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It Takes Two: Remodeling the Management and Control Provisions of Community Property Law

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It Takes Two: Remodeling the Management and Control Provisions of Community Property Law

Elizabeth De Armond*

TABLE OF CONTENTS

I. INTRODUCTION 236
II. THE DEVELOPMENT OF COMMUNITY PROPERTY LAW IN AMERICA 239
A. *The History of Community Property and Its Immigration to America* 239
B. *Traditional Management Rules* 242
III. A VISION OF MARRIAGE 248
A. *A General Approach to Marriage and the Law* 248
B. *Money, Marriage, and Power* 251
C. *Law, Social Engineering, and the Dynamics of Marriage* 255
D. *A Proposed Direction of Change for Community Property Law* 258
IV. ANALYSIS AND CRITIQUE OF PRESENT MANAGEMENT AND CONTROL PROVISIONS 261
A. *Equal/Either Management* 261
B. *Joinder Requirements* 263
1. Real Property 264
2. Household Goods 265
3. Gifts 265
4. Analysis of Joinder Requirements 267
C. *Exclusive Management* 269
D. *Duties of the Acting Spouse* 271
E. *Liability for Debts* 274
F. *Ability of Spouses to Opt Out of the System* 277
V. PROPOSALS FOR REFORM 278
A. *Consensus Decisionmaking* 278
B. *Duties of Good Faith and Care* 280
C. *Debts* 283
D. *Dissolving the Community* 285
E. *Burdens of Proof and Statutes of Limitations* 286

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HeinOnline -- 30 Gonz. L. Rev. 235 1994-1995

VI. CONCLUSION 287

". . . with all my worldly goods I thee endow"[1]

I. INTRODUCTION

A businessman calls up his lawyer. "I'm thinking about starting a partnership with this fellow," he begins. "We want to take advantage of the new craze for men's cosmetics, and we've found a great spot downtown for the store. Here's the way we want it to work. We will both devote all of our efforts and energies solely to the promotion of this business, and we'll both invest all money we make, from whatever source, into the business, at least for awhile, anyway. Sometimes he'll be providing more money, and I will be providing more effort in the way of sweat equity, and sometimes it will be the other way around."

"All right," the lawyer nods, thinking of the many issues that will have to be addressed, and deciding to start with one of the most important. "Who will decide how the business will be run? How the money will be spent? What equipment and inventory will be bought? How profits will be distributed or reinvested?" "Well," thought the man, "I guess that whichever one of us felt like doing something, like buying inventory, or setting prices, or reinvesting the profits, well I guess he'd just do it." "Just do it!" the lawyer exclaims. "Independently? Without consulting the other?" "Well, maybe for really big decisions, like selling the whole business, but otherwise, yes, whoever felt like doing something with the partnership's stuff would just do it."[2]

Few lawyers would be happy with such a management arrangement for a client's business. What are some of the problems? Either partner can unilaterally decide matters on behalf of the whole partnership without consulting his fellow partner. The other partner would be liable for those decisions, even those decisions that he opposed. Fortunately for partners, the Uniform Partnership Act steps in to provide that differences arising as to ordinary matters connected with the partnership business are to be made by

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1. Words from the traditional Church of England marriage ceremony. *See* THE FIRST PRAYER BOOK OF KING EDWARD VI 235 (Griffith Farran Browne & Co. (1549)).

2. The idea for this hypothetical came from MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 66 (1981), in which she quotes Ian Baxter as asking, with regard to the Uniform Marriage and Divorce Act: "[W]hat person will enter a business or professional partnership or joint venture if the only liquidation rule is that a court will have discretion to make any order it thinks fit in regard to all the money and property?" Ian Baxter, *Family Law Reform in Ontario*, 25 U. TORONTO L.J. 236, 261 (1975). In community property law, during an intact marriage it is not the court, but the other spouse, who has such power over the disposition of property. *See* UNIF. MARTIAL PROPERTY ACT § 5, 9A U.L.A. 114 (1994).

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a majority of the partners, unless otherwise agreed,[3] and in a partnership of two, a "majority" means unanimous decisions.

In contrast, eight of nine community property states[4] have instituted a system of autonomous decisionmaking for the vast majority of transactions with co-owned marital property. With few restrictions, either spouse may buy, sell, encumber, lease, use, or give away community property; not just his or her own one-half interest, but also the other spouse's one-half interest in that property. Community property is the only form of co-ownership, other than tenancy by the entireties,[5] that gives each co-owner such broad powers over the interests of other co-owners. Joint tenants and tenants-in-common cannot unilaterally modify the interests of the other owners.[6] Moreover, when the law grants an owner power over property that others also own, the law fetters their power. For example, partners must act with a fiduciary duty of loyalty,[7] and trustees must act not only with such a duty of loyalty, but also with due diligence, care, and skill.[8] Such duties do not apply to most community property spouses. Only spouses in California[9] and Wisconsin[10]

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3. UNIF. PARTNERSHIP ACT § 18(h) 6 U.L.A. 213 (1968). Certain acts require unanimity. *Id. See generally* 59A AM. JUR 2D. *Partnership* § 413 (1987).

4. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Washington and Wisconsin. The ninth state is Texas, which, as described later, designates property for management purposes as either sole (exclusive) management property or joint management property. *See infra* notes 189-211 and accompanying text.

5. Another form of marital property ownership. *See generally* 2 HERBERT T. TIFFANY, REAL PROPERTY §§ 430-36 (3d ed. 1939). Tenancy by the entireties is described as a form of joint-tenancy "modified by the common law theory that husband and wife are one person." *Id.* § 430. Traditionally the husband had full power to control and dispose of the land, and was entitled to all the rents and profits from the land. *Id.* § 435.

6. *See id.* § 453 (stating that co-tenant's sale of his interest does not affect his co-tenant's interest); § 456 (stating that a co-tenant cannot grant an easement in the land without joinder of the other co-tenants); and § 458 (stating that a tenant in common cannot grant a lease of the whole property which will bind his co-tenants).

7. *See* UNIF. PARTNERSHIP ACT §§ 20-21, 6 U.L.A. 256-84 (1968). The duty generally requires partners to act with the "utmost good faith and integrity in their dealings with one another in partnership affairs." 59A AM. JUR 2D *Partnership* § 420 (1987). The standard is much higher than mere non-fraud, and requires partners to render on demand true and full disclosure of all things affecting the partnership to any partner. *Id.* § 425. Some states have also imposed, by case law, a duty on partners to act to a certain standard of care. *See generally* Norwood P. Beveridge, Jr., *Duty of Care: The Partnership Cases*, 15 OKLA. CITY U. L. REV. 753 (1990). The Revised Uniform Partnership Act limits the partner's duty of care to "refraining from engaging in grossly negligent or reckless conduct, intentional misconduct or a knowing violation of law." UNIF. PARTNERSHIP ACT § 404 (c), 6 U.L.A. 254 (Supp. 1994).

8. 76 AM. JUR. 2D *Trusts* §§ 379, 390-91 (1992); *see also* GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS & TRUSTEES § 7-302 (2d rev. ed. 1984).

9. *See infra* note 193 and accompanying text.

10. *See infra* note 192 and accompanying text.

HeinOnline -- 30 Gonz. L. Rev. 237 1994-1995

are statutorily bound to act in good faith,[11] and neither state requires a spouse to notify the other spouse prospectively that his or her interest in the property will be changed.[12]

Furthermore, unlike business partners or trust settlers, spouses are unlikely to visit a lawyer to structure an agreement about managing marital property. To do so might be a breach of understood trust,[13] and besides, prenuptial bliss is not conducive to hard bargaining. Accordingly, the law probably serves as the default arrangement for marriages more often than for more commercial unions.

"All legal rights and duties are aspects of social relationships . . . [t]hey are not essentially rights in things, though they may pertain to things. They are rights to act in certain ways in relation to the rights of other people."[14] The community property laws, management, and control provisions confer many rights, and few duties, concerning the power one spouse may wield over another in connection with marital property. These rights and duties regarding property should especially be considered and scrutinized because they bear directly on a very intimate and close relationship, and because partners are likely to act out other marital issues through property transactions.[15]

This Article argues that the rights and obligations of spouses with respect to community property should reflect the symbiotic nature of marriage, should restrict spouses' abilities to dominate each other through property transactions, and should encourage spouses to work together and act with care when dealing with their co-owned property. The Article begins with a discussion of the development of American community property law and the

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11. *See infra* notes 192-96 and accompanying text.

12. *See infra* notes 192-93 and accompanying text.

13. Women may be even more hesitant about proposing an agreement than men. The National Organization for Women objected to provisions of the Uniform Marital Property Act that permit couples to reach their own agreement about money on the grounds that women may be reluctant to show a perceived lack of trust by not acceding to their husband on money matters. GRACE W. WEINSTEIN, MEN, WOMEN & MONEY: NEW ROLES, NEW RULES 73-74 (1986). Of course, women may be more likely to stand to lose from a premarital agreement.

14. SALLY F. MOORE, LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH 70 (1978).

15. *See* PHILLIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 83 (1983) (claiming that married couples suppress other, more threatening conflicts in fighting about money); WEINSTEIN, *supra* note 13, at 3 ("[w]hen people argue over money . . . the argument is likely to have little to do with money"). It could fairly be argued that these same rights and duties are as important in other intimate human relationships that are not ordinarily recognized by the law, such as those of people cohabiting together or those of partners of the same sex. However, since community property law applies only to those either formally married or putatively married, this paper does not discuss such other relationships.

HeinOnline -- 30 Gonz. L. Rev. 238 1994-1995

current management and control provisions. The Article then presents a vision of marital dynamics, and the ability, and advisability, of using law to encourage certain kinds of marital dynamics over others. A detailed critique of the present management and control rules and the model of marriage they portray follows. The critique includes a discussion of the hidden biases of that model—biases that create imbalanced power relationships and thereby maintain women's limited power both in relationships and with respect to property. Finally, the Article suggests specific changes to the current system that would recognize the interdependence of husband and wife while discouraging marital power imbalances, with the goal of creating a model of both equality and interdependence.

II. The Development of Community Property Law in America

A. *The History of Community Property and Its Immigration to America*

Many lawyers tend to think of community property as a runaway sect from the religion of the common law, an outlandish form of ownership that reigns only in a few outlying areas where civilization has not yet been achieved. However, the nine states that have the system in the United States house 68,115,000 people, 27% of the country's population.[16] Internationally, the Netherlands, Belgium, France, Spain, Italy, Quebec, the Philippines, and most of South America have some form of community property law for their married citizens.[17] However, with the exception of Louisiana, American states that have adopted this civil-law scheme for marital property have adopted the common law for everything else in their legal systems.

Under community property law, basically all income and property (excluding property acquired before the marriage and that later acquired by gift or devise) is deemed to be co-owned by the husband and the wife in equal shares, each with a one-half undivided interest in the property.[18] The

16. *See* BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1991.

17. These countries and their various forms of the system are described in Rheinstein & Glendon, *Interspousal Relations*, in 4 INTERNATIONAL ASS'N OF LEGAL SCIENCE, INT'L ENCY. OF COMP. LAW 47 (1973).

18. WILLIAM Q. DE FUNIAK & MICHAEL VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 1 (1971). This distribution, called the ganancial system, operates in the United States. In contrast, in the Roman-Dutch system, all the property owned by each at the time of the marriage, as well as acquired after marriage, is community property. *Id.* In the United States, property that a spouse acquires through gifts or bequests is not community property, and states vary on whether income or gains from separate property is separate or

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community property system originated with the Visigoths,[19] and was first codified in the *Fuero Juzgo* of 693 A.D.[20] Then, as now, the basis for granting co-ownership of property was the assumption that spouses make equal but different contributions to the marriage: "Among the Visigothic tribes the wife worked shoulder to shoulder with her husband to build and keep the home and property. She participated in his battles, was directed toward making the marriage a 'going concern,' to providing food, shelter, and clothing for the family."[21] The community property regime acknowledges that the traditional contributions of wives are valuable even if those contributions are not remunerated:

> The bearing of children must be done by women and the rearing of children is in fact done by them. Twenty of the most productive years taken from the career of a woman plays the same kind of havoc with it economically that the same time would play if taken from the career of a man. Thus not only is the sexual function different, but this difference creates for women a whole new economic and social position.... [T]he average married woman who is bearing and rearing children and keeping house during a good part of her married life has little opportunity "to acquire property," *while the*

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community property. The common ownership theory is the one widely accepted today. However, at one time, different states characterized the wife's interest in community property differently. California, it has been argued, really allotted full ownership to the husband, giving the wife a mere expectancy in the property until her husband predeceased her. Washington held to an entity theory, the idea that the marriage itself held the property for the benefit of the husband and wife. Texas created a trust theory, whereby each of the spouses had a beneficial and equal interest in the property, but the husband held legal title for their benefit. Arizona, Nevada, New Mexico and Idaho all stuck to the double ownership theory, which is most consistent with the system's Visigothic origins. *See generally* Alvine Evans, *The Ownership of Community Property*, 35 HARV. L. REV. 47 (1921).

19. DE FUNIAK & VAUGHN, *supra* note 18, §§ 1, 24.

20. DE FUNIAK & VAUGHN, *supra* note 18, § 2. Centuries after the Visigoths Hegel advocated a theory of common property, common not just to spouses, but to all of the family members, a theory that reflects a notion of individual autonomy subrogated to the interests of the family in a positive manner:

> It is not merely property which a family possesses; as a universal and enduring person, it requires possessions specifically determined as permanent and secure, i.e. it requires capital. The arbitrariness of a single owner's particular needs is one moment in property taken abstractly; but at this moment, together with the selfishness of desire, is here transformed into something ethical, into labor and care for a common possession. . . . This capital is common property so that, while no member of the family has property of his own, each has his right in the common stock.

G.W.F. HEGEL, PHILOSOPHY OF RIGHT 116 (T. M. Knox 4th ed. 1958) (1821). Hegel thought that the husband should serve as the family's head, at least with regard to the family's relationships with others.

21. DE FUNIAK & VAUGHN, *supra* note 18, § 11.1.

HeinOnline -- 30 Gonz. L. Rev. 240 1994-1995

> *opportunity and capacity of her husband remains not only complete in itself but is greatly enhanced by the intangible values of the very home, the making of which has incapacitated the wife.*[22]

Although modern wives may be more likely to work outside the home than their Visigothic counterparts, they are likely to earn much less than their husbands.[23] At the same time, however, even working wives are primarily responsible for child-rearing and home maintenance. One study of working wives in two-job families found that wives did about 75% of the housework tasks and 80% of the domestic management.[24] Community property law assumes that even though their contributions may be different, husbands and wives contribute equally to the marriage and thus are equally entitled to share in its property. In later parts, this Article refers to this underlying principle as the "going concern" theory of marriage.

Spain, which acquired the community property system from the Visigoths, imported it to the United States directly, through Louisiana, and indirectly, through Mexico.[25] By 1869, Louisiana, Texas, New Mexico,

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22. W. J. BROCKELBANK, THE COMMUNITY PROPERTY LAW OF IDAHO 39 (1962) (emphasis added).

23. Traditionally, even full-time working women have less income than full-time working men. In 1991, full-time women workers earned a median income of $21,243, compared with the $31,332 earned by full-time working men. *U.S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States* 1993, at 465. In 1989, in only 18% of marriages did the wife earn more than her husband. Crispell, *More Bacon*, 11 AM. DEMOGRAPHICS 9 (Dec. 1989) (citing *Earnings of Married-Couple Families: 1987, Current Pop. Reports*, Series P-60, No. 165).

24. ARLIE HOCHSCHILD, SECOND SHIFT 276 (1989). The study's couples were, for the most part, from California, a community property state. Hochschild concluded that when time spent doing housework and child care was added to time it took to do a paid job, working mothers worked roughly fifteen hours long each week than their husbands. *Id.* at 3; *see also* Myra H. Strober, *Two Earner Families*, in FEMINISM, CHILDREN, AND THE NEW FAMILIES 161, 169 (S. Dornbusch & M. Strober eds. 1988) (concluding, on the basis of several studies, that depending on the definition of housework used, working women who are married spend an average of 22-23 hours per week on housework, in contrast to 8.5 to 12 hours spent by husbands); LOUIS HARRIS, INSIDE AMERICA 98-99 (1987) (in a poll of husbands whose spouses are employed, 66% reported that the wife does nearly all or the bulk of the work around the house, 28% report that the work is evenly divided, and 5% claim that they do more than their wives).

