Properties of Marriage

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ARTICLE

PROPERTIES OF MARRIAGE

Carolyn J. Frantz* & Hanoch Dagan**

In this Article, Professors Frantz and Dagan articulate and examine one ideal for the institution of marriage—marriage as an egalitarian liberal community. Under this vision, a commitment to marital community, where spouses share with each other without reference to individual desert, is combined with a concern for non-subordination and the protection of individual autonomy through, primarily, free exit. Professors Frantz and Dagan argue that, contrary to the common assumption that these goals are incompatible, they can be accommodated to a remarkable degree. They then trace the implications of this vision of marriage for marital property law, and use it to defend the equal division rule for existing marital property, broadly defined to include, most notably, increases (and decreases) in both spouses' earning capacity during the pendency of their marriage. Professors Frantz and Dagan also discuss alimony, endorsing generally the practice of rehabilitative alimony, and property governance during marriage, arguing in favor of management rules currently applied in many community property states.

TABLE OF CONTENTS

INTRODUCTION ...................................................... 76
I. MARRIAGE AS AN EGALITARIAN LIBERAL COMMUNITY ........ 81
   A. Marital Virtues ....................................... 81
      1. Community ...................................... 81
         a. Plural Identity and Sharing ............... 81
         b. On Love and Loyalty ....................... 84
      2. Autonomy ...................................... 84
         a. Autonomy Within a Marital Community ...... 84
         b. The Contribution Principle Reconsidered ...... 89
   3. Equality and Non-Subordination .................. 91

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75
INTRODUCTION

It is tempting to think of the legal rules surrounding marital property in the temporal context of divorce. Because these rules practically apply most often at the moment of divorce, commentators tend to focus more on their impact on divorced and divorcing couples than on ongoing marital relationships. But these rules are centrally about marriage, even marriages so successful they ultimately do not have to use them. Through marital property law, the state has the opportunity to help shape the social understanding of marriage, and thus the actions of those who partake in it. The law governing the division of property upon divorce operates on ongoing marriages because possibilities upon divorce give spouses reasons to act in ways better or worse for their individual marriages. More obviously, governance rules operate during marriage, both as a rare source of litigation and to shape spouses' expectations and behavior with respect to marital property. This Article looks at marital property law through the lens of the ongoing marriage.

1. See, e.g., Mary Ann Glendon, Matrimonial Property: A Comparative Study of Law and Social Change, 49 Tul. L. Rev. 21, 24 (1974) (noting that marital property law is of little interest to spouses during marriage, but becomes important "when family life is disrupted by divorce"); Herma Hill Kay, Beyond No-Fault: New Directions in Divorce Reform, in Divorce Reform at the Crossroads 6, 30-31 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (noting that couples will likely not take into account the possibility of divorce when making marital choices); Carl E. Schneider, Rethinking Alimony: Marital Decisions and Moral Discourse, 1991 BYU L. Rev. 197, 205-09 (explaining why spouses do not consider the impact on alimony when making marital decisions); Elizabeth S. Scott & Robert E. Scott, Marriage as Relational Contract, 84 Va. L. Rev. 1225, 1298-99 (1998) (explaining that social and relational norms largely govern working marriages, while legal rules and enforcement become important upon divorce); cf. Jeremy Waldron, When Justice Replaces Affection: The Need for Rights, in Liberal Rights 370, 374 (1993) (limiting the role of legal rules during marriage to providing spouses with knowledge of their fallback position upon divorce).
We provide rare currency in the discussion of marital property law by articulating a particular ideal of marriage and examining its doctrinal implications. In setting this ideal, we bring together three values, prominent in academic and popular debate on marital property law, that are usually put forth as rivals: community, autonomy, and equality. We do not deny the potential tensions between these values in the abstract. And yet—except in the limited context of rehabilitative alimony—we hope to break away from the traditional discourse that requires balancing these values or exalting one at the exclusion of the others. This Article maintains that certain conceptions of community, autonomy, and equality can actually complement each other under one vision of marriage: marriage as an egalitarian liberal community. The saliency of community, autonomy, and equality in academic and popular discussions of marriage gives us hope that our identification of a coherent ideal of marriage in which all three marital virtues can be accommodated will appeal to readers’ intuitions about the value of the institution.

Part I presents and defends the ideal of marriage as an egalitarian liberal community. This ideal uniquely brings together three threads of marriage typically thought to be incompatible—community, autonomy, and equality. The appeal of a communal marriage and the benefits (both consequential and intrinsic) it provides are particularly strong. But marital community has not been without cost. Modern liberal societies are justifiably not so willing to accept the restrictions on autonomy that membership in a marital community has traditionally entailed. The move to “no-fault” divorce—the expansion of spouses’ right to exit—is emblematic of attempts to protect autonomy within marriage. Even more significantly, because marriage has also been a tool of oppression, marital property law must strive to achieve equality between spouses. The shadow of the patriarchal family still hovers over modern marriage. A commitment to gender equality is thus a constraint on any acceptable contemporary marriage law. For these reasons, marital community must be constrained on the one hand by autonomy and on the other by equality.

Marriage as an egalitarian liberal community attempts to bring together these goals. Focusing on the frictions between community, autonomy, and equality in the marital context, scholars tend to emphasize one element of the ideal to the exclusion of the others. For instance, while

2. We do not suggest that marriage is the only relationship that can provide meaningful self-identification and the associated goods of intimacy. For whatever reason, marriage is presently the overwhelmingly dominant social institution of pervasive sharing among adults. But it is not the only one. For instance, the law of cohabitation supports many nonmarital long-term romantic relationships that function in a similar, but not identical, way. Furthermore, the doctrine of undue influence can be understood as supporting other non-romantic relationships of informal intimacy (for instance, relationships between adult brothers and sisters, or close friends). For an examination of the application of one set of legal rules in these contexts, see Hanoch Dagan, The Law and Ethics of Restitution (forthcoming 2004) (manuscript at 176–224, on file with the Columbia Law Review) (discussing the law of restitution in the context of informal intimacy).
the communitarian aspect of marriage is celebrated by more traditional family law scholars, these scholars tend to exalt community at the expense of the other virtues of marriage—equality and autonomy. Feminist scholars and those who see marriage as just another species of contract, by contrast, tend to focus on equality and autonomy (respectively) almost exclusively, ignoring the communal dimension of marriage when making their prescriptions for marital property division. We challenge both camps, claiming not only that equality and autonomy constraints do not typically threaten the virtues of communal marriage, but also that they often support community at its best.

Part II fleshes out the implications of these normative commitments for marital property law. Marital property law can be thought of as a particular species of a "liberal commons," a legal regime that facilitates the ability of a limited group of owners to capture the economic and social benefits from cooperative use of a scarce resource, while also ensuring autonomy for individual members, particularly through their retention of a secure right of exit. But the marital liberal commons regime we articulate in Part II has unique features that are not part of the liberal commons as a general form of property governance. In particular, the kind of community contemplated by marriage resists individual account-

3. Lynn Wardle and Carl Schneider are the leading traditional family law scholars. Wardle has criticized no-fault divorce on the grounds that it focuses inappropriately on equality and individual autonomy in marriage, which, he contends, is governed by the "higher law" of love, understood as sharing and self-sacrifice. Lynn D. Wardle, No-Fault Divorce and the Divorce Conundrum, 1991 BYU L. Rev. 79, 121-24. Though Schneider is less clear in his writings on his own view of marital regulation, his discussion of the shift from community-based moral discourse to (individual and equality-based) discourse centered on personal fulfillment and liberty reads most naturally as a lament. See, e.g., Carl E. Schneider, Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse, 1994 Utah L. Rev. 503. But see id. at 584-85 (addressing the possible need to balance between values in the marriage context).


6. See id. at 566-602 (discussing attributes of the liberal commons). Much modern family law scholarship has identified the problem of the liberal commons as central to the law of marriage, though sometimes using different terms. See Milton C. Regan, Jr., Alone Together: Law and the Meanings of Marriage 15-30 (1999) (discussing the role of both autonomy and community, referring to the "external" and "internal" stances toward marriage); Elizabeth S. Scott, Rehabilitating Liberalism in Modern Divorce Law, 1994 Utah L. Rev. 687, 719-99 (proposing a liberal framework for family law that accommodates community concerns).
PROPERTIES OF MARRIAGE

ing, one aspect of other liberal commons regimes. Additionally, because of its pervasiveness in the lives of its members, the marital community must be concerned with equality (non-subordination) in a way that other forms of collective ownership need not.

The core feature of the marital property regime we espouse in Part II is that spouses are equal owners of the marital estate, broadly defined. We maintain that this characterization supplies the best normative foundation for the prevailing norm of equal property division upon divorce. We further claim that a commitment to the ideal of marriage as an egalitarian liberal community also supports—albeit more contingently—the current practice of rehabilitative alimony. Alongside these reaffirmations of marital property law, our theory yields suggestions for reform—rules that marital property law needs to adopt if it is to take seriously the commitment to the ideal of marriage as an egalitarian liberal community. Both with regard to the scope of the marital estate and with respect to its governance during an intact marriage, we subscribe to many of what are now still minority views. For instance, we endorse a broad definition of the marital estate that encompasses any changes effected during the tenure of marriage in the earning capacity of the spouses. We also advocate recognizing the interests of both spouses in the marital estate as present and vested during marriage, rather than as mere expectancies that are meaningful only upon divorce. Accordingly, we discuss property governance rules entailed by the commitment to the ideal of marriage as an egalitarian liberal community.

