to govern a multitude of our activities. However, although marriage is plainly an extremely important relationship in many people's lives and the opportunity exists to make contracts regarding it, very few individuals sign contracts concerning their marriage. Legal commentators and practitioners estimate that only 5-10% of the population enter into prenuptial agreements,¹ and one study suggests that only 1.5% of marriage license applicants would consider entering into such agreements.² This failure to contract is particularly noteworthy in light of the prevalence of divorce; statistical projections by the U.S. Census Bureau suggest that nearly half of recent first marriages will end in divorce.³

This paper attempts to explain why prenuptial agreements are so unusual. As a preliminary, Part II examines the relevant legal landscape to determine whether the law might provide a rationale for the scarcity of premarital agreements. If the enforceability of prenuptial agreements were too uncertain, couples might choose not to sign the agreements. Furthermore, if the law regulating divorce approximated the arrangements that couples would select for themselves, then signing a prenuptial agreement would not furnish a significant benefit. Neither of these reasons

¹ Because prenuptial agreements do not need to be registered, accurate information on their prevalence is difficult to obtain. However, several commentators have estimated their prevalence: See Marston (1997), p. 891 ("Of marrying couples, approximately 5 percent (about 50,000) sign prenuptials each year.") and Dubin (2001), p. 15 ("Anecdotal evidence suggests that 5 to 10 percent of couples . . . now enter into prenups.")

² A survey of couples that had recently applied for a marriage license indicated that only 1.5% of the applicants expressed any interest in entering into a prenuptial agreement concerning post-divorce finances and none said they would enter into an agreement regarding post-divorce childrearing. See Baker and Emery (1993), p. 448.

³ Assuming current rates of marital disruption, "about 50 percent of first marriages for men under age 45 may end in divorce, and between 44 and 52 percent of women's first marriages may end in divorce for these [sic] age group." U.S. Department of Commerce (2002), p. 18.

is seen to apply, however, and thus the current legal regime does not offer a plausible explanation for the paucity of prenuptial agreements.

Part III of the paper supplies two primary explanations for the relative dearth of premarital agreements. The first explanation involves the effects of ignorance about the value of prenuptial agreements and cognitive biases regarding the likelihood of divorce. That is, lack of information might cause individuals to underestimate the potential value of prenuptial agreements in the case of divorce. Furthermore, undue optimism about personal success in marriage might cause an individual to underestimate the likelihood of divorce and therefore the expected value of a prenuptial agreement. The second major explanation involves signaling. If an individual believes that initiating a discussion about a prenuptial contract suggests uncertainty about the success of marriage to his or her partner, that individual might choose not to request such a contract.

Part IV presents evidence from a survey undertaken by the author that supports the two explanations for the lack of prenuptial agreements. Over optimism about marriage was evident from the data: although respondents recognized that the national rate of divorce was around 50%, they believed that their own chance of divorce was only 11.7%. Furthermore, signaling was apparent: 62% of respondents believed that requesting a prenuptial agreement indicates uncertainty about the success of the marriage. Regression analysis confirmed that optimism bias and a fear of signaling make it less likely that an individual will ask his or her partner to sign a prenuptial agreement. That is, individuals who believe that they are significantly less likely than the average person to be divorced are less likely to consider requesting a prenuptial agreement.

Furthermore, individuals who believe that requesting a prenuptial agreement sends a negative signal to their marriage partners are less likely to consider asking them to sign such agreements.⁴

II. Possible Legal Explanations

A. Are prenuptial agreements unenforceable?

The infrequency of prenuptial agreements might be rational if their enforceability were uncertain. However, modern courts do typically enforce premarital agreements, as a brief review of their legal status will reveal.

It is true that, historically, state courts refused to honor any contract that attempted to allocate assets in the case of divorce. Until the 1970's, courts held that agreements "contemplating divorce" were unenforceable as against the public policy of marital stability.⁵ However, in 1970, the Florida Supreme Court overruled this wholesale rejection of prenuptial agreements in *Posner v. Posner*, holding that such agreements were enforceable so long as they did not induce separation or divorce.⁶ Other courts soon followed, finding that prenuptial agreements were not per se contrary to the public policy of promoting the stability of marriage.⁷

In 1983, the Uniform Premarital Agreements Act (U.P.A.A.) was enacted to augment the enforceability of prenuptial agreements.⁸ The U.P.A.A. limits the determination of unfairness to *ex ante* factors,⁹ allowing the parties to select the liquidated damages they deem appropriate in

⁴ Regarding the contribution of this paper, it should be noted that the two potential explanations for the infrequency of prenuptial agreements studied here have been mentioned before; see, for example, Baker (1990) and Stake (1992). However, the two explanations are considered below in a sustained manner and, for the first time to my knowledge, are tested empirically.

⁵ See, e.g., Norris v. Norris ("The state's interest in preserving the marriage relationship makes any provision which provides for, facilitates or tends to induce a separation or divorce of the parties after marriage contrary to public policy and void.").

⁶ *Posner v. Posner*, p. 385.

⁷ See, e.g., *In re Marriage of Dawley*; *Brooks v. Brooks*; and *Osborne v. Osborne*.

⁸ U.P.A.A. (1987), § 6(a)(2). This act has been adopted by over half of the states.

⁹ Under §6 of the U.P.A.A., there are only two situations that justify invalidating a prenuptial agreement: (1) a lack of voluntariness or (2) if the agreement was substantively unreasonable at the time of execution and the aggrieved party did not have knowledge of the other party's financial position. (U.P.A.A. 1987, § 6).

view of the contributions each spouse is expected to make to the marriage. Following the promulgation and adoption of the U.P.A.A., state courts began to limit their substantive review of prenuptial agreements.¹⁰

In 1990, the Pennsylvania Supreme Court went a step further, holding that any judicial review of the substantive terms of prenuptial agreements was inappropriate. In *Simeone v. Simeone*, the majority held that the “paternalistic approach” could no longer be justified in a time when women have economic independence and equal status under the law.¹¹ The majority asserted that procedural review is sufficient for other contracts and should also be sufficient for prenuptial agreements.

In 2002, the American Law Institute produced the *Principles of the Law of Family Dissolution* (ALI Principles). The ALI Principles begin by commenting on the policy supporting prenuptial agreements¹² and by acknowledging that prenuptial agreements should typically be enforceable.¹³ However, §7.05 diverges from current law, suggesting that substantive review should be permissible, at least in certain circumstances.¹⁴ Although permitting substantive review might make the enforceability of prenuptial agreements somewhat less certain, the ALI Principles are so recent that they can not bear on the use of these agreements over the last decade.¹⁵

¹⁰ See, e.g., *Newman v. Newman* (“Once the stringent tests of full disclosure and lack of fraud or overreaching are met, the parties are free to agree to any arrangement for division of their property.”).

¹¹ *Simeone v. Simeone*, p. 165.

¹² “Allowing parties to make agreements respecting the rights and obligations that will arise from marriage or other ongoing family relationships has special appeal in the United States, which as a general matter highly values contractual freedom.” See ALI Principles (2002), § 7.02, comment B.

¹³ ALI Principles (2002), § 7.02, comment A.

¹⁴ These circumstances are: the passage of more than a statutorily determined number of years, the birth or adoption of a child to parties who had no children in common at the time the agreement was executed, or an unanticipated and substantial change in circumstances since the time of execution. ALI Principles (2002), § 7.05, subsection (2).

¹⁵ For an interesting analysis of the ALI Principles and their impact on the enforceability of prenuptial agreements, see *Harvard Law Review* (2003), p. 2086.

Today, the precise contours of enforceability vary from state to state. In practice, the differences might not be that important, as state courts appear to be enforcing almost all prenuptial agreements.¹⁶ Thus, the dearth of prenuptial agreements does not seem to be the result of a lack of enforceability.