25. Louisiana, which had been a Spanish territory and is the only state that today maintains a civil law system, kept community property when the United States annexed the area from France in 1803. Roy August, *The Spread of Community Property Law to the Far West*, 3 WESTERN LEGAL HIST. 35, 39-40 (1990). Texas, which had been part of Mexico, adopted community property as its own in 1840, although it broke with its Spanish heritage with respect to the rest of its system of law, adopting the English common law. *Id.* at 49. New Mexico came by the system thanks to General Stephen Kearney, who in 1846 declared the "Kearney Code," that "[a]ll laws heretofore in force in this Territory, which are not

HeinOnline -- 30 Gonz. L. Rev. 241 1994-1995

California, Idaho, Washington, and Arizona were all operating under the community law system. The next state to adopt the system was Wisconsin, which in 1986 intrepidly instituted the Uniform Marital Property Act (the "UMPA"),[26] an updated and expanded version of the community property system.

B. *Traditional Management Rules*

Although traditionally a husband and wife may have owned marital property in common,[27] they did not have equal rights to manage the property. From the *Fuero Juzgo* on,[28] the husband was given full management powers over not only the community property, but his wife's separate property as well.[29] This approach may have been natural for the time, given women's inferior social position—and paralleled the common law[30]—but it set a preference for autonomous management that continues today.[31] It can be argued that because of the husband-as-manager rule, the community property system differed little from the common law system, particularly from the woman's perspective. If, in fact, she had no right to use, buy, sell, lease, give away or otherwise manage community property (including her one-half interest), or her own separate property, the adoption of the system may have

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repugnant to or inconsistent with the Constitution of the United States, and the laws thereof, or the statute laws in force for the time being, shall be the rule of action and decision in this Territory." *Id.* at 59 (quoting *Kearney Code*, 82 (1846)). California copied Texas' law in 1850, Nevada adopted California's act, and Idaho, Washington, and Arizona also followed California's example. *Id.* at 56-62.

26. UNIF. MARITAL PROP. ACT § 22, 9A U.L.A. 144 (1987). The UMPA uses the terms "marital" in place of "community" and "individual" in place of "separate," a replacement that has been criticized as confusing, since the terms' concepts are essentially the same. *See* William A. Reppy, Jr., *The Uniform Marital Property Act: Some Suggested Revisions for a Basically Sound Act*, 21 HOUS. L. REV. 679, 682 (1984). Professor Reppy has noted speculation that "marital" was used in place of "community" for political reasons—some of the drafters may have felt that the Act would be more acceptable if the term "community" was not used. *Id.* at 686. This Article treats Wisconsin as a community property state.

27. States differed on the characterization of the ownership. *See* Evans, *supra* note 18, at 48.

28. *See, e.g., Novisima Recopilación,* Book 10, Title 4 (1805) (carried forward from the *Nueva Recopilación* of 1567).

29. Under Spanish law, the wife maintained control of her separate property except for her dowry, and her *paraphernalia* (the property the wife was accustomed to bring into the marriage), which her husband managed if she so provided. *See generally* DE FUNIAK & VAUGHN, *supra* note 18, § 112.

30. M. SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 14-15 (1986).

31. *See infra* text accompanying notes 55-56.

HeinOnline -- 30 Gonz. L. Rev. 242 1994-1995

had little meaning for the wife until she became divorced or widowed.

The community property system did, however, protect a wife's separate property from some seizures, and this protection may have encouraged legislatures to adopt the system.[32] Examination of the original community property systems as they were adopted in the United States reveals evidence that the legislatures may not have intended to ensure that both spouses participated equally in the ownership of property acquired during the marriage. Rather, they may have intended to give wives' separate estates more protection than they received under the common law. Such protection did not require that wives have the rights normally associated with ownership.[33] Though commentators of community property have lauded community property states for recognizing husbands and wives as equal partners in marriage,[34] without equal rights they weren't equal partners.

From the perspective of protecting the wife's separate property, a parallel can be drawn between community property and the common law system that operated in the eastern states. Both assumed that men were superior to women and granted men correspondingly greater powers over property. In this parallel, the wife's one-half interest in the community can be compared to the common law wife's dower right. Since the community property wife had no power to manage or control the property, her ownership interest in the property, like the common law wife's dower right, did not really come into being until her husband's death,[35] unless they divorced. Actually, the dower rights were arguably broader, as they applied to all lands owned by the

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32. August, *supra* note 25, at 54 (At the 1849 California Constitutional Convention, Henry Halleck advocated the adoption of community property, stating "I would call upon all the bachelors in the convention to vote for it. I do not think we can offer a greater inducement for women of fortune to come to California.").

33. *See* Belan K. Wagner, Comment, *California's New Community Property Law - Its Effect on Interspousal Mismanagement Litigation*, 5 PAC. L.J. 723, 725 (1974). With respect to Texas, it has been argued that:

> [C]loser scrutiny of early Texas marital-property laws reveals no notion of the wife as equal partner. Under Spanish law and Texas law a married woman was considered to have the same disabilities as an infant or idiot. Marriage could at best be characterized in nineteenth-century Texas as a limited partnership with the husband as a general partner and the wife as a limited partner with few rights. . . . The objective of early marital-property law was to create and protect a wife's separate property, not to create community property.

Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 699, 701 (1990).

34. *See* Michael J. Vaughn, *The Policy of Community Property and Interspousal Transactions*, 19 BAYLOR L. REV. 20, 27 (1967); *see also* W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 5 (1971).

35. Though the husband could convey away both spouses' interests while he was alive, he could only devise his half by testament. DE FUNIAK & VAUGHN, *supra* note 18, § 198.

husband during marriage,[36] whereas the community property wife's husband could convey all of their land before his death, leaving the wife with no claim to any of it.[37] If "[p]roperty is the right of any person to possess, use, enjoy, and dispose of a thing,"[38] then the husband-as-manager rule arguably nullified the wife's ownership interest in the community property, at least for the duration of the marriage, since she, like the common law wife, had no such rights.

This is not to say that the principles of community property were identical to those of the common law. The community property states recognized, in theory, the wife as a separate being with an individual interest in the property. In contrast, the theory of the English common law system of marital property was that "[t]he husband and wife are one person in law; that is, the very being of the wife is suspended during the marriage, or at least is incorporated and consolidated into that of the husband."[39] But, despite the differences in the underlying theories, the old management and control provisions of community property law did not give the wife much more power than the common law.

While community property states recognized that wives could have separate property—that property they owned before marriage or acquired by gift or devise—for many decades the right and power to manage and control that property lay solely with their husbands, although community property states protected the wife's separate property from creditors.[40] Until the Married Women's Property Acts were passed, all of the common law wife's personalty became her husband's upon marriage, and he also acquired the management and control of her realty.[41] In both systems, the woman lost complete control of property she brought into the marriage.[42] It was not until 1913 that Texas gave its married women a say in the ownership and control of their own separate estates, although a wife still needed her husband's

36. 2 H. TIFFANY, *supra* note 5, § 487.

37. Unless the conveyance was determined to be in fraud of her rights.

38. Wynehamer v. People, 13 N.Y. 378, 433 (1856).

39. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 (London 1759-65).

40. *See* Joseph W. McKnight, *Texas Community Property Law - It's Course of Development and Reform*, 8 CAL. W. L. REV. 117, 125-26 (1971) (as to Texas); Smith, *supra* note 33, at 701-704 (as to Texas and California); PETER T. CONMY, THE HISTORIC SPANISH ORIGIN OF CALIFORNIA'S COMMUNITY PROPERTY LAW AND ITS DEVELOPMENT AND ADAPTATION TO MEET THE NEEDS OF AN AMERICAN STATE 10 (1957) (as to California); W. BROCKELBANK, *supra* note 22, at 15, 23 (as to Idaho).

41. SALMON, *supra* note 30, at 14-15.

42. *See* Barbara A. Brown et al., Comment, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 946-47 (1971). Although the community property wife's separate property was not available to her husband's creditors, she herself did not have the right to control it.

HeinOnline -- 30 Gonz. L. Rev. 244 1994-1995

consent to convey her separately owned realty and to sell securities.[43] Texas continued to refuse women any right to manage community property, as opposed to their separate property, notwithstanding the wife's one-half ownership share.[44] Thus a husband was free to do what he wished, short of fraud, with both his and his wife's interest in the community property.

Among other powers, husbands in community property states could grant a security interest in the community property to creditors, which could completely extinguish the wife's interest through foreclosure and sale.[45] This power indicates that any intent to protect wives was limited to their separate estate only, for otherwise a wife was completely vulnerable to the fickle management of the husband and his debts. Similarly, some common law states imposed full liability for debts on the wife without allowing her any say in their accumulation.[46]

The assumption in community property states that the husband should be in charge of all of the couple's common property was rarely questioned, if at all, for many decades. For example, a 1967 article blithely remarks that "the community property system vests control of the property in the husband as the power who *due to economic and biological factors* is more practiced and experienced in the acquisition and management of property."[47] It is not clear what those biological factors are, and the economic factors are the natural result of the management policy.

The state legislatures' failure to limit the husband's power over community property might be attributable in part to the nineteenth century idea of "separate spheres." Under the separate spheres model, the wife, the marriage, and the household belonged to their own sphere, apart from that of the commercial world, which was the realm of law.[48] Even before the spheres

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43. McKnight, *supra* note 40, at 125-26.

44. McKnight, *supra* note 40, at 126. Some women urged that the Texas 1913 act should be reformed to handle community property as a partnership, giving each spouse the power to deal with any part of the community without the joinder of the other spouse, much the way the law provides now. However, "most men objected that it would give wives too much control over property generated by the husband's efforts." *Id.* at 130. This attitude may evince resistance to the theory of community property, that each spouse contributes in his or her own way to the marriage, and thus has a common interest in the property. Rather, these men seemed to value little their wives' contributions to the ongoing concern that is marriage. Perhaps, however, they simply didn't want their power over the property to be diluted.

45. August, *supra* note 25, at 36. The wife's separate property, however, was generally not subject to debts incurred by her husband.

46. *See* SALMON, *supra* note 30, at 166-67.

47. Michael J. Vaughn, *The Policy of Community Property and Interspousal Transactions*, 19 BAYLOR L. REV. 20, 45 (1967) (emphasis added).

48. For a discussion of the private/public sphere dichotomy, and its effect on women with respect to the law, *see* N. TAUB & E. SCHNEIDER, *Women's Subordination and the*

HeinOnline -- 30 Gonz. L. Rev. 245 1994-1995

model, however, marital dynamics were considered something that should not be touched by the heavy hand of the law.

For example, states traditionally did not allow litigation between spouses in an intact marriage.[49] Assaults on a wife that might have been otherwise actionable were not punished.[50] Likewise, until fairly recently it was not illegal in most states for a man to rape his wife, and even now many states only narrowly prohibit it.[51] Community property law has also been impatient with domestic disputes. One commentator argued against imposing a standard of care on managing spouses by stating that "[a]bsent some evidence of bad faith, a dispute over what is best for the community is nothing more than an internal disagreement between husband and wife."[52] Since other areas of law, such as contracts and torts, step in to referee "internal disagreements" between persons,[53] it appears it is only the domestic nature of the disagreement that shields it from close legal scrutiny.

As cultural norms about the role of women began to change, however, the provisions themselves changed. The provisions did not move toward a consensus decision-making model, but towards grudgingly granting the wife the same unilateral right to control marital property that her husband already had.[54] The movement is curious, however, because the common law, with its

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Role of Law, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 151-76 (D. Kairys ed., rev. ed. 1990); *See also* Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 178 (1982).

49. *See generally* Note, *Litigation Between Husband and Wife*, 79 HARV. L. REV. 1650 (1966) (explaining that the common rationale was that availability of judicial relief would pose a danger to domestic harmony, a rationale that assumes domestic harmony exists when the law enforced between the spouses is private, rather than public). *See also* Miller v. Miller, 42 N.W. 641, 642 (Iowa 1889) (stating that the judicial reluctance to hear family disputes "is one of the genius of our laws, as well as of our civilization").

50. *See, e.g.*, State v. Rhodes, 61 N.C. 453 (1868) (affirming a husband's acquittal from a charge that he had assaulted his wife with a switch about the size of one of his fingers, stating that the court "will not interfere with family government in trifling cases").

51. *See, e.g.*, Virginia's marital rape statute, where a man will be prosecuted only if he was living apart from his wife at the time of the act, or if he caused her substantial personal injury. VA. CODE ANN. § 18.2-61 (Michie 1988); *see also* MODEL PENAL CODE § 213.1 cmt. 8(c) (1980) (justifying the spousal exclusion from rape as avoiding the "unwarranted intrusion of the penal law into the life of the family").

52. Harry M. Cross, *Equality for Spouses in Washington Community Property Law - 1972 Statutory Changes*, 48 WASH. L. REV. 527, 542 (1973).

53. In fact, the whole body of private law is defined to be "that part of the law which is administered *between citizen and citizen*, or which is concerned with the definition, regulation, and enforcement of rights in cases where both the person in whom the right inheres and the person upon whom the obligation is incident *are private individuals*." BLACK'S LAW DICTIONARY 1076 (5th ed. 1979) (emphasis added).

54. All of the community property states have amended their statutes to remove any express designation of the husband as manager of the community estate. *See* ARIZ. REV. STAT. ANN. § 25-214(B) (1991); CAL. FAM. CODE § 1100(a) (West 1994); IDAHO CODE §

HeinOnline -- 30 Gonz. L. Rev. 246 1994-1995

joint tenancy and tenants-in-common models for co-ownership governed in every community property state except Louisiana. In these forms of co-ownership, no co-tenant can unilaterally affect the interest of the other co-tenants in the property; to bind the whole property all co-tenants must agree.[55] Instead of blindly requiring spouses to agree,[56] the law allowed them to work apart, a model that separated the right hand from the left.

Eight of the nine community property states employ a system called "equal" or "either" management, which means that as a general rule either spouse can sell, dispose, lease, give away or otherwise transfer the interests of both spouses in co-owned marital property without notifying or consulting the other spouse. Several states carve out certain transactions to which both spouses must consent. These generally include transactions involving real property and, to a lesser extent, those involving household furnishings or personal effects.[57] Several states also have exclusive management provisions that vest sole power to manage certain community property in one spouse.[58] These generally apply only to businesses, but may also apply to certain titled forms of property and partnership and stock ownership interests.[59]

32-912 (1983 & Supp. 1993); LA. CIV. CODE ANN. art. 2346 (West 1971 & Supp. 1994); NEV. REV. STAT. § 123.230 (1991); N.M. STAT. ANN. § 40-3-14(A) (Michie 1978 & Supp. 1993); TEX. FAM. CODE ANN. § 5.22 (West 1994); WASH. REV. CODE § 26.16.030 (1992); and WIS. STAT. ANN. § 766.51 (West 1993).

55. *See supra* note 7.

56. Except with respect to some transactions involving real estate, household furnishings, and sometimes gifts, where joinder was required. *See infra* notes 143-74 and accompanying text.

57. All states require joinder for at least some real estate transactions. *See* ARIZ. REV. STAT. ANN. § 25-214(C)91) (1994); CAL. FAM. CODE § 1102(a) (West 1994); IDAHO CODE § 32-912 (1983 & Supp. 1993); LA. CIV. CODE ANN. art 2347 (West 1971 & Supp. 1994); NEV. REV. STAT. §§ 123.230(3), (4) (1991); N.M. Stat. Ann. § 40-3-13(A) (Michie 1978 & Supp. 1993); TEX. CONST. art. XVI (West 1994); WASH REV. CODE § 26.16.030(3) (1992); and WIS. STAT. ANN. § 766.51 (West 1993). States that require joinder for certain transactions involving household goods or personal effects include California, CAL. FAM. CODE § 1100(c) (West 1994); Louisiana, LA. CIV. CODE ANN. art. 2347 (West 1971 & Supp. 1994); Nevada, NEV. REV. STAT. § 123.23095) (1991 & Supp. 1993); and Washington, WASH. REV. CODE § 26.16.030(5) (1992). For further discussion of these statutes, *see infra* text accompanying notes 145-64.

58. *See* CAL. FAM. CODE § 1100(d) (West 1994); LA. CIV. CODE ANN. art 2350 (West 1971 & Supp. 1994); NEV. REV. STAT. § 123.230(6) (1991); and WASH. REV. CODE § 26.16.030(6) (1992). For further discussion of these statutes, *see infra* text accompanying notes 180-87.