This Article intentionally brackets three concerns. First, we follow the traditional method of regulating marriage: setting legal rules that support a potentially controversial marital ideal, while at the same time allowing spouses considerable space to opt out. We do not defend this aspect of our theory, leaving the question of the legitimacy of crafting marital property law to reflect any ideal of marriage for another time. For now, it is sufficient to note that some notion of the good marriage is likely to play a role even in the most hands-off of legal regimes; even those advocating a greater role for private contracting in marriage need to account for the types of marriage their rules tend to foster. This is


8. We also do not take a position here about how rigorously such agreements should be enforced. Cf. American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations § 7.03, at 959 (2000) (presenting a rigorous enforcement regime for marital agreements and noting exceptions) [hereinafter ALI Principles].


11. See Don Herzog, Happy Slaves: A Critique of Consent Theory 151 (1989) (arguing that even the most liberal states must promote some conceptions of the good
truer with marriage than with other legal institutions, as relatively few spouses choose to privately order their relationships.\(^{12}\)

Second, we bracket values external to the interspousal relationship. Marriage may affect other social institutions or be a useful tool for accomplishing various social goals. For instance, marital property rules play a role in welfare distribution. They also affect the economy through wage incentives. We do not discuss such external considerations in this Article, but we acknowledge that, after full consideration, such concerns may ultimately require compromise with regard to certain rules we recommend.\(^{13}\)

The bracketing of one external value—the care and support of children—may seem particularly controversial. Raising children is certainly one of the most important reasons for marriage (some say the most important one), and the need to care for children will undoubtedly alter the rules of divorce in many marriages.\(^{14}\) Nonetheless, it is possible—indeed desirable—to separate discussion of the relationship between spouses \(qua\) spouses from their relationship \(qua\) co-parents. We do not deny that the full picture of spouses’ rights and obligations in the large number of divorces involving minor children is affected by the rights and obligations entailed by both relationships. But it is still necessary to analyze each relationship on its own terms. Marriage rules alone tell the whole story for the considerable number of those who do not have children and for those whose children are beyond the age of parental responsibility. Moreover, even with respect to spouses who are also co-parents, a satisfying picture of the whole must begin with separate analyses of each dimension. The reasons for one’s obligation to one’s child—the norma-
tive underpinnings of rules regarding child support—are very different from those underlying one’s obligations to his or her spouse.15

1. MARRIAGE AS AN Egalitarian Liberal Community

Marriage as an egalitarian liberal community brings together three strands of marriage—community, autonomy, and equality. Though it is often assumed that they cannot coexist, this account of marriage accommodates particular conceptions of these three ideals to a remarkable degree. The point is neither that these concepts, in the abstract, are always compatible, nor that we offer an account of how to balance their inevitably competing requirements. The content of each of these concepts is deeply contested,16 and an abstract attempt to balance their demands is unlikely to be determinate enough to yield a workable set of rules for marital property. Therefore, rather than appealing vaguely to community, equality, and autonomy, we set forth particular conceptions of these ideals and show that, in the marital context, these conceptions actually reinforce rather than undermine one another. By demonstrating that our account of marriage harmonizes conceptions of these values—and, indeed, shows how these values can be mutually supportive—this Part seeks to vindicate the viability and desirability of the ideal of marriage as an egalitarian liberal community.17

A. Marital Virtues

1. Community

a. Plural Identity and Sharing. — There are many benefits to being married. Like any other pooling of resources, marriage provides advantages of economies of scale, specialization, and risk spreading.18 But these goods are hardly unique to marriage, and, more importantly, can be purchased on the market. The unique goods of “communal” marriage19—intimacy, caring, and commitment—are collective in a crucially

15. For instance, it is unlikely that the relationship between parents and children will have the liberal dimension—in particular, the need for free exit—that underlies the relationship between spouses.


17. Even if the reader interprets this Article as balancing these values, this does not undermine our project. If it is impossible to accommodate all three values simultaneously, and balancing is inevitable, our account can be read as providing a framework for this exercise.


19. We do not deny that these goods can be obtained through other romantic relationships, and to a lesser extent, through non-romantic ones. See supra note 2.
different way.\textsuperscript{20} A mercenary understanding of these goods is hopelessly misguided, corrupting the community ideal of marriage. A self-centered quest to capture these marital goods—cooperating to achieve solely individual ends—will not ultimately be successful. Rather, to secure these unique goods of marriage, what is good for one spouse must affect what is good for the other. This partial fusion, at the core of communal marriage, is achieved when spouses perceive themselves at least partially as a “we,” a plural subject, that is in turn a constitutive feature of each spouse’s identity as an “I.”\textsuperscript{21}

It is not surprising that marriage is often a site for such communal life. Membership in a functioning marital community may be the best way to achieve one’s communal goals. Spouses typically engage in a variety of collective projects, including child rearing, broader family relationships, friendships, and the common management of resources—a household, investments, and careers. This ever-increasing number of projects requires daily interactions that in turn produce an intensive, long-term fusion. It is this intensity (and its continuity) that stimulates closeness, interdependency, and mutual trust.\textsuperscript{22}

The association of marriage with the creation of plural identity is consistent with the move of divorce law from the title theory of property ownership—where each spouse individually owns property he or she has purchased with separate funds—to a regime that acknowledges the entitlements of both spouses in many marital goods. Sharing the advantages of life together as well as its difficulties is the linchpin of community.\textsuperscript{23} Sharing requires spouses to “infuse \[I\] costs and benefits with an intersubjective character” and to reject any “strict accounting based on individual

\textsuperscript{20} See, e.g., Naomi R. Cahn, The Moral Complexities of Family Law, 50 Stan. L. Rev. 225, 228–29 (1997); Kenneth L. Karst, The Freedom of Intimate Association, 89 Yale L.J. 624, 632, 635 (1980) (noting that “the core associational value of intimacy is not to be reduced to its instrumental uses” and that caring is normally complemented by being cared for and requires a true commitment to the other).

\textsuperscript{21} See Elizabeth Anderson, Value in Ethics and Economics 151 (1993); Margaret Gilbert, Living Together: Rationality, Sociality, and Obligation 2, 8 (1996); see also Milton C. Regan, Jr., Family Law and the Pursuit of Intimacy 147 (1993) (discussing the relational identity of individuals cultivated in marriage); Karst, supra note 20, at 635–37 (describing the impact of intimate relationships on self-definition: “When they are chosen, they take on expressive dimensions as statements defining ourselves.”); Martha Minow & Mary Lindon Shanley, Relational Rights and Responsibilities: Revisiting the Family in Liberal Political Theory and Law, 11 Hypatia 4, 5 (1996) (noting that family members are partially defined by their relationships with others).

\textsuperscript{22} See Gilbert, supra note 21, at 222–23.

\textsuperscript{23} See, e.g., Regan, supra note 21, at 138, 147 (arguing that marriage involves sharing “the burdens of living in what sometimes seems a capricious and indifferent universe”); Simon Gardner, Rethinking Family Property, 109 L.Q. Rev. 263, 290–91 (1993) (“The connotations of marriage are well known. They include a commitment to organise the parties’ whole lives according to the values of trust and collaboration. . . . [S]o far as marriage is concerned, communality seems incontestably the right approach.”).
merit."

Realization of collective goods in marriage depends on each partner "carrying out the projects constitutive of his shared life in a spirit of trust and love rather than of the piecemeal calculation of individual advantage."

Communal marriage demands that spouses not ask for accountings or make individual claims of entitlement to marital goods. Rather, their cooperation should be based on an expectation of a lasting relationship that calls for mutual trust, support, and confident reliance on the other; sharing life and its projects requires spouses to pool their efforts and their rewards, "each operating on joint behalf of both."

24. Regan, supra note 21, at 147; see also Steven L. Nock, Time and Gender in Marriage, 86 Va. L. Rev. 1971, 1981 (2000) (discussing the results of a study indicating that "[k]eeping the mental books . . . is dangerous for a marriage"); Wardle, supra note 3, at 123 (noting the incompatibility of individual accounting and marital satisfaction); cf. Ellickson, supra note 18, § III.A ("In a successful household, explicit reference to perceived imbalances in internal gift exchange may be regarded as inappropriate because [it] signal[s] a lack of trust."). Studies have also shown that people are less self-focused when they share resources with a person they love, and are less likely to engage in bookkeeping when they are in happy relationships. See Regan, supra note 6, at 70–73 (discussing research showing that intimate relationships de-emphasize differentiation between the self and the other in allocating resources).

25. Anderson, supra note 21, at 157; see also, e.g., Regan, supra note 6, at 11. Even in communities where allocation on the basis of individual contribution is acceptable (such as in some cases of limited co-ownership of property by family members or business partners), constant monitoring of contributions and benefits is destructive to the relationship. Monitoring behavior tends to "poison the atmosphere" and make the monitored party more likely to abuse the communal venture. See Carol M. Rose, Trust in the Mirror of Betrayal, 75 B.U. L. Rev. 531, 540 (1995). The problem is all the worse in the context of communal marriage, where the very act of individual calculation may undermine the community.

