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Distribution of Marital Assets in Community Property Jurisdictions: Equitable Doesn't Equal Equal

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The hallmark of an American community property system, in contrast to common law jurisdictions, is that community property is owned in undivided one-half ownership by each spouse.[1] In the event of a divorce, the undivided ownership interest needs to be divided. At first glance, it might sound simple—divide each asset 50/50—but nothing is ever simple when it comes to marital property. Although California,[2] Louisiana[3] and New Mexico[4] require an equal distribution of the community assets, other community property jurisdictions, using various terms, call for equitable distribution of the community assets.[5] But what is an

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1. Eight states have community property regimes: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. GRACE GANZ BLUMBERG, COMMUNITY PROPERTY IN CALIFORNIA 5 (5th ed. 2007). In those jurisdictions "[c]ommunity property is owned equally by the spouses from the moment of acquisition." *Id.* at 6. Wisconsin's statutes, WIS. STAT. ANN. §§ 766.001–766.97 (West, Westlaw through July 2011 amendments), patterned after the Uniform Marital Property Act, 9A U.L.A. 103 (1998), maintain most attributes of a community property system, including the attribute of a present undivided ownership interest in marital assets generated by either spouse during the marriage and has been described as "the ninth American community property state." WILLIAM A. REPPY & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 12 (7th ed. 2009). In common law states, spouses own property during the marriage indistinguishably from how they would own it if there were no marital community. BLUMBERG, *supra*, at 6.

2. CAL. FAM. CODE § 2550 (West, Westlaw through 2011 amendments). "The California norm is equal division of *each* asset," BLUMBERG, *supra* note 1, at 546–47, but has exceptions when community liabilities are greater than the total of community assets, and has a statutory exception for personal injury recoveries, CAL. FAM. CODE § 2603 (West, Westlaw through 2011 amendments), and "[w]here economic circumstances warrant." CAL. FAM. CODE § 2601 (West, Westlaw through 2011 amendments).

3. LA. CIV. CODE ANN. art. 2336 (2011).

4. Ruggles v. Ruggles, 860 P.2d 182, 192 (N.M. 1993) (articulating "the rule requiring equal division of the community property on divorce").

5. *See* IDAHO CODE ANN. § 32-712 (West, Westlaw through July 2011 amendments); NEV. REV. STAT. ANN. § 125.150 (West, Westlaw through 2010 amendments); TEX. FAM. CODE ANN. § 7.001 (West, Westlaw through 2011 amendments); WASH. REV. CODE ANN. § 26.09.080 (West, Westlaw through Aug. 2011 amendments); ARIZ. REV. STAT. ANN. § 25-318 (West, Westlaw through 2011 amendments); REPPY & SAMUEL, *supra* note 1, at 351. Wisconsin

equitable distribution, and how does it differ from an equal distribution?

Arizona is a representative example of a community property jurisdiction with a divorce distribution instruction that all community assets, although owned equally by the divorcing couple in undivided one-half ownership, are to be divided "equitably, although not necessarily in kind . . . without regard to marital misconduct."[6] The statute need not be read as authorizing meaningful departures from a 50/50 split of the net worth of the community. "[E]quitably, although not necessarily in kind" could mean only that it is unnecessary to divide each asset 50/50 and that an overall distribution scheme of the various assets and liabilities to one or the other spouse need not result in a distribution that is equal down to the last penny. Such an interpretation of "equitably, although not necessarily in kind," offers useful flexibility compared to a requirement of perfectly equal distribution. Equal may imply a more cumbersome 50/50 split for each asset.[7] The less constrained construction establishes an optimal structure in which a divorce court has extensive discretion and flexibility concerning *how* to divide various community assets and liabilities to arrive at a 50/50 split.[8] This construction need not achieve a numerically

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also statutorily authorizes equitable distribution at divorce. WIS. STAT. ANN. § 767.61 (West, Westlaw through July 2011 amendments). California provides for equitable division of community debts when marital debts exceed marital assets. CAL. FAM. CODE § 2622 (West, Westlaw through 2011 amendments).

6. ARIZ. REV. STAT. ANN. § 25-318(A) (West, Westlaw through 2011 amendments). The statute also contains a typical authorization for adjustment in the event of management and control fraud or serious squandering or dissipation while divorce was pending: "This section does not prevent the court from considering . . . excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common." *Id.* at § 25-318(C).

7. California, which has a requirement of "equal" distribution, CAL. FAM. CODE. § 2550 (West, Westlaw through 2011 amendments), and a norm that each asset be divided 50/50, has adjusted its structure to avoid some of the harshness associated with that norm, as it can force economically undesirable liquidation of assets, including the custodial home, or other economic impairment. *See* CAL. FAM. CODE § 2601 (West, Westlaw through 2011 amendments) ("Where economic circumstances warrant, the court may award an asset of the community estate to one party on such conditions as the court deems proper to effect a substantially equal division of the community estate."); *In re* Marriage of Brigden, 145 Cal. Rptr. 716 (Cal. Ct. App. 1978).

8. Because there are many different ways to arrive at a roughly 50/50 split of the overall community assets and liabilities, requiring numerical perfection would eliminate much of the flexibility and regress in the direction of liquidating the assets, as cash provides a vehicle for a perfect numerical split.

perfect division, but at the same time does not authorize any meaningful departure from a 50/50 overall split of the community worth. In such a regime, divorce settlement, the mechanism by which the vast majority of divorce property arrangements are achieved,[9] would be negotiated in the shadow of uncertainty about valuation and about the final resting place of various assets, but no uncertainty concerning the shares.

Judges in community property jurisdictions who interpret "equitably, although not necessarily in kind," however, are reluctant to assign it a meaning of "roughly 50/50 in the overall split." One reason for the reluctance may be that the judges feel compelled to assign to the term equitable its well-known general meaning in law: do the fairest thing given the circumstances.[10] Common law equitable distribution jurisdictions, facing the different distributional issue of how to divide separately owned property,[11] tend to use a broader concept of equitable, including concepts of need and contribution, often rejecting even a presumption of equal division.[12] Community property equitable distribution jurisdictions tend to follow along with the common law version of an equitable distribution at divorce, seemingly discounting the fact that what is being divided is property with present equal ownership.[13] In Arizona, for example, descriptions of

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9. ELLMAN, KURTZ, WEITHORN, BIX, CZAPANSKIY, & EICHNER, FAMILY LAW: CASES, TEXT, PROBLEMS 863–866 (5th ed. 2010).

10. *See, e.g.*, Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 133 (1995) (Ginsburg, J., concurring) ("In legal systems . . . 'equitable' signals that which is reasonable, fair, or appropriate. Dictionary definitions of 'equitable' notably include among appropriate meanings: 'just and impartial,' American Heritage Dictionary 622 (3d ed.1992); also 'dealing fairly and equally with all concerned,' Webster's Ninth New Collegiate Dictionary 421 (1983)."); ELLMAN ET AL., *supra* note 9, at 336 ("'Equitable' is merely a four-syllable word for 'fair.'").

11. REPPY & SAMUEL, *supra* note 1, at 12.

12. *Id.*; BLUMBERG, *supra* note 1, at 6 ("In modern common law states, variable distribution is the norm . . . ."); AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 4.09, Reporter's Notes cmt. a (2002) (citing *Luedke v. Luedke*, 487 N.E.2d 133 (Ind. 1985), as an example of an equitable distribution jurisdiction "resisting adoption of an initial presumption" of equal distribution) [hereinafter ALI PRINCIPLES].

13. *See, e.g.*, *In re* Marriage of Urbana, 195 P.3d 959, 964 (Wash. Ct. App. 2008) (explaining that an equitable distribution requires "fairness" rather than "mathematical precision," should be based on a wide variety of factors, and can justify a substantially unequal distribution); McNabney v. McNabney, 782 P.2d 1291, 1296 (Nev. 1989) ("A fifty-fifty rule as a rule of law is inherently inconsistent with our statute. . . .Very frequently justice and equity will require a divorce court to adjust community property in an unequal manner . . . ."); Phillips v. Phillips, 75 S.W.3d 564 (Tex. App. 2002) (divisions of community property can depart from equality by substantial amounts at the discretion of the

a strong presumption of an equal division of the community property at divorce[14] have increasingly given way to a use of "equitable" in a broader sense to justify substantially unequal distributions.[15]

The use of a broad, standardless version of "equitable" division of the community assets and liabilities is unfortunate. It allows divorce courts to evaluate the respective "contribution" efforts of each spouse in generating community property or liability and to give one spouse a greater share based on the evaluation. This undermines two key useful features of modern community property regimes: undivided ownership of community assets that takes place at original acquisition rather than being deferred until divorce or death,[16] and equal or joint management and control of all community assets.[17] The evaluation of "contribution" and the use of unequal contributions to justify unequal division also inevitably leads to consideration of subtle "fault"-type matters, despite the statutory admonition otherwise. The combination of these effects undermines efficient, cost-effective divorce settlements by injecting needless uncertainty and the prospect of fault-based inquiry and proof into the process.

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trial court, which may weigh many factors in reaching its decision, including fault, although fault cannot be used to punish.); BLUMBERG, *supra* note 1, at 6 (in the five community property states that do not require equal distribution, the community portion each spouse receives "is variable and subject to the divorce court's power of equitable distribution.").

14. Hatch v. Hatch, 547 P.2d 1044, 1047 (Ariz. 1976) (en banc) ("In the absence of sound reason, each spouse must receive substantial equivalents."). Reppy & Samuel describe Arizona's rule to be one of "equal absent 'compelling' reasons" and cite *In re* Marriage of Berger, 680 P.2d 1217 (Ariz. Ct. App. 1983). REPPY & SAMUEL, *supra* note 1, at 351. *Berger*, however, uses the "sound reason" standard of *Hatch*. *Berger*, 680 P.2d at 1229–30.

15. *See infra* Part I.A–C (discussing *Toth v. Toth*, 946 P.2d 900 (Ariz. 1997) (en banc), *Kelly v. Kelly* 9 P.3d 1046 (Ariz. 2000), and *Flower v. Flower*, 225 P.3d 588 (Ariz. 2010)).

16. BLUMBERG, *supra* note 1, at 7 ("[T]he notion of a spouse's present equal interest in marital property has considerable symbolic force. It clearly announces that spouses are understood to contribute equally to the family without regard to actual division of labor. It dignifies the work of the homemaker, tends to rectify sex-related inequality of employment opportunity, and recognizes that the couple may make unequal human capital investment in the spouses.").