59. *See* N.M. STAT. ANN. § 40-3-14(B) (Michie 1978 & Supp. 1994) (a spouse named in the title to a piece of community property has the sole power to manage that property); LA. CIV. CODE ANN. art 2351 (a spouse has the exclusive right to manage, alienate, encumber or lease movables issued or registered in that spouse's name), and art. 2352 (a spouse who is a partner has the exclusive right to manage the partnership interest) (West 1971 & Supp. 1994); CAL. FIN. CODE § 851 (West 1994) (a bank account by or in the name

HeinOnline -- 30 Gonz. L. Rev. 247 1994-1995

Texas, instead of using an "either" system of management, divides property into "exclusive" management property and "joint" management property. A spouse has the exclusive right to manage his or her exclusive management property, which is all the property that would have been that spouse's property if single (such as earned income). The spouses jointly manage all other community property and exclusive-management property that has become mixed in with either exclusive property of the other spouse or with joint management property.[60]

Only two of the community property states statutorily impose a duty on a spouse who manages community property.[61] Although other states have cases describing a spousal duty, it is weak.[62] Only California spouses expressly must act pursuant to a fiduciary duty; a duty that includes certain procedural obligations and could possibly impose some sort of duty of care.[63] In other states a spouse, acting unilaterally, can act as carelessly as he or she likes.

How do these laws look when held up to research about marriage? Part III discusses the sociological and psychological aspects of marriage, the relationship between property, money and power in the context of marriage, and the advisability of attempting to manipulate the relationship with rules of law.

III. A VISION OF MARRIAGE

A. *A General Approach to Marriage and the Law*

Community property's management and control provisions have drifted from the "going concern" theory of community property. The provisions focus on autonomy, ignoring the interdependence of the behavior of husband and wife upon each other and meshing property transactions with other aspects of marriage. The management and control provisions should instead encourage both spouses to participate in transactions so that the transactions would manifest each individual's personhood as it develops in relation to the other's, and the independent and shared goals for the marriage. In sum, by

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of a married person shall be held for the express benefit of that person).

60. TEX. FAM. CODE ANN. § 5.22 (West 1994).

61. CAL. FAM. CODE § 1100(e) (West 1994); WIS. STAT. ANN. § 766.15(1) (West 1993).

62. Case references to a duty of good faith seem to reduce the duty to one merely to refrain from fraud. See *infra* note 194 and cases cited therein.

63. The statute requires spouses to act "in accordance with the general rules governing fiduciary relationships which control the actions of persons having relationships of personal confidence as specified by Section 721." CAL. FAM. CODE § 1100(e) (1994). As these general rules are applied by courts to disputing couples the exact contours of the fiduciary duty should become clearer.

HeinOnline -- 30 Gonz. L. Rev. 248 1994-1995

advocating that both spouses should participate in marital property decisions, the law can assist each spouse in developing not just as an individual but also his or her role in the marriage.

The community property system assumes that the marriage is a community to which each spouse contributes in his or her own way, and that each spouse accordingly should have an equal share of property.[64] Accordingly, the system recognizes not only the individual personhood of each spouse, but also the existence of the marriage relationship and its effect on those individuals. That is, the regime recognizes that the husband and wife are each separate individuals by recognizing that each contributes, separately but equally, to the marriage, and also recognizes the marriage itself—the community—as the recipient of those contributions.[65] These recognitions of the husband, the wife, and the marriage distinguish the community property system from the common law system, which envisions the husband, the wife and the marriage as united in one corpus.

The community property system's conception of marriage finds support in psychological theory, which finds that the relationship of marriage has its own effect on each of the marriage partners. A recent work on personal development theory describes marriage partners as "organiz[ing] themselves as parts of a dyadic whole, differently from the way in which they would organize themselves on their own."[66] Another recent work discusses the same idea this way: "All couples develop a character of their own - unique, idiosyncratic, and distinct from the character of either individual partner . . . In time, every couple's character becomes as distinctive as a fingerprint."[67]

The marriage relationship and its effects on the husband and the wife are not static, but rather change over time as the partners shape each other, mutually growing in a common process.[68] Neither partner can change independently of the other partner,[69] and thus each partner is influenced not only by the other partner, and each partner's influences on the marriage, but

64. *See supra* notes 18-24 and accompanying text.

65. The term enterprise is not used to characterize community property marriages as individual legal enterprises. Though some states at one time so denoted the marriage, that theory is no longer accepted. *See generally* Evans, *supra* note 18.

66. JIIRG WILLI, GROWING TOGETHER STAYING TOGETHER: PRESERVING MARRIAGE AND FAMILY IN THE FACE OF PERSONAL CHANGE 123 (1992). Dr. Willi, a Swiss psychiatrist, proposes viewing personal development with an "ecological" approach rather than thinking of it in isolation. *Id.* at vii.

67. BARRY DYM & MICHAEL GLENN, COUPLES: EXPLORING AND UNDERSTANDING THE CYCLES OF INTIMATE RELATIONSHIPS 130 (1993) (asserting that each couple's pattern through the stages is individual to that couple).

68. WILLI, *supra* note 66, at 128, 131.

69. WILLI, *supra* note 66, at 41; DYM & GLENN, *supra* note 67, at 9 (asserting that a couple's social and historical surroundings will also influence their development).

HeinOnline -- 30 Gonz. L. Rev. 249 1994-1995

in turn by the marriage itself in a spiral of effects.[70] It is not just the individuals themselves that develop, but the marriage too "develops a richness and complexity, which expresses the flowering of its own character."[71]

The interconnection of the spouses and their marriage may be the social and psychological reality, but it presents unique problems.[72] Unlike the Supreme Court, a couple who disagrees does not have a tie-breaker.[73] However difficult consensus may be, it avoids the domination that can arise when one spouse dictates decisions to the other. Such consensus, according to the researchers, is necessary for the marriage to develop properly,[74] and any power imbalance will make the relationship rigid and stultified.[75]

What does the psychological construct of marriage have to do with community property? The Visigoths, at some level, recognized the interdependence of the spouses and based a system of property on that interdependence. Unfortunately, for many centuries the perception of male superiority meant women had very little legally-sanctioned right to influence property decisions, and that power imbalance no doubt resonated in other aspects of marriages. Nonetheless, the underlying conception of marriage as a going concern can be dusted off and inspected in light of the current conception of couplehood. The system of law, and its management and control provisions, can acknowledge the myth of complete autonomy, and instead reflect reality by encouraging participation instead of power, convergence instead of divergence. Though property transactions may only play a small role in a couple's development, they can influence other parts of the marriage, because in an integrated system no one partner's action can avoid influencing the other partner. Thus, the laws governing such transactions can influence more than just a couple's property, but its overall development as well.

The importance of the relationship between a marriage's development and property shouldn't be overlooked; property itself can be a necessary part of development. Professor Margaret Jane Radin posits that "[t]o achieve proper self-development - to be a *person* - an individual needs some control over resources in the external environment."[76] That idea can be extended to property common to husband and wife. For each spouse to achieve proper

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70. WILLI, *supra* note 66, at 122; DYM & GLENN, *supra* note 67, at 130-31, 175.

71. DYM & GLENN, *supra* note 67, at 175; Dr. Willi describes this concept as the "suprapersonal processes . . . and the co-evolution of our relational networks." WILLI, *supra* note 66, at vii.

72. Assuming that such creatures really exist.

73. *See* DYM & GLENN, *supra* note 67, at 14.

74. DYM & GLENN, *supra* note 67, at 21.

75. DYM & GLENN, *supra* note 67, at 11.

76. Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982) (emphasis added).

HeinOnline -- 30 Gonz. L. Rev. 250 1994-1995

self-development, and for the marriage itself to achieve proper development, both spouses need some control over the family's property. If only one spouse has control, whether through express law or through mere circumstance, then the development of the marriage will suffer. The marriage's interactions with property and with others regarding that property will over-embody the personality of the acting spouse, retarding that of the other. In the symbiotic model of marriage described above, the asymmetry of power will spread to the development of the marriage itself and will rebound not only to the other spouse, but to the acting spouse as well. The marriage will walk with a limp.

B. *Money, Marriage, and Power*

The previous section discussed what many social scientists perceive to be the reality of marriage, that it is not just two individuals under one shared umbrella. Rather, marriage is a constantly shifting system in which each partner's personality and behavior shape and are shaped by the personality and behavior of the other spouse and the couple's collective identity. To use an admittedly fanciful analogy, the marriage is less like a pod with two peas then like a stew of Beef Bourguignon. The stew has in it wine and meat. Though each can be identified within the finished dish, each has been flavored by, and altered by, the other. The wine simultaneously becomes brothy as it tenderizes the beef. It is this mutual effect that makes the dish a different, and possibly more satisfying, meal from one of mere beef and wine.[77]

How do money and power relate to each other in such a system? Research confirms that "power over matter begets personal power."[78] In a comprehensive study of American couples, Philip Blumstein and Pepper Schwartz, two psychologists, examined 12,000 questionnaire responses on the subject of couples and their money, work, and sex.[79] The two concluded that money[80] has a profound impact on the power relationships of all couples,

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77. A common way to sum up this concept is that the whole is greater than the sum of the parts.

78. *See* K. RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS 107 (O. Kahn-Freund ed. 1949 ed.).

79. The results are summarized in BLUMSTEIN & SCHWARTZ, *supra* note 15, at 19. In addition to the questionnaires, they conducted in-depth interviews with 300 couples, including 120 heterosexual couples of which 78 were married and 42 cohabiting, 90 lesbian couples, and 90 gay male couples. BLUMSTEIN & SCHWARTZ, *supra* note 15, at 17-19. These couples came from New York City, San Francisco, and Seattle, the latter two of which are located in community property states. BLUMSTEIN & SCHWARTZ, *supra* note 15, at 19.

80. The study didn't involve other forms of property.

HeinOnline -- 30 Gonz. L. Rev. 251 1994-1995

except, notably, lesbian couples.[81] The effect on power has a gender bias, because "[m]en . . . have a long tradition of feeling they have the right to exercise control if they have proved their worth by being financially successful."[82] Accordingly, marriages do not operate on a strict money equals power equation, because even if a wife earns more money than her husband, she will not necessarily acquire a proportionate amount of power.[83]

Blumstein and Schwartz's research confirmed that of previous researchers, who had also identified a link between men's greater earnings to marital power. They concluded that wage disparities between men and women are related to the disparity of power within the marriage, and that it is more than mere coincidence that husbands generally have both more income and financial resources as well as greater power and control within the family.[84] The power influences the management. For example, the researchers found that many wives do the shopping for the family, and though that might indicate that they have a good deal of power over money management, the researchers determined that the control is assigned and not a sign of a more fundamental power.[85] The husband understands his authority to include the right to delegate to his wife.[86]

This study is consistent with a later study by Jan Pahl of money management among married couples in England.[87] She analyzed the marriages in terms of four categories: wife-controlled, wife-controlled pooling, husband-controlled, and husband-controlled pooling.[88] In most of the marriages, the wife earned less than 30% of what her husband did. In 61 of 102 of the couples, or 60%, the husband controlled the finances. This statistic does not sound too out of line until one examines the data to learn that in 69% of the marriages where the wife's earnings were less than 30% of

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81. BLUMSTEIN & SCHWARTZ, *supra* note 15, at 53-55; *see also* MARCIA MILLMAN, WARM HEARTS & COLD CASH: THE INTIMATE DYNAMICS OF FAMILIES AND MONEY 5 (1991) (stating that "[m]oney is a primary source of power in relationships").

82. BLUMSTEIN & SCHWARTZ, *supra* note 15, at 55.

83. BLUMSTEIN & SCHWARTZ, *supra* note 15, at 96.

84. BLUMSTEIN & SCHWARTZ, *supra* note 15, at 55. They also found that in gay couples, though not in lesbian, one partner gains an advantage over the other even when there is no gender difference. *Id.* These findings support the conclusion that men place much more emphasis on money as power than women do.

85. BLUMSTEIN & SCHWARTZ, *supra* note 15, at 63.

86. BLUMSTEIN & SCHWARTZ, *supra* note 15, at 63. Though the researchers did not comment on the reasons why so many wives did the shopping for the family, it wouldn't be unreasonable to speculate that most routine family shopping is a chore, and that women are more likely to do it just as they are more likely to do most household chores.

87. JAN PAHL, MONEY & MARRIAGE (1989). England, of course, has a common law, not a community property, system of marriage.

88. Jan Pahl, *Household Spending, Personal Spending and the Control of Money within the Marriage*, 24 SOC. 119 (1990).

HeinOnline -- 30 Gonz. L. Rev. 252 1994-1995

her husband's, the husband controlled the finances.[89] Accordingly, although the inequality of control was not too great in each particular marriage, women who did not make much in the way of monetary contributions to the marriage participated less than those who did, indicating again that superior earnings are rewarded with dominant control.[90]

With regard to management, Pahl found many marriages where the husbands controlled and managed finances and the wives' access to money was severely limited.[91] However, wives were, in general, more likely to be seen as more careful than their husbands, both by themselves and their partners.[92] Pahl also affirmed a previous study that dismantled the stereotype of the housewife being extravagant—"'a device that helps husbands maintain their dominant position by undermining the value of their wives' contribution to the management of resources.'"[93]

Husbands and wives allocated their earnings differently, too. "The great majority of women made their wages available for household consumption."[94] Husbands, in contrast, were more likely to have money for personal spending and for leisure than were wives.[95] Like Blumstein and Schwartz, Pahl found that overall, husbands' greater earning power translated into greater control over finances and greater power in decisionmaking within the family.[96]

The higher wage-earner enjoys other advantages too. Another study by Jan Pahl indicates that resources are distributed and consumed unequally in the family and that the extent of this inequality is related to the economic contribution of family members.[97] Most significantly, what control women might appear to have may be illusory. "Even in cases where wives manage household finances, where the husband hands his paycheck over to his wife . . . the woman does not necessarily control finances. Ultimately, husbands

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89. *Id.*

90. *See* Carol B. Burgoyne, *Money in Marriage: How Patterns of Allocation both Reflect and Conceal Power*, 38 THE SOC. REV. 634, 655 (1990) (claiming that "perceived ownership of earned income legitimizes a pattern of control which can disadvantage a partner whose contribution is less visible because it is unpaid").

91. PAHL, *supra* note 87, at 168-69.

92. PAHL, *supra* note 87, at 102.

93. PAHL, *supra* note 87, at 103 (quoting G. ALLAN, FAMILY LIFE 94 (1985)).

94. PAHL, *supra* note 87, at 129. Pahl states that "[p]ut simply, if a pound entered the household economy through the mother's hands more of it would be spent on food for the family than would be the case if the pound had been brought into the household by the father." *Supra* note 87, at 137.

95. PAHL, *supra* note 87, at 148.

96. PAHL, *supra* note 87, at 169.

97. *See* Jan Pahl, *Patterns of Money Management within Marriage*, 9 JOURNAL OF SOC. POL'Y 313, 335 (1980); Jan Pahl, *Earning, Sharing, Spending: Married Couples and Their Money*, *in* MONEY MATTERS: INCOME, WEALTH AND FINANCIAL WELFARE 195 (R. Walker & G. Parker eds. 1988).

HeinOnline -- 30 Gonz. L. Rev. 253 1994-1995

have veto power by withholding wages."[98] These husbands, like the husbands in Blumstein and Schwartz's study,[99] allow their wives to manage money, but it is not a wife's entitlement. Furthermore, "[e]ven in situations where women's earnings are essential to family upkeep, if her contribution is low in absolute or in relative terms, it may be viewed as supplemental, seen by a spouse as augmenting his household allowance."[100] Thus, the net result is that women's work, whether compensated or not, is not a visible contribution and can be treated quite disparagingly within the family. More money, in contrast, means more power.