B. Does the default law of divorce approximate most individuals' preferences?

Another possible legal explanation for the lack of prenuptial agreements is that the state-provided laws governing divorce are similar to the arrangements that couples would select if they were to define the terms of their marriages. Indeed, in principle, divorce law could be complex enough to perfectly customize the rules regarding exit from marriage based on all relevant traits of a couple, so that couples would not benefit at all from making special prenuptial agreements for themselves. However, given the diversity of family structures¹⁷ and the difficulty courts generally face in determining the particular desires of parties to contracts, it is unlikely that any legal regime will adequately capture the preferences of many couples.

Most obviously, perhaps, couples will vary in their preferences for mediation, arbitration, or judicial proceedings if there is a divorce. Unless they provide in advance for their preferred method of dispute resolution, they might not be able to agree on it at the time of divorce due to bargaining problems. Another reason that couples might gain from using a prenuptial agreement is that their preferred child custody arrangement (for instance, including significant visitation time with grandparents) could be different from what the courts would usually decide. For some couples, there also may be undesirable incentives associated with the state-provided divorce

¹⁶ “Since *Simeone*, the highest courts of twelve states have decided fourteen cases in which they ruled on the validity of challenged antenuptial agreements,” and later commenting that the court invalidated the prenuptial agreements in only two of these cases. (citations omitted) See Younger (2001), p 703 – 15. Also, commenting specifically on the court’s substantive review of alimony limitations, Younger notes that “[i]n the ten years since the *Simeone* case, five of the states’ highest courts addressed the validity of antenuptial waivers of alimony: the waivers were enforced in all but one case.” (citations omitted). See Younger (2001), p. 708.

¹⁷ See, e.g., *Troxel v. Granville* (Writing for the plurality, Justice Sandra Day O’Connor noted that “[t]he demographic changes of the past century make it difficult to speak of an average American family.”).

regime. Consider the prevailing no-fault,¹⁸ low alimony¹⁹ divorce regime. A couple that chooses the traditional family model, with one spouse participating in the workforce and the other spouse staying home to raise the children, might find the current regime unsatisfactory because it makes insufficient provision in divorce awards for the spouse who sacrifices career opportunities to raise the children. Recognizing this, a spouse who the couple would like to have stay at home and raise the children might instead be led to remain in the workforce. Thus, many couples might benefit from a prenuptial agreement that more reasonably provides for the economically dependent spouse in the case of divorce.

Additionally, that divorce law has changed substantially over time suggests that, at least at some points, the law has been out of step with what many couples would prefer.²⁰ Relatedly, even if a couple finds the present divorce law desirable, there is no guarantee that the law at the time of their divorce will not have been modified. Hence there appear to be ample reasons for couples to make premarital agreements. The “adequacy” of divorce law as it exists does not offer a plausible explanation for the scarcity of prenuptial contracts.

¹⁸ Currently every state permits no-fault divorce, and all but three states allow the decision to divorce one’s spouse to be unilateral. “Only three states (Mississippi, New York, and Tennessee) restrict no-fault divorce to cases involving spousal agreement.” See Garrison (1996), p 420 n. 64.

¹⁹ As a corollary to the liberalization of divorce law, alimony awards have been all but eliminated. US Census data indicates that only 14.6% (2.8 million) of the 19.16 million ever-divorced or currently separated women were awarded or had an agreement to receive alimony. See U.S. Bureau of the Census, Current Population Reports (1989).

²⁰ For a review of the evolution of divorce law, see, e.g., Schneider and Brinig (1996), 71-94.

III. Substantive Explanations for the Infrequency of Prenuptial Agreements

This section suggests that the relative scarcity of prenuptial agreements might be explained by two phenomena: (a) couples may systematically underestimate the expected benefits of premarital agreements; and (b) couples may be hesitant to discuss a prenuptial agreement because each person might believe that initiating the conversation would signal uncertainty about the success of the marriage and would conflict with the romance of courtship.

A. Underestimation of the expected value of prenuptial agreements

Couples may underestimate the expected value of prenuptial agreements for two reasons. First, couples may underestimate the value of prenuptial agreements if they fail to understand how prenuptial agreements can help them in the case of divorce. Second, even if couples recognize the potential value of prenuptial agreements, they might underestimate the likelihood of divorce – due to optimism bias – and thus underestimate the expected value of such agreements.

Underestimation of the value of prenuptial contracts in the case of divorce

Why might individuals underestimate the expected value of prenuptial agreements? One possibility is that individuals might not know the terms of marriage as embodied in the divorce law of their state. If they fail to understand the relevant divorce law, they will not be aware of the benefits of contracting around it. If prospective marriage partners assume that the state-provided divorce laws are consistent with their personal preferences, or that the laws are flexible enough to accommodate their unique circumstances, they might not recognize the value of a prenuptial agreement. In fact, many couples do not realize that when they obtain a marriage

license, they are consenting to a set of laws set out in their state's divorce statute.²¹ Indeed, when couples that had recently applied for a marriage license were asked how marriage affects their rights regarding child custody, alimony, child support, and property settlement, respondents correctly identified the current law only slightly more often than random chance would predict.²² Since so many couples seem to misperceive the state-provided law of divorce, their impression of the potential benefits of premarital contracting must be similarly flawed.

Moreover, even if individuals are aware of the divorce law in their state, they might not appreciate the potential uses of prenuptial agreements. First, couples might not realize how expensive contested divorces often are, or how prenuptial agreements can be used to reduce these costs. Prenuptial agreements can decrease the financial cost of divorce by allocating the assets in advance and by providing for mediation in the case of disputes, thereby avoiding court altogether. Even if parts of the agreement or its enforceability are not entirely clear, a premarital contract will reduce the number of decisions to be made by a court. Prenuptial agreements can also reduce the emotional trauma of divorce by allowing the couple to plan for divorce at a time when both spouses are accommodating and cooperative.²³ Second, couples might not recognize that prenuptial agreements can affect behavior during marriage,²⁴ improving the marriage and reducing the likelihood of divorce. In fact, individuals face decisions during marriage that, to

²¹ "When you enter into the contract by saying "I do," you are subscribing to a whole system of rights, obligations and responsibilities. Unlike most other contracts, however, you never get the chance to read the terms or the fine print provisions because the provisions are unwritten and the penalties for breach unspecified. In no other area are contracting parties so in the dark." See Marston (1997), p. 902.

²² See Baker and Emery (1993), p. 441.

²³ Before the marriage, the couple is embarking on what each presumably hopes to be a lifelong journey. Thus, the couple is essentially in a repeat game situation and has an incentive to cooperate. Conversely, post-marital agreements are drafted at a time of intense distrust. As both spouses recognize that they are in the "end game" phase of their relationship, neither spouse has an incentive to cooperate. "Perhaps one reason that divorces are so ugly, marred by unkind acts of mutual deception, is that both parties perceive the "last move" and a sharply truncated shadow of the future." See Buss (1999), p. 258.

²⁴ For example, the couple might not realize that by compensating the economically dependent spouse for lost career opportunities in the case of divorce, they can give this spouse appropriate incentives to stay home to raise the couple's children.

varying degrees, are affected by the economic terms of the marriage contract.²⁵ If couples fail to recognize the potential benefits of prenuptial contracts, they will be less likely to employ them.

Underestimation of the probability of divorce

Some evidence exists that individuals underestimate their chance of divorce. One study found that individuals dramatically miscalculate the likelihood that their marriage will end in divorce; despite recognizing that the overall divorce rate in the population was 50%, the respondents' median estimate of their personal chance of divorce was 0%.²⁶ These findings are consistent with the more general observation that people are subject to optimism bias, believing themselves to be personally immune from many types of risks. For example, people believe that they will live beyond the age of 80, and that they are less likely than average to be injured in an automobile accident.²⁷

Theoretical support for the theory that people might be overly optimistic about their marriage can also be found in the theory of cognitive dissonance.²⁸ In the case of an impending marriage, an individual might hold conflicting beliefs about the probability of divorce, recognizing that the national divorce rate is close to 50%, while believing that his or her own marriage will endure forever. Since the individual must resolve these conflicting ideas, and since

²⁵ Note that as the estimated likelihood of divorce increases (even if the increase occurs during the marriage), the chance that the terms of divorce will influence decisions made during marriage also increases.

