

# Across Curricular Boundaries: Searching for a Confluence Between Marital Agreements and Indian Land Transactions

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## Introduction

We begin today with Socrates. Socrates will lead us inexorably, though unwittingly, into a curricular experiment. The experiment, in turn, will take us across continents and centuries. It will go on for about forty-five minutes—no more, I promise. The experiment will end with a true, and I think, funny, story. Of course, there will be a moral. Then you will have a chance to ask questions or make comments.

Socrates was a lucky fellow. He left no articles or diaries and might have been lost to posterity. But, he had an outstanding student who memorialized him. The student was Plato. According to Plato, Socrates is supposed to have said: “[T]he unexamined life is not worth living.”<sup>1</sup> The occasion was the sentencing phase of Socrates’ trial for heresy and corrupting the young. The jury had already convicted him, and Socrates was explaining to the jurors that neither fine, nor prison, nor exile would stop him from teaching. The jury was sure, however, that the death penalty would shut him up. So Socrates died for his craft.<sup>2</sup>

Of course, Socrates is still teaching, not only philosophers and others inside the academy, but all of us. He remains both a good example and a bad example. On the good side, there is his idea that education is not a “cramming in but [rather] a drawing out.”<sup>3</sup> Socrates thought that questioning students and engaging them in dialogue allowed them to learn by generating their own

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1. COLEMAN PHILLIPSON, *THE TRIAL OF SOCRATES* 372 (1928).

2. *Id.* at 401–02.

3. *Hall of Fame: Socrates*, EPIC THINKING (London, Eng.), Jan. 2005, [http://www.epic.co.uk/content/resources/email\\_newsletter/socrates.htm](http://www.epic.co.uk/content/resources/email_newsletter/socrates.htm) (last visited June 9, 2008).

ideas and reaching their own conclusions. The bad side of Socrates is that he was a bully who relied on “tricks of logic” and “the devices of rhetoric” rather than “coherent reasoning.”<sup>4</sup> His method, according to one critic, included “[f]lattery, cajolery, insinuation, innuendo, sarcasm, feigned humility, personal idiosyncrasies, brow-beating, insolence, anger, changing the subject when in difficulty, distracting attention, faulty analogies, [and] the torturing of words . . . .”<sup>5</sup> Thus, law professors have been abusing students in Socrates’ name since Langdell presided over the Harvard Law School in the 1870s.<sup>6</sup>

Despite the negatives, I am going to take a leaf from Socrates’ book. I would like to apply his famous statement about the unexamined life to the law school curriculum. I hope that in doing so before you today, I will fare better than he did before his jury 2,400 years ago.

Taking Socrates’ statement about the unexamined life and applying it to the law school curriculum gives us the proposition that the unexamined curriculum is not worth teaching or learning. Thus law schools should be, and indeed are, constantly examining their curricula, often in response to criticism from the practicing bar and others interested in improving professional education. The latest such criticism—just off the press—comes from the Carnegie Foundation for the Advancement of Teaching.<sup>7</sup> It calls for, among other things, a more *integrated* law school curriculum.

It is that facet of the report that I want to explore in this talk. I propose to share with you an experiment in integration. I will take two parts of the curriculum that I teach. They are Indian land transactions from Property, a first-year required course, and marital contracts from Family Law, a second- and third-year elective. Though at first glance they seem totally unrelated, I am going to try to link them. Let me set the scene.

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4. FREDERICK J.E. WOODBRIDGE, SON OF APOLLO 269 (1929).

5. *Id.*

6. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 53 (1983).

7. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007). A summary of observations and recommendations is available at [http://www.carnegiefoundation.org/files/elibrary/EducatingLawyers\\_summary.pdf](http://www.carnegiefoundation.org/files/elibrary/EducatingLawyers_summary.pdf) (last visited Apr. 9, 2008).

## I. First Principles

### A. Indian Land Transactions

*Johnson v. McIntosh*<sup>8</sup> is the very first case in the Property casebook that my class uses.<sup>9</sup> The plaintiffs claimed through an organized group of land speculators. These speculators bought two large tracts of land directly from Indian tribes in 1773 and 1775.<sup>10</sup> They did not have the consent of the British government, though it was required by King George's Proclamation of 1763.<sup>11</sup>

The Indians later sold the very same land to the United States.<sup>12</sup> The United States, in turn, sold the land to the defendant, another land speculator.<sup>13</sup> From 1775 to 1810, the plaintiffs and their predecessors tried to get validation of their title from the appropriate sovereigns—Great Britain, then Virginia, and then the United States.<sup>14</sup> When these attempts failed, the plaintiffs turned to the federal courts as a last resort.<sup>15</sup> They brought an ejectment action against the defendant.<sup>16</sup> The plaintiffs lost in the District of Illinois, and the United States Supreme Court affirmed.<sup>17</sup>

The editors of the casebook present *Johnson v. McIntosh* to illustrate the basic proposition that it is the sovereign who decides what are the recognized objects of property and what are the protected relations in them.<sup>18</sup> Neither the plaintiffs nor their predecessors had the consent of the sovereign to buy land from Indians. Thus, as Chief Justice Marshall put it, "the plaintiffs do not exhibit a title which can be sustained in the Courts of the United States . . ."<sup>19</sup>

The Chief Justice, then sixty-eight years old and in his twenty-second year of service on the Court, took the opportunity to

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8. 21 U.S. (8 Wheat.) 543 (1823).