Money plays a daily part in couples' lives,[101] and the findings that power relationships reflected in money management have implications for the marriage as a whole is consistent with the idea that the marriage is an integrated process from which one part cannot be isolated. The researchers agreed that couples who share control over money have happier, more fulfilling relationships overall.[102] Imbalanced power, in contrast, imposes costs on both spouses. For a healthily developed marriage, couples need to negotiate everything, including money. Blumstein and Schwartz point out that there are two ways to share management: (1) couples can decide jointly on each item or (2) they can agree that each person will go his or her own way and be individually responsible for personal decisions.[103] Whichever way, however, it is important for people in any kind of a relationship to feel they are participating equally in financial decisions.[104] "It may be tedious for couples to create budgets together and decide jointly what to spend on everything from groceries to entertainment to clothes and even furniture. And it may not be possible for the two partners to do all their spending separately and not impinge on each other's decisions. When couples *do* take the time to share control over money management, they seem to have happier, calmer relationships."[105] Similarly, Jan Pahl found male control of money to be

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98. Barbara Hobson, *No Exit, No Voice: Women's Economic Dependency and the Welfare State*, 33 ACTA SOC. 235, 236 (1990).

99. *See supra* notes 79-86 and accompanying text.

100. Hobson, *supra* note 98, at 238 (citation omitted).

101. "Money management is a likely area of conflict for couples. It involves daily decisionmaking, which means that differences in financial values come to the surface." BLUMSTEIN & SCHWARTZ, *supra* note 15, at 93.

102. BLUMSTEIN & SCHWARTZ, *supra* note 15, at 93 ("[a]mong all four kinds of couples, partners who feel they have equal control over how money is spent have a more tranquil relationship").

103. BLUMSTEIN & SCHWARTZ, *supra* note 15, at 89.

104. BLUMSTEIN & SCHWARTZ, *supra* note 15, at 89.

105. BLUMSTEIN & SCHWARTZ, *supra* note 15, at 93 (emphasis in original); *see also* DYM & GLENN, *supra* note 67, at 11.

HeinOnline -- 30 Gonz. L. Rev. 254 1994-1995

significantly associated with the unhappiness of *both* husband and wife with the marriage.[106]

Sharing management is not easy. Achieving intimacy, trust and interdependence "are critical for creating commitment, but may interfere with the individual rights of partners."[107] The challenge of compromise may cause each partner to sacrifice his or her own interests to a decision that benefits the marriage as a whole.[108] The ability to affect another so thoroughly brings with it a special responsibility; one's own development should not occur at the cost of another's.[109] The responsibility is one owed not just to the other spouse, but also to oneself, because the feedback effects of an action will rebound to the actor. The sacrifice of some individual autonomy in the name of balanced power, however, may well pay off with a happier marriage.

C. *Law, Social Engineering, and the Dynamics of Marriage*

The social and psychological reality of marriage is one question, whether the law should tell married couples how they should manage their property is another. As noted above,[110] the law has been hesitant about governing intra-family relations. However, by avoiding regulation, the law allows families to be "little empires for the tyrannical and capricious exercise of power by some members over others, discrete centres of coercion conveniently shielded from public scrutiny."[111] Thus, the law can be just as powerful in its absence as in its presence—when silent it implicitly endorses as the ruler the member (or members) of the family with the most power to coerce others into acceding to their rules.

The vision of family as a little empire clashes with the romantic and wistful hope that the home is a peaceful haven, sheltering us from the tempestuous winds of the real world. We are accordingly reluctant to examine closely the family dynamics that fester underneath the rock of family unity:

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106. PAHL, *supra* note 87, at 177.

107. BLUMSTEIN & SCHWARTZ, *supra* note 15, at 109. The authors describe the critical period of discovery in the beginning years of a marriage, when couples have to come to terms with each other's spending habits and work out a way to coordinate their financial values and styles. BLUMSTEIN & SCHWARTZ, *supra* note 15, at 309.

108. BLUMSTEIN & SCHWARTZ, *supra* note 15, at 77.

109. WILLI, *supra* note 66, at 4 ("[i]f self-realization occurs only at the expense of our fellow human beings, then little that is positive can be gained from it."); DYM & GLENN, *supra* note 67, at XIII.

110. *See supra* notes 48-52 and accompanying text.

111. Pamela Symes, *Property, Power and Dependence: Critical Family Law*, 14 J.L. & SOC'Y. 199 (1987).

HeinOnline -- 30 Gonz. L. Rev. 255 1994-1995

> Everything in us resists the idea that this sacred little circle could be disturbed by conflicts of interest, competition, and rage. But cruelty is a part of human nature as well as love, and the family, with its intense attachments, dependencies, and power imbalances, is a breeding ground for all kinds of private cruelties - and one that is hard to leave.[112]

If the formal law sanctions, by its absence, the private law, then it already impacts intra-marital decisions, and the question is no longer whether, but how it should govern. To answer that question, we should first access the underlying social reality through the social sciences. That reality can then be compared and contrasted to the model assumed by the law and the costs and benefits that result when the law is applied to that model. These results can then be evaluated in light of policies based on the social reality, and if they are not favorable to those policies, the law can be adjusted to more closely track the reality and the policies.

In the case of marriage, the social reality is that the husband, the wife and the marriage constantly develop and change from the interactions among them.[113] The social reality is not that the husband and wife are completely autonomous and self-contained units that function separately.[114] However, the "either" system of management and control implements just such a fiction. By ignoring the interrelationship of the spouses, the law unwittingly encourages "unilateral" acts that may well be driven by the more powerful spouse and will affect, emotionally and economically, the other spouse and the marriage.

Though balanced power may lead to happier marriages, the law is not all powerful in its ability to advocate a particular social model. Certainly many have argued that changing the formal law may have little effect on the systems of customary law that hide beneath the shelves of statutes. Several would agree with Bea Ann Smith, a commentator on community property law, that "laws mirror changes in behavior, but rarely shape societal change."[115] But if law has no effect on social behavior then it is, perhaps, pointless to have law at all. In any case, at the very least the law should not, whether by its absence or presence, support the arbitrary power of some over others. Instead, it should be "organized and wielded so as to combat and offset the exploitation and domination of some groups by others."[116] In the case of law involving intimate human relationships, such as marriage, the law

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112. MILLMAN, *supra* note 81, at 38.

113. *See supra* notes 65-75 and accompanying text.

114. *See supra* notes 65-75 and accompanying text.

115. Smith, *supra* note 33, at 735 (quoting K.N. Llewellyn, *Behind the Law of Divorce*, 32 COLUM. L. REV. 1281, 1283 (1932)).

116. Fisher, *The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights*, *in* A CULTURE OF RIGHTS 266, 315 (1991).

HeinOnline -- 30 Gonz. L. Rev. 256 1994-1995

should, at a minimum, quell abusive power of one over another—whether the power is physical or economic. Current community property law does not discourage abuse of power, and in that way differs little from that of centuries ago; the only real difference is that now wives, in addition to the husbands, can abuse power.[117]

The law, however, should do more than merely withdraw from unfavorable policies, it should also increase people's opportunities to develop individually and within the networks of relationships. Although changes to the law may not completely translate to society, we can take advantage of whatever transformative capacity exists. If the law is a belief system that helps define the role of the individual in society and relations with others,[118] then it can promote fulfilling, healthy roles for people and encourage them to relate in particular ways, and not in others. The law should foster the flourishing—and perhaps even the mutual nurturing—of human beings,[119] which means not just encouraging individual freedom, but also caring, responsibility, and consideration of others, particularly those to whom one is connected, whether legally or morally. Such responsibility should be cast not just as an obligation, but as important to personal and inter-personal growth. One concrete move towards such a goal would be to recognize that coercion can kill relationships,[120] and urge people to resolve their disputes through discourse, not fiat.

One goal of the law should be to combat coercion and domination, another should be to repair indefensible inequalities in the society. Current laws enforced against wife-batterers try to combat coercion and domination because much of that behavior stems from the societal belief that women are inferior to men.[121] Similarly, the 1964 Civil Rights Act[122] attempts to combat culturally embedded racism. The law should recognize that certain attitudes are prevalent in our society, and that these attitudes can lead to behavior that subordinates some groups to others, on a broad scale, and one individual to another in certain situations. If the law cannot actually change behavior or attitudes, the law can provide a method of redress to the injured person to

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117. *See generally* Part III. B., C. and accompanying text.

118. David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 577 (1984).

119. Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1851 (1987).

120. ROGER FISHER & SCOTT BROWN, GETTING TOGETHER: BUILDING RELATIONSHIPS AS WE NEGOTIATE 133-34 (1988). The authors discuss the damage that coercion can do to relationships, and stress that "in contrast to an agreement that I have been persuaded to accept, a coerced outcome is likely to be less easy to implement and more likely to break down." *Id.* at 134.

121. Smith, *"Get Out of My Face, or I'll Kill You,"* THE BOSTON GLOBE MAGAZINE, Jan. 2, 1994, at 14-17.

122. 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1988).

HeinOnline -- 30 Gonz. L. Rev. 257 1994-1995

compensate, in some ways, for the culturally-based wrongs suffered, just as the law provides remedies for more ordinary torts.

In summary, law exists with social reality and should recognize social reality in its principles, perhaps by endorsing it or perhaps by changing it, or a mixture of both. In trying to change the social reality the law should consciously seek to discourage arbitrary power and domination by one person over another, to promote personal and interpersonal growth, and to repair social inequalities. Community property law partially recognizes the interconnectedness of husband and wife by mandating that all property coming into the marriage should be shared equally. However, the management and control provisions ignore this interconnectedness, and instead view the spouses as autonomous beings. This view, unwittingly or not, fosters domination and imbalance of power, which is exactly what the law should discourage. In addition, the operation of the current provisions may well exacerbate power and economic inequities between men and women. By changing the management and control provisions to recognize the interconnectedness of the family, the law can alleviate power imbalances, encourage interpersonal growth and more fulfilling marriages, and repair some of the social inequity that exists in general with respect to women's curtailed control over property.

D. *A Proposed Direction of Change for Community Property Law*

The previous section described law and its relationship to human behavior in general, and the goals of law in encouraging or discouraging behavior. Here, the discussion turns towards the specific area of management and control of community property. How can we change the management and control provisions of community property law to encourage the full development of each spouse and the marriage and discourage arbitrary, unilateral actions? The first step is to recognize that for a spouse to participate in a transaction,[123] the spouse must know about the intended transaction. Furthermore, each partner needs all available information regarding the property and the proposed transaction and should have the opportunity to discuss the transaction with the other and the right to accede to the final decision. The result of notice, disclosure, participation and consensus may well be to change the course of the property's destiny, and the course of the marriage itself, in a manner that considers everyone's wishes.

Though this Article has used the phrase "management and control" as a

123. Used in this sense, transaction encompasses all modes of dealing with property, including storing it in a closet or putting it in a bank, and not just conveyances, leases, or other forms of changing the actual ownership form of the property.

HeinOnline -- 30 Gonz. L. Rev. 258 1994-1995

single aspect of community property law, the management of decisions can be distinguished from the control of decisions. Naturally, most potential transactions will originate with one spouse, not simultaneously with both, and it may be that the partners agree that one spouse will be in charge of managing the marriage's property, or some part of that property, in the sense that the spouse will consider various transactions in light of the family's resources and needs and propose courses of action. Once the decision is made by both spouses, that spouse may well be the one to implement the decision and follow through on it. But there should be a stage in the process in which both spouses discuss and consider a proposed transaction and its alternatives, with the idea that no action will be taken unless both agree to it.

This is not to say that both spouses will favor every transaction. As with most negotiations, partners will trade concessions on issues. However, the occasion for decision control will protect each spouse from transactions which that spouse strongly opposes and will allow the spouses to jointly consider the proposed transaction in the context of the marriage and its whole historical record of property transactions. The process also allows the couple to generate an array of possible resolutions, so the final outcome may be one that evolved from the discussion and was not obvious at the outset. Over the long run, the pool of the couple's transactions will take on aspects of the personalities of both partners as they mature in the milieu of the marriage.

To carry out meaningful decision control, each spouse should have all available information regarding the property and the proposed transaction. Sometimes that information will be limited, but discussing the transaction may reveal a gap of material information that the decision-managing spouse has not seen. The other spouse may consider some facts more important or more trivial than the decision-managing spouse or may point out factors regarding other property transactions that bear on the decision. The spouses may agree to a delay to gather more facts, or to await other events that may bear on the issue.

To illustrate the information process in a domestic context, imagine a couple that plans to go out to dinner at a restaurant. The wife, on the way home that night in her car, hears *La Bomba* on the radio, and dreams about a sizzling plate of chalupas, accompanied by a salted frozen margarita. Analogizing to current community property management rules, she could go home, pick up her husband, and take him to a Mexican restaurant without ever discussing the matter with him. Thus, he would have no decision management and no decision control.

However, if the wife first discussed the matter with him, he might mention that when he got on the scale that morning he had sworn off Mexican food for at least a month, vowing to eat nothing but clear soups and croutonless salads. He would be miserable at a Mexican restaurant. He would either joylessly watch his beloved tuck into a calorie-laden meal of

HeinOnline -- 30 Gonz. L. Rev. 259 1994-1995

beans, meat, and cheese trying desperately not to touch the basket of tortilla chips so temptingly within reach, or break his vow and grumble all the way home about how his wife is always trying to sabotage his fitness plans. If it were discussed, they could choose another restaurant, perhaps one of those eclectic ones that prepares food, with varying success, from many different cultures. She could have her margarita and he could have his light beer or perhaps, they could alternate—Mexican tonight, sushi tomorrow. They can each get what they want.

The above example shows the difference between a formal, adversarial and hierarchical mode of dispute resolution, where the party with the ability to do so simply enforces his or her will on the other, and consensus decisionmaking. Consensus decisionmaking does not always mean agreement, in the sense that both parties are in favor of a particular outcome. It does mean that each party had an opportunity to contribute to and develop the process of the decision and decide for his or her own reasons that the final outcome was at least acceptable. But if either party has the power to unilaterally foist the decision on the other, with no more ado, then the final decision might not reflect any participation of the other spouse's personality or desires, yet will impact that spouse nonetheless.

Which spouse is more likely to have the power to autocratically enforce decisions? One of the oddities of our society is that only certain forms of work are rewarded with property, i.e., income. The management and control provisions advance the interests of those with better access to property. Accordingly they work to the benefit of those whose work is compensated with property or with relatively more property. Those who work in industry, corporations or businesses are remunerated with property, whereas those who work inside the home—often women—generally are not. Furthermore, compensation often does not correlate with worth or with effort.

Since the concept of marriage behind the community property system is that each spouse contributes equally to a going concern regardless of whether that contribution is in the form of earned property or otherwise, the provisions, by benefiting those that it does, undermine the very point of the system. Though this imbalance may be partly attributable to the influence of the common law form of property that prevails in most of the United States, more of it is attributable to the reason that the husband was for so long the formally designated manager of the community estate: our society deems the work, intellect and abilities of women to be inferior to those of men. Instead of exacerbating that prejudice, the management and control provisions should fight it and correct the diminished power of women and their access to and control of property. In other words, one question to ask is which outcome might best improve the position of women.[124] The next section discusses the

124. *See* Fisher, *supra* note 116, at 315-16.

HeinOnline -- 30 Gonz. L. Rev. 260 1994-1995

present provisions as the background for proposing these sorts of changes.

IV. Analysis and Critique of Present Management and Control Provisions

Management is about power: the power to use, administer, convey, encumber, give away, invest, spend, and sell community property. It may well be that one of the most important powers is the power to spend community funds, yet oddly this power is not expressly addressed by any of the statutes governing community property management.

The present provisions can be broken up into the following topics: either/equal management; situations where both spouses must join in a transaction; exclusive management provisions; and the duties, or standard of behavior, of the acting spouse. In addition, this part will discuss the liability of each spouse's share of community property for debts incurred by the other, and the possibility for spouses to opt out of the community property system.

A. *Equal/Either Management*

One might expect, given the common law structure of the community property states' legal systems (with the exception of Louisiana),[125] that gradually the management and control provisions would have moved toward those of other common law forms of common ownership, like joint tenancy and tenancy in common. In such a form, each spouse could have acted individually only with respect to his or her own one-half share in each item of community property. However, the law veered away from these traditional forms, and today eight of the nine community property states[126] impose a general rule that either spouse may singly manage the whole of community property. These states have what is variously called "equal" or "either" management. In Arizona,[127] California,[128] Idaho,[129] Louisiana,[130] Nevada,[131] New Mexico,[132] Washington[133] and Wisconsin,[134] either spouse may manage both spouse's shares of community property.