²⁶ This survey questioned both law students and engaged individuals; both groups revealed excessive optimism. See Baker and Emery (1993), p. 443.

²⁷ See Weinstein (1980), p. 810. See generally Svenson (1981) and Weinstein (1984).

²⁸ Leon Festinger developed the concept of cognitive dissonance in 1957. See Festinger (1957). "The theory of cognitive dissonance is based on the principle that people prefer their cognitions, or beliefs, to be consistent with each other and with their own behavior. Inconsistency, or dissonance, among their own ideas makes people uneasy enough to alter these ideas so that they will agree with each other." See Gale Encyclopedia of Psychology (2001).

the individual's desire to be confident about his or her own marriage is likely to be dominant, the individual may well refuse to acknowledge the actual likelihood of divorce.²⁹

If people do underestimate the chance that they will divorce, their estimate of the expected value of prenuptial agreements will be biased downward. One reason is that optimism bias might cause individuals to underestimate the cost-savings and related benefits prenuptial agreements might provide at the time of divorce.³⁰ Since the cost-savings at divorce will be weighted by the probability of divorce, if individuals systematically underestimate their chance of divorce, then they will discount the cost-savings by too great an amount. Perhaps less obvious, optimism bias will also lead people to discount the incentive-creation benefits of premarital contracting. In the extreme, if an individual were to believe that his or her marriage would last forever, a premarital contract would have no effect on that individual's behavior during marriage. However, a problem might arise if the perceived chance of divorce subsequently increases to a sizeable amount, even if this increase occurs during the marriage, because the individual might then be affected by the incentives created by the unmodified divorce law.³¹ Optimism at the time of marriage will result in individuals underestimating the benefit of using a prenuptial agreement to create incentives consistent with the couple's preferences.

²⁹ Furthermore, to the extent that optimism bias is a motivated bias, each spouse likely hopes that the feelings of satisfaction and permanence are more valid than the belief that their marriage might end in divorce, and will thus be particularly likely to disregard any reservations.

³⁰ The ALI Principles identify this possibility: "[P]eople are in general overly optimistic about future developments, and there is particular evidence of parties' unrealistic optimism, at the time of their marriage, concerning the chance that they will never divorce. The consequence is that people are likely to discount, by an inappropriately large percentage, the importance of contractual terms that would apply only if they divorce." ALI PRINCIPLES (2002), § 7.05, comment B. This possibility is also discussed in Rasmusen and Stake (1998), 461.

³¹ If these incentives diverge from the couple's desires, the spouses might be persuaded to take actions that do not reflect their true preferences.

b. Negative Signaling

A second potential explanation for the infrequency of premarital contracting is that the potential marriage partners are making a strategic choice not to initiate bargaining. Specifically, the partners might recognize that there are potential gains from contracting but decide not to initiate negotiations because doing so would signal either distrust or a recognition that the marriage might end in divorce.³² Whether accurate or not, the revelation of apparent doubt to one's fiancé(e) might sour the relationship or, in the most serious instance, result in the marriage not being consummated.

To amplify, it is important to distinguish two potential signals that a prenuptial agreement might send. One signal, a “first-order” signal, is that the individual believes that there is a positive probability of divorce, for if he or she did not believe this, there would be no reason to make a prenuptial agreement. The first-order signal, then, is likely to be negative and therefore to result in reluctance to suggest premarital contracts.

But premarital contracting also results in what might be termed “second-order” signals, based on the very terms of a proposed prenuptial agreement. By observing which terms a partner values, the other partner might gain insight into the type of marriage that person desires. These second-order signals might reinforce or outweigh the first-order signal, depending on their magnitude and direction. Notably, if the second-order signals increase the confidence of the marriage partners in each other sufficiently, the making of a prenuptial agreement could be a

³² This point is often made. See, e.g., Levmore (2000), p. 201 (“Some people will avoid prenuptial arrangements or bargains because they fear that raising the topic would signal distrust.”) and Amar, et. al. (1998), p. 427 (“People do not take advantage of [prenuptial agreements], even though many people consider it a good idea. . . [b]ecause there is a signaling problem. No one wants to start the conversation.”)

positive factor on net.³³ Thus, signaling might, in the end, constitute an affirmative reason to make a prenuptial agreement. The effect of signaling must be judged from data on the matter.

IV. Survey and Regression Evidence

In this section, survey evidence is examined in order to measure the influence of optimism bias and signaling on the likelihood that an individual will request a prenuptial agreement. As will be discussed, both optimism bias and signaling are negatively and significantly correlated with the whether a respondent plans to ask his or her partner to sign a prenuptial agreement.

a. Method

I first distributed a preliminary survey to 91 law students at Harvard Law School.³⁴ The preliminary survey revealed significant results and, after several minor changes in the survey,³⁵ I distributed a second survey in malls and schools in various cities to 270 individuals.³⁶

Table 1 summarizes information about each of the variables for the population of law students, the general population, and the combined population. For binomial variables, the tables indicate the percent of respondents answering the question affirmatively. For continuous variables, the tables indicate the mean response with the standard deviation in parentheses below. The combined sample of 361 respondents was 58% female.³⁷ The average respondent was 34.6

³³ For example, a contract that restricted the grounds for divorce to the traditional, fault-based reasons would signal a commitment to make the marriage work.

³⁴ See Appendix A for a copy of the survey.

³⁵ After finding no effect for either religiosity or religious literalism, I eliminated those questions from the survey. I also added options for potential premarital contract clauses.

³⁶ Specifically, I distributed the survey at malls in Boston, MA, State College, PA, Pittsburgh, PA, Frederick MD, and San Francisco CA. I also distributed the survey to students and faculty in two high schools, one in Frederick, MD, and the other in Pittsburgh, PA.

³⁷ See Table 1. Note that the Law Student sample was 39% female, while the General Population sample was 65% female.

years old.³⁸ The sample was well-educated; more than half of the population had attended at least some graduate school.³⁹ Perhaps because of the young average age of respondents, only 55% had ever been married.⁴⁰ Furthermore, only 17% had been divorced, and only 21% of respondent's parents were divorced,⁴¹ well below the national average of approximately 50%.⁴²

My analysis of the potential effect of optimism bias and signaling on prenuptial contracting proceeds in two steps.⁴³ First, I examine the survey results to discover the percent of the population that believes prenuptial agreements send a negative signal and the extent to which the population suffers from optimism bias. Second, I use regression analysis to isolate the influence of these variables on a respondent's belief that he or she will request a prenuptial agreement.

b. Results: Initial analysis

³⁸ Id. The standard deviation was 14.1 years. The average age for Law Students was 22.97, while the average age for the General Population was 36.59.

³⁹ Id. 28.5% of the sample had attended some law school, while 29.7% had attended another type of graduate school. Thus, 58.2% of the sample attended school beyond college. Furthermore, 24.1% of the sample attended at least some college. Thus, only 17.7% of this sample did not continue beyond high school. Note that as 100% of the Law Student sample attended some law school. While this skewed the final results, almost 45% of the General Population sample received some graduate education.

⁴⁰ Id.

⁴¹ Id.

⁴² See footnote 3, *supra*, and accompanying text.

⁴³ The survey does not test respondent's knowledge of the current divorce law in their state. Thus, it does not address the possibility that the value of prenuptial agreements is underestimated due to a lack of knowledge about the divorce law. The empirical evidence is limited to showing that respondents underestimate the value of prenuptial agreements due to false optimism that their marriage will last.