17. The basic rule in all community property jurisdictions except Texas is that each spouse has equal management and control over each community asset. Some assets, most notably community real property, require a joint management and control decision. *See* REPPY & SAMUEL, *supra* note 1, at 257, 267; *see also* Susan Westerberg Prager, *The Persistence of Separate Property Concepts in California's Community Property System*, 24 UCLA L. REV. 1 (1976) (discussing the importance of equal management and control).

This essay offers a critical assessment of judicial conclusions that statutorily-mandated equitable distribution of community property permits a divorce distribution that substantially deviates from an equal split. My conclusion is that the departures do more damage than good and should not be authorized. An equal division of the community worth in every case is preferable to a system that permits unequal divisions. The organization of the essay is as follows. In Part I, I discuss three Arizona cases that use a statutory instruction to divide community property "equitably, although not necessarily in kind" to justify significant departures from a 50/50 split of the worth of the community. The cases exemplify the use in community property jurisdictions of a broad notion of "equitable" distribution and demonstrate that inquiries concerning what is equitable potentially involve inquiry concerning marital fault. In Part II, I explain why the broad approach to "equitable" demonstrated by Part I is undesirable. I assess possible advantages of the broad approach, including the opportunity to adjust a distribution based on spousal contribution or spousal need, especially in the context of marital debt, and explain the reasons why the advantages are more than outweighed by disadvantages. In Part III, I focus on one aspect of carving out the proper rule for distribution of community assets at divorce: the reality that much of the case law makes rules on facts that are far from typical. I conclude that the perhaps inevitable desire judges may have to do the right thing in a divorce posing perverse facts has the potential to undermine not only divorce settlements concerning normal facts, but the entire community property system.

I. UNEQUAL IS EQUITABLE

Several recent Arizona cases have grappled with the meaning of "equitable" in the divorce distribution statute, including *Toth v. Toth*,[18] *Kelly v. Kelly*,[19] and *Flower v. Flower*.[20] The combination of these cases offers divorce court judges discretion to contemplate substantial departures from a 50/50 split of the community worth.

A. Toth v. Toth—*A 90/10 split is equitable*

If the facts of *Toth* were posed as a law school exam question or class hypothetical, students might respond with: "Oh, people don't really do that sort of thing. You are just making it up so that

18. *Toth*, 946 P.2d 900.
19. *Kelly*, 9 P.3d 1046.
20. *Flower*, 225 P.3d 588.

you can ask the question." The facts are simple, entertaining, and effectively pose the question of what "equitable" means in the context of the divorce distribution statute.

Anthony Toth, 87, met Gloria Snyder, 62, at a senior citizens dance and married a year later.[21] The day after the marriage, Anthony took $140,000 of his separate property and purchased a home in a retirement community for the couple to live in, putting title in both of their names in Joint Tenancy with Right of Survivorship (JTWRS).[22] Within three weeks, however, the Toths began to experience marital difficulty. The trial court's finding of facts vaguely alluded to possible reasons for the difficulty: "Anthony moved out of the marital bedroom,"[23] and Gloria may not have made a "good faith effort to create a viable marriage."[24]

A month after the marriage, Anthony filed for an annulment.[25] There was only one possible community[26] asset: the home. Gloria sought half the worth, $70,000.[27] The trial court, however, noting the parties' differing ages, needs, health, and income, and noting the lack of evidence that Gloria made a good faith effort to make the marriage work, concluded Gloria was entitled only to $15,000.[28] The division of the entire community was roughly 89% to Anthony and 11% to Gloria, a radical departure from a 50/50 division. The court of appeals, reading meager case law and the statutory language, reversed, concluding that a departure from a

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21. *Toth*, 946 P.2d at 901.
22. *Id.*
23. *Id.*
24. *Id.* at 904.
25. *Id.* at 901. It took more than a year from the filing until the final decree of divorce, which means that the divorce process took longer to effectuate than their entire relationship, let alone their marriage. *Id.*
26. In Arizona, JTWRS property is divided at divorce indistinguishably from all community property. ARIZ. REV. STAT. ANN. § 25-318 (West, Westlaw through 2011 amendments). This is fairly typical of community property jurisdictions, although there is controversy about it. *See generally* James R. Ratner, *Community Property, Right of Survivorship, and Separate Property Contributions to Marital Assets: An Interplay*, 41 ARIZ. L. REV. 993 (1999). Despite the statutory language, Arizona unhelpfully treats JTWRS differently from community property in certain non-death respects, including authorizing separate property reimbursement for contributions to JTWRS when reimbursement is not permitted for the identical contribution to community property, and authorizing voluntary or involuntary severing, unavailable without joinder of both spouses if the property were community property rather than JTWRS. *Id.*
27. *Toth*, 946 P.2d at 901.
28. *Id.* at 901, 904.

50/50 split was justified only in the event of fraud, excessive or abnormal expenditures, destruction, or concealment.[29]

The Arizona Supreme Court sided with the trial court view.[30] According to the Arizona Supreme Court, the legislature's use of the word "equitable" rather than the word "equal" signaled the legislature's desire to give divorce courts authority to decide in each case what constitutes an equitable distribution.[31] A divorce court has broad discretion concerning the basis for its decision as to what division of the community assets is equitable, and is not limited to only spousal conduct pertaining to the specific assets and liabilities to be divided. The statute "does not purport to define the universe of relevance,"[32] which means that the source of funds used to generate a community asset, the duration of the marriage, the ages of the parties, the health of the parties, the income of the parties, the needs of the parties, and the parties' "personal situations" all can factor into a decision concerning what division is equitable.[33] "'Equitable' means just that—it is a concept of fairness dependent upon the facts of particular cases."[34] Although the starting point in most cases may be that an equal distribution will be the "most equitable,"[35] there may be sound reasons to depart from a substantially equal division, and a divorce court has discretion concerning that decision.[36]

In the view of the Arizona Supreme Court majority, the facts presented "sound reason to divide the Toths' property unequally"[37] because the asset was generated solely by Anthony.[38] Although Gloria did not engage in marital misconduct,[39] she failed to contribute to the asset or to the community.[40] "In this case, equal is not equitable. . . . '[I]n all fairness . . . the property . . . should . . . be awarded [in large measure] to one spouse. . . .'"[41]

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29. *Id.* at 901.
30. *Id.*
31. *Id.* at 903.
32. *Id.*
33. *Id.* at 904.
34. *Id.* at 903.
35. *Id.* The statute does not require the "most equitable" distribution, however—only that the trial judge distribute the assets "equitably." ARIZ. REV. STAT. ANN. § 25-318 (West, Westlaw through 2011 amendments).
36. *Toth*, 946 P.2d at 903.
37. *Id.*
38. *Id.*
39. *Id.* ("This is not a determination of fault; why the marriage dissolved is irrelevant.").
40. *Id.*
41. *Id.* at 903-904 (quoting Barbara J. Torrez, *Arizona Property Division Upon Marital Dissolution*, 1979 ARIZ. ST. L.J. 411, 437).

Toth thus stands for the proposition that the statute's instruction to divide all community and other jointly owned marital property equitably at divorce authorizes close to a 90/10 split in favor of a husband, and that a divorce court can base its determination that such a split is equitable on the following facts: (1) the wife failed to generate or contribute to the generation of community assets, while the husband generated the community assets in question; (2) the wife may not have contributed to the marital relationship; (3) the duration of the marriage was short; and (4) the parties were of different ages, with different needs, health, income, and personal situations. Although the most prominent fact is that the marriage lasted less than a month,[42] the decision is based on the meaning of "equitable," rather than on the duration of the marriage, and fails to address the level of importance of the factors, as is borne out by subsequent Arizona cases.[43] Thus, *Toth* stands as an invitation for any lawyer with a divorce client interested in a greater-than-50% share of the worth of the community to develop analogous facts justifying a similar result. One problem with the *Toth* result is that virtually every lawyer with a divorce client will respond to the invitation.

B. Kelly v. Kelly—*A Tale of Two Retirement Plans and Federal Law as the Source of Inequity*

During a 13-year marriage, Byron and Corinne Kelly both worked for the federal government.[44] Corrine's retirement plan was in the Federal Employees Retirement System—under that system, a portion of her retirement was to be paid out through Social Security.[45] Byron, in contrast, was enrolled in the Civil Service Retirement System, which, in effect, precluded social security—if Byron took social security, it would reduce his retirement benefits.[46]

When they divorced, Byron's retirement plan was characterized as community property to be divided between the

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42. *Id.* at 903 ("The marriage lasted two weeks, allowing no time for a marital relationship to develop, or for other equities to come into play.").

43. In *Kelly v. Kelly*, 9 P.3d 1046 (Ariz. 2000), discussed *infra* Part I.B, duration was not relevant. In *Flower v. Flower*, 225 P.3d 588 (Ariz. Ct. App. 2010), duration was a factor, but the duration was a year, and *Toth* was viewed as not restricted to marriages with a duration of less than a month. *See infra* Part I.C.

44. *Kelly*, 9 P.3d at 1047.

45. *Id.*

46. *Id.*

spouses.[47] Much of Corinne's plan, however, was her separate property, not divisible at divorce.[48] Corinne was given the Social Security portion of her plan outright because the federal statutes that grant the benefit directly to the earning spouse have been interpreted to preempt state marital property laws that characterize social security as a community retirement plan.[49]

Byron was understandably unhappy that his entire pension was divisible community property while much of Corrine's was not. As it turned out, the Arizona Supreme Court did not like it, either.[50] The Arizona Supreme Court chose not to confront head-on the preemption analysis that forced the differing treatments for identical-appearing assets, even though preemption was not an automatic result.[51] Nor did the Arizona Supreme Court consider a remedy that might have been compatible with preemption—the alternative of giving the community a reimbursement interest based on the opportunity cost loss associated with Corrine's plan.[52] Instead, the Arizona Supreme Court employed *Toth*'s expansive interpretation of "equitably, although not necessarily in kind"[53] to justify a result borrowed from a common law equitable distribution jurisdiction:[54] the value of Byron's retirement plan that would have

47. *Id.* ("In 1978, Congress amended the Civil Service Retirement Act . . . to allow state courts to treat such payments as marital or community property.")