26. Milton Regan's example of this commonly shared intuition comes from The Joy Luck Club. In the book, a young couple itemizes its household expenditures to ensure that each member pays precisely his or her portion. As Regan rightly observes, most would react to this type of arrangement with some degree of unease or embarrassment. See Regan, supra note 6, at 22–23.

27. See Scott & Scott, supra note 1, at 1255–56 (pointing to the centrality of mutual commitment, trust, and reliance in marriage); Margaret F. Brinig & Steven L. Nock, "I Only Want Trust": Norms, Trust and Autonomy 1, 7 (May 9, 2001) (unpublished manuscript, on file with the Columbia Law Review) (emphasizing the importance of trust, grounded in the expectation of permanence and unconditional love, for good marriage). Reliance is an important value in the marital context because it facilitates desirable trust and cooperation. It is for this reason that "the protection of the reliance interest in marriage" is "a consistent theme" in the law of marriage and divorce. Margaret F. Brinig & June Carbone, The Reliance Interest in Marriage and Divorce, 62 Tul. L. Rev. 855, 870 (1988); cf. Hanoeh Dagan, Mistakes, 79 Tex. L. Rev. 1795, 1804 n.38 (2001) ("[T]he law never protects reliance per se; it protects reliance if and only if there is a good reason to encourage (or at least not discourage) the type and magnitude of the reliance at issue.").

28. Gardner, supra note 23, at 283; cf. Deborah L. Rhode & Martha Minow, Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law, in Divorce Reform at the Crossroads, supra note 1, at 191, 199 (arguing that sharing of individual earnings, benefits, and entitlements "encourages cooperative commitments between spouses"). Evidence suggests that this communal ideal is widely shared. Even spouses who do not live up to this ideal—in whose lives the magnitude of each spouse's contribution does affect allocation—endorse it. See, e.g., Carole B. Burgoyne & Alan
b. On Love and Loyalty. — But what about love? Focusing on community may seem to sweep close to, yet ultimately leave out, what is widely regarded as the most important part of marriage. We do not mean to disregard love as a crucial feature of most marriages. We exclude it from our direct concern, however, for two reasons. First, the law cannot control love and loyalty. Marital property rules can only make marriages more or less hospitable to love by changing spouses’ attitudes toward marriage or giving them reasons to act in particular ways. In a sense, then, community is a stand-in for those aspects of love that can be controlled by law. Our focus is necessarily on the aspects of marriage that law can control—division on divorce and property governance during marriage—and on the ideals that relate to them.

More importantly, we bracket love because it is good that some aspects of the interspousal relationship remain unregulated. While the law can and should support interpersonal trust between spouses, if marriage is to be a true community, the law should not entirely constitute that trust. Sharing and interpersonal trust are promoted when one spouse makes herself vulnerable to the other, sharing the financial and (more importantly) emotional risks and benefits of marriage. Because the regulation of love or loyalty may undermine these crucial components of communal marriage, love and loyalty should be bracketed from the legal account of marriage. For this reason, we also exclude “fault”—in the sense of emotional or sexual betrayal—from the universe of considerations that are relevant to the division of marital property.

2. Autonomy

a. Autonomy Within a Marital Community. — Marriage as an egalitarian liberal community demands that spouses look beyond their narrow self-interest. But contrary to the belief of some traditional scholars, this

Lewis, Distributive Justice in Marriage: Equality or Equity?, 4 J. Comm. & Applied Soc. Psych. 101, 112 (1994) (summarizing results of an eight-couple study in which all couples subscribed to the ideal of equal sharing even though “this was not always easy to achieve” and contribution factors “undermine[d] a sense of marriage as a partnership among equals”).

29. See Wardle, supra note 3, at 124.

30. Most jurisdictions have also rejected fault as a basis for property division and alimony. See ALI Principles, supra note 8, at 43–49 (identifying twenty-two states that consider fault for alimony purposes and fifteen that consider fault for property division purposes). As far as emotions are concerned, there is no meaningful way to divide them upon divorce, nor would it be desirable for the law to attempt to do so. Moreover, compensating for these sorts of harms raises additional difficulties. Insofar as emotional harms would, as a practical matter, have to be reduced to penalties for certain bad actions—for instance, infidelity—the law would invariably misallocate fault in many marriages. Should the spouse who resorts to infidelity at the end of a marriage that has otherwise been emotionally oppressive be penalized, while her spouse is assessed no fine for his abusive behavior? Any legal attempt to account for fault in marriage would be so flawed as to undermine any purpose ascribed to it.
vision does not require the negation of the self. 31 Although altruistic care of the other plays an important part in the meaning of marriage, the institution does not—indeed should not—imply self-sacrifice. This should not be interpreted as a sign of hypocrisy or half-hearted commitment. As Jean Hampton has explained, selflessness, or constant self-denial, is anathema to true altruism. 32 While human “saints” are often revered by those whom they beneficilly serve, the exclusion of their individual selves (and their own needs) from moral deliberation is certainly not required and may even be morally blameworthy. Indirectly, self-sacrificers may be harming the very people for whom they care by teaching “the permissibility of their own exploitation by submitting to, and even supporting, their subservient role.” 33

A liberal conception of the marital community thus views the communal goods obtained through marriage as an aspect of individual self-fulfillment, 34 with that “self” properly including the new plural self of marriage. Spouses’ identification with and commitment to the marital community should be voluntarily chosen based in part on the value of the marital community to themselves—hence, the liberal qualifier. 35 Thus, the plural identity constituted by marriage is only partial: Incorporating what is good for the other into the perception of what is good for oneself need not, and should not, erase each spouse’s individual identity. In the ideal of marriage as an egalitarian liberal community, the community of marriage is good for the individual spouse, rather than simply good of her.

As we will see in discussing the scope of the marital estate, this core aspect of individual autonomy requires limits on the collectivization of projects individual spouses undertake during the tenure of their marriage. For now, it is important to note the implications of autonomy for exit. If the marital community is to be a good for each individual spouse, law should secure the ability of each spouse to decide whether or not,

31. Wardle, supra note 3, at 122 (“Self-sacrifice, sharing, continuous giving, and continual forgiving are indispensable to any happy marriage.”); cf. Schneider, supra note 3, at 525–31 (noting tensions between an autonomy-based personal fulfillment approach and traditional marriage based on permanence and dependency).


33. Id. at 136, 148.

34. Both “substantive” communitarians and liberals have emphasized the importance of collective goods. See, respectively, Michael J. Sandel, Liberalism and the Limits of Justice 143 (2d ed. 1998) (emphasizing human belonging to constitutive communities and the entailed value of social responsibility), and Joseph Raz, The Morality of Freedom 193, 198–207 (1986) (arguing that availability of collective goods constituting social alternatives is central to true autonomy).

35. Cf. Andrew Mason, Community, Solidarity and Belonging: Levels of Community and Their Normative Significance 23 (2000) (arguing that identification with a group and commitment to its goals “need not be wholly non-voluntary, and may involve an element of choice”).
and for how long, to participate in the institution.\textsuperscript{36} While each spouse in a communal marriage is in part constituted by her relationship with the other, she should be able to choose to abandon, through divorce, this part of her identity.\textsuperscript{37} Liberal societies are accordingly committed to ensuring that the participation of individuals in marriages (and other social groups) is legally voluntary.

Legal entry into marriage is entirely and uncontroversially free: At the very least, no one is legally compelled to marry.\textsuperscript{38} What is at issue in our incorporation of autonomy into the ideal of marriage is the availability of free exit through no-fault divorce. Exit is a bedrock liberal value. It stands for the right to withdraw or refuse to engage; it is the ability to dissociate, to cut oneself out of a relationship with other persons.\textsuperscript{39} A strong commitment to exit—to the idea of open boundaries that enable geographical, social, familial, and political mobility—"enhances the capacity for a self-directed life, including the capacity to form, revise, and pursue our ends."\textsuperscript{40} In marriage, as in all contexts, the availability of exit is crucial to achieving these central goals. Impeding people from exiting—either through outright prohibitions or rules that de facto prohibit exit (including rules that impose prohibitive exit costs)—is incompatible with the most fundamental liberal tenets.\textsuperscript{41} Meaningful self-identification and the goods it provides should be part of the good life for individuals, not a legal duty that they must bear regardless of its continuing appeal.

Social pressure may of course affect people's decisions to enter or exit marriage. Where this pressure takes the form of mere disapproval by friends, family, and religious communities, this is not necessarily illiberal because people can ultimately choose their own way. The law's power,
however, cannot be escaped, and therefore a commitment to liberal values requires that the legal boundaries of marriage be open. Nonetheless, social pressure is at times institutionalized in a law-like fashion (consider, for instance, some close-knit and pervasive religious communities), making exit practically impossible. In these contexts, we hope that an exit-friendly law can begin to ameliorate those pressures.

Free exit does not necessarily undermine the communal nature of marriage. People marry "because of a shared commitment to each other and the institution," and although most of them are aware of the divorce rate, they continue to marry in large numbers. A genuine marital community can exist even if it does not last forever. Spouses can share the burdens and the benefits of a joint life, even if they know that at some point this collectivity may come to an end.

Furthermore, exit is not only passively compatible with marital community, but can actively support it. Part of what makes marriage meaningful as a community is that spouses know that it is entered into and maintained only by choice. Intimacy, caring, and commitment are particularly valuable if voluntarily chosen. The legal power to exit converts the daily life of marriage into a manifestation of a choice that positively reaffirms spouses' plural identity.