Table 1: Summary Table

Question Posed	Law Student Population (n = 91)	General Population (n = 270)	Combined Population (n = 361)
Gender	39% female	65% female	58% female
Age	22.97 (8.70)	36.59 (15.83)	34.64 (14.06)
Education	100%: law school	24.1%: high school 32.2%: college 4.8%: law school 38.9%: grad school	17.7%: high school 24.1%: college 28.5%: law school 29.7%: grad school
Have you ever been married?*	19%	67%	55%
Have you ever been divorced?*	1%	17%	13%
Have your parents been divorced?*	23%	20%	21%
What is the likelihood that your marriage will end in a divorce?	16.55% (17.09)	10.00% (16.71)	11.65% (17.02)
Will you or did you ask your fiancée to sign a prenuptial agreement?*	27%	16%	19%
Would having your partner ask you to sign a PNA signal that there was a greater possibility of divorce than otherwise?*	56%	64%	62%
Did you or do you plan to live with your spouse before marriage?*	58%	53%	54%
Do you expect to earn a higher salary than your spouse?*	70%	44%	50%
Did you or do you expect to enter the marriage with more assets than your spouse?*	45%	37%	39%
Do you smoke?*	9%	9%	9%
Do you wear a seatbelt? (1: always, 2: usually, 3: sometimes, 4: never)	1.43	1.27	1.31
What percent of marriages in the United States end in divorce?	48.92% (7.55)	52.41% (9.57)	51.53% (9.22)
What percent of your close friends do you believe will get divorced?	30.80% (16.35)	28.87% (22.53)	29.36% (21.14%)
Optimism bias (predicted base rate for US – predicted personal rate)	32.38% (18.36)	42.41% (17.53)	39.88% (18.25)

* For these binomial variables, the number indicates the percent of respondents who answered affirmatively. For all other variables, the mean is noted with the standard deviation included in parentheses below the mean.

Optimism Bias

Optimism bias was evident in the sample. While both law students and the general population correctly estimated the national divorce rate to be approximately 50%,⁴⁴ both groups believed that their marriages were significantly more likely to succeed than average.

Specifically, the law students believed that they had, on average, a 16.55% chance of divorce, while the general population believed that there was only a 10.00% chance that their marriage would end in divorce. Perhaps even more striking is the fact that over 50% of the general population and almost 25% of the law student population estimated that their chance of divorce was 0%.^{45, 46}

The degree of optimism bias, calculated by deducting the likelihood that the respondent's marriage would end in divorce from the respondent's estimate of the national rate of divorce, is significant. Specifically, law students predict that they are 32.38% less likely to divorce than their estimate of the national divorce rate.⁴⁷ However, these respondents were not representative of the general population as they were all working towards graduate degrees. This difference is important since individuals with a college education have a lower divorce rate than their less educated counterparts, and thus part of their apparent optimism might be justified.⁴⁸ Respondents

⁴⁴ The law students estimated the rate of divorce as 48.92%, while the general population estimated the rate as 52.41%. See Table 1.

⁴⁵ 151 out of the 270, or 55.9%, of the respondents from the general population believed that they had a 0% chance of divorce. See Table 1. Furthermore, 22 out of 91, or 24.2%, of the law students estimated their chance of divorce as 0%. Id.

⁴⁶ This result is consistent with the results of the Baker and Emery study cited above. See footnote 26 and accompanying text.

⁴⁷ See Table 1.

⁴⁸ Bramlett and Mosher note that after 10 years, a woman with more than a high school education has a 29% chance of divorce while a woman with a high school education or less has a 42% chance of divorce. Bramlett and Mosher (2002), Stat 23(22).

from the general population estimated that they were 42.41% less likely to be divorced than the average American.⁴⁹

Signaling

A cursory review of Table 1 also indicates that many people do believe that prenuptial agreements send a negative signal. Specifically, 56.04% of law students and 63.70% of the general population responded that they would believe divorce was more likely than otherwise if their fiancé(e) asked them to sign a prenuptial agreement.⁵⁰

Signaling is also suggested by the gap between the percent of respondents who would consider signing a prenuptial agreement suggested by their partner and the percent who would ask their partner to sign a prenuptial agreement. Although only 16.30% of the general population would ask their partner to sign a prenuptial agreement, 64.81% would consider signing one if asked. That is, 48.51% more people, nearly half of the respondents, would be willing to consider signing a prenuptial agreement, but would not consider raising the subject themselves.⁵¹ There was a similar disparity for the law students: while only 27.47% of these respondents would request a prenuptial agreement, 75.82% would consider signing one. For law students, the disparity is thus 48.35%.⁵²

Ultimately, requesting a prenuptial agreement does seem to send a negative signal.

c. Results: Regression Analysis

I then performed regression analysis to isolate the effect of optimism bias and signaling on the likelihood that a respondent would consider requesting a prenuptial agreement. The

⁴⁹ However, almost 45% of the general population had attended some graduate school, and thus were also potentially not representative of the “average” American. *Id.*

⁵⁰ See Table 1.

⁵¹ *Id.*

⁵² *Id.*

dependent variable was a binomial variable indicating whether the respondent asked or planned to ask his or her fiancé(e) to sign a premarital contract.⁵³

The two primary independent variables were a continuous variable measuring the respondent's optimism, calculated by subtracting his estimated chance of divorce from his estimate of the national divorce rate, and a binomial variable indicating whether the respondent believed that requesting a prenuptial agreement sent a negative signal about the likelihood of divorce. Other independent variables, which were potentially predictive of whether a person planned to request a prenuptial agreement, were also included. These potentially relevant variables included, *inter alia*, binomial variables indicating marital status, parent's marital status, whether the respondent would cohabit with his or her partner before marriage, expectations about relative assets and salary (as compared to respondent's fiancé(e)), as well as general demographic information such as gender, age, and education.

To explore the effect of these variables on a person's willingness to request a prenuptial agreement, I estimated a series of five regression equations.⁵⁴ The first equation explores how optimism bias and a fear of signaling affect an individual's decision to request a prenuptial agreement. By successively adding sets of independent variables, the next four equations determine the extent to which other factors might also influence this decision. Given that the dependent variable was a binomial variable, I used a Probit regression. Both the tables and the text report the marginal effects to make the results easier to interpret.⁵⁵

⁵³ This variable takes a value of one if the respondent indicated that he or she planned to ask or had already asked his or her partner to sign a prenuptial agreement, and zero otherwise.

⁵⁴ The results of these regressions are presented in Tables 2, 3 and 4. Table 2 contains the regressions for the Combined Population, Table 3 for the General Population, and Table 4 for the Law Student Population. The results for all groups were similar. This section will focus on Table 2, the results for the pooled population. The text will highlight the areas where the groups significantly diverge, and the reader is invited to compare Tables 2, 3, and 4 for any variable of interest that is not addressed in text.

⁵⁵ The marginal effects are calculated from the Probit coefficients. The *dprobit* function in STATA reports the change in the probability that the dependent variable is "1" for an infinitesimal change in each independent,

Regression analysis supported my hypotheses. The more optimistic an individual is about the success of her marriage, the less likely it is that he or she plans to request a prenuptial agreement. Also, if a person believes that prenuptial agreements indicate uncertainty about the success of the marriage, he or she is less likely to initiate a discussion about a premarital contract. Both effects are significant and robust to additions of other potential explanatory variables.

continuous variable and the discrete change in probability for dummy variables. A positive number indicates that this trait makes it more likely that the respondent would ask his fiancée to sign a prenuptial agreement, while a negative coefficient indicates that this trait makes it less likely that a respondent would request a prenuptial agreement.