Texas does not have equal/either management, but instead has a unique

125. *See supra* text accompanying notes 32-46.
126. Texas is the nonconformist. TEX. FAM. CODE ANN. § 5.22 (West 1993).
127. ARIZ. REV. STAT. ANN. § 25-214(B) (1994).
128. CAL. FAM. CODE § 1100(a) (West 1994).
129. IDAHO CODE § 32-912 (1983 & Supp. 1993).
130. LA. CIV. CODE ANN. art. 2346 (West 1971 & Supp. 1994).
131. NEV. REV. STAT. § 123.230 (1991).
132. N.M. STAT. ANN. § 40-3-14(A) (Michie 1978 & Supp. 1993).
133. WASH. REV. CODE § 26.16.030 (1986).
134. WIS. STAT. ANN. § 766.51 (West 1993).

system of joint management and sole management. It provides that each spouse has the sole right to manage, control, and dispose of that community property that he or she would have owned if single, including but not limited to the personal earnings of the spouse, along with revenue from the spouse's separate property, and the increase and mutations of, and revenue from, *all* property subject to that spouse's sole management,[135] regardless of whether it's real or personal property.[136] All other property is joint management property, transactions with which require both spouses' consent.[137]

The term "equal management" benefits from its egalitarian and opportunity-filled tone. Either spouse can do as he or she will with equal management community property, subject only to the flimsy limitation that such spouse not defraud the other. However, the egalitarian surface can hide unattractive power differentials that might exist in a marriage. Who will have the most opportunity to put a personal stamp on community property? The one who acts first. After all, if the couple owns a gold coin collection, and one spouse wants to keep it, and the other wants to sell it, the contest becomes one of whether the first one can find it before the second one can successfully hide it.[138] Who has the best ability to act first? The one with the best access to the property.

This rule also endorses the active over the passive. If one spouse wants to buy a new car, and the other does not, the first spouse, assuming he or she has access to sufficient community money, can buy a new car. Even if the spouse does not have sufficient money, he or she can take out a loan for the new car to be repaid out of both spouses' interests in community funds. The creditor can reach not only the borrower's interest in the community estate, but also that of the other spouse.[139]

The current system promotes the power of the spouse who has the better access to the property, but that spouse may be the one less needy of protection. For example, the husband's paycheck is community property. However, if the boss gives it to him on Friday evening, he can cash it and spend it on what he chooses without consulting his wife, who works at home and thus has little access to cash other than that meted out by her husband. Texas, at least, is open about its preference for the "conduit spouse," the

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135. If the property becomes mixed with the sole management property of the other spouse, the mixed/combined community property becomes subject to the management, control, and disposition of both the spouses jointly. TEX. FAM. CODE ANN. § 5.22(b) (West 1994).

136. TEX. FAM. CODE ANN. § 5.22(a) (West 1994).

137. *Id.*

138. *See* William A. Reppy, Jr., *Retroactivity of the 1975 California Community Property Reforms*, 48 S. CAL. L. REV. 977, 1014 (1975).

139. *See infra* part IV. E. for additional discussion of creditors' rights to community property.

HeinOnline -- 30 Gonz. L. Rev. 262 1994-1995

spouse that is responsible for bringing the property or income into the marriage.[140]

Since no notice is required, the acting spouse might not learn of other circumstances, or other property transactions, that may have affected his or her decision. This was very sweet when it occurred in O. Henry's *Gift of the Magi*, but one can envision less charming results. For example, imagine that a couple wins a camping trailer in a church lottery. The husband, who hates to camp, but loves their car, sells the trailer (which, though community property, is titled in his name) to buy an opulent custom stereo for the car. The wife, who is very much looking forward to camping, sells the car (which, though community property, is titled in her name) to buy a used pick-up truck to tow the trailer. They might laugh at the end of the day, but perhaps not. Of course, the respective buyers have adequate title to the trailer and the car respectively and perhaps they should.[141] But neither spouse has a remedy against the other, even though each spouse conveyed away, without consent and without discussion, property belonging in part to the other.[142]

The point is that the equal management provisions encourage spouses to dispose of property that doesn't belong entirely to them, and discourage notice, disclosure, and consensus by giving each spouse the power to enforce his or her will over the whole of the property. The result is that the spouse that is most prone to act and has better access to community property is rewarded, and the marital property transactions will reflect, and develop, that spouse's personality, to the detriment of the marriage. Of course, the law doesn't prohibit spouses from acting jointly, but no right exists to such participation except with respect to a few transactions. To serve the disadvantaged, the law should protect those with less munificent partners.

B. *Joinder Requirements*

States have carved out quite narrow exceptions to the general rule that either spouse can dispose of the other's interest without consent. Contrast this situation with the rules applying to co-tenants. If, for example, Mom died and left the farm and the farmhouse and all of its contents to her son and daughter as tenants in common, then neither could sell a single teakettle without the consent of the other,[143] or without some kind of court order, and the sale would be ineffective as against third persons, at least as to the interest of the

140. TEX. FAM. CODE ANN. § 5.22(a) (West 1994).

141. *See infra* part IV. E. for a discussion and analysis of creditors' rights.

142. Although in Wisconsin the spouse is subject to an obligation of good faith, and in California to a fiduciary duty, these transactions would likely not fall afoul of those rules. *See* sources cited *infra* notes 192-93.

143. *See generally* 20 AM. JUR 2D *Cotenancy and Joint Ownership* § 91 (1965).

HeinOnline -- 30 Gonz. L. Rev. 263 1994-1995

non-selling tenant.[144] However, the law treats married people quite differently. Discussed below are presently existing exceptions where both spouses must consent to a transaction. These exceptions are generally built around the type of property involved, though exceptions about gifts go to the mode of conveyance.

1. Real Property

Most states require both spouses to join in at least some transactions concerning community real property: Arizona, though not for unpatented mining claims and leases for less than a year;[145] California, for leases for greater than one year, or to sell, convey or encumber;[146] Idaho, to sell, convey or encumber;[147] Louisiana, for transactions involving "immovables;"[148] Nevada, to sell, purchase, convey or encumber;[149] New Mexico, but not for purchase money mortgages or leases for less than five years;[150] Texas, for the couple's homestead;[151] Washington, to sell, purchase, convey or encumber;[152] and Wisconsin, if the property is held in joint names, or to assign, mortgage or encumber.[153] Three states, Arizona,[154] Nevada,[155] and Washington,[156] require joinder of both spouses to purchase community realty.

Although these joinder provisions may look comprehensive, in fact they are filled with loopholes that allow one spouse to dispose of the other spouse's interest in community real property without notification or consent. Take, for example, the question of leases. Common law tenants-in-common have no power to lease the property they own in common without the joinder of the other co-tenants,[157] yet in five community property states, one spouse can effectively grant away the other spouse's rights to possession of the property. What if it is the family homestead? In Wisconsin, the spouse has

144. *Id.*

145. ARIZ. REV. STAT. ANN. § 25-214(c)(1) (1994).

146. CAL. FAM. CODE ANN. § 1102(a) (West 1994).

147. IDAHO CODE § 32-912 (1983 & Supp. 1993).

148. LA. CIV. CODE ANN. art. 2347 (West 1971 & Supp. 1994).

149. NEV. REV. STAT. § 123.230(3) (1991).

150. N.M. STAT. ANN. § 40-3-13(A) (Michie 1978 & Supp. 1993).

151. TEX. CONST. art. XVI, § 50 (West 1994).

152. WASH. REV. CODE § 26.16.030(3) (1992); Washington also prohibits a spouse from acquiring, purchasing, selling, conveying or encumbering the assets of a business without the consent of the other where both spouses participate in managing the business. *Id.* § 26.030(6).

153. WIS. STAT. ANN. § 766.51 (West 1993).

154. ARIZ. REV. STAT. ANN. § 25-214(c)(1) (1994).

155. NEV. REV. STAT. § 123.230(4) (1993).

156. WASH. REV. CODE § 26.16.030(4) (1992).

157. *See* Tiffany, *supra* note 5, at § 458.

HeinOnline -- 30 Gonz. L. Rev. 264 1994-1995

the right to join in conveyances of real property only if it is registered in both of their names.[158] What if it is not? The non-registered spouse loses *not just* the ability to void the transaction with a third party, but also any right of recovery against the registered spouse.[159]

2. Household Goods

Another exception to the general rule that either spouse can independently dispose of co-owned marital property affects certain community household goods and furnishings. California requires written consent of the other spouse to sell, convey or encumber household furniture or the clothing of the other spouse or of minor children;[160] Louisiana requires joinder to convey the furniture or furnishings while located in a family home, or all or substantially all of the assets of a community enterprise and movables jointly registered;[161] Nevada provides that a spouse can't create a non-purchase money security interest in, or sell community household goods, furnishings, or appliances;[162] and Washington has the same rule, extended to include mobile homes.[163] The other five states have no such requirements, so that a spouse in those states can autonomously sell all of the couple's household goods without even prior notice, let alone prior consent.[164] The lack of a joinder requirement for household goods in those states that otherwise requires joinder for real property transactions may well work against poor people, who may be less likely to own real estate, and whose most valuable possessions may be their household goods. Even aside from value, however, many people's dearest possessions, their religious icons, personal papers and treasures, paintings, books and photographs, are not protected.

3. Gifts

Gift provisions should be particularly scrutinized because they are transactions for no consideration and, accordingly, present a particular drain on the community estate. However, most of the community property states

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158. WIS. STAT. ANN. § 766.51(2) (West 1993).

159. The injured spouse may have a cause of action if the action was in bad faith. *See id.* § 766.51(i).

160. CAL. FAM. CODE § 1100(c) (West 1994).

161. LA. CIV. CODE ANN. art. 2347 (West 1971 & Supp. 1994). One wonders if a two-step transaction, whereby a spouse first moved the furniture out of the family home, and then transferred them, would be upheld on the argument that at the time of transfer the furniture was no longer located in the family home.

162. NEV. REV. STAT. § 123.230(5) (1991 & Supp. 1993).

163. WASH. REV. CODE § 26.16.030(5) (1993).

164. *See infra* notes 185-86, 190-92 and accompanying text.

HeinOnline -- 30 Gonz. L. Rev. 265 1994-1995

allow either spouse to give away community property or funds without consulting the other spouse. Only California,[165] Nevada[166] and Washington[167] require consent to all gifts, and in Nevada and Washington that consent may be implied. Louisiana requires consent unless the gift is "usual or customary [and] of a value commensurate with the economic position of the spouses at the time of the donation."[168] Wisconsin allows a spouse to give any one person up to $1000 annually, and more if "when made, the gift is reasonable in amount considering the economic position of the spouses."[169] Texas also allows sizable gifts of community property.[170] Furthermore, the states that purport to require consent to gifts may allow a sole managing spouse to circumvent the rule by giving away property from a solely managed business without the consent of the other spouse.[171]

We should not necessarily discourage gifts. Many charitable donations provide a vital function in our society, and gifts are an important part of social life. However, we need to examine the policy of allowing one spouse to give away property partly belonging to another without his or her consent. Here, again, if a spouse needed to notify, discuss, and agree with his or her partner about a donation or a gift, the input might lead to a richer and more satisfying contribution for both of them. The satisfaction of giving will not come to an unaware spouse unless he or she knows that the property or funds is being

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165. CAL. FAM. CODE § 1100(b) (West 1994).

166. NEV. REV. STAT. § 123.230(2) (1993).

167. WASH. REV. CODE § 26.16.030(2) (1993).

168. LA. CIV. CODE ANN. art. 2349 (West 1971 & Supp. 1994); Franz v. Cormier, 579 So. 2d 1201, 1202-03 (La. Ct. App. 1991) applied this statute in affirming a preliminary injunction that had been granted to prevent the defendant from withdrawing a money market certificate in her name from a bank. The plaintiff alleged that the monies in dispute had been given by her husband to the defendant, another woman without her consent.

169. WIS. STAT. ANN. § 766.53 (West 1993). As yet, no cases have illuminated this provision, but it reads as though a spouse could give up to $1,000 to each of 100 people without violating the statute. Presumably, however, the gifts could be attacked if they were made in bad faith. *See id.* § 766.15(1).

170. *See, e.g.*, Tabassi v. NBC Bank, 737 S.W.2d 612 (Tex. Ct. App. 1987) (approving husband's significant gifts of community funds in the amount of $495,000, some 30% of the community estate, to his children from a former marriage; the court noted that the wife was aware through a pre-nuptial agreement of her husband's intent to make gifts); Horlock v. Horlock, 533 S.W.2d 52 (Tex. Ct. App. 1975) (gifts to husband's daughters totaling $131,000 approved; the court considered factors of (1) the size of the gift in relation to the entire community estate; (2) the adequacy of the remaining estate to support the wife; and (3) the relationship to the donee). These cases indicate that gifts to the donor's family members will be viewed favorably.

171. CAL. FAM. CODE § 1100(d) (West 1994); WASH. REV. CODE § 26.16.030(6) (1993); LA. CIV. CODE ANN. art. 2350 (West 1985 & Supp. 1994) (note that it could be argued that the bar on unilateral gifts trumps the sole management business rule, the statutes are ambiguous).

HeinOnline -- 30 Gonz. L. Rev. 266 1994-1995

given, to whom, and why. An obvious example is political contributions. Should a wife be able to donate a monthly paycheck to the Republican party when her husband, as she well knows, is a yellow dog Democrat? Of course, one solution would be for him simply to make a corresponding contribution to the party or candidate of his choice, but if they consulted with each other they might find some political issue that they agreed upon, perhaps campaign finance reform, and make a joint contribution to that cause.

In addition, the scant control on gifts provides fertile ground for fraud. A husband, planning a divorce, can "give" large sums of money and property (perhaps a car, a boat, a house) to his child from a former marriage, a donee likely to pass the court's scrutiny, and then the child can conveniently give the property back to the parent-spouse following the judicial decree dissolving the marriage.

California, Washington and Nevada wisely require consent to gifts, but the provisions should also require that the consent be fully informed. Louisiana's exception for "usual and customary gifts" in the context of the family's financial situation has some attractive flexibility; we may want to yield the policy of requiring informed consent to the office pool for birthday or baby gift contributions. However, a decision about whether a significant sum of property should be conveyed without consideration should be knowledgeably made by both owners of the property.

4. Analysis of Joinder Requirements

The obvious problem with the present joinder exceptions is that they typically apply only to real estate transactions, and thus, those married couples who do not own any real property do not benefit from the provisions, even though they might have property as valuable, economically or otherwise, as real property. California, Louisiana, Nevada, Washington, and Wisconsin have addressed this omission by requiring that both spouses join in a conveyance of household furniture, and in the case of Nevada and Washington, other household goods as well.[172] Furthermore, in Texas many of such goods would likely also be subject to joint control.[173] However, none of the states require both spouses to join in a purchase, as opposed to a sale, of expensive items with community funds.

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172. *See supra* text accompanying notes 160-63.

173. *See* TEX. FAM. CODE ANN. § 5.22(c) (West 1994). Third parties received significant protection from Texas' joinder requirements, though. *See id.* § 5.24(b) (a third person is entitled to rely on that spouse's authority to deal with the property if (1) the property is presumed to be subject to the sole management, control and disposition of the spouse, and (2) the person dealing with the spouse is not a party to fraud upon the other spouse or another person and doesn't have notice of the spouse's lack of authority).

HeinOnline -- 30 Gonz. L. Rev. 267 1994-1995

For example, either spouse may buy, with the family's life savings in which each spouse has an equal interest, a share in an Arizona gold mine limited partnership. Not only is the transaction good as against the partnership, but the non-acting spouse has no recourse against the acting spouse.[174]

In some states, exclusive management provisions can allow a spouse to circumvent joinder requirements. In Louisiana,[175] New Mexico,[176] and Wisconsin,[177] the person with title to a share of stock or a partnership interest has the sole right to manage it. If he or she has sufficient power, the spouse can cause that entity to engage in transactions such as purchasing or selling real estate, or selling the assets of the business, without the joinder of the other spouse that might otherwise be required if the property or asset was owned by the couple rather than by the business entity. Thus, a spouse can use a wholly-owned corporation or other entity to evade joinder requirements. Wisconsin's[178] and California's[179] add-a-name remedies, which allow a spouse to add his or her name to the title of community property so that others are on notice of the interest, does not apply to partnership interests and interests in professional corporations (and certain sole proprietorships, in Wisconsin), so the other spouse is helpless to prevent this sort of legerdemain. This manipulability results from a contrived system of different rules for different types of property, instead of a good solid general rule.