By insisting that autonomy and community are mutually reinforcing, our account of communal marriage departs from the influential communitarian account of Milton Regan. In discussing the "internal" (roughly communal) and "external" (roughly autonomous) stances toward marriage, Regan ultimately concludes that they are locked in an irresolvable tension. Rules must be chosen to reflect one or the other stance, and

42. But see Regan, supra note 6, at 144-45 (arguing that the no-fault divorce paradigm adopts "primarily an external stance toward marriage" and that "[t]his discourse tends to conceptualize ex-spouses as strangers rather than spouses"); Allen M. Parkman, Mutual Consent Divorce, in The Law and Economics of Marriage and Divorce 57, 63 (Antony W. Dnes & Robert Rowthorn eds., 2002) [hereinafter Law and Economics of Marriage] (arguing that no-fault divorce provides a disincentive to make sacrifices for the benefit of the marital community); Carl E. Schneider, Moral Discourse and the Transformation of American Family Law, 83 Mich. L. Rev. 1803, 1809-11 (1985) (describing no-fault divorce as reducing legal support for "mutual spousal responsibility"); Wardle, supra note 3, at 124-26 (arguing that no-fault divorce undermines the commitment necessary to form a true bond with one's partner).

43. Cahn, supra note 20, at 252.

44. Id. at 252-53.

45. Karst, supra note 20, at 637 (arguing that associational values realized through voluntary choice require the freedom to terminate); see also Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality 234-39 (1983) (noting that "[t]he distributive principle of romantic love is free choice," and that "[l]ove, affection, friendship, generosity, solicitude, and respect are not only initially but also continuously, at every point in time, matters of individual choice"); cf. Marilyn Friedman, What Are Friends For? 208 (1993) ("In our culture, friendship is a voluntary relationship . . . .").

46. See Karst, supra note 20, at 637-38.

47. Regan, supra note 6, at 3-5 (noting "tension" between the stances and that they are "fundamentally different orientations that are irreducible to one another").
rough justice must be done to accommodate their competing demands. Under our conception of these values, however, the demands of community and autonomy are ultimately coincident.

We do not deny that the availability of exit poses a grave threat to the functioning of the marital community. As in other commons settings, exit tends to undermine sharing and trust by exacerbating the difficulty of collective action, inviting opportunism, and thus threatening cooperation, even in long-term relationships. This difficulty is particularly acute in marriage, where couples often make long-term, relationship-specific investments based on the assumption that their marriage will endure for a lifetime, thus creating asymmetric vulnerability as to the contingency of early termination by divorce. One particularly resonant example is the vulnerability created by "traditional" marriage, where one spouse (the wife) makes sacrifices early in hopes of reaping rewards later in life.

This does not mean that securing the communal goods of marriage in a liberal environment is impossible. Rather, as with other liberal commons institutions, the risks opened up by free exit should be taken as a challenge. Fortunately, there are quite a few things marriage law can do to mitigate these difficulties. First, entrenching the ideal of marriage as an egalitarian liberal community in marital property law can help to internalize these values, making opportunistic behavior even less likely. Moreover, guided by this ideal, marital property law can provide a safety net (as discussed below) that can ameliorate the vulnerability of spouses. And there is another possibility: making exit, though free, not necessarily easy. Cooperative relationships are particularly vulnerable to opportunistic behavior when the parties' horizon is only short term. Temporary time-limited restraints on exit—so-called "cooling-off periods"—can alleviate this problem, enabling parties to engage in longer-term cooperation and guarding against impulsive exit. Accordingly, state divorce schemes that provide for waiting periods before divorce may—if implemented carefully enough—partially counteract the difficulties exit poses for community.

48. This difficulty is acute where vigilant retaliation is difficult, such as in many situations involving the management of common resources, due to differences in payoffs from round to round and exogenous, nonstrategic reasons to exit. See Dagan & Heller, supra note 5, at 576-77. Both of these features are prominent in the marital community.

49. See Kay, supra note 1, at 31; Scott & Scott, supra note 1, at 1264-65; see also Ellickson, supra note 18, § I.C.2 (noting the positive correlation between the threat of exit from a household and power).


51. See Dagan & Heller, supra note 5, at 574-79 (demonstrating that with proper legal facilitation, liberal exit and community can coexist, so that securing cooperation gains need not undermine legally free exit).

52. See id. at 598-99.

b. The Contribution Principle Reconsidered. — In exalting exit, we embrace the individual within the community of marriage. Some scholars have argued that a liberal marriage must go even further and include a commitment to giving each spouse what are singularly the fruits of his or her contribution. We do not dismiss the importance of the desert for labor principle on which this view seems to rest. Liberal societies are generally committed to awarding property rights (or wages) to those who engage in purposeful, value-creating activity. But there is nothing in the commitment to desert that requires that the deserving unit must always be an individual. Competitive markets, which exalt desert, frequently reward the labor of collectivities, such as corporations, partnerships, and joint ventures. Concomitantly, the desert for labor principle is simply indifferent as to whether the deserving unit is the individual spouse or the marital community.

The desert for labor principle should not guide the legal allocation of entitlements between spouses because piercing the veil of the marital unit in an attempt to determine individual contributions undermines community. To be sure, even spouses who understand marriage as an egalitarian liberal community justifiably expect one another to contribute to the collectivity. Communal marriage does not require that a spouse accept an arrangement where she is being exploited, expected to expend a disproportionate amount of effort, and yet reaping relatively little in the way of reward. There are, in other words, limits to acceptable asymmetric

(West 2000) (defining covenant marriage and conditions on dissolution); see also Katherine Shaw Spaht, What's Become of Louisiana Covenant Marriage Through the Eyes of Social Scientists, 47 Loy. L. Rev. 709, 711 (2001) (describing conditions on dissolution of covenant marriage, including mandatory premarital counseling, taking reasonable steps to preserve marriage, and various restrictive grounds for divorce). In a pervasive community, however, even such soft restrictions on exit must be viewed with caution. See Dagan & Heller, supra note 5, at 598 (noting that community enhancing exit limitations are problematic in commons settings, such as marriage, where sharing pervades members' lives). To the extent that covenant marriage does not allow immediate exit from emotionally or psychologically abusive relationships, we obviously do not endorse it. See Jeanne Louise Carriere, “It's Déjà Vu All Over Again”: The Covenant Marriage Act in Popular Cultural Perception and Legal Reality, 72 Tul. L. Rev. 1701, 1714–17 (1998) (arguing that compulsory marriage counseling in covenant marriage may endanger battered spouses).

54. See, e.g., Allen M. Parkman, Good Intentions Gone Awry: No-Fault Divorce and the American Family 187 (2000) (arguing for property settlements on divorce based on (economic) partnership principles); Katharine B. Silbaugh, Gender and Nonfinancial Matters in the ALl Principles of the Law of Family Dissolution, 8 Duke J. Gender L. & Pol'y 203, 205–11 (2001) (arguing that spouses ought to be singularly compensated for their contributions, both financial and non-financial, on divorce).


contribution within the ideal of communal marriage. But these limits are not based on the metric of desert for labor in the sense of each spouse insisting upon receiving benefits in proportion to individual market-valued contribution. Instead, marriage operates on a metric focused on individual effort. Though the joint endeavor need not be the product of similar market contributions, it should be the product of similar personal investments in the success of the marital endeavor. Furthermore, the ideal of rough long-term reciprocity of effort must be self-enforced. Effort is not measured in terms of an external criterion; determining whether rough long-term reciprocity of effort exists in a marriage is personal to each couple, based upon their goals, beliefs, and private valuations. Therefore, law should not use that standard to divide property or to determine who may be allowed to divorce (and, of course, autonomy demands that spouses be allowed to exit from marriage for any reason, or no reason at all).

It may seem that substituting equal sharing for contribution would discourage spouses from investing in marriage. However, spouses have reasons to invest beyond the point where their investments are protected. In part, this is simply a point about the desirability of taking risk in order to achieve potentially greater gains. But the point is also more profound: Certain goods, such as intimacy, commitment, and self-identification can only exist in the face of risk. Making oneself vulnerable is a necessary precondition to the formation of a plural self and its attendant goods. Moreover, investing in the marriage may be necessary to stop the other spouse from exiting. Leaving is a form of self-defense, and “[t]he possibility of exit may itself make the group responsive to the interests of its members.” Furthermore, generous investment in the marital community today signals the probability of similarly generous investment in the future, and thus may cause the other spouse to reciprocate. In any event, the law should not protect every spousal investment. If spouses are only willing to invest in a marriage because they know that their investments will be repaid, they are already outside the communal ideal. The existence of the plural self should make spouses willing to risk their own self-interest to some degree. Marital property law should have little interest in encouraging the investment of a spouse who will only contribute more than half the effort involved in a joint project if she knows that she will reap more than half the reward.

57. It is an open and difficult question whether some extreme and unexpected disparities in market contribution (such as those arising from a sudden serious illness of one spouse) would ever necessitate deviation from the ideal, even if the efforts of both spouses remain constant.

58. Green, supra note 40, at 171; see also Hirschman, supra note 39, at 22–25 (describing the interaction of consumer exit and the management reaction function).