Table 2: Probit Regressions for Combined Population Sample
 Variables influencing whether respondent would consider asking for a prenuptial agreement
 (Marginal Effect with Standard Error in Parentheses)

Variable	(1)	(2)	(3)	(4)	(5)
Signal	-.3701*** (.0444)	-.3642*** (.0449)	-.3612*** (.0454)	-.3541*** (.0489)	-.3556*** (.0492)
Optimism bias	-.0037*** (.0009)	-.0030** (.0009)	-.0029** (.0009)	-.0021* (.0009)	-.0022* (.0009)
Married		-.0916* (.0434)	-.0907* (.0425)	-.0335 (.0545)	-.0278 (.0546)
Divorced		.1139 [†] (.0789)	.0918 (.0727)	.0862 (.0747)	.0745 (.0734)
Parents divorced		.0046 (.0341)	.0088 (.0284)	.0193 (.0276)	.0202 (.0280)
Live with		-.0173 (.0371)	-.0260 (.0357)	-.0221 (.0344)	-.0216 (.0347)
Higher salary			-.0522 (.0375)	-.0983* (.0401)	-.0996* (.0405)
More assets			.1205** (.0437)	.1305** (.0456)	.1288** (.0456)
Gender (female)				-.0888* (.0431)	-.0871* (.0432)
Age				.0016 (.0017)	.0014 (.0017)
High School Dummy				.2273** (.1041)	.2175** (.1053)
College Dummy				-.0114 (.0455)	-.0167 (.0450)
Law School Dummy				.0947 (.0750)	.0872 (.0743)
Smoke					.0166 (.0708)
Seatbelt					.0199 (.0253)

*** p<.001 * p<.05
 ** p<.01 † p<.10

Table 3: Probit Regressions for General Population Sample
Variables influencing whether respondent would consider asking for a prenuptial agreement
(Marginal Effect and Standard Error in Parentheses)

Variable	(1)	(2)	(3)	(4)	(5)
Signal	-.3806*** (.0516)	-.3770*** (.0530)	-.3825*** (.0542)	-.3872*** (.0584)	-.3830*** (.0586)
Optimism bias	-.0028*** (.0009)	-.0022** (.0008)	-.0021** (.0009)	-.0018* (.0008)	-.0018** (.0008)
Married		-.1048* (.0509)	-.1131** (.0512)	-.0688 (.0687)	-.0631 (.0695)
Divorced		.0805 (.0647)	.0677 (.0596)	.0588 (.0567)	.0536 (.0560)
Parents divorced		.0012 (.0301)	.0050 (.0236)	.0099 (.0234)	.0120 (.0232)
Live with		-.0041 (.0329)	-.0127 (.0315)	-.0059 (.0304)	-.0050 (.0311)
Higher salary			-.0397 (.0315)	-.0600 [†] (.0334)	-.0622 [†] (.0344)
More assets			.0800* (.0418)	.1024** (.0467)	.0996* (.0467)
Gender (female)				-.0525 (.0386)	-.0514 (.0391)
Age				.0011 (.0012)	.0011 (.0012)
High School Dummy				.1124 [†] (.0762)	.1109 [†] (.0770)
College Dummy				-.0133 (.0315)	-.0175 (.0319)
Law School Dummy				.1017 (.1555)	.1000 (.1533)
Smoke					.0200 (.0596)
Seatbelt					.0146 (.0221)

*** p<.001 * p<.05
** p<.01 † p<.10

Table 4: Probit Regressions for Law Student Sample
 Variables influencing whether respondent would consider asking for a prenuptial agreement
 (Marginal Effect and Standard Error in Parentheses)

Variable	(1)	(2)	(3)	(4)	(5)
Signal	-.3303*** (.0920)	-.3400*** (.0946)	-.3071** (.1011)	-.3205** (.1039)	-.3434** (.1060)
Optimism bias	-.0047 [†] (.0025)	-.0049 [†] (.0025)	-.0056* (.0026)	-.0061* (.0026)	-.0053* (.0027)
Married		.0660 (.1413)	.0897 (.1447)	.0938 (.1452)	.0974 (.1495)
Experience w/ div		-.0050 (.1161)	-.0210 (.1194)	-.0183 (.1146)	-.0301 (.1200)
Live with		-.0679 (.1006)	-.0650 (.1007)	-.0570 (.1004)	-.0740 (.1022)
Higher salary			-.1258 (.1194)	-.2446 [†] (.1527)	-.2571 (.1570)
More assets			.2134* (.1066)	.2091* (.1061)	.2149* (.1076)
Gender (female)				-.1561 (.1065)	-.1459 (.1086)
Age				-.0073 (.0061)	-.0072 (.0063)
Smoke					.2350 (.2512)
Seatbelt					.0285 (.0734)

*** p<.001 * p<.05
 ** p<.01 † p<.10

Optimism Bias and Signaling

Equation (1) includes only optimism bias and signaling as predictors of whether an individual will ask his or her partner to sign a prenuptial agreement. For the general population, if a respondent believes that a prenuptial agreement indicates uncertainty about the success of the marriage, the probability that he or she will consider asking his or her partner to sign a prenuptial

agreement decreases by .3701.⁵⁶ That is, if we hold the level of optimism bias constant, individuals who believe that requesting a prenuptial agreement indicates uncertainty in the marriage are 37.01 percentage points less likely to request a prenuptial agreement than respondents who do not believe that requesting a prenuptial agreement sends a negative signal. This coefficient is significant at the 99.9% level.⁵⁷ Thus, assuming optimism bias equal to the sample mean, an individual who believes that requesting a prenuptial agreement does send a negative signal will request such an agreement in 3.71% of the cases.⁵⁸ A respondent with the same degree of optimism bias, but who does not believe that requesting a prenuptial agreement sends a negative signal will request such an agreement in 40.67% of the cases.⁵⁹ Note that there is a 36.96% percent difference between the two estimates, which is approximately equal to the .3701 marginal effect coefficient from the regression.⁶⁰

Optimism bias also is a significant predictor of the likelihood that the respondent plans to ask his or her partner for a prenuptial agreement; for each percentage point increase in optimism, the probability that the respondent plans to request a prenuptial agreement decreases by .37 percentage points.⁶¹ For example, a respondent with a 39.88% optimism bias, the mean in the

⁵⁶ See Table 2, Equation (1). The Marginal Effect of this variable on the dependent variable is -.3701 as calculated by the `-dprobit-` function in STATA.

⁵⁷ The results for the general population and the law student population were similar. A respondent from the general population who does not believe that requesting a prenuptial agreement sends a negative signal is 38.06% less likely to request one with 99.9% significance. A law student who believes that prenuptial agreements send a negative signal is 33.03% likely to request such an agreement with 99.9% significance.

⁵⁸ Calculated using the `-probit-` coefficients and the mean optimism bias: $[Y = .5137 + -.0188 (39.88) + -1.5494 (1) = -1.7854]$. Assuming that Y has a standard normal distribution, to determine the probability corresponding to this Y value, calculate $\text{Prob}(\text{ask_prenup}) = \text{Prob}(z \leq -1.7854)$ where z is distributed $N(0, 1)$. A respondent with average optimism bias who believes that prenuptial agreements send a negative signal will request a prenuptial agreement in 3.7098% of the cases.

⁵⁹ Calculated using the equation: $[Y = .5137 + -.0188 (39.88) + -1.5494 (0) = -.2360]$. Again, to determine the probability corresponding to this Y value, calculate $\text{Prob}(\text{ask_prenup}) = \text{Prob}(z \leq -.2360)$ where z is distributed $N(0, 1)$. A respondent with average optimism bias who does not believe that prenuptial agreements send a negative signal will request a prenuptial agreement in 40.6716% of the cases.

⁶⁰ The difference between the two estimates is due to rounding error. The `-dprobit-` estimate is more accurate as it uses 15 numbers after the decimal point, while I only used 4 numbers after the decimal point in my calculations.

⁶¹ See Table 2, Equation (1). The marginal effect of this variable on the dependent variable is -.0037 as calculated by the `-dprobit-` function in STATA.

survey population, is 14.76 percentage points less likely to request a prenuptial agreement than an unbiased respondent. This coefficient is also significant at the 99.9% level.⁶²

Equation (1) shows that optimism bias and a fear of signaling are significant predictors of the likelihood that an individual will request a prenuptial agreement. In fact, these two variables alone can explain 28.44% of the variation in the dependent variable.⁶³

Adding variables that indicate experience with marriage and divorce

Equation (2) determines the extent to which experience with marriage and divorce, or experience living with one's partner, might affect the tendency of a respondent to request a prenuptial agreement. Specifically, this regression includes dummy variables indicating whether the individual has ever been married, has been divorced, has parents who were divorced, or plans to live with his or her partner prior to marriage. One might expect people who have been married, who have been through a divorce themselves, or who experienced their parents' divorce to be more aware of the default divorce regime, and thus more aware of the potential benefits of contracting out of this regime.