9. JESSE DUKEMINIER & JAMES KRIER, PROPERTY 3 (5th ed. 2002).

10. *Johnson*, 21 U.S. (8 Wheat.) at 549–56.

11. *See id.* at 593.

12. *See, e.g.*, Eric Kades, *The Dark Side of Efficiency: Johnson v. McIntosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1088–90 (2000) (describing the sales from Indian tribes to the United States in 1803 and 1809).

13. *See Johnson*, 21 U.S. (8 Wheat.) at 560.

14. *See id.* at 562; *see also* Kades, *supra* note 12, at 1081–87.

15. *See* Judith T. Younger, *Whose America?*, 22 CONST. COMMENT. 241, 243 (2005).

16. *Johnson*, 21 U.S. (8 Wheat.) at 543.

17. *Id.* at 549–50.

18. DUKEMINIER & KRIER, *supra* note 9, at 11.

19. *Johnson*, 21 U.S. (8 Wheat.) at 604.

lay out the governing land principle among European nations in the New World. It was that discovery and conquest gave England and its successors in sovereignty an exclusive right to extinguish Indian title to land.<sup>20</sup> Until this right was exercised, the Indians could continue to occupy the land they possessed.<sup>21</sup>

Students view *Johnson v. McIntosh* with a jaundiced eye. To them, it is a case of Indians against Europeans. I point out that there were no Indian parties to the litigation, just two groups of European land speculators. I also point out that the Indians did well in this particular trade; they sold and got paid for the same land twice. The students are unmoved. "The Indians were here first," they say. "Justice thus demands a decision for plaintiffs who claim through them." "What about the fact that the land purchases were clearly illegal?" I ask. The students reject that too. They say the Europeans "owned" the legal system; it was skewed against the Indians. They tell me—as if I did not know it—that now the Indians have lost all but a tiny fraction of their original lands and that their efforts to regain those lands are a continual source of tension in our society. We then leave the subject to return later, as we will in this talk, for a look at three Supreme Court cases, decided 151, 162, and 183 years, respectively, after *Johnson v. McIntosh*.

### B. Marital Agreements

In my Family Law class, we talk about the rules governing a married couple and the couple's property, and we also talk about the extent to which a couple can alter those rules by contract between the husband and wife. We learn that while most contracts between engaged and married couples are considered "domestic" and therefore unenforceable, contracts covering the financial details of marital breakup on death or divorce may indeed be enforced.<sup>22</sup> While it is possible to use a postmarital agreement for this purpose, it is the premarital agreement, made in consideration and contemplation of marriage, that has become the favorite tool for so-called "breakup" planning.<sup>23</sup> Accordingly,

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20. See *id.* at 596.

21. *Id.* at 567–68 (holding that the Indian right to possession was, in fact, extinguished by the governmental grant of the land to McIntosh).

22. See Judith T. Younger, *Perspectives on Antenuptial Agreements: An Update*, 8 J. AM. ACAD. MATRIMONIAL LAW, 1, 15 (1992) (noting that contracts dealing with personal ordering of the marital agreement are generally "thought to be unenforceable because they run afoul of the well-established rule that it is improper for courts to intervene in the married couple's daily affairs").

23. See, e.g., Allison A. Marston, *Planning for Love: The Politics of Prenuptial*

the casebook<sup>24</sup> features *Binek v. Binek*,<sup>25</sup> a prototypical case from North Dakota.

In *Binek*, Theodore presented Ruth with a premarital agreement two days before their wedding.<sup>26</sup> He told her that unless she signed it, he would not marry.<sup>27</sup> He made no meaningful disclosure of his assets or income.<sup>28</sup> While he was represented by counsel, Ruth was not.<sup>29</sup> She, nevertheless, signed the agreement and the wedding took place as planned.<sup>30</sup> The marriage lasted for almost nineteen years,<sup>31</sup> during which Ruth was the homemaker.<sup>32</sup> At the time of divorce, she was seventy-two years old, had only the most meager of assets, and, by virtue of the agreement, would acquire no more.<sup>33</sup> Indeed, if the agreement were enforced against her, she would have to go on welfare.<sup>34</sup>

Ruth challenged the validity of the agreement, arguing that it was involuntary, unconscionable, made without adequate disclosure, and meant to be applied only on dissolution of the marriage by death of a spouse, not divorce.<sup>35</sup> She lost.<sup>36</sup> Both the trial court and the Supreme Court of North Dakota found the agreement valid.<sup>37</sup> As a result, Ruth left the marriage with virtually nothing to show for her nineteen years of work in the home.<sup>38</sup> The students do not like this result any more than they like that in *Johnson v. McIntosh*.

### C. A Pattern Emerges

Thinking about my students' reactions to these two cases led me to see a surprising confluence between Indian land transactions and marital agreements. First, each deals with a

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*Agreements*, 49 STAN. L. REV. 887, 891-92 (1997) (discussing the increasing popularity of prenuptial agreements).

24. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 132-35 (3d ed. 2006).

25. 673 N.W.2d 594 (N.D. 2004).

26. *Id.* at 596.

27. *Id.*

28. *Id.* at 598-99.

29. *Id.* at 596.

30. *See id.*

31. *See id.* at 596-97.

32. *Id.* at 597.

33. *Id.*

34. *Id.* at 599.

35. *Id.* at 598.

36. *Id.* at 596.

37. *Id.*

38. *See id.* at 596-97.

valuable commodity—lands formerly owned by Indian tribes on the one hand and women's work in the home on the other.<sup>39</sup>

Second, the legal system deliberately attempted to depress the value of each commodity to make it less expensive to acquire. It made the government the only legal buyer of Indian land and the husband first the owner of—and later the only buyer for—women's work in the home.