PROPERTIES OF MARRIAGE

3. Equality and Non-Subordination. — People may engage in many joint enterprises where equality is not necessary. Joint owners in a business, for instance, may divide the ownership interest 70-30 without raising any alarm. But it would be perverse to conceive of a marriage of this sort, where one spouse has a recognized controlling interest in the property that partially constitutes the marriage, and, correspondingly, in marital decisions. One reason for this difference is that marriage is a more pervasive engagement than any other enterprise.\(^6\) Disparity in the control of marital property moves beyond simple inequality—which an individual may rightly choose as a means to other ends—to subordination, which systematically denies the importance of whatever ends that individual chooses. As subordination in marriage is a threat to a spouse's basic personhood, the marital community must be bounded by a commitment to equality.\(^6\)

Equality as non-subordination is also crucial to the communal dimension of marriage. Spouses in an inegalitarian marriage cannot form a true plural self or enjoy the unique collective goods of marriage. This applies not only to the oppressed spouse, but also to the oppressor: "One committed and loving partner," Elizabeth Anderson explains, "cannot unequivocally rejoice in his life with his partner if he knows that the other finds the relationship oppressive in some way."\(^6\)\(^2\) An oppressive marriage not only deprives the subordinated spouse of a voice, but also deprives the subordinating spouse of a partner, thus precluding realization of intimacy, caring, commitment, and emotional attachment.

Yet the history of equality in marriage is not promising. The marital community, a locus of sharing and trust, has been abused to shield subordinating patriarchal structures.\(^6\)\(^3\) Patriarchal marriages allow men to capture a disproportionately high share of the benefits (including decision-making power) of marriage and bear a disproportionately low share of its

60. To the extent that any communal enterprise is so pervasive—for instance, in the case of tribes or communes—the same analysis applies.
61. We do not mean to suggest that spouses should be equal in all respects. Mutual dependency is, after all, a central aspect of marriage. Cf. Robert E. Goodin, Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities 197 (1985) (arguing that demands for complete equality are misguided, as a certain amount of dependency characterizes most personal relationships); Nock, supra note 24, at 1977-78, 1980 (describing the interdependencies that underlie gender differences in marriage, and arguing that these are viewed as legitimate). Rather, equality in the marital context stands for non-subordination.
62. Anderson, supra note 21, at 151.
"When we look seriously at the distribution between husbands and wives of such critical social goods as work (paid and unpaid), power, prestige, self-esteem, opportunities for self-development, and both physical and economic security, we find socially constructed inequalities between them, right down the list."  

The persistence of patriarchal marriages can be attributed to the enhanced leverage men have in their explicit and implicit bargaining with women. This is due to men's greater earning power, or, more precisely, the "cycle of power relations and decisions [that] pervades both family and workplace, and the [way in which the] inequalities of each reinforce those that already exist in the other."  

It can also be attributed to "men's higher extramarital utility, better remarriage prospects, and longer reproductive life." Finally, as Carol Rose explains, if women have a greater taste for cooperation than men or if they are perceived to have such a taste, over time men are likely to get the lion's share of the joint gains from marriage.  

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65. Okin, supra note 63, at 136. A patriarchal marriage need not be characterized by the husband maliciously or intentionally taking advantage of the wife. Rather, we assume that in most cases the inequitable distribution of the marital goods between the spouses is the outcome of broader social inequities, where the choices of wives are systematically more constrained than those of their husbands.  

66. Id. at 147. Recent census bureau figures show that the gendered wage gap still exists, even in the newest generation of workers (16–24 years of age). See U.S. Census Bureau, Statistical Abstract of the United States: Full-Time and Salary Workers—Number and Earnings: 1985 to 1999, at 437 tbl.696 (2000). While some studies have lessened this gap by factoring out variables such as willingness to have long gaps in work to care for children, see Diana Furchtgott-Roth & Christine Stolba, Women’s Figures 12–18 (1999), many such variables are themselves products of discrimination, and therefore should not be excluded. See Morley Gunderson, Male-Female Wage Differentials and Policy Responses, 27 J. Econ. Lit. 46, 48–53 (1989).  

67. Wax, supra note 64, at 579. Recent literature has explored the devastating financial impact of divorce on women. See Lenore J. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America 323–56 (1985) (describing the economic benefits to men and costs to women of divorce); Margaret F. Brinig & Steven M. Crafton, Marriage and Opportunism, 23 J. Legal Stud. 869, 894 (1994) (same); Cahn, supra note 20, at 254 (discussing the decreased standard of living for women following divorce under the no-fault regime); Scott & Scott, supra note 1, at 1233, 1245–47 (noting that wives' marital investments are not adequately protected by no-fault divorce and current divorce rules governing financial distribution); see also Cahn, supra note 20, at 253 n.130 (collecting additional sources). The asymmetric cost of divorce likely contributes to male dominance during marriage.  

Any subordination—whether based on gender or another feature—is problematic within marriage. However, exit and entry are sufficient for combating subordination that does not arise from gender inequality. If choice is otherwise unconstrained, spouses are unlikely to choose to enter into a marriage they find oppressive, and are likely to withdraw if it becomes oppressive over time.\(^6\)

But with gender inequality, things are different. Heterosexual women cannot be expected to avoid marriage with those who have the power to subordinate them.\(^7\) Once they have married men, exit from a subordinating relationship will not necessarily be a tenable alternative.\(^7\)

Some commentators have proposed a radical solution—giving up on marriage altogether.\(^7\) But communal marriage is not likely to go anywhere any time soon. Because of the intense long-term fusion of marriage, it is one of the few relationships that can produce the communal goods of interpersonal trust, caring, and commitment (and few other relationships promote realization of these goods to such a degree).\(^7\) For this reason, people will continue to partner despite the lack of legal marriage, but will do so without the protections against subordination that the law can provide. Therefore, the pragmatic way to reform the relationship between men and women is to change marriage, rather than make ultimately futile attempts to erase it.\(^7\)

Because expecting women to protect themselves against marital subordination is both unrealistic and undesirable, the law must provide insti-

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69. The availability of low-cost exit from a subordinating relationship is typically thought to be sufficient to combat exploitation. See Goodin, supra note 61, at 197 (“As long as the subordinate party can withdraw without severe cost, the superordinate cannot exploit him.”).

70. Some have argued that allowing same-sex marriage can make the institution itself less oppressive. See John G. Culhane, Uprooting the Arguments Against Same-Sex Marriage, 20 Cardozo L. Rev. 1119, 1189 (1999) (arguing that same-sex marriage would “boost” traditional marriage by reinforcing principles of commitment and love).


72. See Martha Albertson Fineman, The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies 228–30 (1995).

73. Cf. Marsha Garrison, Toward a Contractarian Account of Family Governance, 1998 Utah L. Rev. 241, 260 (noting the centrality of family to economic organization, and noting that familial ties, including ties between husband and wife, “have traditionally been the focus of most individuals’ emotional lives”); Norval D. Glenn, Values, Attitudes, and the State of American Marriage, in Promises to Keep: Decline and Renewal of Marriage in America 15, 15 (David Popenoe et al. eds., 1996) (noting that satisfactory marriage “is more predictive of the health, happiness, and general well-being of adults” than any other variable).

tutional guarantees of gender equality to support the marital community. This prescription is not only founded on the intrinsic value of gender equality, but is also entailed by the communal maxims of marriage. As Susan Moller Okin explains, men’s ability to use the threat of exit as leverage affects the very functioning of the community by affecting women’s voice within it. With pervasive gender inequality, the fact that women remain in and cooperate during marriage may be due to social, economic, and cultural lack of choice. This is anathema to genuine community.

Admittedly, marital property law cannot completely free women or marriage from gender subordination. Fully compensating for all social gender discrimination is too great an obligation to put on marriage. In particular, expecting husbands to completely neutralize their wives’ social disadvantages may jeopardize their own autonomy. Thus, the best we can hope for is a reasonable compromise between these competing goals. And yet there is hope that marital property law can help facilitate the egalitarian transformation. In Part II, we show that a commitment to the ideal of marriage as an egalitarian liberal community entails a significant legal reform: Spouses’ claims to the marital estate, broadly defined, should be based on their joint and equal entitlement, rather than on a property redistribution theory. Through these and other reforms, we hope that a revitalized marital property law, consistent with the ideal of marriage as an egalitarian liberal community, will be one important—although by no means sufficient—step toward gender equality.

B. Law and Marriage

Assuming that our ideal of marriage as an egalitarian liberal community is appealing, how can marital property law—particularly because it operates primarily at the moment of divorce—have any impact on whether marriages reflect that ideal? Though the role of law is admittedly modest, it performs an important function in ongoing marriages.

75. See Okin, supra note 63, at 137-38, 161, 167-68, 180. By reinforcing bargaining imbalances, men’s threat of exit diminishes women’s power within marriage. See June Carbone, Income Sharing: Redefining the Family in Terms of Community, 31 Hous. L. Rev. 359, 405 (1994) (noting that men’s implicit threat of exit has contributed to women’s diminished power within marriage); Wax, supra note 64, at 544-51, 626-36 (describing the adverse impact of bargaining disparity, partially due to men’s exit threat advantage, on women’s choices within marriage). This loss of power translates into a loss of voice.