48. *Id.*

49. *Id.* ("Social security bears many characteristics of a pension and would ordinarily be considered community property . . . . Federal law, however, prohibits such benefits from being subject to 'execution, levy, attachment, garnishment, or other legal process,' and declares that they are not 'transferable or assignable.' 42 U.S.C. § 407(a). This provision has generally been interpreted to prevent social security from being divided by state courts at divorce. . . . We agree, and view this entitlement as the separate property of the participating spouse.")

50. *Id.* at 1048.

51. The United States Supreme Court has not directly confronted the question of whether the Social Security Act preempts community property treatment. This issue has been litigated in state courts only, with conflicting results concerning the extent to which social security benefits can permissibly influence the division of marital assets at divorce. *See generally* Stanley V. Welsh and Franki J. Hargrave, *Social Security Benefits at Divorce: Avoiding Federal Preemption to Allow Equitable Division of Property in Divorce*, 20 J. AM. ACAD. MATRIM. LAW. 285 (2007).

52. *Id.*

53. *Kelly*, 9 P.3d at 1048 (describing *Toth* as deciding that a trial judge has considerable discretion to make an unequal division of community property based on "'a concept of fairness dependent upon the facts of particular cases'" and "relying on this 'concept of fairness'" as the basis for authorizing a significant departure from an equal distribution of the community property).

54. *Id.* (relying on Cornbleth v. Cornbleth, 580 A.2d 369 (Pa. Super. Ct. 1990)).

been his social security benefit "had he participated in that plan during the marriage" was distributed to Byron as his separate property.[55] The import of the Arizona Supreme Court decision was that Corrine's share of the community property was not unacceptably reduced inconsistent with federal law, because she was not entitled to a 50% share of the worth of Byron's community property retirement plan, only an "equitable" share. The actual result, however, was a division of the community worth in a manner other than 50/50, with Byron getting significantly more, justified because Byron had generated the asset in question and Corrine had generated less retirement to the community. The result and the justification in *Kelly* thus reinforced and expanded *Toth*'s proposition that the word "equitable" in the divorce distribution statute authorizes a divorce court to divide the worth of the community unequally whenever the trial judge's sense of fairness dictates an unequal division.[56]

Kelly's use of Pennsylvania case law to support its departure from a 50/50 division of the community worth also reinforces the

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55. *Id.* at 1048. This result enabled the Arizona Supreme Court to say the result was faithful to federal law because the result involved neither valuing and dividing Corrine's social security nor giving Byron an offset in other community property. It is true that Corrine's federally protected social security was not divided. It is also true that her social security was not de facto reduced by the Arizona Supreme Court because the amount given to Byron as his separate property was based on the worth of Byron's retirement plan rather than an offset of the worth of Corrine's plan. The distinctions seem somewhat disingenuous, however, because Byron was given a greater than 50% share of the total community property only because Corrine's comparable retirement plan was her separate property.

56. The decision tried to limit its import by indicating that it was limited to its facts. *Id.* at 1048. The facts are unusual, as both worked for the federal government. One had a Social-Security-based retirement plan and the other did not. The "limited-to-its-facts" tactic may not be particularly successful, as the key facts of Kelly, which are that what would have been a community asset was invested in a federally granted benefit directed only to one of the spouses, are not particularly unusual. A spouse seeking a greater than 50% share of the community worth is likely to argue that *Kelly*'s "equitable" departure is appropriate whenever community assets are directed into social security or some other federally granted benefit. Extensions of *Kelly*'s expansive interpretation of "equitably although not necessarily in kind" to justify a departure from a 50/50 division of the community have begun to occur outside of the context of each spouse with a federal retirement plan. *See* Kohler v. Kohler, 118 P.3d 621 (Ariz. Ct. App. 2005) (indicating that, where one spouse made contributions to Social Security through her private sector employment and a portion of the other spouse's state Public Safety Personnel Retirement System contributions were in lieu of Social Security contributions, a trial court is permitted to consider the unfairness that community-earned contributions to social security will result in separate property social security benefits for the private sector spouse as a basis for dividing the community assets unequally).

proposition that "equitable" division of community assets and liabilities is not different from equitable division of marital assets in common law jurisdictions. That proposition, however, ignores a key difference. Divorce courts in community property jurisdictions are dividing assets that have been owned in undivided 100% ownership by both spouses since the moment the asset was generated.[57] In common law equitable-distribution jurisdictions, the division is of assets owned individually by each of the spouses.[58]

C. Flower v. Flower—*Are Motivations for Marriage Relevant to a Property Split?*

Toth and *Kelly* practically compel divorce lawyers to seek a departure from a 50/50 split in favor of their client whenever one or more of the following facts are present: (1) the client alone generated community assets, (2) the other spouse can be argued to not have contributed adequately to those assets, to the community assets generally, or to the marital relationship, (3) the marriage was short in duration or the marriage ended shortly after the assets in question were generated, or (4) whenever standard well-settled law yields a result that can be described as "inequitable" in some way. Included in 2, 3, and 4 are invitations to make thinly disguised "give my client more because he (or she) deserves it and the other side doesn't" arguments. The very existence of *Flower v. Flower*[59] exemplifies the willingness of lawyers to respond to the invitations offered by *Toth* and *Kelly*. The result of *Flower* demonstrates the inclination of Arizona trial court and appellate judges to simply track the rules out of those cases without meaningful limitation. Appellate judges appear willing to offer trial courts so much discretion concerning decisions about "equitable" division of community assets as to undermine meaningful appellate oversight of those decisions.

The facts of *Flower* resemble those of *Toth* in certain respects. Judy, age 55, married Norman, age 76.[60] Shortly afterwards Norman changed the title in his home to community property with right of survivorship (CPWRS).[61] The couple lived in the CPWRS house for six months[62] and then moved into a house owned by

57. BLUMBERG, *supra* note 1, at 6.
58. *Id.*
59. 225 P.3d 588 (Ariz. Ct. App. 2010)
60. *Id.* at 590.
61. *Id.*
62. *Id.*

Judy (for which there had been no title change).[63] After a year of marriage, Norman alleged that Judy never had a romantic interest in him and only married him for financial motivations,[64] and sought annulment.[65] The trial focused on the only significant community asset, the CPWRS house. Norman argued that he had given Judy a community property ownership interest in that home through "misunderstanding, fraud, or coercion," but argued in the alternative that an equitable distribution of the community property required that he be awarded the CPWRS house outright as his property.[66] Judy disputed Norman's factual allegations concerning her motivation for marriage and argued the community worth, which largely constituted the CPWRS house, should be split 50/50.[67]

The trial court denied an annulment[68] but concluded, citing *Toth*, that it was obligated to consider the "overall issue of fairness and equity" when dividing the community property.[69] Pursuant to that consideration, Norman was given the CPWRS house outright, partly in recognition that "there was no effort, toil, or contribution from the community to increase the property's value . . . ."[70] Judy appealed, arguing that the significantly unequal property division was an unwarranted extension of *Toth*,[71] but the Court of Appeals agreed with the trial court.[72] According to the Court of Appeals, *Toth* instructed that the word "equitable" in the divorce distribution

63. *Id.* The couple made significant improvements to Judy's house while living in Norman's house and moved into Judy's house when the improvements were complete. *Id.* About half of the improvements to Judy's house appear to have been funded by a home equity loan secured by the CPWRS property. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 590–91. The equity in the CPWRS house was approximately $250,000 at the time of divorce. *Id.* at 590.

67. *Id.* at 590–91. Arizona presumes all real property titled in both spouses' names is community property regardless of whether the source of that property was the separate property of one of the spouses. The presumption can be overcome only by clear and convincing evidence of the lack of donative intent by the originating spouse. *See* Sommerfield v. Sommerfield, 592 P.2d 771, 773–74 (Ariz. 1979); Becchelli v. Becchelli, 508 P. 2d 59, 62–63 (Ariz. 1973).

68. *Id.* at 591. According to the court of appeals, the trial court judge determined that a valid marriage existed by "reasoning that later-in-life marriages are often entered into for reasons other than a sexual relationship, such as companionship, and even if the Wife married Husband for financial reasons, she still demonstrated genuine affection towards him as both parties had suffered significant personal losses that may have brought them together." *Id.*

69. *Id.*

70. *Id.* The trial court also recognized that Judy's home was her "sole and separate property free from any claims of the Husband." *Id.*

71. *Id.*

72. *Id.* at 596.

statute required trial courts to consider "'fairness' on a case-by-case basis rather than relying upon *per se* rules."[73] Further, the court's notion of equitability required a "balancing [of] equities"[74] such that different courts "might reach different conclusions in similar cases without abusing their discretion."[75] Accordingly, when determining the appropriate division of the community worth, a divorce court has wide discretion to consider not only the source of the funds used to purchase or improve assets in question[76] but also "any factor that has bearing on the equitable division of the marital property,"[77] including "contributions made by each spouse to the community, in whatever form."[78] The trial court's decision to divide the community assets unequally was thus well within its discretion. Judy's lack of contribution to the CPWRS house and her lack of general contribution to the marital community,[79] along with "a relatively short" marriage, justified the unequal distribution in Norman's favor.[80]

II. THE DRAWBACKS TO OPEN-ENDED EQUITABLE DISCRETION

Toth, *Kelly* and *Flower*, in the aggregate, seem to authorize an "equitable distribution" regime that permits departures from a 50/50 split of the community worth based on the consideration of many different factors, including contribution and need. Contribution and need are both fundamental concepts employed by divorce courts in common law equitable-distribution jurisdictions

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73. *Id.* at 595.
74. *Id.* at 592.
75. *Id.*
76. *Id.* at 593.
77. *Id.* at 595.
78. *Id.* at 594.
79. *Id.*
80. *Id.* at 595. The Court of Appeals described *Toth*, in which the marriage had been less than a month, as placing only "limited emphasis on the length of marriage," and explicitly rejected the wife's argument that *Toth* authorized departures from an equal division of the community worth result only for marriages of less than a month. *Id.* at 595–56. The Court of Appeals concluded that

> in balancing the equities of property division . . . . while the legal duration of the marriage was just over one year, the . . . Husband moved out of the marital home less than eleven months after the wedding, and . . . the marital relationship was strained and deteriorating [in] less than eight months . . . . By almost any account this would be considered a short marriage, where there was insufficient time for other equities to tip the scale in favor of substantially equal distribution.