Third, both kinds of transaction, though outwardly consensual in form, reveal elements of coercion in substance.

Fourth, though the law governing the validity of transfers of Indian lands and the validity of marital contracts is settled, the courts are unwilling to enforce it as to either.

To support these conclusions, I will have to give you a brief overview of the historical developments in each case.

## II. Digging Deeper: The Story Behind *Johnson v. McIntosh*

### A. *Explorers, Sovereignty, and Speculation*

Let us start with Indian land transactions. The tale begins in 1496 when Henry VII, the King of England, commissioned John and Sebastian Cabot to discover countries which had "beene unknownen to all Christians" and to take possession of them in the King's name.<sup>40</sup> The Cabots, father and son, were Italians living in England.<sup>41</sup> They made two voyages of discovery in 1497 and 1498.<sup>42</sup> John Cabot, along with four of his five ships, was lost on the second voyage.<sup>43</sup> In the course of the first, however, he touched down on the coast of North America; we do not know precisely where.<sup>44</sup> He thus became the man who, in the words of Samuel Eliot Morison, "gave England her American title."<sup>45</sup>

The exact nature of that title and, incidentally, the title of the Indians who were already in possession when the Cabots made

39. By "women's work in the home," I mean cooking, cleaning, childcare, household management, and the like. This work is typically done by women, whether they also work outside the home or not, so I call it *women's work*. See, e.g., Theodore N. Greenstein, *Economic Dependence, Gender, and the Division of Labor in the Home: A Replication and Extension*, 62 J. MARRIAGE & FAM. 322, 322 (2000) (finding that even with increased rates of employment outside the home, wives still generally "do the majority of the housework").

40. SAMUEL ELIOT MORISON, *THE EUROPEAN DISCOVERY OF AMERICA: THE NORTHERN VOYAGES 159* (1971).

41. *Id.* at 158, 161.

42. *Id.* at 179, 191.

43. *Id.* at 191–92.

44. *Id.* at 171.

45. *Id.* at 157.

landfall was not clearly articulated until more than 300 years later. The vehicle was the case I told you about, the United States Supreme Court's 1823 decision in *Johnson v. McIntosh*. By then, of course, England had been succeeded as sovereign, first by the original colonies, and then by the United States.<sup>46</sup>

All three sovereigns adopted the same policy with respect to Indian lands: private individuals were prohibited from buying them without government consent.<sup>47</sup> As one commentator describes the effect of this land policy:

A free market inevitably would have led to bidding wars for desirable Indian lands. While some colonists might have favored an unfettered market for Indian land, Europeans as a group would have been the losers since Indians would have extracted higher prices for their acreage. . . . [I]t was collectively efficient for Europeans to make their governments the only legal entities empowered to buy Indian land. Single buyers . . . can drive prices down just as single sellers . . . can drive prices up.<sup>48</sup>

In a world where land speculation was the norm and everyone was a land speculator,<sup>49</sup> the prohibitions did not succeed in preventing unauthorized purchases from Indian tribes. But, they may have kept prices down.<sup>50</sup> The United States is said to have paid over \$800 million for Indian lands.<sup>51</sup> Who knows what the price would have been in a free market?

### B. Finding Coercion Behind the Contract

The next point of comparison between Indian land transactions and marital contracts is the consensual or voluntary form of the transactions, which nevertheless mask subtle, and not so subtle, coercion. I owe this insight into Indian land transactions to Professor Stuart Banner. In his recent book *How the Indians Lost Their Land*, he points out that transfers of Indian lands have, for the most part, been consensual in form, if not in fact. He posits a continuum between conquest and contract with a

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46. See STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005) (tracing the sovereignty over the land in question from the British Crown, first to an independent Virginia and then to the United States); Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*, 19 L. & HIST. REV. 67, 86–88 (2001) (same).

47. See BANNER, *supra* note 46, at 11; Kades, *supra* note 46, at 69–70.

48. Kades, *supra* note 46, at 111.

49. BERNARD BAILYN, *THE PEOPLING OF BRITISH NORTH AMERICA: AN INTRODUCTION* 65–67 (1986).

50. BANNER, *supra* note 46, at 12.

51. Kades, *supra* note 46, at 74.

large middle ground between the two.<sup>52</sup> He says:

At most times, and in most places, the Indians were not exactly conquered, but they did not exactly choose to sell their land either. The truth was somewhere in the middle. The interesting question about Indian land sales is . . . where they were located within that middle ground at any given time or place.<sup>53</sup>

From an Indian point of view and from that of my Property students, the story is one of weakening power from the early-seventeenth to the early-twentieth century.<sup>54</sup> In the seventeenth century, when there were relatively few Europeans in the New World and the power balance between Indians and Europeans was close to equal, transactions in Indian land often were good for both.<sup>55</sup> These early land sales were close to the "contract" end of Professor Banner's continuum.<sup>56</sup> As the European presence in the New World increased and the power relationship between Europeans and Indians shifted, land transactions moved closer to the "conquest" end of the continuum.<sup>57</sup> The Indians' early consents to land sales were more voluntary than their later consents to removal, reservations, and private allotments of formerly communal lands.<sup>58</sup> Ultimately, land cessions ceased to be "voluntary in any meaningful sense of the word, even as they retained the form of negotiated treaties."<sup>59</sup>

### C. A Failure of Enforcement

Going on, we come to the courts' failure to apply the governing rules once settled. When *Johnson v. McIntosh* was decided, the Indian right of occupancy was already widely accepted doctrine.<sup>60</sup> But it was not enforced. As my Property students put it, the Europeans owned the legal system. States granted lands to settlers before the federal government had extinguished Indian title.<sup>61</sup> States bought land from Indians directly,<sup>62</sup> though the

52. BANNER, *supra* note 46, at 3-4.

53. *Id.* at 4.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 6.