Out of this set of variables, the only significant characteristic was whether the respondent either was currently or had ever been married. This group includes individuals who are currently married to their first spouse, individuals who remarried after a divorce, and individuals who divorced and never remarried. It is important to note, however, that over 75% of this group was

⁶² The result for the law student population was larger than the effect for the general population. The marginal effect for the general population was -.0028, while the result for the law student population was -.0047. The law student coefficient is significant only at the 90% level. Note, however, that the average optimism bias is 10.03 percentage points higher for the general population than for the law students. Thus, an estimate of the difference between an unbiased respondent and a respondent with the average optimism bias in the samples is closer than the difference between the marginal effects. Specifically, a person from the general population with the average optimism bias would be 11.87 percentage points less likely to believe they would request a prenuptial agreement than an unbiased participant. A law student with the average optimism bias of a law student would be 15.22 percentage points less likely to consider requesting a prenuptial agreement than an unbiased law student. (See Tables 3 and 4)

⁶³ The Pseudo R² is .2844 for the Combined Population, with a Prob>Chi2 of .000. The Pseudo R² is .3396 for the general population sample, again with a Prob>Chi2 of .0000. For the law student sample, the Pseudo R² is lower at .1708, and the Prob>Chi2 is .0001, indicating that we can say with 99.9% certainty that the value of these two coefficients are not zero.

in their first marriage.⁶⁴ Since many of these respondents were in a successful marriage having never used a prenuptial agreement, we might expect that the coefficient would be negative, indicating that marriage would make it less likely that the respondent would request a prenuptial agreement. In fact, respondents who had been married at some point were 9.16 percentage points less likely to have requested a prenuptial agreement. This effect was significant at the 95% level.

However, the apparent effect of “Married” on the dependent variable might be caused by the wording of the survey question rather than by a true difference between married and unmarried respondents. The survey question asked “Will you or did you ask your fiancé(e) to sign a prenuptial agreement?” Thus, respondents who were married were answering a different question than those who had never been married. That is, married respondents were answering based on whether they had in fact asked their fiancé(e) to sign a prenuptial agreement, while unmarried respondents were simply speculating about whether they might ask their partner to sign a prenuptial agreement.⁶⁵ For the unmarried population, it is important to recognize that the regressions can only show how people *who believe* that they will ask for a prenuptial agreement are different from those *who believe* that they will not request such an agreement. Because of these differences, I divided the respondents into those who had been married and those who had

⁶⁴ See Table 1. It reports that 55% of the population had married, while only 13% had been divorced. Thus, 76.36% of those who had married had never been divorced.

⁶⁵ For the 45% of respondents who have never been married, this question was purely hypothetical. Their answers are likely less reliable than the answers of the married respondents who were merely asked to recall past behavior. In fact, this might explain why 19% of the respondents said that they will (or did) ask their partner to sign prenuptial agreements although the estimated national average is a more modest 5 – 10%; people might think that they will request a prenuptial agreement, but not follow through once they become engaged. (Alternatively, the higher number might be due to the fact that the respondents were prompted to consider requesting a prenuptial agreement, while the general population might not be aware of such agreements.) In fact, while 24.39% of unmarried respondents indicated that they plan to ask their partner to sign a prenuptial agreement, only 14.72% of married respondents answered affirmatively. Further subdividing the respondents who have been married at some point into those who have never divorced and those who have been divorced provides more insight. Respondents who are married and have never been divorced are only 10.07% likely to respond affirmatively, while those who have been divorced are 29.17% likely to say that they did or plan to ask their partner to sign a prenuptial agreement.

never been married, and estimated separate regressions for each group.⁶⁶ The separate regressions yielded similar results,⁶⁷ but due to sample size limitations, I will report results for the combined population throughout this section.

While we might expect that having been divorced would reduce a respondent's optimism bias, and therefore increase the likelihood that he will request a prenuptial agreement,⁶⁸ it seems reasonable to expect that such individuals might be more likely to request a prenuptial agreement for reasons beyond the decrease in optimism bias. Since these individuals are older,⁶⁹ they are more likely to have accumulated significant assets. Perhaps more importantly, having been through a divorce, we might think that these individuals would have a more complete understanding of the divorce process and the default rules, and thus would be more likely to recognize the potential benefit to contracting around these laws.⁷⁰ While having been divorced did increase the likelihood that a respondent would request a prenuptial agreement by 11.39 percentage points, the effect was only significant at the 90% level.^{71, 72}

⁶⁶ Divorced respondents were included in the group of respondents who had been married, but their status as "Divorced" was included as a variable in the regression.

⁶⁷ The regression results for each group are presented in Appendix D.

⁶⁸ As expected, the Pearson's R correlation between Optimism Bias and Divorce is -.063. (See Appendix B). Thus, having been divorced is negatively correlated to a respondent's optimism bias.

⁶⁹ The average age of divorced respondents was 46.87, whereas the average age for never-divorced respondents (both married and unmarried) was 34.64.

⁷⁰ The same might be said, albeit to a lesser degree, for individuals whose parents were divorced.

⁷¹ Note that multivariate regression analysis isolates the direct impact of these variables on the dependent variable. The impact of these variables could theoretically be hidden if the variable decreases the magnitude of, e.g., the optimism bias or signaling variable, which indirectly decreases the dependent variable. However, the correlation table reveals that none of these variables are correlated with either optimism bias or signaling to a worrisome degree. See Appendix B.

⁷² Since Optimism Bias was moderately correlated with several variables, I ran a regression using Optimism Bias as the dependent variable. See Appendix C. Two of the variable in this set had a statistically significant impact on a respondent's Optimism Bias, suggesting that they will reduce the significance of Optimism Bias in the original probit regressions. Specifically, as one might expect, having ever been married increases the Optimism Bias of a respondent by 5.76 percentage points. Having been divorced, intuitively, decreases the Optimism Bias of a respondent by 8.63 percentage points. The correlation between Optimism Bias and these two variables likely explains the decrease in the significance of Optimism Bias from 99.9% to 99% as this set of variables was added to the initial regression.

Including these variables does not significantly diminish the effect of a fear of signaling or optimism bias. A fear of signaling still decreases the likelihood that an individual will request a prenuptial contract by 36.42 percentage points. This effect is significant at the 99.9% level.⁷³ Furthermore, each increment of optimism makes it .30 percentage points less likely that the respondent will request a prenuptial agreement. This result is significant at the 99% level.⁷⁴

Adding variables which measure the relative assets and salary of each partner

Equation (3) measures the impact of premarital assets and expected salary on the respondent's likelihood of requesting a prenuptial agreement. Since the predominant use of prenuptial agreements today is to protect premarital assets, individuals entering the marriage with more assets than their partner might be more likely to consider such a contract. We might also expect that individuals who expect to earn a higher salary than their spouse would use a prenuptial agreement to protect their anticipated future assets.

Expecting to enter the marriage with more assets does increase the likelihood that a respondent plans to request a prenuptial agreement. A person who believes that she will have more assets than her partner is 12.05 percentage points more likely to consider requesting a prenuptial agreement, a result that is significant at the 99% level.⁷⁵ Conversely, holding other attributes constant, including predictions about premarital assets, a respondent who planned to

⁷³ See Table 2, Equation (2).

⁷⁴ Id. As discussed above, the correlation between Married and Optimism Bias might explain the decrease in the significance of Optimism Bias from 99.9% to 99%.