Id. at 596.

to arrive at a division of the marital assets and liabilities.[81] *Toth* and *Flower* vaguely involve need in the calculus, without any specification of the appropriate weight and influence to be assigned to need. *Toth*, *Kelly*, and *Flower* all implicate contribution values by rewarding the spouse who generated the asset, and *Toth* and *Flower* also stress the lack of contribution by the other spouse. This regime offers little guidance concerning the following: how and when to consider need, contribution, and other factors; how to assign weight to each of the factors; the relative importance of each factor; and the extent to which trial-judge discretion concerning use of the factors is mandated or precluded.

The concept of dividing community assets and liabilities unequally at divorce seems inconsistent with the essential functions of community property regimes. The essence of community property regimes is that they entitle a spouse to undivided present ownership of all community assets, regardless of which spouse generated the asset and the behavior of the spouse during the marriage. Given this hallmark, one might assume that a mandate of "equal" division of the presently owned property would permeate the divorce distribution statutes of all community property jurisdictions. Instead, "equal" rather than "equitable" division appears to be the minority approach. Only California,[82] Louisiana,[83] and New Mexico[84] explicitly undertake equal distribution, although several other community property jurisdictions are often cited as effectuating a presumptively equal system.[85] As reflected in Wisconsin,[86] which based its marital

81. ALI PRINCIPLES, *supra* note 12, at § 4.09 cmt. a and Reporter's Notes cmt. a. The *ALI Principles* conclude that the myriad factors used in equitable distribution jurisdictions fall into two general categories: contribution, that is, rewarding the one who generated the asset; and need, that is, giving more to the one who has fewer post-divorce financial prospects. The principles also point out that these two values inevitably conflict. *Id.*

82. CAL. FAM. CODE § 2601 (West 2010).

83. LA. CIV. CODE art. 2336 (2011).

84. Ruggles v. Ruggles, 860 P.2d 182, 192 (N.M. 1993).

85. *See* REPPY & SAMUEL, *supra* note 1, at 351; ALI PRINCIPLES, *supra* note 12, at § 4.09, Reporter's Notes cmt. b (citing Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, *in* DIVORCE REFORM AT THE CROSSROADS 6 (Steven Sugarman & Herma Hill Kay eds., 1990)).

86. WIS. STAT. ANN. § 767.61 (West, Westlaw through July 2011 amendments). Reflecting its roots in the Uniform Marital Property Act, 9A U.L.A. 103 (1998), devised for both common law and community property jurisdictions, this divorce distribution statute calls for equitable distribution considering separate as well as community property.

property system on the Uniform Marital Property Act,[87] equitable rather than equal distribution at divorce lies at the intersection of community property and common law jurisdictions, with many common law states characterizing marital property, for divorce distribution purposes, in a fashion quite similar to community property jurisdictions,[88] some even presuming a 50/50 split unless there are compelling countervailing considerations.[89]

For several interconnected reasons, however, an equal division of the community worth is preferable to the formulation of "equitable" promoted by the results and the analysis of *Toth*, *Kelly* and *Flower*. Allowing divorce courts open-ended and largely unreviewable equitable discretion concerning division of community worth undermines horizontal equity, renders property division at divorce a high-stakes judicial lottery, and likely raises the costs of obtaining a divorce. Permitting divorce courts to employ an open-ended, undefined concept of "need" to justify a larger share for the one in need unacceptably undermines the concept of community property ownership. At the same time, allowing divorce courts to justify a larger share for the spouse who generated community assets with an open-ended idea of "contribution" is a frontal assault on the idea of community property (as well as in conflict with the idea of justifying departures from equal division on the basis of need). Authorizing divorce courts to address marital debts with an open-ended equitable calculation inevitably forces consideration of need and contribution and undesirably implicates creditors in every divorce in which there is debt. Perhaps most disturbing, the open-ended formulation of equitable discretion re-injects a subtle but substantial form of evaluating marital misconduct into the calculus concerning asset division. It does so by permitting divorce courts to contemplate whether a spouse was not married long enough to contribute to the marital community or failed to make a genuine contribution to the community, and in effect penalizes a spouse who did not contribute adequately with a lesser share of the community assets.

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87. Howard S. Erlanger and June M. Weisberger, *From Common Law Property To Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 WIS. L. REV. 769, 770 (1990).

88. ALI PRINCIPLES, *supra* note 12, at § 4.03, Reporter's Notes cmt. a.

89. *Id.* at Reporter's Notes cmt. b. It is ironic that in several common law states, which do not attach marital property rights at the time of acquisition, but do assign a presumption of equal division that can only be overcome by a compelling reason, the likelihood of equal division may be greater than in several community property states that confer property rights at acquisition but permit equitable distribution concepts to justify departures from an equal split more easily.

A. Open-ended equitable distribution of community assets undermines horizontal equity.

A divorce court's equitable discretion to depart from a 50/50 split of the worth of community assets, as envisioned by *Toth*, *Kelly* and *Flower*, can result in a distinct lack of horizontal equity: similarly situated spouses may end up with different results.[90] A variety of unequal splits of community assets may occur depending on which judge the couple draws and that judge's notion of "fairness" within a marriage.

The problem of a lack of horizontal equity has long been recognized as a key undesirable aspect of equitable distribution.[91] It is particularly a problem when the division pertains to property rights owned in undivided fashion by both spouses at the time of division. The prospect of an unequal split of the value of supposedly equally owned assets may undermine a spouse's ability to rely that he or she genuinely owns those assets during a marriage. This in turn may undermine the goal of "facilitating a sharing relationship in an ongoing marriage" that underlies modern community property regimes.[92]

Open-ended administration of "equitable distribution" is sometimes defended in spite of its sacrifice of horizontal equity on the ground that it enables departures from the precision required in an equal division, thereby saving costs associated with precision in

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90. *Toth*, 946 P.2d 900 (Ariz. 1997), and *Kelly*, 9 P.3d 1046 (Ariz. 2000), bury this possibility by not acknowledging it, while *Flower* embraces it as an important part of the distributional scheme. *Flower*, 225 P.3d 588, 592 (Ariz. Ct. App. 2010) ("[C]ourts might reach different conclusions in similar cases without abusing their discretion").

91. *See, e.g.*, Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553, 1556 (1984) (describing equitable distribution as "more properly called discretionary distribution" because it is more unpredictable than equitable, and as a structure that "throws divorcing spouses . . . into a lottery whose outcome greatly depends on the luck of the judicial draw and the competence of counsel, and in which the only sure winners are the lawyers."); Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 516–519 (1966); ALI PRINCIPLES, *supra* note 12, at § 4.09, Reporter's Notes cmt. a; Craig W. Dallon, *The Likely Impact of the ALI Principles of the Law of Family Dissolution on Property Division*, 2001 BYU L. REV. 891, 895 (2001); Ira Mark Ellman, *Inventing Family Law*, 32 U.C. DAVIS L. REV. 855 (1999).

92. For identification and discussion of the sharing value, see, e.g., BLUMBERG, *supra* note 1, at 7, 28–30; Susan Westerberg Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1 (1977); Catherine T. Smith, *Marital Property: Philosophical Models Of Marriage And Their Influence On Property Division Methods At Divorce*, 11 J. CONTEMP. LEGAL ISSUES 214 (2000); ALI PRINCIPLES, *supra* note 12, at § 4.09 cmt. b.

litigation.[93] But this justification is not particularly compelling, especially in community property contexts, because the community property "equitable" jurisdictions use equal as a baseline or, in some cases, a quite strong presumption for what is equitable. A divorce court judge, and thus divorce lawyers, cannot appropriately skip precise valuation of all the assets subject to division, because precision will be necessary to effectuate the baseline of equality. Rather than minimizing the costs of divorce litigation, leaving wide discretion to divorce courts leaves all divorcing couples and their lawyers in a potentially costly state of uncertainty.[94] The uncertainty about the outcome cannot be predicted to get to "better" settlements, as longstanding "bargaining in the shadow of the law" literature predicts it is likely to inject bias in favor of a spouse more willing to take risks.[95]

B. An open-ended use of "need" as the basis for departures from an equal division is understandable but undermines a key concept of community property as owned by each spouse when generated.

Should departures from a 50/50 split of the community worth be justified on the basis that one spouse needs more? Need is a classic underlying value associated with distribution in common

93. ELLMAN ET AL., *supra* note 9, at 323–24. Dividing community value equally requires meticulous characterization of each asset as either community or separate property, and meticulous valuation of each asset not liquidated or evenly divided in kind, thus exerting significant pressure to be perfect in characterization and in valuation. This can get expensive, as it may involve experts and considerable deposition testimony. "Equitable" allows much more room to be generous in characterizing assets as community, because it permits adjustments in the shares. Valuation similarly need not be precise, as any equitable division is appropriate, allowing a trial court to just sort of wing it on the value.

94. *See* Howard S. Erlanger, et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC'Y REV. 585, 598 (1978); Garrison, *supra* note 91, at 516–19. Open-ended discretion means those who want to know how their situation would be treated in court before settling more often need legal advice, and since legal assistance is not cheap, all other things being equal, discretionary standards may be more expensive. While some of these costs might be offset by legal aid/pro bono/reduced fee panels/law school and other clinics, there is, of course, no guarantee such sources will defray costs. If the costs of finding out are greater than what the inquirer stands to gain by finding out, the assistance will not happen.

95. Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968–69 (1979); Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621 (1991).

law "equitable" distribution jurisdictions,[96] and one community property jurisdiction once described a form of need as the classic reason to "equitably" depart from a 50/50 split of community property.[97] Despite its prevalence, however, there are many critiques of the use of need as an underlying value justifying equitable but unequal distributions of marital property.[98]

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96. ALI PRINCIPLES, *supra* note 12, at § 4.09 cmt. a and Reporter's Notes cmt. a. *But see* MARTHA FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991) (arguing that even where need was considered in property division, an equality value so strongly influenced property distributions as to lead to equal divisions of property to the harm of women in need); *see also* Milton C. Regan, Jr, *Divorce Reform And The Legacy Of Gender*, 90 MICH. L. REV. 1453, 1461–1472 (1992) (reviewing FINEMAN, *supra*).

97. McNabney v. McNabney, 782 P.2d 1291, 1296 (Nev. 1989) ("The preeminent example is that of the wife and mother in a long-term marriage who has given up career opportunities to devote herself to her family. Very frequently justice and equity will require a divorce court to adjust community property in an unequal manner in these cases"). The factual basis for *McNabney*'s idea of the "classic consideration of need" as part of an equitable split of community property in favor of the wife is in general quite different than it was 50 or 60 years ago. *See* Ira Mark Ellman, *Marital Roles and Declining Marriage Rates*, 41 FAM. L.Q. 455 (2007). The classic is perhaps no longer classic—only 20% of households feature the husband as sole earner, although half of all working mothers don't work full-time. ELLMAN ET AL., *supra* note 9, at 346–47.