59. *Id.* at 4.

60. *See id.* at 168-74 (discussing several cases where Indians only maintained right of occupancy on their land).

61. *See id.* at 190 (noting that the biggest blow to Indian land ownership was states granting land to settlers even though only the federal government could purchase land from Indians).

Indian Intercourse Acts prohibited such purchases.<sup>63</sup>

Enforcement of those Acts or even of basic contracts was extremely difficult for Indian tribes. They faced formidable barriers in bringing lawsuits. Even if the tribes could find, let alone afford, lawyers willing to take their cases, contracts to hire them had to be approved by the Secretary of the Interior.<sup>64</sup> Then there was the problem of finding a court able to hear the lawsuit, and lawsuits required the consent of the United States.<sup>65</sup> It was not until 1966 that Congress passed a law giving federally recognized Indian nations the power to bring lawsuits in federal court without governmental consent.<sup>66</sup>

The Oneida Nation brought suit four years later. This suit resulted in a decision by the United States Supreme Court in *Oneida Indian Nation v. County of Oneida*, so-called "*Oneida I*."<sup>67</sup> In it, the Court recognized a federal cause of action for wrongful possession of lands premised on the Indian right of occupancy enunciated in *Johnson v. McIntosh*.<sup>68</sup> Eleven years later in *County of Oneida v. Oneida Nation*, so-called "*Oneida II*,"<sup>69</sup> the Court further held that three Indian tribes could recover damages for fair rental value of land presently owned and occupied by two counties in New York.<sup>70</sup> Though the suit was premised on an illegal land sale by tribes to New York State in 1795, 175 years earlier, the Court held that it could nevertheless proceed.<sup>71</sup>

It is interesting to note that the Indian successes in these two cases had nothing to do with the voluntariness of the underlying

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62. See *id.* at 136 (noting that the State of New York directly purchased Indian land even though the purchase was illegal and would come back to haunt the State two centuries later).

63. See, e.g., An Act to Regulate Trade and Intercourse Act with the Indian Tribes, 2 Cong. ch. 19, § 8, 1 Stat. 330 (1793). A permanent Indian Intercourse Act was passed in 1834 and is codified at 25 U.S.C. § 177 (2000).

64. This was the state of the law until 2000. See Indian Tribal Economic Development and Contracts Encouragement Act of 2000, Pub. L. No. 106-179, § 2(f)(1), 114 Stat. 46, 47 (2000) (codified as amended at 25 U.S.C. § 81 (2000)).

65. See Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 769-70 (1992) (discussing doubts prior to 1966 as to whether Indians had capacity to sue without federal consent).

66. Pub. L. No. 89-635, 80 Stat. 880 (1966).

67. *Oneida Indian Nation v. County of Oneida (Oneida I)*, 414 U.S. 661 (1974).

68. *Id.* 669-70 (noting that Indian right to occupancy could only be extinguished by the Federal Government).

69. *County of Oneida v. Oneida Nation (Oneida II)*, 470 U.S. 226 (1985).

70. *Id.* at 236.

71. *Id.* at 253 ("One would have thought that claims dating back more than a century and a half would have been barred . . . [N]either petitioners nor we have found any applicable statute of limitations or other relevant legal basis for holding that the Oneidas' claims are barred or otherwise have been satisfied.")

transaction. It turned, rather, on the fact that it was illegal when it occurred.<sup>72</sup> The argument, thought up by some ingenious lawyer, goes something like this: we sold our land; the law prohibited us from selling it without federal consent; we did not have federal consent; the sale was therefore void; the land is still ours!<sup>73</sup> This was a high point for ongoing Indian efforts to reclaim their land.

But, the Supreme Court soon changed its mind. Only twenty-one years after *Oneida II*, the Court decided *City of Sherrill v. Oneida Indian Nation*.<sup>74</sup> In *Sherrill*, the Court virtually overruled *Oneida II*,<sup>75</sup> while denying throughout that it was doing so.<sup>76</sup> The facts of *Sherrill* follow. In 1997 and 1998, the Oneida Nation bought back land on the open market that had been part of its original reservation, but which it had lost in an illegal transaction with New York State in 1805.<sup>77</sup> The City of Sherrill tried to tax it.<sup>78</sup> The Oneidas refused to pay.<sup>79</sup> Sherrill brought an action to evict them.<sup>80</sup> The Oneidas sought an injunction to prevent the eviction and a declaratory judgment that they were exempt from taxation.<sup>81</sup> The tribe argued that, since the original transaction with New York was illegal, the tribe had never lost title.<sup>82</sup> The tribe won in both lower courts,<sup>83</sup> but the Supreme Court reversed.<sup>84</sup>

The Court said that *Oneida I* and *II* involved demands for money compensation.<sup>85</sup> In *Sherrill*, the Oneidas were seeking equitable relief.<sup>86</sup> In the Court's own words, "the distance from

72. See *id.* at 232 ("Despite Congress' clear policy that no person or entity should purchase Indian land without the acquiescence of the Federal Government, in 1795 the State of New York began negotiations to buy the remainder of the Oneidas' land."); *Oneida I*, 414 U.S. at 670 ("The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13.").