Furthermore, the equal management provisions and the joint management exceptions impose an artificially discrete structure on property transactions. Just as spouses are not isolated individuals, marital property transactions are not individual units that are immune from each other's effects. The decision whether to buy a new car, for example, will often depend on the amount of savings the couple has, which depends in part on what they've spent in other transactions, many of which may have been equal management transactions undertaken by just one spouse. In fact, the family's financial and property complexion at any time is the result of a whole history of transactions. By culling a few joint management transactions from the pool of equal

174. In Wisconsin, a spouse can get a court order granting management and control where he or she can show that marital property has been or is likely to be substantially injured by the other spouse's gross mismanagement, waste, or absence. WIS. STAT. ANN. § 766.70(4) (West 1983).

175. LA. CIV. CODE ANN. art. 2351 (West 1971 & Supp. 1994).

176. N.M. STAT. ANN. § 40-3-14(B) (Michie 1978 & Supp. 1993) (providing that if only that spouse's name is mentioned in a written agreement between that spouse and a third party as having sole right to manage the community property that is the subject of that agreement, then such spouse has sole power to manage that property).

177. WIS. STAT. ANN. § 766.51(1) (West 1993).

178. *Id.* § 766.70(3).

179. CAL. FAM. CODE § 1101(c) (West 1994).

HeinOnline -- 30 Gonz. L. Rev. 268 1994-1995

management transactions, the law ignores the integrated character of the family's marital estate.

C. *Exclusive Management*

Another common exception to the general rule of equal/either management is the inverse of the joinder exceptions. In California,[180] Louisiana,[181] Nevada,[182] Washington,[183] and in certain cases, Texas,[184] a spouse who is the sole manager of a community-owned business has the *exclusive* right to manage the business, and to buy, sell, encumber and convey its assets. Exclusive management means that though the business is in fact owned 50-50 by both parties, only one spouse can operate or otherwise control it. Accordingly, a spouse that owns one half of a business, that may form a substantial portion of the family's wealth and livelihood, may have absolutely no right or power to participate in any business decisions or even to be notified of those decisions prior to their implementation. There are few restraints on the managing spouse's power,[185] except in California and Wisconsin, where the acting spouse is subject to fiduciary and good faith standards respectively.[186] Thus, in Hohfeldian terms, the power lies entirely in one spouse, while the corresponding liability will be suffered by the other.[187]

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180. *Id.* § 1100(d) (though the spouse must give prior written notice to the other spouse of any sale, lease, exchange, encumbrance or other disposition of all or substantially all of the personal property used in the business).

181. LA. CIV. CODE ANN. art. 2350 (West 1971 & Supp. 1994).

182. NEV. REV. STAT. § 123.230(6) (1993) (limited to transactions in the ordinary course of business; if both spouses participate in the management neither may convey the assets of the business without the other's prior consent).

183. WASH. REV. CODE § 26.16.030(6) (1993) (like Nevada, limited to transactions in the ordinary course of business, and if both spouses participate in the management of the business, neither may convey the assets of the business without the other's consent).

184. If the business would have been owned in full by that spouse if single. TEX. FAM. CODE ANN. § 5.22(a) (West 1994).

185. There are a few restrictions on this right, for example, in California a spouse must give the other spouse prior written notice of a sale, lease, encumbrance or other disposition of all or substantially all the personal property. CAL. FAM. CODE § 1100(d) (West 1994); Louisiana's exclusive right applies only to movables, and then not if issued in the name of the other spouse, LA. CIV. CODE ANN. art. 2350 (West 1971 & Supp. 1994); Nevada's and Washington's exclusive right doesn't apply to transactions that are not in the ordinary course of business, NEV. REV. STAT. § 123.230(6) (1993); WASH. REV. CODE § 26.16.030(6) (1993).

186. CAL. FAM. CODE § 1100(e) (West 1994); WIS. STAT. ANN. § 766.15(1) (West 1993).

187. Wesley Hohfeld advocated disaggregating entitlements, and he designated eight varieties of elemental entitlements: rights, privileges, powers, immunities, duties, no-rights,

HeinOnline -- 30 Gonz. L. Rev. 269 1994-1995

Why are the community property management provisions so different from those for non-married property co-owners? One possibility is that the legislators subscribed to the Puritan notion that dependent wives promoted their policy of family unity[188] and as the provisions were later modified to give wives "equal" powers with their husbands, they never updated the policies or the mechanisms to implement them. Another possibility is that people are reluctant to share control over property they feel they have earned individually, and not as members of a group, a subtle resistance to the assumptions of community property that all property (other than gifts, inheritances, and pre-marital property) is fruit of the marriage.

Exclusive management provisions are very troubling.[189] A justification might be that if one spouse is already managing a business, it will presumably cause problems to have the other spouse trying to be involved all the time. But even shareholders in a corporation, distant though they are from the day-to-day operation of the business, can vote out the board of directors. In contrast, a spouse whose partner has sole management of a business may have no ability to participate in its future.

Texas has the broadest exclusive management provisions,[190] and by covering the income of either spouse, a critical aspect of most families' property, they nearly gobble up the whole concept of community property. Texas provides that the "conduit" spouse, the spouse responsible for bringing the income or other property into the marriage and who would own the property outright if he or she was single, has sole management over it.[191]

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liabilities, and disabilities. Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,* 23 YALE L.J. 16, 30 (1913). Under the scheme he presents, liability, defined to be the susceptibility to having one's legal position altered, is the correlative of the element of power. *Id.* at 44. It is this relationship between power and liability, as distributed between husbands and wives, with which I am interested, and which I hope will light up in the discussion of present provisions. Under traditional community property law, power to transfer the couple's property lay solely with the husband, while the wife was under a disability with respect to such property. Under current equal/either management rules, both spouses have the privilege to transfer, encumber or otherwise dispose of marital property, but neither is under a duty to consult the other or obtain the other's consent with regard to a transaction. *See id.* at 32-44.

188. SALMON, *supra* note 30, at 13.

189. In addition to the exclusive management provisions discussed above, New Mexico and Wisconsin have an exception that the spouse named in the title to a piece of community property has the sole power to manage that property. N.M. STAT. ANN. § 40-3-14(B) (Michie 1978 & Supp. 1994); WIS. STAT. ANN. § 766.51(1)(am) (West 1993). Louisiana provides that a spouse has the exclusive right to manage "movables" issued or registered in that spouse's name. LA. CIV. CODE ANN. art. 2351 (West 1971 & Supp. 1994). California law provides that a bank account by or in the name of a married person shall be held for the express benefit of that person. CAL. FIN. CODE § 851 (West 1993).

190. *See* TEX. FAM. CODE ANN. § 5.22 (West 1994).

191. *Id.*

HeinOnline -- 30 Gonz. L. Rev. 270 1994-1995

These provisions suffer from the same policy defects as the exclusive management provisions discussed above. Because they cover earnings, however, Texas' provisions may be the most likely to result in transactions that represent only one spouse's choices and interests, and not those of the couple together. Because the non-managing spouse has no claim to participate in any decisions concerning the income brought in by the conduit spouse, the portion such income forms of the couple's property measures the degree of autonomy of the earning spouse and the potential for coercion of the other.

D. *Duties of the Acting Spouse*

What duties should restrain a spouse who unilaterally manages community property? Two sorts generally arise in discussions: 1) a duty of good faith, sometimes called a fiduciary duty; and 2) a duty of care, to act reasonably or prudently. Each of these duties can have varying degrees of intensity. Of the nine community property states, only Wisconsin[192] and California[193] impose a statutory duty on spouses with respect to the

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192. WIS. STAT. ANN. § 766.15(1) (West 1993) ("[e]ach spouse shall act in good faith with respect to the other spouse in matters involving marital property or other property of the other spouse").

193. CAL. FAM. CODE § 1100(e) (West 1994) provides as follows:

> Each spouse shall act with respect to the other spouse in the management and control of community assets and liabilities in accordance with the general rules governing fiduciary relationships which control the actions of persons having relationships of personal confidence as specified in Section 721, until such time as the assets and liabilities have been divided by the parties or by a court. *This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, upon request.*

(Emphasis added). *In re* Baltins, 212 Cal. App. 3d 66, 260 Cal. Rptr. 403 (1989) documented the history of this standard: Before 1975, when the husband had the management and control of all community property, he was held by case law to the duties of a trustee or a fiduciary. When the Civil Code was amended to give spouses equal management and control of the community property, the Legislature mandated that "[e]ach spouse shall act in good faith with respect to the other spouse in the management and control of the community property." 1974 CAL. STAT. ch. 1206, § 4, at 2609-10. When California courts interpreted this section as changing the old case-law-imposed fiduciary duty to a lesser one of good faith, the Legislature amended the statutory duty to provide as follows:

> Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property in accordance with the general rules which control the actions of persons having relationships of personal confidence

management and control of community property.[194] Wisconsin requires spouses to act in good faith, while California expressly provides that spouses are in a fiduciary relationship and are subject to the general rules that control the actions of persons having relationships of personal confidence.[195] The California statute specifies that the duty imposes obligations to fully disclose to the other spouse, *upon that spouse's request*, all material facts and information as to the existence, characterization, and valuation of all assets of the community and all debts for which the community may be liable, and to provide equal access to all information, records and books that pertain to the value and character of those assets and debts. It is not yet clear whether the duty will impose substantive standards of behavior over and above these procedural ones.[196] If it is determined to do so, California would become the sole state to prescribe a standard of care on the acting spouse.

> as specified in Section 5103 [now CAL. FAM. CODE § 721], until such time as the property has been divided by the parties or by a court. This duty includes the obligation to make full disclosure to the other spouse of the existence of assets in which the community has an interest and debts for which the community may be liable, upon request. *The case law defining the standard of care applicable to Section 5103, but not the case law applicable to [trustees], applies to this section.*

(Emphasis added). *In re* Baltins, 212 Cal. App. 3d 66, 89-91, 260 Cal. Rptr. 403, 417-18 (1989). The present statute, which omits the reference to trustees' standards, was enacted in 1992.

Louisiana does not require spouses to act in good faith, but does impose liability on a spouse for "any loss or damage caused by fraud or bad faith in the management of community property." LA. CIV. CODE ANN. art. 2354 (West 1985).

194. Some other states imply a duty of good faith in case law, but arguably the duty is no more onerous, as applied, than a duty not to commit fraud. *See, e.g., In re* Marriage of De Vine, 569 S.W.2d 415, 421 (Tex. Ct. App. 1993) (stating that spouses must use the "utmost good faith" in their dealings with each other, but cause of action arises only when spouse commits fraud by transferring community property or expending community funds for the primary purpose of depriving the other spouse of the use and enjoyment of the assets involved in the transaction); Andrews v. Andrews, 677 S.W.2d 171, 175 (Tex. Ct. App. 1984) (though spouse are in a fiduciary relationship, "[a]bsent a fraud on the community, the court may not order reimbursement for gifts of community property made during the marriage to a stranger"); Bodine v. Bodine, 754 P.2d 1200, 1201 (Idaho 1988) (though spouses are in a fiduciary relationship, a husband's knowing misrepresentation of the value of community property does not establish fraud in absence of evidence of failure of husband to disclose information or pertinent facts necessary to arrive at a reasonable valuation). These cases seem to find good faith as co-extensive with lack of fraud, but if a spouse acts decisively in his or her own interests, but not the interest of the marriage or the other spouse, there may be no intent to defraud, but certainly it's arguable whether the spouse acts in good faith. Two Idaho cases, Smith v. Smith, 860 P.2d 634 (1993), and Compton v. Compton, 612 P.2d 1175 (Idaho 1980) allude to a fiduciary duty that may heighten the scrutiny of transactions alleged to be fraudulent, though *Bodine* certainly didn't apply a heightened standard. *See Bodine,* 744 P.2d at 1205-06.

195. No case has yet interpreted these duties in the context of the amended statute.

196. *See generally* SALMON, *supra* note 30.

HeinOnline -- 30 Gonz. L. Rev. 272 1994-1995

The lack of a standard of care on the acting spouse is one of the most curious aspects of community property's management and control provisions. It would be reasonable to expect that the managing spouse who acts without the informed consent of the other spouse would be subject to a duty of reasonable care in managing the property. The argument for such a standard of care is strongest with respect to exclusive management transactions, where the non-managing spouse is powerless to act at all. After all, a trust beneficiary, who has a beneficial, if not a legal, interest in his trust cannot manage the trust, and accordingly the trustee is not only held to the highest fiduciary standard in managing it, but must also act with prudent care.[197] However, no state imposes any sort of substantive obligation of reasonable care where a spouse acts alone. Furthermore, in six states, a spouse can act unfettered by considerations of good faith, let alone good judgment.

This broad expanse of allowable behavior contrasts with the law of future interests, which protects those who follow a life tenant in interest from any sort of "waste" by the life tenant.[198] But the law should require more than a duty not to waste community property. If a spouse chooses to act unilaterally with respect to co-owned property, a standard of reasonable care should work not only to protect the non-acting spouse, but to encourage the acting spouse to reflect. He or she may, given pause, seek the partner's input and consent.

Wisconsin, while not imposing a standard of care, allows a spouse to petition for a court decree awarding sole management on the basis that it would be in the best interests of the couple because the community estate has been "substantially injured or is likely to be substantially injured by the other spouse's gross mismanagement, waste or absence."[199] However, the statute requires a fairly high degree of malfeasance before authorizing sole management, and sole management, as opposed to co-management, may be the wrong solution as it runs the risk of merely swapping tyrants.

Many might argue that imposing standards of good faith and due care will

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197. *See supra* note 8.

198. 5 AMERICAN LAW OF PROP. § 20.1 (1952). The general test of whether the holder of land has committed waste is whether his or her acts reduced the market value of the reversioner's or remainderman's interest. Thus, there is a duty not to commit acts that are not in accordance with "good husbandry." *Id.* § 20.2. Also, the life tenant must not remove fixtures installed by him that have become so acceded to the land that their removal will cause injury to the freehold. *Id.* § 20.7. Acts may be waste even though they increase the value of the land, if they violate the actual or presumed intent of the grantor, although the doctrine of ameliorative waste is not popular in this country. *Id.* §20.11.

199. WIS. STAT. ANN. § 766.70(4) (West 1993). Professor Carol Bruch has argued that California also needs to adopt some means of separating financial obligations or of protecting the more responsible spouse from the financial recklessness of the other. Carol S. Bruch, *Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform*, 34 HASTINGS L.J. 227, 277 (1982).

HeinOnline -- 30 Gonz. L. Rev. 273 1994-1995

aggravate discord in marital relationships and will further snarl the congested family courts. However, merely adopting standards of behavior for married couples and their property that are similar to standards imposed on less intimate groups of persons will not create discord where all was previously harmonious. And if our courts stagger under a load of family law cases, then it might indicate that a great amount of ill treatment between married partners exists that should be redressed, not ignored, by the law. The fact that the duties will apply to such huge numbers of people is an argument in favor, not against, the proposal, because it highlights the magnitude of the present omission. One of the law's most important functions should be to protect people from harm, whether from physical, emotional or economic tyranny. If the courts are overburdened, perhaps they should be expanded. Perhaps we should teach children at a young age the importance of responsibility to each other and the rewards of mutually satisfying dispute resolution in the hope that future generations will have less domestic conflict. Whatever the answer is, it is not to deny a remedy to suffering family members.

E. *Liability for Debts*

With respect to the rights of creditors against the community estate, California,[200] Louisiana,[201] Texas,[202] Idaho,[203] and Nevada[204] employ a "managerial system" for debts. The managerial system provides that the property that a spouse is able to manage is obligated for his or her debts regardless of the purpose of the debt.[205] Thus, any property a spouse has the legal power to alienate, even if the consent of the other spouse would normally be required, can be seized in its entirety to satisfy a debt. Thus, in these states only the community property subject to the exclusive control of the non-debtor spouse is safe from the other spouse's creditors. Louisiana and California allow the creditor full recourse to community property for a spouse's debts, even the property subject to the exclusive management of the non-debtor spouse.

Texas prohibits contract creditors from reaching the property managed exclusively by the other spouse, but tort creditors may reach both spouses' interests in all community property.[206] Note the irony in Texas' allocation of obligations. If a husband, for example, breaches his duty of care to a third

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200. CAL. FAM. CODE § 910 (West 1994).
201. LA. CIV. CODE ANN. art. 2345 (West 1971 & Supp. 1994).
202. TEX. FAM. CODE ANN. § 5.61 (West 1986).
203. *See* IDAHO CODE § 32-912 (1994).
204. *See* NEV. REV. STAT. § 123.230 (1993).
205. *See* W. REPPY & C. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 251-52 (1982).
206. TEX. FAM. CODE ANN. § 5.61(d) (West 1994).