98. Many of the criticisms of using need to justify a particular division of marital assets developed in response to the use of need in alimony, although need has been an underlying basis for property division, especially in common law equitable distribution jurisdictions, as well. *See* Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989); *see also* ALI PRINCIPLES, *supra* note 12, at § 4.09 cmt. d (the meaning and use of need does not vary whether the context is property distribution or alimony). Criticisms range from the idea that need-values implement a form of welfare that will perpetuate undesirable dependency, to the idea that it undermines an equality partnership/democratic model of marriage, one best facilitated by an equal rather than need-based division of assets and liabilities should the joint venture dissolve. *See* Ellman, *supra*; Smith, *supra* note 92. The *ALI Principles* conclude that need is not relevant to property division because need neither explains who should meet the need nor justifies making the other spouse meet it. ALI PRINCIPLES, *supra* note 12, at § 4.09 cmt. d, § 5.02 cmt. a. Instead, the *ALI Principles* suggest compensation for loss as the proper theory for alimony, and propose imposing it occasionally on property distribution, too, as a reason to depart from a 50–50 split. *Id.* Under this approach, a spouse might receive compensation from the other spouse for loss of earning capacity arising from a spouse's disproportionate share of caretaking for children, losses that arise from the changes in life opportunities caused by adjustments a spouse make during a long marriage, disparities in the financial impact of a short marital relationship on the spouses' post-divorce lives, as compared to their situation prior to marriage, and the primacy of the income earner's claim to benefit from the fruits of his or her own labor, as compared to the claims of a former spouse. *Id.*

I do not propose in this essay to resolve once and for all whether need is an appropriate factor for shifting assets between spouses at divorce, or whether compensation is a better theoretical concept for addressing the needs of divorced mothers.[99] My point is limited: use of need or compensation to justify departures from a 50/50 split of community worth at divorce, undertaken as part of a vague, standardless inquiry concerning an "equitable division," undermines important community property concepts of genuine property ownership and equality.[100] In addition, divorce courts given the authority to make "equitable" departures from a 50/50 split of the community worth are not be restricted by the word "equitable" to considering only the needs of divorced mothers as a basis for departures.[101]

Decisions about whether need or compensation for loss are appropriate justifications for distributional awards to one spouse can best be handled in a spousal support structure. Spousal support structures already permit consideration of need as a basis for the support and can standardize and specify the nature of the inquiry

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99. The *ALI Principles* approach of substituting loss for need offers more precision and can be expected to make results more uniform. Any departure from a 50/50 division of the net worth of community property, even on the basis of loss, would nevertheless undermine the idea of presently owned community property. The *ALI Principles* justify including loss as a factor in property division as well as alimony because that approach, using need, "is implicit in existing law," ALI PRINCIPLES, *supra* note 12, at § 409 cmt. d, and because as a practical matter, property division and period payments are two ways to get to the same place. The comments, which stress practicality, can be read to simply suggest that a trial judge should not be precluded from using a lump sum current asset award rather than periodic payments in fashioning a remedy for the *ALI Principles*' proposed loss-compensation based alimony. *Id.* at § 409, Reporter's Notes cmt. d. Viewed this way, the comments do not advocate large departures from a 50/50 split of the community worth on the basis of loss factors.

100. Although in a different context, Chief Justice Roger Traynor of the California Supreme Court recognized the true nature of community property as genuine existing ownership, not a contingency based on the situation a judge may conclude exists at the end of the marriage. See v. See, 415 P.2d 776, 782–83 (Cal. 1966) (community property is a "'present, existing and equal interest'" not to be transformed by a legal rule into "an inchoate expectancy" only possibly available in some amount or form at the end of the marriage).

101. The historic use of need based factors in distribution has often resulted in a departure from a 50/50 split in favor of women who have fewer financial prospects at divorce than the husband, but Arizona's "equitable" distribution structure does not appear to be emphasizing such a result. *Toth*, 946 P.2d 900 (Ariz. 1997), *Kelly*, 9 P.3d 1046 (Ariz. 2000), and *Flower*, 225 P.3d 588 (Ariz. Ct. App. 2010), each adjust the 50/50 split in favor of the husband, without appearing to consider the needs of the wife. *Toth* and *Flower*, however, may signal an emphasis on the needs of spouses over 80.

into need and the basis for an award.[102] Practical aspects of whether need is better addressed via lump sum methods rather than periodic payments can be better accommodated within this alimony structure, in which couples are permitted, once need obligations are established, to agree to a property distribution that eliminates or minimizes the need for periodic payments.[103]

Arizona's divorce distribution system of "equitably, not necessarily in kind" already accommodates a key aspect of need without departing from a 50/50 split of the community property. A drawback to an equal system is that the only practical way to achieve an equal distribution of each asset is to liquidate the assets and divide the money. Liquidation may be undesirable from the perspective of minor children of the divorcing couple if, for example, the marital home is liquidated.[104] This is a form of need, although it is child-based need more than spousal need. Arizona's equitable system enables considerations of need concerning the direction of particular assets, thereby facilitating a distribution in which the marital home can more easily go to the custodial parent (although in some situations there may not be enough remaining community assets to balance the distribution).[105] Use of a broad "equitable" distribution scheme to give the family home outright to the custodial spouse, without finding some method of splitting the community worth 50/50, may further skew the already-pressure-filled incentives spouses face to seek custody as part of an overall divorce settlement strategy rather than out of a true desire for custody.

C. An open-ended idea of "contribution" to justify a larger share for the spouse who generated community assets is a frontal assault on the concept of community property.

A driving motivation for the result in *Toth*, *Kelly*, and *Flowers* is the extent of the respective spouses' contributions to the

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102. *See* BLUMBERG, supra note 1, at 24. This is the currently existing approach in California. As a practical matter, only a small number of divorces feature divisible assets sufficient to avoid an alimony determination. Therefore for most divorcing couples the alimony structure cannot be avoided by an unequal property division. ALI PRINCIPLES, *supra* note 12, *Introduction* at 26.

103. *See* ELLMAN ET AL., *supra* note 9, at 337.

104. California recognized this problem and amended its statute providing for an exception to the equal division requirement. CAL. FAM. CODE § 2601 (West 2010).

105. One solution is to defer any sale of the residence, and, as the *ALI Principles* propose, provide a child support credit for the non-custodial spouse. ALI PRINCIPLES, *supra* note 12, at § 4.09(3) and § 4.09 cmt. i.

community. The spouses that contributed the assets in question were rewarded with a greater share of the community worth, and the spouses that may not have made contributions to the assets or the community as a whole received less than 50% of the community worth. While need/contribution-for-loss based "equitable distribution" considerations seem like a wolf in sheep's clothing, contribution values seem like a wolf that comes as a wolf.[106] Contribution values contain an inherent bias against a spouse who provides only non-pecuniary contributions to the community, because the underlying implication of contribution as a basis for a departure from a 50/50 split of the community assets is that a spouse who failed to contribute much toward an asset or toward the marriage in general need not receive 50% of the community worth.[107] This idea threatens the fundamental premise of the modern view of community property[108] and is a step back in the direction of the common law title system.[109] Community property systems are not vehicles that enable each of the spouses to get paid with community assets for their contributions to the community, with each entitled to equal pay only if they made equal contributions. Rather, the message to each spouse delivered by a community property system is that regardless of what is done by each spouse and how it is done, each spouse will own equally all of the assets generated or deliberately placed into the marital community by either spouse. In addition, each spouse will be equally responsible for all the debts incurred by either spouse on behalf of the marital community. A goal of a community property system is to facilitate long-lasting marriages by freeing each spouse to contribute (or not) in a variety of ways, especially non-pecuniary ways, without worrying about the need to contribute in pecuniary ways or in ways that can be proven to facilitate greater

106. I first saw the analogy of legal rules that come disguised or directly as a wolf in *Morrison v. Olson*, 487 U.S. 654, 700 (1988) (Scalia, J., dissenting).

107. ALI PRINCIPLES, *supra* note 12, at § 4.09 cmt. b. If serious weight is given to contribution for purposes of departing from a 50/50 split, the almost tautological result will be unequal distributions in the direction of the spouse with greater economic ability, as it tends to favor the wage earner. As the *ALI Principles* point out, using contribution as part of an equitable calculus thus conflicts with need-based values. *Id.* at cmt. a.

108. *See* ELLMAN ET AL., *supra* note 9, at 341 (making this point by slightly misstating: "Note that contribution is not relevant under the community property system."); *see also* ALI PRINCIPLES, *supra* note 12, at § 4.09 cmt. c ("Unequal financial contribution is rarely accepted as a basis for unequal division among the community-property states"). The *ALI Principles* reject any idea of an unequal-contribution exception to an equal division. ALI PRINCIPLES, *supra* note 12, at § 4.09 cmt. c.

109. ALI PRINCIPLES, *supra* note 12, at § 4.09 cmt. b.

financial earnings for the community as a whole.[110] Contribution, like need, should play an appropriate role in the decision concerning where a particular asset goes in the event of divorce. Contemplating that the contributor is entitled to a greater-than-50%-share because he is the contributor is to suggest that equal ownership of community property is a myth.

D. A Combination of Contribution and Need: Unequal Distribution of Community Debts?

Even if community assets should be divided equally, without consideration of need or contribution, should debts be distributed equitably rather than equally? Marital debt incurred on the basis of the income-earning capacity of both spouses, split equally, may pose problems for a spouse with lower post-divorce income prospects.[111] To address this area of need, the prototypical "equal" division community property jurisdiction, California, enables a "just and equitable" assignment of community debt, although only in the event that community liabilities exceed community property/quasi-community property assets.[112]

Unfortunately, unequal debt allocation based either on need or contribution potentially undermines another important aspect of community property systems—equal management and control—which empowers each spouse to make financial decisions based on the entire wealth and earning power of the marital community, without requiring a joint decision.[113] Equal management and control goes hand in hand with equal present ownership, and an underlying goal of the rules mandating equal

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110. *See* Prager, *supra* note 92.

111. ALI PRINCIPLES, *supra* note 12, at § 409 cmt. h (If one spouse earns more than the other during marriage, when the couple incurs debt, "the spouses (as well as their creditor) normally rely disproportionately on the income of the higher earner to service it. Where the debt has not been repaid at the time of divorce, and exceeds the marital assets, the parties' disparate earnings remain the only source for retiring it, and are appropriately considered in its allocation.").