73. See *Oneida II*, 470 U.S. 226; *Oneida I*, 414 U.S. 661.

74. 544 U.S. 197 (2005).

75. See *id.* at 221.

76. See, e.g., *id.* (stating that the Court is not disturbing its holding in *Oneida II*).

77. See *id.* at 198.

78. See *id.* at 202.

79. *Id.*

80. *Id.* at 198.

81. See *id.* at 214.

82. *Id.* at 199.

83. *Id.* at 198.

84. *Id.* at 221.

85. *Id.* at 198.

86. *Id.*

1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility . . . .<sup>87</sup> The Court suggested that the only way the Oneidas could revive their sovereignty over the land was to petition the Secretary of the Interior to acquire it in trust for the Indians, thus exempting it from state and local taxes.<sup>88</sup> This is a long and difficult political process.<sup>89</sup>

Repercussions from *Sherrill* were immediate. Seizing on it—indeed significantly expanding it—the Second Circuit reversed a \$248 million damage award to the Cayuga Nation against the State of New York for an illegal land transaction.<sup>90</sup> It did so even though the United States had joined in the action as a plaintiff<sup>91</sup> and despite the fact that the Cayugas were not seeking an equitable remedy.<sup>92</sup> The United States Supreme Court denied certiorari.<sup>93</sup>

The future for Indian land claims in the courts seems bleak.

### III. Marital Contracts and “Women’s Work”

#### A. *In the Beginning, There Was Undervaluing*

We come now to marital contracts and the other valuable commodity—women’s work in the home. This story dates back to the Old Testament and the Creation. In case you have forgotten it, let me remind you that the Lord created Adam on the sixth day, Eve after him.<sup>94</sup> The Lord made Eve out of one of Adam’s parts.<sup>95</sup> She was designed to meet Adam’s need.<sup>96</sup> The Lord married her to Adam without ever asking for her consent.<sup>97</sup> This story is incorporated into the Christian ideal of marriage, and that ideal

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87. *Id.* at 221.

88. *Id.* at 220–21 (referencing 25 U.S.C. § 465 (2000)). As the Court put it: “[S]tandards of federal Indian law and federal equity practice’ preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.” *Id.* at 214 (quoting *Oneida Indian Nation v. County of Oneida*, 199 F.R.D. 61, 71–72 (N.D.N.Y. 2000)).

89. *See id.* at 220–21 (discussing the “complex jurisdictional concerns” regarding control over land entails).

90. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 266 (2d Cir. 2005).

91. *Id.* at 270–71.

92. *See id.* at 269.

93. *Cayuga Indian Nation v. Pataki*, 547 U.S. 1128 (2006).

94. *Genesis* 2:4–25.

95. *Genesis* 2:22.

96. *Genesis* 2:18.

97. *Genesis* 2:18–25.

underlay the two great legal systems that settled side by side in the New World.<sup>98</sup>

One of these legal systems was the common law. It came with the English.<sup>99</sup> The other was the civil law. It came with the Spanish and the French.<sup>100</sup> Though founded on the same ideal, the two legal systems diverged in their treatment of wives. Under the common law, the spouses were a single person; that person was the husband.<sup>101</sup> The wife lost her proprietary rights and legal capacity during marriage.<sup>102</sup> Under the civil law, the spouses retained their individuality,<sup>103</sup> though, as in the common law, the husband was the financially dominant spouse.<sup>104</sup> He was the exclusive manager of community assets.<sup>105</sup> These were defined as anything acquired by either spouse during marriage except for gifts and inheritances.<sup>106</sup> As in the common law, the husband was responsible for supporting the wife and the family; the wife was the provider of domestic services.<sup>107</sup>

The two systems settled side-by-side and a rivalry for preeminence ensued.<sup>108</sup> At first, common law ideas prevailed,<sup>109</sup> making the two systems virtually identical in their practical effect. It could easily be said that in this period, under both systems, the

98. See Judith T. Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349, 353 (2007) (discussing the differences between the common law and the civil law but noting that the husband was dominant in both).

99. *Id.*

100. *Id.*

101. See EDWARD JENKS, *THE BOOK OF ENGLISH LAW* 225–26 (P.B. Fairest ed., 6th ed. 1967) (noting that historically the English common law considered a married couple as one person, the husband).

102. See *id.*; see also 15 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 195 (1965) (noting that “a married woman was given normal capacity” in 1935).

103. See WILLIAM Q. DEFUNIAK & MICHAEL J. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 60 (2d ed. 1971) (discussing the allocation of community property as split between husbands and wives).

104. See *id.* § 61.

105. *Id.*

106. *Id.* § 66 (stating that exceptions existed to the presumption that all property received during a marriage were community property—those exceptions being gifts and inheritances directed towards a single spouse).

107. See Joan Williams, *Do Wives Own Half? Winning for Wives After Wendt*, 32 CONN. L. REV. 249, 256 (1999) (noting that at common law the husband was the head of the family and the wife provided household labor).

108. See DEFUNIAK & VAUGHN, *supra* note 103, §§ 1–2 (discussing the differences in marriage laws between the common law and civil law and the fact that some American states used the civil law, while others used the common law).