HeinOnline -- 30 Gonz. L. Rev. 274 1994-1995

party stranger, his wife's interest in co-owned community property is liable for that breach. Yet the husband has no such duty of care to his own wife in the management of the community property. Furthermore, Texas' shield of exclusive management property from contract creditors is of little comfort to a non-debtor spouse with little exclusive management property, the very spouse who may need more protection from creditors. Louisiana's rule resembles that of Texas, except that all of the assets of a community business and registered movables may be used to satisfy contract obligations, even if they are subject to the exclusive management of the non-debtor spouse.[207]

In the managerial system, the non-debtor spouse can have an equitable claim for reimbursement if the debt was a "separate debt," i.e., if it was not deemed to have had a community purpose or the separate estate of the debtor spouse was intended to benefit from the debt. However, if the non-acting spouse did not give informed consent to the debt's creation, is it truly fair to obligate his or her claim to reimbursement on someone else's judgment of benefit? Perhaps the non-debtor spouse should be entitled to reimbursement unless he or she gave informed consent to the debt, and thus the controllable risk would lie entirely with the acting spouse.

Arizona,[208] New Mexico,[209] Washington[210] and Wisconsin[211] employ the "community debt" system, whereby a creditor's entitlement to be paid from the entire community estate depends on whether the debt is deemed to be a community debt, regardless of whether both spouses joined in creating it. In the community debt states, the creditor can seize the entire community and the debtor's separate property to satisfy "community debts."[212] In Arizona[213] and Washington,[214] contractual debts incurred during the marriage are presumptively for the community, a presumption that can be overturned only by "clear and convincing evidence" of no community benefit.[215] In Wisconsin, all contractual debts incurred during the marriage are community debts unless the spouses have otherwise agreed, or unless the creditor and spouse have earmarked the debt as separate.[216] Here, too, a spouse may suffer a "benefit" he or she didn't want.

In Washington and Arizona, tort creditors have less access to the share of

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207. LA. CIV. CODE ANN. art. 2347 (West 1971 & Supp. 1994).
208. ARIZ. REV. STAT. ANN. § 25-215 (1991).
209. N.M. STAT. ANN. § 40-3-11 (Michie 1978).
210. WASH. REV. CODE § 26.16.030 (1993).
211. WIS. STAT. ANN. § 766.55 (West 1993).
212. See W. REPPY & C. SAMUEL, *supra* note 205, at 265.
213. ARIZ. REV. STAT. ANN. § 25-215(D) (1991).
214. WASH. REV. CODE § 26.16.030 (1993).
215. *See. e.g.*, Hofmann Co. v. Meisner, 497 P.2d 83, 87 (Ariz. 1972); Oil Heat Co. of Port Angeles, Inc. v. Sweeney, 26 Wash. App. 351, 613 P.2d 169, 171 (1980).
216. WIS. STAT. ANN. § 766.55(1) (West 1991).

HeinOnline -- 30 Gonz. L. Rev. 275 1994-1995

the non-tortfeasor spouse. Unless the tortfeasor was acting for the benefit of the community, tort creditors in Arizona[217] can't reach the spouse's interest in community property and such creditors in Washington[218] have access only to the defendant spouse's separate property and one-half interest in community property. Certainly these states are much fairer to the non-injuring spouse—a tort plaintiff could not reach any other sort of co-tenant's interest in property,[219] or a executory interest holder's interest in property currently possessed by a tortiously-acting life tenant. The Arizona rule, however, by exempting the injuring spouse's interest in community property, seems unfair to tort victims. For many couples, the bulk of their assets will be community ones, and the tortfeasor's one-half ownership interest in those assets is just as much theirs as their separate property. Washington's rule, in contrast, seems to fairly balance the interests of all involved.

It is notable that all partnership property is subject to debts contracted for by any one partner on behalf of the partnership so long as that partner had apparent, even if not actual, authority.[220] However, the creditor can rely on the apparent authority of a partner to contract on behalf of the partnership only if the act is apparently within the usual course of the partnership business; no similar limitation burdens creditors of married people.[221] Furthermore, partners benefit from two precepts not generally available to community property spouses. First, though the creditor may be satisfied, the non-acting partners may, if the debt was contracted for without authority, have an equitable remedy against the debt-making partner's share of the partnership property: they may seek an accounting, and once the accounting is complete, pursue damages against the wrongdoing partner.[222] Second, the partner, even if the debt was made with authority, must act in accordance with the highest fiduciary standard of good faith, or risk liability.[223] Only in California and Wisconsin are spouses entitled to a meaningful standard of good faith, and its not clear that such a standard applies to debt creation.[224] In all managerial states, and with respect to community debts in community

217. *See* Schilling v. Embree, 575 P.2d 1262 (Ariz. 1977).

218. WASH. REV. CODE § 26.16.190 (1993).

219. 2 TIFFANY, *supra* note 5, at §§ 453, 456, and 458.

220. UNIF. PARTNERSHIP ACT § 9(1), 6 U.L.A. 132 (1969).

221. In addition, the third party has the burden of showing that the act was apparently for carrying on the partnership's business in the usual way. *See* I A. BROMBERG & L. RIBSTEIN, BROMBERG & RIBSTEIN ON PARTNERSHIP § 4.02(a) (1988 & Supp. 1994) and cases cited therein.

222. UNIF. PARTNERSHIP ACT § 22, 6 U.L.A. 284 (1969). Partners generally may not maintain an action at law among themselves where the subject of the action relates to partnership transactions unless there is a prior accounting or settlement of the partnership affairs. *See* BROMBERG & RIBSTEIN, *supra* note 221, § 6.08(c) and cases cited therein.

223. UNIF. PARTNERSHIP ACT § 21, 6 U.L.A. 258 (1969).

224. *See supra* notes 192-96 and accompanying text.

HeinOnline -- 30 Gonz. L. Rev. 276 1994-1995

debt states, a spouse who did not make the debt, did not want the debt, and does not benefit from the debt may well find his or her share of the community estate seized by a creditor of a spouse, even if that spouse acted in bad faith and without authority. Furthermore, they may have no remedy against that spouse.

F. *Ability of Spouses to Opt Out of the System*

Idaho[225] and Texas[226] explicitly allow spouses to agree on a different scheme of management and control, and thus it can be argued that in those states the parties are free to adopt an arrangement that best suits their needs. However, by requiring the spouses to act, without an agreement, the spouses are subject to the state's scheme for management and control, a scheme that sustains unilateral actions. Furthermore, an opt-out may harm the less knowledgeable, or more trusting, spouse who may agree to a system that gives him or her even less right to participate in property decisions than the state's system. Louisiana allows a spouse to expressly renounce his or her right to concur in the few situations in which such concurrence is required.[227] An opt-out provision can further marginalize the renouncing spouse from financial decisions.

Many would argue that married couples should have the power to autonomously adopt a system of property management that best suits their respective needs, and it seems overbroad to argue that all couples must submit to a state mandate, even the one that I will propose. Perhaps such agreements could be enforceable so long as they received careful scrutiny for fairness and full disclosure when the state was requested to enforce it. Otherwise, the opt-out provision is simply a mechanism to make a bad situation worse.

Joint action, though perhaps ideal, may not always be possible, and certain states allow spouses to escape from the consent or concurrence provisions in specialized cases. Depending on how carefully they are supervised, these provisions can give spouses needed powers when they are in bad situations. Louisiana, for example, allows one spouse to act unilaterally if the proposed transaction is in the best interest of the family, and consent that otherwise would be required has been arbitrarily refused or cannot be obtained due to physical or mental incapacity, commitment,

225. IDAHO CODE § 32-916 (1994) (spouses may partition or exchange between themselves any part of their community property).

226. TEX. FAM. CODE § 5.52 (West 1994) (spouses may partition or exchange between themselves any part of their community property), *Id.* § 5.53 (spouses may agree that the income or property arising from the separate property then owned by one of them or thereafter acquired shall be the separate property of the owning person).

227. LA. CIV. CODE ANN. art. 2348 (West 1971 & Supp. 1994).

HeinOnline -- 30 Gonz. L. Rev. 277 1994-1995

imprisonment, or other absence of the non-consenting spouse.[228] Likewise, California allows a court, upon a spouse's motion, to dispense with a joinder requirement if the transaction is in the community's best interest and has been arbitrarily refused, or consent cannot be obtained for other specified reasons.[229] These provisions could prevent a capricious spouse from thwarting his or her partner in providing the family with necessary or appropriate items. As noted above, Wisconsin will grant one spouse sole management if a court finds gross mismanagement, waste or absence on the part of the other spouse.[230] Careful court supervision may well give these provisions legitimacy where they could be implemented by just one spouse's individual determination.

V. PROPOSALS FOR REFORM

Martial property statutes should acknowledge the synergistic relationship of husbands and wives in a marriage, and should encourage them to cooperate in seeking a common life. The statutes should discourage domination and coercion, and alleviate cultural and societal inequities that lead to the economic disempowerment of women. Ultimately, the law should set an example of a social model designed to lead to personal and marital fulfillment and growth, while not demanding that all accede to that model. Below are some specific changes to the present management and control provisions that were designed with these objectives in mind.

A. *Consensus Decisionmaking*

One possible solution to the present condition of sanctioned autocracy is to treat community property as other forms of traditional co-ownership, such as tenancy-in-common and joint tenancy. Under this regime, neither partner would have any power to bind the one-half share of the other partner in any transaction without that partner's consent.

While enticing because of its brutal simplicity, converting community property into just another form of joint ownership would be a bad idea. From a practical standpoint, those forms are ill-suited to relationships like marriage, where the volume of transactions is very high, and many of the transactions involve money or personal property—fungible or quasi-fungible goods that are often used daily. It is unrealistic to require each partner to expressly consent to each quarter in the newspaper machine, each gallon of gas in the car. While co-tenancies may work well for two cousins who inherit a family

228. LA. CIV. CODE ANN. art. 2355 (West 1971 & Supp. 1994).
229. CAL. FAM. CODE § 1101(e) (West 1994).
230. WIS. STAT. ANN. § 766.70(4) (West 1993).

HeinOnline -- 30 Gonz. L. Rev. 278 1994-1995

pasture leased annually to some local farmer, it would overburden the couple, and third parties, to limit spouses so drastically.

I propose instead a new general, but contextualized, rule to replace the either/or management provisions, the joinder provisions, and the exclusive management provisions: A spouse cannot engage in any transaction with community property if: (1) his or her spouse has notified the other spouse that he or she opposes the transaction; or (2) the transaction will or may have a material effect on either the spouse, the marriage, or the marriage's community income or property, and he or she has not notified the other spouse of the proposed transaction, given the spouses know all relevant information about the transaction, and reached a consensus with the other spouse about the transaction.

The second part of the rule needs further discussion. In this rule, material means non-trivial, and whether a transaction is material should depend upon all the circumstances of the particular marriage. Such a standard recognizes that what is material in one marriage, such as the expenditure of $50, may not be material in another. Any bright-line objective test would fail to take into account the very personal and unique characteristics attendant to a marriage. Evaluating materiality should include reflection on the dollar value of the transaction (for example, the 25 cent newspaper versus a cruise); the commonness of the transaction in the marriage (for example, weekly dry cleaning versus a new car); the extent to which the transaction involves fungible goods that are easily replaced as opposed to personal and individual goods (for example groceries versus a personal photograph); and the type of and permanence of the transaction (for example, letting a friend borrow a car versus selling a stamp collection). As is illustrated by the examples, the concept of materiality is much broader than the standards used by Wisconsin[231] and Louisiana[232] regarding allowable gifts, which both focus only on the dollar value of the transaction.

If a spouse entered into a material transaction without prior notice, disclosure and consent, the other spouse, upon objection, should be able to charge half the value of the transaction against the acting spouse's interest in the community (or his or her separate estate). Moreover, for certain transactions, the nonconsenting spouse should be able to void the event.[233]

This proposal raises a couple of foreseeable problems that need to be addressed. First, some might complain that, if every expenditure required a family conference, the rule would require too much time and effort. However, the vast majority of run-of-the-mill transactions would not need to be rehashed and agreed to again before each occurrence if the couple had

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231. *See supra* note 177 and accompanying text.
232. *See supra* note 175 and accompanying text.
233. The interests of third parties are discussed *supra* notes 171-76.

HeinOnline -- 30 Gonz. L. Rev. 279 1994-1995

agreed that common transactions could repeat without rediscussion. Likewise, if a basic budget system for grocery shopping were established, the couple could agree that it would operate until further notice. Furthermore, only material or opposed transactions would be covered by the rule. Although the intent is to encompass all but trivial transactions, I am not suggesting that a spouse could not buy tangerines instead of oranges without full-scale negotiations. Of course, what if he or she could not? The tangerines' cost would simply come out of his or her half of the community estate instead of being shared by both. The remedy is as trivial as the corresponding transaction.

What if one spouse arbitrarily and irrationally disallowed a reasonably necessary transaction? The state could adopt the California provision that allows the acting spouse to seek court approval to go ahead without the other spouse's consent if the transaction was in the best interests of the family.[234] Another possibility would be that the transaction would come out of the acting spouse's share of community property, and that he or she could later, if a court determined the transaction was necessary or appropriate for the well-being of the family, be reimbursed out of the non-consenting spouse's share of community property or separate property.

B. *Duties of Good Faith and Care*

All spouses who transact with co-owned marital property should be subject to the highest fiduciary duty of good faith, regardless of whether the couple has reached an informed consensus for the action. The intimate nature of the marital relationship, where each spouse's actions have such psychological and economic effects on the other and on the relationship, demands just such a duty. The duty would require the spouses to put the interests of the marriage, the community, ahead of their own when dealing with the community's property. Furthermore, at all times spouses should be obligated to disclose the existence, location, valuation and other relevant information about co-owned assets and transactions with them.

In addition to the obligation to seek consent to material transactions, and to act in good faith, spouses should also be subject to a duty of care, to act as a reasonably prudent person. The standard should be like a trustee's duty to act with the due diligence, care and skill that would be observed by a prudent person dealing with the property of another.[235]

The duty of care would substantially supplement the consent procedure described above. First, it would apply, in agreed-to transactions, to shape the acting spouse's behavior in carrying out the transaction. For example, if a

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234. *See supra* note 229 and accompanying text.

235. *See* BOGERT & BOGERT, *supra* note 8, § 541.

HeinOnline -- 30 Gonz. L. Rev. 280 1994-1995

husband and wife agreed with each other to sell their house for a specific price, and further agreed that the husband will carry out the mechanics of the sale, then the duty of care might prevent the husband from taking a note from an unemployed troubadour in lieu of selling to a buyer who has obtained reliable financing.

Another example derives from the Texas case of *Andrews v. Andrews*,[236] in which the court perfunctorily disposed of the wife's claim that the husband's use of community funds to purchase, with his mother, some parcels of real estate should be redressed when dividing the marital estate. It appeared, in fact, that the husband had made a gift of the funds to his mother.[237] Though the wife characterized the act as "waste, mismanagement, or outright conversion of community funds," the court disagreed, ruling that "[a]bsent a fraud on the community, the court may not order a reimbursement for gifts of community property made during the marriage."[238] The court seemed to characterize the husband's "poor investments" as having been made in good faith, even if unwise.[239]

How would the case have come out under this article's proposed provisions? If the expenditure of funds was material under the circumstances of the marriage, then the husband would have been required to consult with his wife and work out an agreement before giving the funds to his mother. The case does not provide enough facts to be sure, but it seems likely that funds sufficient to invest in real estate and to be at issue on appeal had significance for the marriage. Accordingly, having failed to get the wife's consent to the deal, once she objected he would have been required to reimburse the community for the value of the funds (or reimburse his wife for half of such value) without reference to his good faith. Did the action also

236. 677 S.W.2d 171 (Tex. Ct. App. 1984).

237. *Id.* at 175.