112. CAL. FAM. CODE. § 2622 (b) (West 2010). The *ALI Principles* propose much the same idea. ALI PRINCIPLES, *supra* note 12, at § 409 (2)(c) (When "debts exceed assets . . . an equal allocation of the debt may be unjust . . . because of a significant disparity between the spouses in their financial capacity, their participation in the decision to incur the debt, their consumption of the goods or services that the debt was incurred to acquired, or some combination. . . . [In such situations] it is just and equitable to assign the excess debt unequally."). Marsha Garrison proposed the same thing 20 years ago for New York, suggesting the comparison of spousal incomes and expenses in a division. Garrison, *supra* note 95.

113. All community property states maintain a version of equal management and control. REPPY & SAMUEL, *supra* note 1, at 257–58.

management and control, like the rules mandating equal ownership, is facilitation of a long-lasting marital relationship.[114] An unequal debt allocation based on concepts of justice and equity, rather than part of a 50/50 split of the overall worth of the community, implicitly places liability on a spouse for making a decision to incur community liability that did not work out positively.[115] The approach thus discounts the fact that liability was incurred pursuing potential or actual benefits to the community and emphasizes the liability solely as a negative to be paid off. The divorce court evaluation of whether to unequally allocate the community debts at divorce may unavoidably involve second-guessing how community assets were managed and consumed.[116] The prospect of this second-guessing may in turn influence and thereby undermine a spouse's management and control behaviors within a marriage.[117]

Permitting a divorce court to assess the financial and non-financial benefits of a debt, including who benefitted in which way, for purposes of placing greater responsibility on one spouse for various debts, is unwise. It poses the same trap as divorce court assessments concerning particular contributions to a particular asset, and comparisons to overall need, for purposes of dividing community assets unequally. For both inquiries, it would not be unusual for motivation, consumption, and need to pull in different directions, leaving decisions standardless. If community assets are negative, it seldom will be one easy-to-characterize financial decision that led to the result. It is naive to think otherwise.[118]

In addition, authorizing divorce courts to allocate marital debts unequally raises complications pertaining to the creditors. Creditors, ordinarily not parties to the divorce proceedings,[119] do

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114. *See* Susan Prager, *The Persistence Of Separate Property Concepts In California's Community Property System*, 1849–1975, 24 UCLA L. REV. 1, 68–72.

115. Departing from a 50/50 split only when debts outweigh liabilities may subtly punish managers whose investment turns out so poorly that, combined with other decisions, the community is left in the red, even if uncontrollable market effects ultimately were responsible for rendering the community with less assets than liabilities.

116. Some liabilities may be incurred even though there is no expectation of a positive return, for example.

117. Such second-guessing is widely perceived as undesirable. *See* ALI PRINCIPLES, *supra* note 12, at § 4.10 cmt. b.

118. An example in the *ALI Principles* concedes as much, suggesting that after full consideration of these factors a divorce court "may or may not" divide the debt equally and "may or may not" divide the debt according to post-divorce predicted incomes. ALI PRINCIPLES, *supra* note 12, at § 4.09 illus. 2.

119. James Ratner, *Creditor and Debtor Windfalls at Divorce*, 3 EST. PLAN. & COMMUNITY PROP. L. J. 211 (2011).

not want their ability to collect jeopardized by a divorce allocation of assets and liabilities[120] and are consequently not usually precluded from collecting from either spouse subsequent to the divorce.[121] As long as community creditors are permitted to seek satisfaction from either spouse after a divorce, a departure from a 50/50 overall split of the worth of the community, including debts, will not offer strong protection to the spouse assigned less of the debt, regardless of the reason for the unequal distribution.[122] California has adjusted away from the usual approach of enabling a creditor to obtain satisfaction of community debts from either spouse after divorce by precluding creditors from seeking assets from a non-debtor spouse not assigned the debt at divorce.[123] The preclusion offers some protection to a non-debtor spouse but offers non-debtor spouses a possible windfall from divorce[124] and creates incentives for couples to divorce.[125]

A regime that permits an unequal division of community liabilities and requires a creditor to collect from only the spouse assigned the liability at divorce provides some protection for a spouse with less potential to earn after a divorce. The combination of an unequal division of the liabilities combined with creditor inability to follow and collect from all community assets after divorce, however, not only sets up windfalls for the spouse given the lesser amount of debt and incentives for spouses to divorce to minimize their total liability. It also has the potential to turn every

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120. *Id.*

121. *Id.* The usual rule is that if the spouse not assigned the debt ends up having to pay the creditor, that person is entitled to reimbursement from the spouse assigned the debt, in effect turning the spouse that pays into an involuntary creditor of the spouse assigned the debt who did not pay it.

122. *Id.* In particular, many spouses who incur debt and consume the benefits of it during a marriage will continue to incur debt and not pay it back after the marriage is over, in effect continuing to impose a disproportionate allocation on the other spouse.

123. CAL. FAM. CODE § 2622(b) (West 2010); *see also* Ratner, *supra* note 119. The protection will not work, however, if the spouse with less ability to pay is the debtor spouse. No jurisdiction contemplates precluding the creditor from seeking satisfaction from the actual debtor spouse. Ratner, *supra* note 119.

124. Ratner, *supra* note 119.

125. Andrea Carroll, *Incentivizing Divorce*, 30 CARDOZO L. REV. 1925, 1928–1944 (2009). In the extreme, a couple could try to divorce, assign as many debts as possible to one spouse and all of the assets to the other spouse, and in that way avoid collection while continuing their relationship. *Id.* At the same time, for all community debts assigned in whole or in part to the non-debtor spouse, California's structure gives possible windfalls to creditors, because if a non-debtor spouse is assigned the debt at divorce, all of her assets, including separate property assets unavailable to a community creditor during a marriage, are available. *See* CAL. FAM. CODE §2622(b) (West 2004); Ratner, *supra* note 119.

routine divorce into a mini-bankruptcy hearing in which creditors may insist on playing a crucial role in allocation of debts and assets. Under such a regime, every routine decision concerning allocation of community liabilities and assets has the potential to affect all community creditors' ability to collect.[126]

Marital debt raises perplexing issues. The way to address those issues is not, however, to dump all matters of who initiated, who benefitted from, and who has the better ability to pay various debts in both a relative and an absolute sense into a vague, standardless equitable distribution structure. Perhaps the most sensible way[127] to accommodate need or loss concerns associated with marital debt is via a spousal support structure. Property allocation adjustments should be reserved for situations of genuine financial misconduct that leads to the debt. Each community property jurisdiction, regardless of whether its norm is equitable or equal distribution, already permits property division adjustments when there has been genuine financial misconduct.[128] The adjustments do not ordinarily necessitate a departure from a 50/50 split of the worth because the mismanaging spouse's share of the community worth often can simply include the losses imposed by the mismanagement.[129]

E. Open-ended consideration of "contribution to the marital relationship" and "good faith efforts" as part of an equitable division of the worth of the community inevitably involves fault-based considerations.

Perhaps the most troubling aspect of the open-ended idea of "equitable distribution" espoused by *Toth*, *Kelly* and *Flower* is that it inevitably injects a vague concept of fault into the calculus for

126. Ratner, *supra* note 119, at 237.

127. A possible alternative that responds to the real problem is to rethink the characterization of a debt as entirely a marital debt if it was incurred based only on the assets and earning power of one of the spouses, including separate assets. Pushed to an analytical extreme, it might make sense to contemplate that if an unpaid liability was incurred based on post-divorce earnings of a spouse, that obligation could be characterized in whole or in part as the separate property of that spouse. Ratner, *supra* note 119. But this approach requires that assets traceable to that liability would need to be characterized as separate property, too.

128. Arizona's statute is typical. ARIZ. REV. STAT. ANN. §25-318 (West, Westlaw through 2011) enables a divorce court to consider abnormal expenditures, destruction, concealment or fraudulent disposition when dividing the community assets and liabilities. California allows for other than an equal split if one spouse "deliberately misappropriated [community property] to the exclusion of the interest of the other party in the community estate." CAL. FAM. CODE § 2602 (West 2004).

129. ALI PRINCIPLES, *supra* note 12, at § 4.11, Reporter's Notes at 769.

dividing the worth of the community.[130] The standard no-fault regime in most community property states precludes a lawyer from arguing that marital misconduct is a basis for departing from a 50/50 split.[131] Nevertheless, the *Toth–Kelly–Flower* approach to "equitable" considerations allows fault to come in a side door in unspecified ways. *Toth*, in particular, concludes that a divorce court has discretion to consider when a spouse moved out of the marital bedroom and whether a spouse made a good faith effort to contribute to the marital relationship.[132] The conclusion invites any divorcing party to introduce evidence concerning the who, what, when, and why concerning how the relationship deteriorated.[133] Facts pertaining to subtle forms of fault and lack of contribution, along with vague facts concerning need and strong facts concerning who generated the asset, are likely to be present in virtually every divorce. Thus, all divorce discovery and every divorce settlement conference are infected by the prospect that one side or the other may raise the possibility of fault and seek a departure from a 50/50 split.

There is real danger in permitting a divorce court to assess, under an open-ended, unrestricted notion of an "equitable" division of the community worth, whether a spouse adequately contributed to the marital community. The permission places power in the

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130. *See* Toth v. Toth, 946 P.2d 900, 906 (Ariz. 1997) (en banc) (Moeller, J., dissenting) ("Any reasonable reading of these findings compels the conclusion that the trial judge made the unequal division because of some perceived fault on Mrs. Toth's part . . . .")

131. *See, e.g.*, ARIZ. REV. STAT. ANN. §25-318 (West, Westlaw through 2011) (division of property shall be made "without regard to marital misconduct"); ALI PRINCIPLES, *supra* note 12, Reporter's Notes at 67–84. Arizona, California, Louisiana, Idaho, New Mexico, Nevada, and Washington have a no-fault regime for property division purposes. *Id.* Texas appears to permit consideration of fault in a property division, perhaps as long as it is not "punishment." *See* TEX. FAM. CODE ANN. § 7.001 (marital property is to be divided as the divorce court "deems just and right."); Smith v. Smith 143 S.W.3d 206, 213 (Tex. App. 2004) (fault acceptable as a basis for division); *see also* Lauren Redman, *Domesticity and the Texas Community Property System*, 16 BUF. WOM. LAW J. 23, 27-28 (2008). The *ALI Principles* concluded that more than half of all states do not permit consideration of fault for purposes of property division. ALI PRINCIPLES, *supra* note 12, Reporter's Notes at 67–84 (2002).