109. See *id.* § 37 (noting that in many regions in America, the English common law displaced the community property system).

husband was the owner of the wife's work in the home.<sup>110</sup>

Ultimately, civil law jurisdictions shook off the common law's early influence, while common law jurisdictions assimilated the civil law's treatment of spouses as separate persons and incorporated some partnership principles into their marital property regimes.<sup>111</sup> The wife's legal position in the family improved in all states.<sup>112</sup> One could say that she became the owner of her work at home, but her husband was, as he still is, the only buyer for it.

The wife receives no financial compensation for this work. She accrues no pension or social security benefits because of it; she is not entitled to workmen's compensation for injuries incurred doing it. Though she is supposed to have a right to support from her husband during their marriage, she cannot translate that right into cash.<sup>113</sup> We have seen a similar phenomenon with Indian lands: a governmental scheme to depress the price of a valuable commodity by limiting buyers to one.<sup>114</sup> Here it is again.

Looking back at Ruth Binek, a traditional wife in a long marriage, we see her at divorce in a position similar to that of a seller who makes substantial investments in order to provide services to a monopoly buyer, her husband.<sup>115</sup> He is free to take his business elsewhere. As the American Law Institute describes it in its *Principles of the Law of Family Dissolution*: "The older the wife, the closer the analogy, since her age-related decline in marriageability and reproductive capacity are the facts that place her husband in a position analogous to that of the monopoly buyer."<sup>116</sup>

Let me assure you that Mrs. Binek, whose marriage occurred in 1984 and whose case was decided in 2004, is still a prototype.

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110. See Williams, *supra* note 107, at 256.

111. WEISSBERG & APPLETON, *supra* note 24, at 603 ("[T]oday, property division at divorce reflects the notion of marriage as a partnership. . . .").

112. Using partnership principles to allocate marital property resulted in compensation for work that increased the value of an item of marital property. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.05 (2000) [hereinafter PRINCIPLES] (providing for "Enhancement of Separate Property by Marital Labor").

113. See *McGuire v. McGuire*, 59 N.W.2d 336, 345 (Neb. 1953) (holding that in the ongoing marriage the wife's right to support is only what he is willing to provide her).

114. See *supra* Part II.A for a discussion of the implications of forbidding private individuals from buying Indian land without government consent, thus eliminating a free market for Indian land.

115. See PRINCIPLES, *supra* note 112, § 5.04 cmt. c (equating the position of a traditional wife at divorce to a seller who provides services to a monopoly buyer).

116. *Id.*

The available data demonstrate

a strong persistence in traditional marital roles[.] [W]ives continue . . . to sacrifice earnings opportunities to care for their children [and homes, relying on] continued market labor by their husbands. This pattern is [plain] even among highly educated wives whose reduction in market labor [carries] significant opportunity costs. . . . [T]his reduction appears even in marriages in which there are no children. . . .<sup>117</sup>

Modern notions of marital property came into being in about the 1970s.<sup>118</sup> At divorce in both common law and civil law states, assets acquired by either spouse, except for gifts and inheritances, are now subject to equal or equitable division between the spouses, regardless of title.<sup>119</sup> There is also the possibility of, but not an entitlement to, continued support from an ex-spouse in the form of alimony or maintenance.<sup>120</sup> When a marriage ends by death of a spouse, the survivor's protection in civil-law states is his or her share of the community assets,<sup>121</sup> and in the common law states is a statutory elective or intestate share of the other's estate.<sup>122</sup>

These financial prescriptions for spouses at the ends of their marriages are the closest to pay that married women ever get for the work they do at home. Ironically, they are commonly waived by spouses like Mrs. Binek in modern premarital or postmarital agreements.

### B. Coercion Creeps into Marital Agreements

Like Indian land transactions, these agreements have the appearance of consensual transactions but are coercive in substance. They are couched in mutual language and justified by saying that it is desirable for parties to craft the terms of their own marital dissolutions.<sup>123</sup> In reality, they are always worth

117. *Id.*

118. See WEISSBERG & APPLETON, *supra* note 24, at 152 (discussing the passage of the Uniform Marriage and Divorce Act in 1970).

119. See PRINCIPLES, *supra* note 112, § 4.09 (discussing division of marital property so that "spouses receive net shares equal in value").

120. See *id.* § 4.07 cmt. a ("Relative earning capacity . . . can give rise to a claim for compensatory payments."); see also *id.* § 5.05 (compensating a spouse whose earning capacity is lessened due to being the primary caregiver for the couple's children).

121. WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, *COMMUNITY PROPERTY IN THE UNITED STATES* iii (3d ed. 1991); see also Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 *YALE J. L. & FEMINISM* 229, 235-38 (1994) (describing the protections of the civil law community property states).

122. See WEISSBERG & APPLETON, *supra* note 24, at 600 (discussing the common law division of property by "equitable distribution").

123. See PRINCIPLES, *supra* note 112, § 7.02 (defining the objective of allowing spouses to accommodate their needs in marital dissolution).

more to one spouse than the other and are rarely bargains between equals. While my goal in talking about marital agreements is to be even-handed and “politically correct,” the fact is that men are often the proponents of these agreements and women are almost always the challengers.<sup>124</sup> Most represented parties had male lawyers.<sup>125</sup>

Typically, the spouse or prospective spouse with the greater assets, usually the prospective husband, seeks the agreement from the less wealthy spouse, usually the wife.<sup>126</sup> He wants to preserve his assets for himself or others if the marriage breaks up by death or divorce. The *Binek* case is still instructive. Mr. Binek presented the agreement two days before the wedding, along with an ultimatum to the effect of “sign it or I won’t marry you.”<sup>127</sup> He thus threatened to breach an unenforceable agreement—the agreement to marry. Some lower courts have recognized this as a subtle form of coercion, only to be reversed on appeal.<sup>128</sup>

Another fact bears on coercion or the lack of voluntariness of the agreement. It is that Mrs. Binek was unrepresented.<sup>129</sup> Courts say that representation by independent counsel is evidence of voluntariness.<sup>130</sup> “Is not then the lack of representation evidence of involuntariness?” My students invariably ask this question. I reply that the courts do not see it that way, and I ask in turn, “Why should an adult woman like Ruth Binek who has chosen the dependent role in marriage and waived the protections of the marital regime by contract be relieved of her bargain?” She

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124. See generally *id.* § 7.02 cmts. c, d (listing a number of cases in which men present prenuptial agreements at the “eleventh hour” before marriage).