⁷⁵ See Table 2, Equation (3). Here, there is a difference between law students and the general population. Among respondents from the general population, respondents who expected to enter the marriage with more assets than their spouse were 8 percentage points more likely to request a prenuptial agreement, which was significant at the 95% level. See Table 3, Equation (3). For law students, respondents who believed they would enter the marriage with more assets than their spouse were 21.34 percentage points more likely to request a prenuptial agreement, which was significant at the 95% level. See Table 4, Equation (3).

earn a higher salary during the marriage was actually less likely to request a prenuptial agreement, although this effect was not significant for either sample or the pooled population.⁷⁶

Again, this set of variables does not notably diminish the magnitude or the significance of the effect of signaling or optimism bias on the dependent variable. A belief that premarital contracts indicate uncertainty about the marriage still makes it 36.12% less likely, with 99.9% significance, that the individual will request a prenuptial agreement.⁷⁷ And again, each additional increment of optimism makes requesting a prenuptial agreement .29% less likely at a 99% level of significance.⁷⁸

Adding Demographic Factors

Equation (4) adds demographic factors, including gender, age, and level of education. We might think that the gender of the respondent would affect his or her propensity to consider requesting a prenuptial agreement beyond what is captured by the variables thus far included. For example, we might believe that women have a more romanticized view of marriage and thus would be more skeptical of contracting about marriage. Conversely, we might think that women are more concerned about providing for their children in the case of divorce, and thus would be more likely to view prenuptial agreements with approbation. In fact, women are less likely to

⁷⁶ This might reflect the belief by high-income individuals that they will be able to support themselves regardless of the asset allocation at divorce, and thus a sense that a prenuptial agreement is not necessary.

⁷⁷ See Table 2, Equation (3). For the general population, a fear of signaling decreased the likelihood of requesting a prenuptial agreement by 38.25 percentage points, with 99.9% significance. See Table 3, Equation (3). For law students, a fear of signaling decreased the likelihood of requesting a prenuptial agreement by 30.71%, with a 99% level of significance. See Table 4, Equation (3).

⁷⁸ See Table 2, Equation (3). For the general population, each increment increase in optimism decreased the likelihood that the respondent would request a prenuptial agreement by .21 percentage points. See Table 3, Equation (3). For law students, each increment of optimism bias decreased the likelihood that the respondent would request a prenuptial agreement by .56%. See Table 4, Equation (3).

consider suggesting a prenuptial agreement. For the pooled sample, a female is 8.88 percentage points less likely to request a prenuptial agreement than her male counterpart.⁷⁹

We might think that age would also influence whether a respondent would consider requesting a prenuptial agreement. The older generation might be uncomfortable with the idea of divorce and might take offense at the notion that a contract should determine the rules of divorce. Conversely, their additional experience with the effects of divorce might offset or even overwhelm this effect. Ultimately, however, age did not significantly affect the likelihood of requesting a prenuptial agreement.⁸⁰

We might also expect education level to influence the likelihood that a respondent would sign a prenuptial agreement.⁸¹ Studies have suggested that divorce rates are higher for women with only a high school education, as compared to women with more than a high school education.⁸² As these marriages are more prone to divorce, respondents with only a high school education might be more likely to request a prenuptial agreement. Alternatively, we might think that since these many of the respondents with a high school education were young (many were, in fact, in their junior or senior year of high school), that they would be less likely to have heard of or to have considered a prenuptial agreement. In fact, respondents with a high school education were more likely to consider requesting a prenuptial agreement. Compared to respondents who had attended at least some graduate school, respondents who had attended at

⁷⁹ See Table 2, Equation 4. This coefficient is significant at the 95% level. Note that while this effect was negative for both the general population sample and the law school sample, the coefficient is not statistically significant in either population.

⁸⁰ See Table 2, Equation (4). Age was also not a significant predictor in either the general population sample or the law student sample. See Table 3, Equation (4) and Table 4, Equation (4).

⁸¹ Here, the regressions include three dummy variables, indicating that the respondent had completed some high school, some college, or some law school. Each of these variables was compared to the fourth (omitted) dummy variable indicating that the respondent had completed some graduate school.

⁸² Bramlett and Mosher note that after 10 years, a woman with more than a high school education has a 29% chance of divorce while a woman with a high school education or less has a 42% chance of divorce. Bramlett and Mosher (2002).

least some high school were 22.73 percentage points more likely to request a prenuptial agreement.⁸³ Neither of the other two dummy variables, indicating the completion of some college or some law school, was significantly different from the variable indicating that the respondent had completed some graduate school. However, having gone to law school was correlated with optimism bias, and thus its magnitude and significance might be concealed.⁸⁴

The effect of both optimism bias and signaling were robust to the addition of the demographic characteristics. Respondents who viewed prenuptial agreements as sending negative signal were 35.41 percentage points less likely to consider requesting such a contract.⁸⁵ Each increment of optimism made asking for a prenuptial agreement .21 percentage points less likely.⁸⁶

Adding proxies for risk-related behavior

The final equation, equation (5), includes two variables meant to approximate the respondent's risk-related behavior. By determining whether the respondent smoked and how often the respondent wore a seatbelt, these variables sought to estimate the risk related behavior of the individual. If the respondent is willing to take risks in other areas of his life, he or she might be more willing to request a premarital contract even if he or she believes that it would send a negative signal to his or her fiancée. Alternatively, if the respondent is hesitant to take

⁸³ See Table 2, Equation (4). This coefficient is significant at the 99% level. For the general population, the dummy variable indicated that a respondent who had attended some high school was 11.24 percentage points more likely to request a prenuptial agreement than a respondent who had attended at least some graduate school. This coefficient was significant only at the 90% level. See Table 3, Equation (4). By definition, the law student sample did not contain any respondents who had only completed some high school.

⁸⁴ See Appendix C. The regression using Optimism Bias as a dependent variable showed that attending some Law School decreased optimism by 9.05 percentage points with 99% significance. Note that almost all of the Law Student respondents were attending Harvard Law School when they completed the survey.

⁸⁵ See Table 2, Equation (4). This coefficient was 99.9% significant. The effect of signaling was also robust to additions of the demographic variables in both the law student and the general population regressions. See Table 3, Equation (4) and Table 4, Equation (4).

⁸⁶ See Table 2, Equation (4). This coefficient was significant at the 99% level. The effect of optimism bias was also robust to additions of the demographic variables in both the law student and the general population regressions, although the significance of this coefficient decreased to 95% for each sub-group. See Table 3, Equation (4) and Table 4, Equation (4).

risks, he or she might be more likely to value the risk-allocation benefits of prenuptial agreements, as well as the relative certainty they provide as compared to the default regime. However, neither of these risk proxies was significant.⁸⁷

The addition of these variables did not notably affect the magnitude or significance of the signaling and optimism bias coefficients. A fear of signaling made it 35.56 percentage points less likely that the respondent would consider requesting a prenuptial agreement.⁸⁸ Furthermore, each percentage point increase in optimism made it .22 percentage points less likely that the respondent would consider requesting a premarital contract.⁸⁹

V. Conclusion

Survey results confirm what theoretical consideration suggests are the major explanations for the infrequency of prenuptial agreements. Namely, both optimism bias and a fear of signaling are pervasive and influence an individual's decision to consider requesting a prenuptial agreement. The more optimistic an individual is regarding his or her chance of divorce, the less likely it is that the individual will consider requesting a prenuptial agreement. Furthermore, an individual who believes that prenuptial agreements send a negative signal will be less likely to ask his or her partner to sign such an agreement. Both of these effects are significant and are robust to the inclusion of other potential explanatory variables in the regressions.

⁸⁷ Risk proxies also were not significant predictors in the general population sample or the law student sample.

⁸⁸ See Table 2, Equation (5). This coefficient remained significant at the 99.9% level. The effect of signaling was similarly robust for the law student population and the general population. See Table 3, Equation (5) and Table 4, Equation (5).

⁸⁹ See Table 2, Equation (5). This coefficient was significant at a 99% level. The impact of optimism bias was similarly robust in each of the sub-populations.

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Appendix A: Survey

Please answer the following questions as you see fit – there are no right or wrong answers. Your answers will be kept completely confidential.