132. *See supra* Part I.A.

133. The husband in *Flower v. Flower*, 225 P.3d 588 (Ariz. Ct. App. 2010), for example, responded to the *Toth v. Toth*, 946 P.2d 900 (1997), invitation by arguing his wife did not make a good faith effort in the marriage, and instead only married him for his money, an argument that did not succeed in annulment but was in some way considered by the trial court as part of an equitable calculation that gave the husband considerably more than half the community property. *See supra* Part I.C.

judiciary to make unreviewable decisions concerning what behaviors are "normal" and what behaviors are not normal, in marital and marital-type relationships. The inevitable temptation of divorce court judges, when given an open-ended instruction to do what is fair and equitable, is to include as part of their basis for their decisions their conclusions concerning who was at fault, or more at fault, with respect to the assets and the relationship between the parties. A rule requiring an equitable distribution of marital property will never escape an undercurrent of fault, which may be one reason why equitable distribution has so often been vilified for being unpredictable and thereby sacrificing horizontal equity.[134] Fault-based inquiries are both intrusive to the parties and suspect because they are influenced by the factual interpretations and life experiences of the judge making the inquiry. A divorce court judge's generalizations about whether behavior is aberrant or faulty and therefore not a contribution might well be considered wrong by one of the parties or a different divorce court judge. Because an open-ended notion of "equitable" has no absolute reference point, and instead will vary from decision-maker to decision-maker, it is standardless and thus cannot afford meaningful review. *Toth*, *Kelly* and *Flower* demonstrate that judges, given the power to make an equitable distribution, do not want to give up that power in favor of an inquiry that will not include fault-style factors, and will instead opt for a virtually unreviewable interpretation of "equitable" that enables consideration of whatever the judge thinks is fair.[135] Fault is thus insidious in an equitable distribution context, lurking just beneath the surface, justifying intrusive inquiry without offering benefits in property division.[136]

134. *See supra* Part II.A.

135. *See, e.g.*, *Toth*, 946 P.2d at 903 ("[T]he statute . . . . does not purport to define the universe of relevance. 'Equitable' means just that—it is a concept of fairness dependent upon the facts of particular cases.").

136. *See* ALI PRINCIPLES, *supra* note 12, at 42–67 (noting that until 1968, fault was an allowed factor in property distribution decisions, that now "American law is sharply divided on the question of whether 'marital misconduct' should be considered in allocating marital property," and concluding that fault should be left out of marital property distributions, because the possible valid purposes for considering fault are best served by tort and criminal law regimes and fault has the potential to impose "serious distortions in the dissolution action").

III. THE PROBLEM OF MAKING RULES ON PERVERSE CASES

Making rules on the perverse case is a problem for all areas of law,[137] and a particular problem in marital property law, in which a large number of decisions are made[138] and only a tiny fraction are appealed. Appeals seem to occur only when there is a combination of a large amount of money at stake, facts so uncommon that none of the normal structures seem to fit, and relative irrationality of at least one of the parties. The development of marital property case law and statutory interpretation thus generally occurs in response to cases that depart meaningfully from the factual norm for divorcing couples. The interpretations and rules, however, fashioned in response to highly stylized facts, are then picked up and used as "the law."[139]

Toth and *Kelly* involved highly stylized facts[140] that necessitated an interpretation of "equitable" in the divorce

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137. This point underlies the saying "hard cases make bad law." That phrase is attributed to English Judge Robert Rolf in *Winterbottom v. Wright*, 152 Eng. Rep. 402, 405–06 (1842) ("This is one of those unfortunate cases in which . . . it is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has frequently been observed, are apt to introduce bad law."). The decision, hardly foresighted, denied the plaintiff a negligence claim because there was no privity of contract, thus leaving severely restricted claims of negligence in 19th century England. Oliver Wendell Holmes, dissenting in an early antitrust case, *Northern Securities Co. v. United States*, 193 U.S. 197 (1904), did not offer a reference to any source when he wrote that "great cases, like hard cases, make bad law."

138. For example, all divorces in Arizona, even if uncontested or the product of settlement, involve a judicial decree concerning distribution of property. ARIZ. REV. STAT. ANN. § 25-312 (4) (West, Westlaw through 2011). The total number of Arizona divorces in the year 2005 was reported to be 24,535. CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL VITAL STATISTICS REPORTS, BIRTHS, MARRIAGES, DIVORCES AND DEATHS: PROVISIONAL DATA FOR 2005, tbl.3. Westlaw searches did not reveal a reported or unreported appeal decision that cited the Arizona divorce distribution statute in 2005 or otherwise appealed a property distribution.

139. A good example is *Hrudka v. Hrudka*, 919 P.2d 179, 183, 185–88 (Ariz. Ct. App. 1995). The case involved a debt of more than $3.5 million, gifts of jewelry worth over $1 million, a Valentine's day 1987 Rolls Royce with a big bow, plus a prenuptial agreement presented to the wife two days before marriage—with the statements that without it there would be no marriage—but that probably wouldn't ever be enforced, with the parties swapping positions on the enforceability of the agreement in the middle of trial, and a motion by the wife to disqualify the husband's lawyer. Nothing was remotely normal about the case, yet Westlaw citing references list 100 references to the case.

140. The facts of *Flower v. Flower*, 225 P.3d 588 (Ariz. Ct. App. 2010), in contrast, are not particularly unusual. *Flower* is an example of a case that employs decision-tools developed to address perverse facts in order to resolve normal facts.

distribution statute. While the unusual facts of these cases may have led the judges to seek statutory flexibility to "do what is just,"[141] the consequence of the interpretation is to impose a highly discretionary, virtually standardless regime on all divorces. Most divorces will not be improved by injecting into the divorce process the possibility of an unequal split of the community worth assessed by a standardless evaluation of the duration of the marriage, each spouse's age, health and need, each spouse's contribution to community assets, the nature of each spouse's "contribution to the marriage relationship," and whether each spouse made a good faith effort to contribute to the relationship. Even worse, such a regime inevitably invites an inquiry into behavior that looks suspiciously like marital misconduct, and creates an opportunity for divorce lawyers in no-fault regimes to nevertheless develop fault issues and use them to seek a more favorable property division. The injection of uncertainty concerning need and asset contribution, along with the inclusion of the peculiar sort of fault calculus, raise the specter of an increased number of divorce cases that will feature arguments in court in favor of a significant departure from a 50/50 split. The open-ended interpretation of "equitable" in *Toth* and *Kelly* will likely influence settlement negotiations,[142] discovery, and eventually could influence how *pro se* couples reach their own decisions.[143]

The matter of equitable rather than equal comes down to whether an open-ended, standardless notion of "equitable distribution" is necessary to permit something other than 50/50 distribution in the occasional situation where "everybody knows" a 50/50 split will yield a bad result. The judiciary and perhaps the general public often seem to cling to judicial discretion as an essential attribute of the judicial system, in the hope that a wise judge with Solomonic wisdom will get it right. Overly rigid rules can create undesirable results that leave everyone with a lack of respect for the judiciary and the rule of law. Courts and legislators

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141. Toth v. Toth, 946 P.2d 900, 903 (Ariz. 1997) (en banc) ("This unusual case is one of those 'rare occasions when the circumstances and facts are such that, in all fairness to the parties' . . . . equal is not equitable.")

142. Property division at divorce is a classic example of bargaining in the shadow of the law. ALI PRINCIPLES, *supra* note 12, at § 4.09, Reporter's Notes cmt. a. (citing Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979)).

143. Although the legal rule may not affect pro se divorce, as the parties may be unaware of the rule, a "common understanding" of the rule may develop given the amount of discussion concerning divorce distribution that can be found on, e.g., the Internet. (A Google search on "Arizona divorce distribution rules" yielded "about 91,700 results (0.21 seconds).")

appear to endorse judicial discretion.[144] Washington describes its equitable distribution system as "a wise legislative recognition of the fact that the establishment of hard and fast rules in this area would only lead to inequities and untenable results."[145]

Concerning marital property issues, however, the cost of this flexibility is substantial. A do-the-right-thing interpretation of equitable, motivated by the need to respond to perverse facts, cannot be contained, despite statements in a decision to depart from a 50/50 split that it is unusual to do so.[146] Containment is not possible because there is no consensus concerning which facts should be included in the evaluation of when a situation is so unusual as to necessitate the departure. Many people believe need to be a sufficient justification for a departure from a 50/50 split, but there is little agreement concerning when that need is so extensive as to justify a greater share for the needy spouse.[147] Other people believe that there is not a sufficient basis for divorce courts to undertake a consideration of need, and argue awards based on need should be replaced by reimbursement for financial loss.[148] Many people reject contribution as a basis for a divorce court's award of assets to a spouse,[149] yet the main feature leading to the result in *Toth* and *Flower* was that key assets were contributed by one spouse, and the other spouse's contributions to the asset or the marital relationship in general were deemed inadequate to justify a 50/50 split.[150] There is thus no consensus

144. Dallon, *supra* note 91, at 909 (2001).

145. *In re* Marriage of Kittleson, 585 P.2d 167, 172 (Wash. Ct. App. 1978).

146. *Toth v. Toth*, 946 P.2d 900 (Ariz. 1997) (en banc), *Kelly v. Kelly*, 9 P.3d 1046 (Ariz. 2000), and *Flower v. Flower*, 225 P.3d 588 (Ariz. Ct. App. 2010), dutifully make such pronouncements. *See Toth*, 946 P.2d at 903 ("This is not a departure from the general principle that all marital joint property should be divided substantially equally unless sound reason exists to divide the property otherwise."); *Flower*, 225 P.3d at 596 ("We conclude by emphasizing that in our view, a substantially unequal division of property must continue to represent a rare exception, lest it undermine the entire framework for dividing property during a marriage dissolution. . . ."). But, these brief statements are swamped by the quantity of discussion concerning the result and that trial court discretion that will not be overruled without clear error. *See Toth*, 946 P.2d at 903–04; *Flower*, 225 P.3d at 592–596. Perhaps part of the blame for this belongs with legal education, as lawyers tend to emphasize rules rather than distinguishing facts.