125. See, e.g., Judith T. Younger, *supra* note 22, at 20–27 (reviewing cases and determining that the prospective husbands are often represented by male lawyers, while the prospective wife often goes unrepresented). If my use of pronouns occasionally slips from a neutral “he” or “she” into “he” for proponent or lawyer and “she” for challenger, I hope you will forgive me.

126. See *id.*; see also PRINCIPLES, *supra* note 112, § 7.04 cmt. d (noting that the wife is usually the challenger of prenuptial agreements which were proposed by men).

127. See *Binek v. Binek*, 673 N.W.2d 594, 596 (N.D. 2004).

128. See, e.g., *In re Yannalfo*, 794 A.2d 795, 798 (N.H. 2002) (finding that the husband’s threat of refusal to marry if wife did not sign prenuptial agreement is insufficient to constitute duress); see also Younger, *supra* note 98, at 371.

129. See *Binek*, 673 N.W.2d at 596.

130. See, e.g., *In re Estate of Crawford*, 730 P.2d 675, 678 (Wash. 1986) (en banc) (requiring independent counsel to have been used in signing the agreement in order to enforce an unreasonable prenuptial agreement); *Gant v. Gant*, 329 S.E.2d 106, 116 (W. Va. 1985) (“[A]dvice of independent counsel at the time parties enter into a prenuptial agreement helps demonstrate that there has not been fraud, duress, or misrepresentation.”).

had choices, and she made them. My students fall upon me. They accuse me of leaving *power* out of the equation. What they mean is that *choices* like Ruth Binek's are not made in a vacuum.<sup>131</sup> As one astute commentator puts it: wives' decisions are made "in a world that women never made, according to rules they didn't write."<sup>132</sup> We still live in a world in which many of the things women really want and need are unavailable—good part-time jobs and affordable, reliable daycare, to limit it to only two examples.<sup>133</sup>

In other words, "[t]o most women choice is all about bad options and difficult decisions: your child or your profession; taking on the domestic chores or marital strife,"<sup>134</sup> signing the premarital agreement; or foregoing the marriage—to mention only a few. The same is true of *consensual* Indian land transactions: voluntariness was inextricably tied to power, and what was billed as *choice* is better described as acquiescence in the least bad of available options.<sup>135</sup>

### C. Another Failure of Enforcement

Now to the last point of comparison between Indian land transactions and marital agreements: the courts' unwillingness to enforce settled rules. In a nutshell, to be valid, marital agreements are supposed to be procedurally and substantively fair when they are executed.<sup>136</sup> In many jurisdictions they have to be tested again for substantive fairness at the time of enforcement.<sup>137</sup> The idea is to protect parties from unexpected, unforeseeable events that may make enforcement unfair.<sup>138</sup> Yet when we look at the cases, we see that the enunciated standards are not being

131. ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD* 235 (2001).

132. *Id.*

133. *Id.*

134. *Id.* at 237.

135. See BANNER, *supra* note 46, at 6 (discussing the power dynamic in the colonization of the United States).

136. See, e.g., *DeMatteo v. DeMatteo*, 762 N.E.2d 797, 809 (Mass. 2002) (stating that a judge must determine whether the agreement "contains a fair and reasonable provision as measured at the time of execution" (quoting *Rosenberg v. Lipnick*, 377 Mass. 666, 672 (1979))).

137. See, e.g., *McKee-Johnson v. Johnson*, 444 N.W.2d 259, 267 (Minn. 1989) ("The court should also review, and make appropriate findings, with respect to what effect, if any, the birth of the parties' child, and any sequences of that event, significantly resulted in changed circumstances so as to trigger a further substantive fairness review; or, to state it another way, whether in the light of those facts the enforcement would be oppressive and unconscionable.").

138. See *DeMatteo*, 762 N.E.2d at 807 ("[T]he disclosure [must] be such that a decision by the opposing party may reasonably be made as to whether the agreement should go forward." (citations and footnote omitted)).

followed.<sup>139</sup>

Taking those cases<sup>140</sup> decided by the highest state courts since 2000, we find that courts upheld agreements challenged as substantively unfair at execution despite draconian terms.<sup>141</sup> Of those challenged as substantively unfair at enforcement, all were upheld except one.<sup>142</sup> That one invalidated an alimony waiver on the basis of great disparity between the spouses' financial situations but only for the limited period of three years.<sup>143</sup> In all the others, enforcement of the challenged agreements was found to be fair despite the birth of children, marital misconduct, such as physical abuse, adultery, and conviction of a drug-related crime, lengthy marriages, disproportionate growth in one spouse's assets, spousal disability, and being cast onto welfare by enforcement of the contract.<sup>144</sup>