238. *Id.* This court distinguished another Texas case, Reaney v. Reaney, 505 S.W.2d 338 (Tex. Ct. App. 1974) in which the court treated the husband's loss of community funds through gambling as a fraud on the estate. Modern courts take a dim view of gambling with community funds. *See, e.g.*, Broussard v. Broussard, 132 So. 2d 85 (La. Ct. App. 1961) (declaring void a note and mortgage executed by husband to his brother, proceeds from which were allegedly expended on liquor and gambling). Likewise, spending money on one's paramour must also be accounted for on the divorce's judgment day. *See, e.g.*, Czapar v. Czapar, 232 Cal. App. 3d 1308, 285 Cal. Rptr. 479 (1991) (requiring husband to reimburse the community for his girlfriend's salary, which he had caused a community-owned company to pay her). In contrast, traditional Spanish law did not require a husband who dissipated community property on "gaming or harlotry" to reimburse the community. *Novisima Recopilación*, Book 10, Title 4, Law 5 (1805), Commentary of Matienzo. However, a widow who behaved "wantonly" could lose her half of the community estate to the heirs of her deceased husband. *Id.; Nueva Recopilación*, Book 5, Title 9, Law 5 (1567).

239. *Andrews*, 677 S.W.2d at 175.

violate the proposed duty of good faith? Unless the husband could show the gift to have been in the interests of the marriage as a whole, and not just his own interests, I would argue that it violated such a duty. If the husband wanted to make a gift to his mother he could have either gotten his wife's prior consent, or he could have made a gift from his separate property.

Had it not been a gift, but a real investment, then the duty of care would consider factors such as the expected return, whether the husband had conducted any kind of due diligence prior to the sale to determine the property's economic value (getting an appraisal, for example), and whether, under all the circumstances, the investment was prudent. Of course, the fact that it turned out badly might unfairly affect the analysis, and a court should be conscious of evaluating the factors at the time of the investment, and not through the skewed perspective of hindsight.

The duty of care would also apply to those actions too insignificant to be caught by the notice, disclosure and consent procedure that I have set forth. For example, a wife might take the family El Camino to meet friends at a local honky-tonk after work. After she has a couple of beers, she heads home. Though not over the legal blood-alcohol limit, she is just woozy enough that she skitters off the road into a cement drainage ditch. The $600 dent totals the car. Did she act with due care in using the car under the circumstances? Hard to tell. She might owe her husband $300 depending upon whether her behavior was reasonably prudent—relevant circumstances might include the amount she'd had to drink and the value and the ability to replace the property involved. In a marriage these factors will necessarily be situational.

States should adopt a duty of care (and of good faith, in those states that don't yet have it) even if other provisions for management and control are left standing as is. The duties of care and good faith can be considered separate and apart from the notice, disclosure and consensus procedure, and their enactment would not interfere with the preference for autonomy we might have as a people. They are also a far less radical restructure of community property law. The duties of care and good faith, coupled with a reimbursement remedy, would limit autonomy at its outermost edges, and soften the power imbalance that can be mustered through the current system. The duties would move the law towards recognizing the interconnectedness of a married couple.

It might be argued that so long as a spouse acts in good faith (although in most states this is not a requirement) he or she should not be punished for acting in poor judgment. One response is that a spouse is free to act in the poorest judgment he or she likes with respect to such spouse's own half share and that share only.[240] When a spouse chooses to change the legal

240. It might be necessary, in this scheme, to allow a spouse to partition certain forms of community property by alienation. Such a proposal would have to be carefully

HeinOnline -- 30 Gonz. L. Rev. 282 1994-1995

relationship of another without that person's consent, however, that spouse should act prudently. Even if he or she does act prudently, it may be that the non-acting spouse should still have a claim for reimbursement if the action was without his or her consent. A softer rule would allow the reimbursement only for non-consented-to actions that were outside the ordinary course of the marriage, or perhaps with respect to actions involving a certain dollar or value limit, though such exceptions would fragment the system in somewhat the same manner that has drawn criticism to the present system.

C. *Debts*

Either spouse should be able to receive credit based on his or her half of the community estate. However, creditors should only be able to reach the other spouse's interest if the creditor has obtained that spouse's prior written consent to the credit transaction. Some might immediately respond that such a requirement would impossibly restrict commerce. But the question is not whether we should restrict creditor's access, but whether, as a policy matter, our interest in giving creditor's access to the property and funds of a person who did not consent to the transaction outweighs that person's interest in the property or funds. The problem with the managerial system of California, Idaho, Louisiana, Nevada and Texas[241] is that a spouse can obtain credit based on not only his or her share of community property but also on the other spouse's share, regardless of whether the spouse has consented to or even knows of the debt, or whether the transaction will benefit that spouse or the marriage. The community debt system[242] fares little better because it presumes that debts are for the benefit of the community, allowing one spouse full voice in determining what is good for the community. Spouses are not children, and unless they are otherwise incapacitated they are quite capable of participating in decisions about what's good for the marriage, and without that participation, their share of property should not be at risk.

Another issue to examine is what should result when a creditor acts under the mistaken assumption, or the spouse's false representation, that the spouse is not married and that accordingly the community estate is represented to be owned by him or her in full. Should the transaction be voidable, or merely yield a claim for reimbursement by the non-acting spouse against the acting

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considered, however, because it could result in a spouse owning a house or a family car as tenant-in-common with a total stranger. In the scheme proposed above, the spouse can effectively alienate his or her economic interest in property through a non-voidable transaction by simply closing the deal, and then reimbursing the other spouse (upon his or her objection) for half the value of the property.

241. *See supra* notes 200-07 and accompanying text.

242. *See supra* notes 208-19 and accompanying text.

HeinOnline -- 30 Gonz. L. Rev. 283 1994-1995

spouse? Phrased another way, how much of a burden do we want to put on third parties? A reasonable burden? How much is reasonable?

Greater access to information about the marital status of those who live in community property states would help resolve these questions. If the information is of public record somewhere, in the form of a license, the process should be one simply of gathering the information into a manageable and accessible form.[243] As information becomes more accessible, particularly through on-line computer networks, the process will become simpler. Credit reporting companies could put the subject's marital status on their reports, and thus notify a potential creditor that it should require the consent of both spouses to a transaction.[244] It would not add time or burden to the creditor beyond the time required to check the credit report. If access to marital-status information is available, the creditor should lose any claim to the non-debtor's share of the community estate if it did not get that spouse's consent.

However, even with access to marital status, it would not be reasonable to expect all third parties to check with spouses on a routine or small transaction basis. Some small transactions include the dry cleaner who takes the wife's cash and gives her the family's laundry or the woman who buys a couch at a garage sale. It might be inefficient and unreasonable to require these parties to check marital status before closing the exchange. Of course, assuming that the alienating spouse did not know of his or her partner's opposition to the transfer, the transaction is only in jeopardy under the proposed rule if it would have had material impact on either of the spouses or the marriage, or if it would be in violation of the duty of good faith or care. Since those standards must be read in light of individual circumstances, though, the ordinary third party won't know be able to ascertain the spouse's authority unless he or she has the other spouse's consent in hand.

Perhaps such people should be protected by enforcing unauthorized small transactions. One possibility is to put an upper dollar limit on non-voidable transactions, such as $500, to alert third persons to check the marital status if the transaction involves a greater amount of money. This kind of rule earns the same criticism as the current system—that it artificially breaks up transactions into discrete units. Furthermore it should be noted that $500 is more to some couples than to others, as will be true of any dollar amount, and that the rule wouldn't allow a spouse to void a transaction that might be small in economic but large in sentimental value. In any event, the debtor spouse

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243. Those married without a license, or putatively married, would not be included in such a database unless they specifically registered, and accordingly under this plan third parties would be protected as if the couple were not married, unless the party knew of the marriage.

244. However, they may well not be motivated to do so until creditors are threatened with the specter of voidable transactions.

HeinOnline -- 30 Gonz. L. Rev. 284 1994-1995

would be liable to the other spouse for the transaction regardless of the result to the creditor—the rules for creditors would not change the general rule that applies between spouses.

As for tort debtors, except in the unlikely circumstance that the other spouse has agreed to the proposed tortious action after being given all attendant information, all states should adopt the rule that recovery is limited to the tort-acting spouse's separate property and share in community property. While the rule may seem unfair to tort victims, remember that it is something of a windfall to be lucky enough to be victimized by a married spouse and thereby get access to two people's property.[245]

D. *Dissolving the Community*

What if the spouses cannot agree? What if the proposed rule strains their ability to negotiate and agree, causes too much stress, takes too much time, and leads to endless tiresome squabbling? Though the proposed remodel of the rules tries to incorporate the social and psychological reality of marriage, not all marriages may look like that reality - in some the spouses will conduct their lives in isolation, divorced in mind and spirit if not in law. Should these persons, or any other married couple, be coerced into a consensus system of decisionmaking if they don't choose to operate that way? The response to this argument is that the proposed provisions allow them to adopt whatever system of management that they both agree to. The system will only come into play as the backup when a spouse feels that his or her property has been somehow used or transferred wrongfully, whereupon the rules give the aggrieved spouse a cause of action to reclaim his or her share of property.

The present system not only projects a vision of marriage that detracts from the general reality, but it doesn't allow a spouse who is coerced into a marriage of imbalanced power any ability, short of divorce, to participate in the large number of marital property decisions that don't require joinder (let alone informed joinder) under state laws. In contrast, the proposed regime encourages, but does not force couples to share management. The law will only step in when the spouses disagree, and then it will step in on the side of agreement, not autonomy.

It has also been proposed that couples should be able to decide that they will not share community property, that from a certain point in time forward they would operate as if they were in a common law state.[246] The opt-out idea has promise, but I would modify it to maintain the original idea of community

245. This suggestion does not address rules of agency or other doctrines which might impose liability on the non-acting spouse on some basis other than the mere fact of matrimony.

246. Bruch, *supra* note 199, at 277-279.

HeinOnline -- 30 Gonz. L. Rev. 285 1994-1995

property, that all property belongs to both parties in equal shares to reflect their equal, though different, contributions to the marriage.[247] This could be achieved by directing that all property from a certain point forward will be divided in half, if feasible, and belong to the spouses as their separate property. One way to implement this with some family funds would be to use the mechanism that some states use to obtain child support—garnishment.[248] Each spouse would have a separate account, and each paycheck or other form of monetary compensation would be divided by the payor in half and distributed to each of the separate accounts. This mechanism would be cumbersome and less than ideal, but would preserve the original purpose of community property. After the division, the property would be the separate property of each spouse and would be subject to his or her sole management and control. Other, non-currency property could be liquidated and split, if feasible, or otherwise divided between the spouses and once split, would then be separate property. Of course, a certain amount of bartering could take place á la I'll give you the Elvis Costello poster if you give me all the old copies of *National Geographic.*

E. *Burdens of Proof and Statutes of Limitations*

Other changes that should be made relate to burden of proof and the statute of limitations. Under the original Spanish provisions, the wife had the burden of proving that her husband's transactions were in fraud of her marital rights.[249] This rule should be flipped such that in all cases concerning a breach of an obligation or duty pertaining to community property, the burden of proof should be on the acting spouse, as the one who is proposing the transaction and likely has more information about the transaction. He or she should have to prove, in order to avoid a claim for reimbursement, that the transaction fell within the rules: that he or she obtained informed consent; or that the transaction was not material and had not been opposed by the other spouse; and that he or she did not breach the obligations of good faith and care.

What about the statute of limitations? Spouses are often reluctant to damage whatever little harmony there might be in the marriage by bringing a court action to receive compensation for or rescind a non-complying transaction. Professor Carol Bruch has proposed that the statute of limitations

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247. *See supra* text accompanying notes 18-24.

248. The Family Support Act of 1988 requires that by Jan. 1, 1994, each state implement automatic withholding for child support unless good cause exists or the parties have otherwise agreed. 42 U.S.C. §§ 666(a)(8), 666(b)(3) (1988 & Supp. III 1991).

249. *See* DE FUNIAK & VAUGHN, *supra* note 18, § 126.

HeinOnline -- 30 Gonz. L. Rev. 286 1994-1995

for community property transactions should not begin to run until a marriage ends by death or divorce.[250] Injured spouses who are trying to preserve the marriage should not be punished by denying them the right to be made whole from a spouse's unauthorized transaction.

Adjusting the provisions might invite more litigation, and the traditional reluctance to intervene in intra-marital affairs that exists in our legal system[251] will be aggravated by the prospect of further overburdened family law courts. However, to deny people access to the legal system to right wrongs is to promote the tyranny of the powerful, hardly the principle our legal system should stand for. The answer may be to develop less time-consuming, cheaper, and more available state supervised and sanctioned dispute mechanisms, such as mediation, or arbitration. Naturally, there are concerns that any form of dispute mechanism that relies on negotiation or information gathering may benefit the more powerful spouse, or the spouse with access to more property or funds, and measures should be considered to counteract any such advantages.[252]

VI. CONCLUSION

The theme that underlies community property, that each spouse contributes to a marriage differently but equally and should therefore share equally in its fruits, is laudable. Properly implemented, the theme harmonizes with the uniquely interconnected and symbiotic psychological system that is marriage, in a system in which the behavior of each spouse derives from and drives the behavior of the other spouse and shapes the marriage as a whole. The community property management and control provisions should promote the balanced growth of the marriage and its personality as well as the character of the marriage's participants. They could limit dominance and coercion in marriages, and allow women more access to property, thereby helping to correct the gender imbalance of power over property that exists in our society.

In contrast, the present system is too girded in the Spanish preference for autonomous management, and this preference detracts from the goals described. The Spanish law, which gave the husband full power over all the co-owned property, has given way in theory, if not in practice in all states but Texas, to equal/either management, allowing each spouse to control both spouses' interests in encumbering or disposing of community property. This control contrasts with the quite minimal control that other co-owners, such as

250. Bruch, *supra* note 199, at 282.

251. *See supra* notes 48-52 and accompanying text.

252. *See* Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQ. J. 21 (1984).

HeinOnline -- 30 Gonz. L. Rev. 287 1994-1995

joint tenants or tenants-in-common, have over a co-owner's property.

The system has certain exceptions where both spouses must join in a transaction, but these exceptions ignore both the continuous nature of the marital relationship and the integrated nature of marital property by creating artificially discrete categories of transactions, categories that can be manipulated. Provisions for exclusive management suffer from these same defects. Although acting spouses in Wisconsin have a duty of good faith, and in California are subject to a fiduciary duty, no state requires an acting spouse to act with reasonable care or good judgment, even when the other spouse is totally unaware of the actions. Furthermore, in most states contract creditors can reach all the property of the marriage, other than the property subject to the exclusive management of the other spouse (and some creditors can reach even that). In the other states creditors can reach *both* spouses' share of property, if the debt is deemed to have had a community benefit, even though the non-acting spouse may not have had any opportunity to participate in determining whether the action benefitted the marriage or not.

In practice, the current system works against the spouse with the least access to property and the spouse that earns less, restricting such spouse from effectively participating in transactions that will change the spouse's interest in property, the marriage's relationship to property and quite possibly the relationship of the spouses with each other. This spouse will often be the wife, and her diminished role may be exacerbated by the tendency of husbands to identify power in a marriage with power over property.

As a general rule, all spouses should consult with each other, giving full information and reaching a consensus, for all transactions with co-owned property that will have a material impact on the marriage relationship. Furthermore, spouses should be prohibited from carrying out transactions to which the other spouse has objected, whether they are material or not. Furthermore, spouses must at all times act with good faith and due diligence, care and skill towards each other with regard to marital property. Limitations on claims against a spouse should not start running until the marriage breaks up, either through death or divorce.

It may be argued that the state should not be in the business of telling couples how to manage their finances and property. However, the proposal does not tell a spouse what he or she can do with his or her own property, rather, it sets up rules for when a spouse can do something, without consequences, with someone *else's* property. In contrast, the present system allows no action for a spouse who seeks, against the other spouse's wishes, to participate in marital property transactions. Hopefully, couples will discuss and negotiate with each other concerning transactions that will affect both of their interests in an item or sum of property, because that will allow each spouse to shape the course of the record of marital property and, derivatively, the marriage itself and the relationships of the partners with each other.

HeinOnline -- 30 Gonz. L. Rev. 288 1994-1995

However, it may be that couples will not choose this vehicle by which to flourish and develop, and this proposal doesn't deny other avenues for growth. By requiring good faith and due care, and limiting imbalanced control of one spouse over the other, it maximizes the opportunities for couples to develop an alternative marital property scheme that will reflect the unique nature of the particular individuals and their relationship with each other.

HeinOnline -- 30 Gonz. L. Rev. 289 1994-1995

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