147. ALI PRINCIPLES, *supra* note 12, at § 4.09 cmt. d.

148. *Id.*

149. *Id.* at § 4.09 cmt. c ("Unequal financial contribution is rarely accepted as a basis for unequal division among the community-property states, nor does the trend favor it in the common-law states.").

150. *See Toth*, 946 P.2d at 903 ("Anthony paid for this property entirely . . . . Gloria made no contribution—pecuniary or otherwise—to the purchase of the

concerning which factors are appropriate for considering a departure from the 50/50 norm and, thus, no basis for excluding inquiry concerning any of them.

Whenever a rule is developed in response to a blend of unusual facts, the likely result will be that there will be no consensus concerning when other facts are sufficiently unusual as to obtain the same treatment. There is, in fact, no consensus, and therefore no standard, concerning the point at which the blend of various factors tips in favor of departing from the 50/50 norm. Some people suggest that if one spouse has higher earning capacity and income *and* does the majority of the household work,[151] or if a wife makes more money than her husband, does most of the housework, provides care for the children, and the husband leaves home, spends nights out drinking, and is violent,[152] it is not sensible to order an equal division of marital property. If a husband provided for all his wife's needs and education and she accumulated her own earnings, is it fair and equitable to give the husband a larger share of the marital assets?[153] Is a departure justified every time a marriage was short, as it was in *Toth*, or every time a federal rule interferes with the state scheme, as it did in *Kelly*?[154] In *Flower*, the marriage was not very long, the wife had her own house, and the husband believed she was only

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house. The marriage lasted two weeks, allowing no time for a marital relationship to develop, or for other equities to come into play."); *Flower*, 225 P.3d at 594 ("A determination of what constitutes an equitable division of marital property must include consideration of contributions made by each spouse to the community, in whatever form. . . . Wife does not assert that she made any contributions to the purchase or improvement of the . . . house nor does she allege she made pecuniary contributions to the community in other areas or that any effort, toil, or contributions from the community were comingled with the property to increase its value. . . . Wife's lack of contributions provides at least partial justification for a substantially unequal division of the community property. . . .").

151. Dallon, *supra* note 91, at 911–912 (citing Matwijczuk v. Matwijczuk, 690 N.Y.S.2d 343, 344–45 (N.Y. App. Div. 1999), Jochum v. Jochum, 557 N.W.2d 257 (Wis. Ct. App. 1996), and Mosley v. Mosley, 601 A.2d 599 (D.C. 1992)).

152. *Id.* at 912 (citing Mosley v. Mosley, 601 A.2d 599 (D.C. 1992)).

153. *Id.* at 912–913 (citing *In re* Marriage of Stetler, 657 N.E.2d 395 (Ind. Ct. App. 1995)).

154. Kelly v. Kelly, 9 P.3d 1046, 1048 (Ariz. 2000) ("The resulting benefits, but for federal law, would be divisible as community property . . . . It may be suggested that this method will create an imbalance whenever there is a disparity between the salaries of each spouse. But such an inequity is not of our making. . . .").

financially (and not romantically) interested in him.[155] The trial and appellate judges thought those facts sufficiently unusual to depart from the norm. In *Hatch*,[156] a trial court found the husband had made a much greater relative effort to preserve and protect the community estate, and the wife had deliberately destroyed a meaningful father–daughter relationship, justifying a $170,000/$27,000 split in favor of the husband.[157]

The open-ended idea of an "equitable" distribution of the community property, developed to address unusual facts that struck some judges as unfair, provides no standard for resolving any of these situations. Instead, it empowers judges to impose their individual differing senses of what is appropriate in a marriage on the rest of the world. Results will be random, depending on the belief system and life experiences of the divorce court judge that decides. There is thus as much to be feared as to be embraced by such empowerment, depending on whether one is inside or outside of a randomly assigned decision-maker's norm concerning personal and idiosyncratic marital behaviors.

The other problem with making rules on perverse cases is straightforward: the rules influence the entire landscape, not just the individuals with the perverse facts. The open-ended interpretation of equitable distribution developed in *Toth*, *Kelly* and *Flower* is applicable to every divorce and thus injects uncertainty and fault into the calculus for every single divorce. The uncertainty concerning whether the facts of the situation justify a departure from a 50/50 split undermines yet another desirable attribute of the community property system: community worth, split 50/50, is the great compromise solution that ensures that neither side is entirely closed out. A clear signal concerning a 50/50 split of the community worth is a stride in the direction of helping couples come to their own settlements, either at divorce or prior to marriage. Subjecting all divorce litigation and settlement to the possibility of an open-ended idea of equitable distribution in which divorce court and appellate judges are permitted to exercise their inevitable biases concerning who should get more and why undermines that attribute.

The flexibility to depart from a 50/50 division in a small number of perverse situations is thus not worth the cost. No serious

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155. *Flower*, 225 P.3d at 590.

156. Hatch v. Hatch, 547 P.2d 1044, 1046–47 (Ariz. 1976) (en banc).

157. *Id.* at 1046–47. The Arizona Supreme Court overruled the trial court, indicating that the basis for departure was not sound and hinting that it might be inconsistent with due process in the United States Constitution to divide the community property unequally. *Id.* at 1045–47.

damage would have been done in *Toth*, *Kelly*, and *Flower* if those decisions had stuck with a rule that the community worth must be split roughly 50/50, with plenty of discretion concerning the direction of the assets. If judicial decision-makers genuinely believe results are unjust, they should confront the specific rules that lead to the perceived problem,[158] rather than adopt a structure that can give a tailored result in the case at hand but that has the potential to make every divorce far more excruciating.

IV. CONCLUSION

Community property regimes entitle spouses to undivided present ownership of community assets during a marriage. At divorce, however, most community property jurisdictions parrot common law jurisdictions and divide the community property equitably rather than equally. While "equitable" could be interpreted to differ from "equal" only in that "equal" requires a 50/50 split of each community asset and "equitable" requires only equal division of the community worth, "equitable" has recently been interpreted in a far more open-ended manner. As a result, vague factors including need, contribution, duration of the marriage, the age of the divorcing parties, and the behavior of the parties during the marriage are used to justify substantially unequal divisions of community property at divorce.

Arizona is a representative example of a community property jurisdiction that has moved to an open-ended interpretation of "equitably" that in the discretion of divorce court judges can be used to implement notably unequal divisions of community property. In *Toth*, a divorce court was permitted to consider contribution and a lack of evidence that during the first weeks of the marriage the wife made a good faith effort to make a marriage work as justification for an approximately 90/10 split of the community property in favor of the husband. In *Kelly,* a divorce

158. Thus, for *Toth v Toth*, 946 P.2d 900 (1997), it is perhaps worth considering whether to treat separate property placed in JTWRS title as a gift that is only fully effective if the donor spouse dies while still married, making it is a gift of present use during the marriage and outright ownership at death—but not an outright gift effectuated at divorce. If the marriage ends in divorce, the gift is traceable to separate property and should be treated that way despite the title. *See* Ratner, *supra* note 26. For *Kelly*, the preemption analysis should be directly confronted, and perhaps an opportunity cost reimbursement scheme should be adopted. For *Flower*, the husband can be given his house outright, especially considering that his wife has a house, but the community worth needs to be equalized, perhaps by assigning more community debt to the husband as an offset.

court was entitled to consider the lack of contribution of the wife to the community retirement plans compared to the husband's contribution to the community retirement plan as justification for giving the husband a greater share of his retirement plan. In *Flower*, a divorce court was permitted to consider the contribution of the husband to the community assets, the lack of contribution of the wife to the community assets, the duration of the marriage, and the overall "fairness" of the situation as justification for giving the husband a significantly larger share of the community worth.

The adoption of a broad, standardless interpretation of the statutory instruction to equitably divide the community property, exemplified by the Arizona cases, is a bad idea. The matter an equitable rather than equal division comes down to whether the flexibility of an open-ended, standardless notion of equitable division of the community worth is necessary to permit something other than a 50/50 distribution in the occasional situation where everybody knows a 50/50 split yields a bad result. The need to address the unusual situations posed in the facts of those cases likely led to the open-ended concept of equitable division articulated in the Arizona cases, but that interpretation cannot be constrained to the highly stylized facts that led to the interpretation. Instead, the interpretation injects into every divorce the potential for a fight over the need to depart from a 50/50 split of the community worth. In addition, because the open-ended conception of "equitable" adopted by the Arizona cases includes authorizing divorce courts to consider whether spouses contributed to the marriage relationship, the use of "equitable" as envisioned by those decisions injects a form of fault inquiry into the calculus concerning the proper share of the community worth. The costs of the flexibility to adjust in a small number of situations seem far outweighed by the harms of distortion to the vast majority of divorces.

Equal division in the end is perhaps best justified by the fact that the alternatives are much worse.[159] Division of marital property at divorce is largely implemented in default or pro se contexts and is often mostly about the debt. The open-ended interpretation of "equitable" suggested by *Toth*, *Kelly*, and *Flower* and employed by many common law equitable distribution jurisdictions promotes the hassle of divorce, the expense of divorce, and the power of the judiciary to impose various judges' ideas of a "fair" split. Equal, rather than equitable, offers a superior, although imperfect, compromise between the competing

159. ALI PRINCIPLES, *supra* note 12, at § 4.09 cmt. b.

claims of contribution and need[160] as well as the legitimate societal desire to enable judicial flexibility. The combination of needs and contributions that is sufficient to justify departures from a 50/50 split is prohibitively difficult to define. When left to a trial judge's virtually unreviewable sense of fairness, the result is a standardless system that cannot predictably accomplish any of the conflicting distributional goals suggested by the values underlying the system.

The lack of predictability undermines the community property attribute that what is being divided already has property rights attached to it. Community property systems are property ownership systems rather than just divorce distribution systems.[161] Property ownership determinations based on vague and conflicting notions of equity and fairness will undermine the institution of property, so property ownership rules necessarily should be bright-line rules with clear answers.

The best approach for a distribution rule for community property at divorce is to offer clean, simple guidance[162] to couples exiting and entering marriages: in the event of a divorce, community assets and liabilities will be identified and valued, and the value will be split right down the middle, with decision-makers maintaining large flexibility concerning the direction of the particular assets. With that notice, an equal split of the community worth in every case is hardly inequitable.

160. *Id.*

161. BLUMBERG, *supra* note 1, at 27–28.

162. ALI PRINCIPLES, *supra* note 12, at § 4.09, Reporter's Notes cmt. c ("Equal division . . . has . . . the significant advantage of simplicity in administration.")