76. Some commentators have argued that inequality is endemic to marriage, and that marriage should therefore be rejected. See, e.g., Ertman, supra note 4, at 82-83, 90-98 (putting forth a business model as an egalitarian alternative to traditional marriage). This view underestimates the important ways in which our existing social world can serve as a fertile source of social criticism. As Michael Walzer argues, the need to validate current practice is potentially subversive because it requires a respectable justification. See Michael Walzer, Interpretation and Social Criticism 21, 39, 43, 47-48, 61 (1987). Likewise, we believe that by celebrating marriage (while pushing for egalitarian reforms), there is a potentially greater opportunity to confront and overcome gender inequality than by abandoning the institution altogether.
We begin with the law's limits. Marital property law cannot be deployed on a regular basis. Constant legal intervention is not likely to facilitate cooperation, but instead will undermine the relational norms of harmony, reciprocity, and solidarity.\(^7\) Furthermore, law should not attempt to fully protect spouses from the collapse of the emotional core of their relationships.\(^7\) To be meaningful, trust should involve vulnerability to another's power.\(^7\) Therefore, we accept law's traditional reluctance to resolve disputes within functioning marriages.\(^8\)

With this important caveat in mind, we must also be careful not to overlook the role law should play in sustaining a functioning marital community, even if it necessarily operates only in the background.\(^8\) Marital property rules can provide—like other liberal commons institutions—a formal “safety net” that minimizes incentives for opportunism, the lingering threat to trust and cooperation.\(^8\) The core of these background rules, as elaborated in Part II, is the rule of equal sharing of the marital estate broadly defined.\(^8\) This rule guards spousal investments of material—as opposed to emotional—resources against the opportunism of a

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7. See Scott & Scott, supra note 1, at 1285–87, 1294–95; see also Robert C. Ellickson, Order Without Law 60–64, 69, 76, 283 (1991) (describing Shasta County residents' community-based objections to legal controls, and arguing that close-knit groups prefer informal controls).


77. See Scott & Scott, supra note 1, at 1268–69.

78. See Annette C. Baier, Moral Prejudices 133, 137, 139 (1994); see also Regan, supra note 6, at 25–26 (arguing that effectuating trust requires "confidence in the other as a given").

80. For a classic exposition of this reluctance, see Kilgrew v. Kilgrew, 107 So. 2d 885, 888–89 (Ala. 1958). For an exception to this approach in our proposal, see infra notes 264–265 and accompanying text.

81. One indication of the importance of legal entitlements to the proper functioning of the marital relationship is that women tend to support them. See Gwynn Davis et al., Simple Quarrels 62 (1994). Given the history of men abusing women's trust in the family, it should not be surprising that women are particularly concerned with security in marriage. But they have not chosen to pursue it through abandoning the law; rather, they have embraced legal entitlements on divorce. Cf. Patricia J. Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 Harv. C.R.-C.L. L. Rev. 401, 405, 433 (1987) (noting the empowerment of oppressed groups through rights-assertion).

82. This paragraph uses some basic economic insights, which may be seen as inconsistent with our emphasis on the collective nature of marital goods. While it should not govern marital property law, economic methodology can inform legal intervention to prevent, in certain instances, the derailment of ongoing marriages. Admittedly, much of the nastiness in marriages does not have anything to do with the pursuit of economic self-interest (e.g., the husband who immiserates himself in order to visit damage upon his wife in a divorce proceeding). Nonetheless, as long as part of this nastiness arises from the pursuit of financial self-interest, reference to economic insights can be informative. For a discussion of the application of economic theory to family law, see Brian H. Bix, Engagement with Economics: The New Hybrids of Family Law/Law & Economics Thinking 2–7 (Apr. 18, 2001) (unpublished manuscript, on file with the Columbia Law Review).

83. The prescription to divide fruits and revenues is not, in and of itself, unique to the marital commons. See Dagan & Heller, supra note 5, at 589 (arguing that distribution of fruits and revenues is fundamental to all commons). But in a nonmarital liberal commons,
defecting spouse. This rule aims to ameliorate the inevitable vulnerability that is an intrinsic part of long-term relationships of trust and cooperation: If one party exits, the other will not be left holding the bag, at least not entirely. It thus gives spouses a leg up on the trust that they need to make their marriage work while it exists.

This function is not undermined by the fact that spouses may contract around most of the marital property rules we discuss. Making specific marital agreements is difficult; romance and hard-headed business bargaining are not easily blended together, which may explain why explicit contracts in the marital context are not very frequent. More importantly, a regime that sets the norm of equal sharing as its default and imposes transaction costs on contracting around it forces the party who does not share the ideal of marriage as an egalitarian liberal community to raise his objections and convince his spouse to opt out. All legal regimes, of course, force some potential spouses to reveal their preferences. But there is an important value in imposing such a burden on the spouse who disfavors equal sharing—sharing is both meritorious

these fruits and revenues are usually divided in proportion to each owner's contribution. In a marital community, these shares are necessarily equal.

84. Cf. id. at 577-79 (noting that law can supply mechanisms that guard against opportunism in commons settings).

85. As we have argued above, because communal marriage stands for the ideal of sharing both the difficulties and advantages of joint life, rather than of efficient investments or deserved compensation, marital property law need not protect all spousal investments.

86. But cf. Silbaugh, supra note 54, at 204-05 (noting ALL limitations on prenuptial agreements justified on the basis of promoting certain policies).

87. See, e.g., Stephen D. Sugarman, Dividing Financial Interests on Divorce, in Divorce Reform at the Crossroads, supra note 1, at 130, 141-43 (arguing that because marriage is more about love than business bargaining, "there is reason to fear that many individuals would not insist upon terms that would sufficiently protect themselves").

88. See supra note 12 (noting prenuptial agreements in roughly five percent of first-time marriages and twenty percent of remarriages).

89. Because the initial allocation of entitlements typically affects parties' preferences, it will tend to burden those who would otherwise prefer a different allocation. See Russell Korobkin, Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms, 51 Vand. L. Rev. 1583, 1602 (1998) (citing empirical evidence showing that the initial allocation of entitlements affects preferences for these entitlements); Russell Korobkin, The Status Quo Bias and Contract Default Rules, 85 Cornell L. Rev. 608, 675 (1998) ("Contracting parties may view the default term—the term that will govern the parties if they fail to contract for an explicit term—as a status quo endowment. Because individuals tend to prefer the status quo to alternative states, they are likely to prefer the default term, whatever it may be, to other options, all other things being equal.").

90. Notice that even if one were to consider only transaction costs, special attention should be given to the costs to those for whom bargaining out of the default is expensive. See David Charny, Hypothetical Bargains: The Normative Structure of Contract Interpretation, 89 Mich. L. Rev. 1815, 1842, 1864-65, 1878 (1991). Insofar as the preference for equal sharing is more prevalent among women, and the effort to realize this preference in a culture that tends to find desert-based claims obviously justified may be prohibitively costly, the choice of equal sharing as the default rule is merited.
(because it leads to a trusting marriage) and risky (because it makes one vulnerable to the opportunistic behavior of the other). Setting equal sharing as the default regime diminishes these vulnerabilities by forcing potential partners who do not intend to share equally to reveal their conception of marriage before the potentially vulnerable party detrimentally relies on her commitment to marriage as an egalitarian liberal community.

In addition to its protective and facilitative role, the law can have an expressive impact; it can help entrench the ideal of the egalitarian liberal community in the social understanding of the institution. A supportive marital property law can demonstrate the good that can come from marital community and what is necessary to achieve this goal. This expressive function is not accomplished by hollow rhetoric; a regime of equal sharing ensures that the material consequences of marriage reflect the lessons the law is trying to teach.

We do not claim that most spouses act upon the particular details of marital property law, which are, for the most part, unknown to them, and furthermore are seen as inappropriate for daily application during a

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91. Cf. Carol M. Rose, Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory, in Property and Persuasion, supra note 68, at 25, 30–37, 40–41 (describing "Mom," who makes sacrifices for the common good by favoring greater joint utility over individual wealth maximization, as the "heroine" of various group thought experiments).

92. Stated a different way, equal sharing is a desirable default because it is information-forcing. More precisely, it forces the spouse who demands a contract that is more self-interested than the default to reveal something about his unobservable "type" to the other spouse. See Alan Schwartz, The Default Rule Paradigm and the Limits of Contract Law, 3 S. Cal. Interdisc. L.J. 389, 390–91 & n.3 (1993) (noting that information-forcing default rules incentivize disclosure and alert parties, who do not protest, to the relevance of important issues). In commercial settings there is a concern that such information forcing might deter efficient contracting out by parties who wish to maintain the benefit of private information. See Kathryn E. Spier, Incomplete Contracts and Signaling, 23 RAND J. Econ. 432, 432–33 (1992) (arguing that the failure to contract out may be due to the desire to maintain an asymmetric information advantage). But surely this concern is less acute in the context of marriage.

93. We do not deny the limits of law's cultural effects. The dynamics of the interaction between law and culture is still a puzzle, which we obviously do not purport to solve here. We only make the modest claim that legal rules can reinforce desirable social norms. See, e.g., Dagan, supra note 2, at 94–95, 110–13 (arguing that recognizing restitution claims of good Samaritans may have a positive impact on social behavior); Robert Cooter, Expressive Law and Economics, 27 J. Legal Stud. 585, 585–86 (1998) (explaining in economic terms the law's ability to shape or reinforce social norms). Of course, broad resistance to law's ideals may yield counterproductive outcomes. Lacking perfect information about law's cultural effects, one cannot deny such a possibility. However, we see no reason to suspect a moral backlash that would undermine the intended effect of the reforms we propose in this Article.