Gender: male female
Age: _____
Education (highest level attended):
high school college graduate school (law) graduate school (other)

Have you ever been married? yes no

Have you ever been divorced? yes no

Were your parents divorced? yes no

If you currently are married or plan to get married at some point in the future, what is the likelihood that your marriage will end in a divorce? (0-100%) _____

Some couples are choosing to sign prenuptial agreements before getting married. The main purpose of these agreements is to specify what happens to a couple's assets in the event of a divorce. Will you or did you ask your fiancé(e) to sign a prenuptial agreement?
yes no

If you would **NOT** ask your partner to sign a prenuptial agreement, why not?
(check all that apply):

I don't believe I will get divorced

It's not romantic

I don't want to indicate to my partner that I am uncertain about our marriage

I have no pre-marital assets

I understand and agree with my state's laws governing divorce

Other (please specify)

Would having your partner ask you to sign a prenuptial agreement make you believe that there was a greater probability of divorce than you would otherwise believe?
yes no

Did you or do you plan to live with your spouse before marriage? yes no

Do you or do you expect to earn a higher salary than your spouse? yes no

Did you or do you expect to enter your marriage with more assets than your spouse?
yes no

Do you smoke? yes no

Do you wear a seatbelt? always usually sometimes never

What percent of marriages in the United States end in divorce? (0-100%)

What percent of your close friends do you believe will get divorced? (0-100%)

If your partner asked you to sign a prenuptial agreement that included the following terms, would you sign it? (Check all agreements that you would consider signing or, if you would never sign a prenuptial agreement, please check the last box.)

Each spouse keeps all assets (items and money) they had before the marriage (i.e. they are not divided)

Each spouse keeps only specified assets (e.g. family heirlooms)

Assets acquired during the marriage are split evenly (50-50)

Assets acquired during the marriage are split according to the proportion of income each party contributes (e.g. if spouse 1 makes 70% of the income and spouse 2 makes 30%, the assets are split 70-30)

Assets acquired during the marriage are split according to the proportion of income each party contributes, BUT if one party stays home to care for children, that spouse gets a “wage” equal to the other spouse during those years (e.g. split 50-50 for those years)

If only your spouse will work, a provision giving you a set amount of money per year

Spousal support will be a fixed amount per year, adjusted for the length of marriage

After divorce, earnings will continue to be split 50-50

Neither spouse will pay spousal support to the other

A fixed “penalty” amount for extramarital affairs

An agreement that specifies joint custody of your children upon divorce

An agreement that specifies that you would get custody of your children upon divorce

An agreement that specifies that your spouse would get custody of your children

An agreement that specifies child care payments above the state minimum

I would never sign a prenuptial agreement

Appendix B: Correlation Table

This Table reports the correlation between the variables for the Combined Population
(Reported as Pearson's r)

	ask PNA	sig	OB	mar	div	par div	live with	high sal	more asset	gend	age	HS dum	Col dum	LS dum	smoke	seat-belt
ask PNA	1.00															
signal	-.459	1.00														
OB	-.212	.102	1.00													
mar	-.107	.030	.200	1.00												
div	.085	-.069	-.063	.355	1.00											
par div	.002	.035	.012	-.071	-.007	1.00										
live with	.064	-.094	.144	-.112	.119	.158	1.00									
high sal	.025	-.072	-.095	-.142	-.100	.084	.081	1.00								
more assets	.126	.003	-.075	-.010	.071	.023	.063	.364	1.00							
gender	-.064	-.013	.071	.116	.151	.006	-.033	-.471	-.156	1.00						
age	-.006	-.104	.155	.708	.359	-.107	-.230	-.131	-.040	.086	1.00					
HS dum	.116	.005	-.001	-.294	-.120	.002	.002	-.022	-.035	.111	-.281	1.00				
COL dum	-.086	.009	.162	.208	.127	.044	-.044	-.135	.038	.011	.250	-.267	1.00			
LS dum	.117	-.097	-.262	-.401	-.220	-.008	.082	.260	.045	-.298	-.357	-.287	-.341	1.00		
smoke	.035	.045	.021	-.009	.081	.009	.135	.100	.119	-.076	.027	.064	.072	.001	1.00	
seat-belt	.106	-.051	-.010	-.140	.101	-.011	.017	.053	.044	-.095	-.044	.002	.078	.125	.195	1.00

Appendix C: OLS regressions with Optimism Bias as the independent variable
 Variables influencing the Optimism Bias of a Respondent
 (Coefficient with Standard Error in Parentheses)

Variable	
Married	5.7581 (2.8915)
Divorced	-8.6273 (3.0991)
Parents divorced	.8830 (1.4375)
Live with	-3.5391 (2.0082)
Higher salary	-.1037 (2.2975)
More assets	-2.0320 (2.0854)
Gender (female)	.3686 (2.2269)
Age	-.0346 (.1007)
High School Dummy	-1.6877 (3.1842)
College Dummy	2.3946 (2.6193)
Law School Dummy	-9.0496 (3.0626)
Smoke	3.0630 (3.6247)
Seatbelt	1.4415 (1.6442)

*** p<.001 * p<.05
 ** p<.01 † p<.10

Appendix D: OLS Regressions for Married Respondents and for Never Married Respondents

Probit Regressions for Combined Population Sample for Married respondents
 Variables influencing whether respondent would consider asking for a prenuptial agreement
 (Marginal Effect with Standard Error in Parentheses)

Variable	(1)	(2)	(3)	(4)	(5)
Signal	-.3309*** (.0575)	-.3262*** (.0595)	-.3326*** (.0606)	-.2937*** (.0673)	-.3062*** (.0686)
Optimism bias	-.0028** (.0009)	-.0022** (.0009)	-.0020* (.0009)	-.0013* (.0007)	-.0013* (.0008)
Divorced		.0747 (.0573)	.0495 (.0479)	.0259 (.0362)	.0142 (.0332)
Parents divorced		.0825 (.0767)	.1095 [†] (.0846)	.1104 [†] (.0881)	.0956 [†] (.0840)
Live with		-.0230 (.0383)	-.0229 (.0347)	-.0031 (.0256)	-.0024 (.0265)
Higher salary			-.0603 [†] (.0346)	-.0670* (.0362)	-.0693* (.0367)
More assets			.0807 [†] (.0451)	.0862* (.0467)	.0784* (.0452)
Gender (female)				-.0276 (.0318)	-.0238 (.0313)
Age				.0026* (.0015)	.0024* (.0015)
High School Dummy				.0741 (.0907)	.0532 (.0862)
College Dummy				-.0215 (.0227)	-.0257 (.0237)
Law School Dummy				.2097* (.1558)	.1821 [†] (.1510)
Smoke					.0415 (.0919)
Seatbelt					.0194 (.0253)

*** p<.001 * p<.05
 ** p<.01 † p<.10

Appendix E: Probit Regressions for Combined Population Sample for Never Married respondents
Variables influencing whether respondent would consider asking for a prenuptial agreement
(Marginal Effect with Standard Error in Parentheses)

Variable	(1)	(2)	(3)	(4)	(5)
Signal	-.4175*** (.0688)	-.4220*** (.0691)	-.4278*** (.0718)	-.2923*** (.0692)	-.2951*** (.0707)
Optimism bias	-.0037* (.0017)	-.0036* (.0017)	-.0028 [†] (.0017)	-.0007 (.0010)	-.0007 (.0009)
Parents divorced		-.0563 (.0812)	-.0609 (.0810)	-.0214 (.0443)	-.0266 (.0453)
Live with		-.0105 (.0672)	-.0229 (.0661)	-.0227 (.0376)	-.0276 (.0376)
Higher salary			-.0227 (.0722)	-.0671 (.0509)	-.0702 (.0498)
More assets			.1981** (.0813)	.1333** (.0619)	.1377** (.0693)
Gender (female)				-.0809 [†] (.0471)	-.0788 [†] (.0441)
Age				.0001 (.0033)	.0007 (.0038)
High School Dummy				.9987*** (.0015)	.9985*** (.0030)
College Dummy				.9912*** (.0042)	.9912*** (.0092)
Law School Dummy				.9533*** (.0292)	.9517*** (.0537)
Smoke					.0623 (.1128)
Seatbelt					-.0117 (.0252)

*** p<.001 * p<.05
** p<.01 † p<.10