Together the decisions display a lamentable disregard for the spouse who, in the interest of the relationship, gives up the production of income to devote herself to the family enterprise.<sup>145</sup> When it fails, she is left to carry the whole financial risk.<sup>146</sup> The courts, as they decide these cases, make some revealing statements. As one court put it, "[i]t is only where the contesting party is essentially stripped of substantially all marital interests that a judge may determine that an . . . agreement is not 'fair and reasonable.'" <sup>147</sup>

The decline of substantive review enhances the importance of procedural fairness. Yet when we turn to it, the picture is equally bleak. The judicial sense of what is procedurally fair is just as deficient as the judicial sense of what is substantively fair. The litigated cases reveal the recurring *Binek* pattern.<sup>148</sup> 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 prospective spouse very close to the time of the impending marriage. Then, the emotional stakes and the social pressures make it very hard to change course and almost

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139. See Younger, *supra* note 98, at 349, 405–11 (providing a detailed discussion of these cases).

140. See *id.*

141. See *id.*

142. See *Lane v. Lane*, 202 S.W.3d 577 (Ky. 2006).

143. *Id.* at 579–81.

144. See Younger, *supra* note 98, at 349, 405–11.

145. See *id.*

146. See *id.*

147. *DeMatteo v. DeMatteo*, 762 N.E.2d 797, 809 (Mass. 2002).

148. See *supra* Part I.B for a description of *Binek*.

impossible to dispassionately evaluate the consequences of signing the agreement. More often than not, the proposed agreement is accompanied by an ultimatum—if it is not signed, then there will be no wedding. Prospective wife signs it, and when the relationship deteriorates, the voluntariness of the agreement often becomes an issue. The cases demonstrate the prevailing view that the ultimatum is not the kind of coercion that makes an agreement involuntary. A further inquiry into voluntariness should, as my students point out, consider the role of counsel. As we said before, representation by counsel is, perhaps, the best evidence that the party made the agreement voluntarily. Yet cases in which both parties are represented are the exception rather than the rule.<sup>149</sup>

In most cases, wives like Mrs. Binek are unrepresented at the agreement's execution, and the agreement is presented so close to the wedding that there is no real opportunity for her to get counsel or for counsel to go over the agreement.<sup>150</sup> In some cases wife's counsel is procured, paid for by, or connected to, husband in some way.<sup>151</sup> This raises questions about independence. Ethics rules require that such a lawyer disclose the fee arrangement or other connection, explain it as creating a possible conflict of interest, and get wife to consent to or waive any conflict.<sup>152</sup> This was not done in any of the cases in my sample group. In one case, the trial court invalidated a premarital agreement on the basis of such an ethical infraction, only to be reversed on appeal.<sup>153</sup>

The last procedural safeguard which many jurisdictions say they require for enforcement of these agreements is that the parties have disclosed their finances to each other.<sup>154</sup> But courts are diluting the disclosure requirement. They hold, as in *Binek*, that prospective wife knew enough about the prospective husband's finances even though no disclosure was made.<sup>155</sup> They hold that disclosure was sufficient though no values were attached to the listed assets. They transform the duty to disclose by the

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149. See Younger, *supra* note 98, at 389, 409. Of all the cases cited in the article, only two involved representation for both parties.

150. See *id.* at 423.

151. See *id.* at 407 (citing a case in which the wife's attorney was recommended by the husband's friend and paid for by the husband).

152. See MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (2005).

153. *Friezo v. Friezo*, 914 A.2d 533 (Conn. 2007).

154. See Younger, *supra* note 98, at 365–66 n.156 (explaining Montana's disclosure requirement).

155. See, e.g., *Binek v. Binek*, 673 N.W.2d 594, 599 (concluding that the wife was sufficiently aware of her husband's finances).

wealthier party into a duty to investigate by the less wealthy party.

In sum, courts are enforcing these agreements though they do not comply with enunciated legal standards. As with Indian land transactions, the rule of law is ignored.

### Conclusion

I am about to end my experiment in integration. I want to close by pointing out how much I learned from it. Crossing curricular boundaries enabled me to see a greater, grander, but sadder picture of my two subjects. A rule of law, whether it be for Indians or married women, is only good if lawyers will argue it and courts will enforce it. Courts say one thing and do another. Voluntariness is not what it seems. Choice is constrained by power. Injustice is rife; so are ethical violations. Now that I am so much wiser, what of my students? Here, I am reminded of a story.

I had just finished teaching Property for the first time. I had graded the exams, turned the grades in, and was sitting in my office, expecting student complaints. I heard a knock at the door.

I said "Come in." The door opened to reveal a young man with a bushy red beard and hair to match.

He said, "Hello, Professor Younger, my name is Myles Arbor."

"Hello," I replied, "what can I do for you?"

"I was in your Property class," he said.

"No, you weren't" I replied, "I've never seen you before."

"I never came to class," he said.

Nonplussed, but not speechless, I said: "What brings you here now?"

"Oh," he said, "I came to thank you for the grade. You gave me an A+!"

There is a *moral*, but what is it? I think it is that the curriculum is important, but not very. Very important is the basic truth that students are their own best teachers. Socrates knew it. So did Myles Arbor.

Where does that leave law professors? Unemployed? Employed in some job, but without any prospect of tenure? Certainly *not*! I'm not proposing *revolution*, only a subtle shift in emphasis. Instead of trying to *teach* our students we should be trying to *inspire* them. Inspire them? Inspire them to do what? Inspire them to do the hard work necessary to teach *themselves*, of course!

Thank you for your patience.