94. See, e.g., Lynn A. Baker & Robert E. Emery, When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage, 17 Law & Hum. Behav. 439, 441–45 (1993) (concluding from a survey of marriage license applicants that "those who are about to be married have largely incorrect perceptions of the legal terms of the marriage contract as embodied in divorce statutes").
functioning marriage. But to the extent that law can ever affect social understandings, marital law is at the center of public awareness and debate. Moreover, many parties to ongoing marriages have themselves been divorced, or are at least intimately familiar with the divorce of a close friend or relative. While most spouses may not know all of the legal details, they may be affected by their accumulated impact: the experiences, practices, and social expectations generated by the principles underlying the legal dogma.

II. MARITAL PROPERTY LAW

Assessing the desirability of the egalitarian liberal community ideal for marriage requires not only abstract discussion of principles, but also

95. Our proposal includes both rules regarding division on divorce and rules regarding governance. It may seem that, because they deal with functioning marriages, the latter are unlikely to have any impact, expressive or behavioral, on marriage, and that in any event governance should be a matter of private ordering. See J. Thomas Oldham, Management of the Community Estate During an Intact Marriage, Law & Contemp. Probs., Spring 1993, at 99, 101–04, 116–17; Scott & Scott, supra note 1, passim. The legal regime may be self-enforcing or substituted by informal norms, but a judicial forum for relief is nonetheless required as a safety net for those pathological cases in which these nonlegal avenues do not provide adequate protection of a spouse’s interests. Garrison, supra note 73, at 267 & n.142. Furthermore, public prescriptions regarding family governance are significant in providing an important public signaling of the proper allocation of goods, responsibilities, and power between spouses. See id. at 254 (“The distribution of power and resources within the family will also mirror . . . those of the larger community. It is no accident that, in societies with a tradition of male supremacy, families typically discriminate against their female members. Nor is it mere chance that hierarchical societies tend toward hierarchical families.” (footnotes omitted)). Thus, governance rules affect marriage exactly like division rules—both provide a safety net and express a view of the good marriage.

96. See Sean E. Brotherson & Jeffrey B. Teichert, Value of the Law in Shaping Social Perspectives on Marriage, 3 J.L. & Fam. Stud. 23, 28–30 (2001) (“The pragmatic value of the law in establishing sanctions or penalties for the breaking of prescribed rules of conduct sets a baseline for appropriate behavior.”); Garrison, supra note 73, at 241–43 (arguing that family law is “constitutional” in that it delimits “the offices, powers, and rights of individual family members,” so that ultimately the terms of family governance “rest to a substantial extent on public prescription”); see also Dagan, supra note 2, at 112–13 (discussing the limits of the expressive role of law).

97. See Mary Ann Glendon, Abortion and Divorce in Western Law 107 (1987) (“The imaginative portrayal of family life and ethics in divorce law reaches deeply into our culture—as the law is transmitted in lawyers’ offices; in courtrooms; in television news, documentaries, and dramas; in newspapers and popular magazines; and in the cinema.”); Brotherson & Teichert, supra note 96, at 30 (“The law has . . . become the great battleground for moral and cultural transitions.”).

98. See Paul Horton & Lawrence Alexander, Freedom of Contract and the Family: A Skeptical Appraisal, in The American Family and the State 229, 249–50 (Joseph R. Peden & Fred R. Glahe eds., 1986) (noting that even minor regulatory modifications “have been perceived by many to have had a profound effect on the stability” of the marital institution); Elizabeth S. Scott, Social Norms and the Legal Regulation of Marriage, 86 Va. L. Rev. 1901, 1923–24 (2000) (“The couple comes to expect of each other and of themselves what their social community seems to expect of married couples.”).
an analysis of the implications of these prescriptions for marital property law. 99 Therefore, we now shift from theory to practice, to translate the ideal into a set of detailed rules. In Part I, we discussed the rules regarding exit. We endorsed no-fault divorce with perhaps a cooling-off period. Part II focuses on aspects of marriage and divorce law that address the property relationship between spouses: the rules regarding property division and alimony upon divorce, as well as those addressing the governance of property during marriage. 100 We find that the law already reflects the ideal of the egalitarian liberal community to a significant degree. At the same time, we point to blemishes in the existing doctrine, some of which are very significant in their effects. In these contexts, we rely on the ideal of marriage as an egalitarian liberal community as a justification for important reforms.

A. Property Division

1. A Note on Terminology. — We should note at the outset our use of the categories of property division and alimony. One understanding of these two categories is formal—property division is what a party goes home with at the end of the divorce proceeding, while alimony is what comes in periodic checks later. 101 We use property division and alimony to signify different substantive considerations: Property division is backward-looking (looking at the marital relationship while it existed), while alimony reflects the law’s concern with the post-divorce financial situation of the parties, their future needs, and their prospective abilities. 102 Keeping in mind this conceptual framework can help avoid confusion, because each substantive concern can be addressed by either form. 103 Di-

99. In other words, as lawyers and pragmatists, we are committed to pay attention both to the particular contexts of specific doctrinal questions and to the motivating principles and policies underlying their resolution. Cf. Don Herzog, Without Foundations: Justification in Political Theory 225, 231–33 (1985) (insisting that abstract views must be evaluated “by examining their concrete implications”). The top-down structure of this Article is purely expositional; any valuable legal analysis needs to have both the “top” and the “down.”

100. While those taking other approaches to family law—notably traditionalists, economists, and radical feminists—may each join some of our recommendations in this Part, they will not endorse them entirely. As previously argued, each of these approaches typically focuses on one aspect of marriage to the relative exclusion of others (traditionalists to community, economists to autonomy, feminists to equality). See supra notes 3–4 and accompanying text. Our vision necessarily depends on the combination of all three components.

101. See ALI Principles, supra note 8, § 4.07 cmt. a, at 694–95.

102. But see Joan M. Krauskopf, Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery, 23 Fam. L.Q. 253, 256–57 (1989) (arguing that both property division and alimony should be designed to allocate benefits and burdens of marriage fairly).

103. Historically, they may have been more aligned. See Suzanne Reynolds, The Relationship of Property Division and Alimony: The Division of Property to Address Need, 56 Fordham L. Rev. 827, 831–37 (1988) (“Early in the history of divorce provisions in separate property states, some of these jurisdictions authorized the division of property to
vision of certain resources that we perceive as presently existing marital property—such as a family home where the children continue to live—may only be feasible (or desirable) in installment form. Conversely, concerns about future financial disparity (substantive alimony) may be reflected by formal property division—for instance, through granting complete ownership of the family home to the spouse with lower earning potential.

2. Equal Division. — The cornerstone of the contemporary law of marital property—the one rule that seems least disputed (at least as a theoretical matter) by courts, commentators, and lay people alike—is the rule of equal division upon divorce. Equal division is a relative latecomer to marital property law, but by now we can hardly think of the law without it.

Equal division of the marital estate has been endorsed as a rigid mandatory prescription in only three jurisdictions. Elsewhere equality effectuate an award of alimony.” (footnotes omitted)). Mary Ann Glendon has criticized the movement to divide earning potential on divorce as simply collecting alimony under a different name. See Mary Ann Glendon, The New Family and the New Property 66–68 (1981). Under our analysis, Glendon’s characterization fails to consider the different substantive considerations addressed by division of earning capacity and alimony.

104. See, e.g., Mahoney v. Mahoney, 453 A.2d 527, 534 (N.J. 1982) (introducing the concept of reimbursement alimony—time-limited payments to the spouse who contributed to the other’s degree). There are difficulties with the post-divorce periodic form. See Allen M. Parkman, The ALI Principles and Marital Quality, 8 Duke J. Gender L. & Pol’y 157, 163–66 (2001) (arguing that periodic payments “can be unfair and inefficient”).

105. See, e.g., Unif. Marriage & Divorce Act, Prefatory Note, 9A pt. I U.L.A. 161 (1998) (“Because of its property division provisions, the Act does not continue the traditional reliance upon maintenance as the primary means of support for divorced spouses.”); Mahoney, 453 A.2d at 535–36 (stating that property should be divided to reflect, in part, spouses’ different capacities and earning potential).


PROPERTIES OF MARRIAGE
typifies the law in softer ways. Many states have a presumption of equal division of property established either through statute or through common law rule. Several other states have adopted less powerful fifty-percent "starting points" for division. Even states that have failed to adopt an equality standard, or that explicitly reject the notion, presume equal ownership of jointly held property (typically the family home, the only significant existing marital asset in most cases), regardless of the origin of the purchase money. The "substantial evidence" needed

108. See ALl Principles, supra note 8, § 4.09 cmt. a, at 733 (discussing states incorporating equal division presumptions and informal applications of the equal division rule).


113. See Peter M. Moldave, Comment, The Division of the Family Residence Acquired with a Mixture of Separate and Community Funds, 70 Cal. L. Rev. 1263, 1263 (1982) ("The division of the family residence upon marital dissolution is a critical issue for many divorce litigants, in part because often much of a family's wealth is invested in that single asset.").

to overcome such a presumption is rarely forthcoming—most couples do not discuss the ownership of the home in the event of divorce at the time of purchase—and, absent considerations involving housing of the couple’s children, the value of the family home is frequently divided equally.\textsuperscript{115}

3. Tormented Explanations. — While equality is the emerging norm in the law of property division, its underlying justification is far from settled. The American Law Institute’s (ALI) Principles of Family Dissolution Law, which adopts the equal division rule,\textsuperscript{116} exemplifies the confusion. As the ALI notes, many have supported equal division on the basis of contribution theory, arguing that equal division accurately values the contributions of non-market work (typically expended disproportionately by women) to the joint marital enterprise.\textsuperscript{117} The ALI rightly rejects this argument because of its factual implausibility—there is little reason to believe that the non-market contributions of the spouse with less market power are sufficient to balance the other spouse’s significant market power advantage.\textsuperscript{118} But then the ALI makes an inconsistent concession to contribution theory—that an equal division rule may in fact reflect contributions to the entire marital relationship, because “[o]ne spouse may have contributed more than the other in emotional stability, opt-
This, however, is no more factually defensible than the presumption of equal financial contribution. Are we to assume that women, with less market power, must necessarily have more interpersonal skills?

The problem with the ALI's explanation is that it ultimately depends on assigning an external value to each spouse's contribution, suggesting that on some meaningful external calculation, both spouses would inevitably come out equal. This is wrong not only because it is wishful thinking—assuming, to a certain extent, background gender equality—but also because it misunderstands the metric of marriage. As discussed above, spouses do keep some rough idea of the fairness of their marriage, but this is not based on the external value of their contributions, but rather on a rough assessment of mutual fairness that can only be internally measured and must be self-enforced. By relying on an external valuation of market and non-market contribution, the ALI fails to account for the communal character of marriage.

A similar response is appropriate for other dubious explanations for the equal division rule. Elizabeth and Robert Scott have argued that equal division of marital assets can be justified on grounds of efficiency—and is thus firmly grounded in spouses' hypothetical consent—as a means of preserving the incentive to share during marriage, as well as the incentive to exit the marital community at certain strategically valuable points. But even these authors admit that this contractual logic can only justify recovery to the extent of the opportunity costs of the non-propertied spouse. Realistically, when parties enter the marriage with substantially differing degrees of market power, equal division is not necessary to secure the advantages of collective action.

4. Justifying Equal Division. — Instead of reference to contribution, efficiency, or hypothetical consent, we propose a justification for the equal division rule based on the ideal of marriage as an egalitarian liberal community. First, equal division performs a desirable expressive function. Equality stands against any investigation into the interior functioning of the marital community to determine individual desert, and best demonstrates that no party is any more entitled to marital resources than

119. ALI Principles, supra note 8, § 4.09 cmt. c, at 735.
120. The ALI's other explanations for the equal division rule are equally disappointing. It maintains that "[s]ince the principle that both spouses have claims to the marital property is accepted, dividing that property equally between them is the allocation that least requires justification. It is difficult to offer a convincing rationale for any other percentage." Id. § 4.09 cmt. b, at 734. Somewhat similarly, the ALI presents equal division as "a rough compromise between the competing claims of contribution and need." Id. These explanations are unsatisfactory as they present equal division, at best, as an arbitrary choice or a rough and ready numerical proxy for a mismatch norm. At one point it seems that the ALI endorses a sharing-based justification, but then it holds back by arguing that "[s]pouses can share ... without necessarily sharing equally." Id.
121. Scott & Scott, supra note 1, at 1271–73.
122. Id. at 1273–74.
any other. Equal division also decreases parties' incentives to view their marriages individualistically. A fifty percent rule ensures that there is no advantage to keeping an accounting of individual investments in and returns from the marital relationship. The party who shows up in divorce court with a stack of receipts tracing back to the beginning of the marriage has clearly not signed on to a communal understanding of the institution. A rule of equal property division on divorce discourages such behavior. Moreover, equal division makes it easier for spouses to engage in sharing behavior—investing in relationship-specific goods, specializing, and making individual sacrifices for the overall good of the community. Spreading the benefits and the risks of this kind of behavior equally between the parties transforms personal sacrifice into joint endeavor.

Some argue that an individual investment model actually supports the marital community because it encourages spouses to invest by removing risk. But not all investments in marriage are good ones. A contribution-based rule encourages the investment of those who are only willing to invest knowing that they will reap a proportionate share of the rewards. Though it may be a way of encouraging efficient investment among some spouses, it is incompatible with the idea of a marital community. As we have previously argued, individualistic contribution accounting is antithetical to the communitarian sharing principle and is not required by the liberal commitment to autonomy.

Contribution-based rules should also be rejected because they threaten to reinforce problematic gender roles. Due to (unjustified) differences in market earning power, in most marriages it is efficient for the

123. For this reason we are careful not to use the term marital "partnership." Not all partnerships are sharing partnerships. Some (maybe most) uses of the term signify quite the opposite of the egalitarian liberal marital community we endorse: an economic partnership. See Regan, supra note 6, at 145 (presenting a view of marriage as an economic partnership emphasizing reward proportionate to spousal contribution); Rhode & Minow, supra note 28, at 199 (explaining the ideal of marriage as a partnership entailing distribution according to contribution and need); cf. Sanford N. Katz, Marriage as Partnership, 73 Notre Dame L. Rev. 1251, 1252 (1998) (noting that the partnership model emphasizes the individual over community). Even "equal contribution" partnerships are economic (they simply insist on assuming equal contributions) and thus anathema to the egalitarian liberal community. See, e.g., Fineman, supra note 117, at 396 (arguing for marriage as an equal partnership based on the assumption of equal contribution).

124. See Regan, supra note 6, at 11 ("Genuine intimacy seems to require [that] the relationship is taken as a given without reference to individual costs and benefits.").

125. See Kay, supra note 1, at 30-31; Rhode & Minow, supra note 28, at 199.

126. E.g., Ellman, supra note 50, at 51; see also Arthur B. Cornell, Jr., When Two Become One, and Then Come Undone: An Organizational Approach to Marriage and Its Implications for Divorce Law, 26 Fam. L.Q. 103, 123 (1992) (noting that compensation for individual losses provides further incentives to work for marriage).

127. But cf. Schneider, supra note 1, at 218-19 (attacking the focus on "optimization of family income" as a primary marital objective).
woman to work less in the market and more inside the home.\textsuperscript{128} Contribution schemes may exacerbate inequality by encouraging such specialization, thus posing a threat to marital community.\textsuperscript{129} Equal division, by contrast, spreads the risks of spouses' own sharing choices without aiming to encourage any particular choice.\textsuperscript{130} Equal division does not necessarily\textit{discourage} spouses from choosing gender-role specialization.\textsuperscript{131} But it avoids channeling women to their traditional non-market roles.

Moreover, equal division can play a limited but significant role in achieving egalitarian marriage by partly ameliorating men's greater market advantages.\textsuperscript{132} We do not deny that women are still not on an economic par with men, even if granted half of the assets of the marriage.\textsuperscript{133} It is for this reason that we shortly turn to substantive alimony as a means to further address gender inequality. Still, even in terms of gender inequality, equal division has real advantages. Division of existing marital assets sends a powerful message of ownership—that the award is not a social welfare handout, but rather an entitlement.\textsuperscript{134} Unlike alimony,

\begin{itemize}
\item \textsuperscript{129}Cf. June Carbone & Margaret F. Brinig, Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform, 65 Tul. L. Rev. 953, 988 (1991) (describing the traditionalist view that protects spouses' expectation interests and thus encourages specialization); Sugarman, supra note 87, at 145 (noting objections to specialization grounded in gender equality concerns). By promoting specialization, these schemes endorse sex-segregation, which is profoundly unfair to women as individuals, and undermines the marital community. See Steven L. Nock & Margaret F. Brinig, Weak Men and Disorderly Women: Divorce and the Division of Labor, in Law and Economics of Marriage, supra note 42, at 171, 174-88 (presenting data showing that marriages become more unstable when either partner spends more time in traditionally female household chores and that stability depends on the perceived fairness of division of labor).
\item \textsuperscript{130}Cf. Schneider, supra note 1, at 220 (criticizing rules that favor one form of sharing over others in the context of alimony).
\item \textsuperscript{131}See Herma Hill Kay, Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath, 56 U. Cin. L. Rev. 1, 77-89 (1987) (noting that gender specialization is often chosen for non-financial reasons). Actively discouraging women from choosing non-market roles is problematic since it forces certain women to make choices simply because they are good for women as a class. Cf. John Rawls, The Idea of Public Reason Revisited, 64 U. Chi. L. Rev. 765, 792 (1997) (arguing that the liberal conception of justice may have to allow for voluntarily chosen gender specialization).
\item \textsuperscript{132}See Olsen, supra note 63, \textit{passim}; Rhode & Minow, supra note 28, at 199.
\item \textsuperscript{133}See Fineman, supra note 106, \textit{passim} (describing reasons for financial inequality between men and women in the divorce context); Okin, supra note 63, at 162 (noting that in most divorces women bear post-divorce childrearing duties resulting in greater economic need).
\item \textsuperscript{134}See Okin, supra note 63, at 181; see also Joyce Davis, Enhanced Earning Capacity/Human Capital: The Reluctance to Call It Property, 17 Women's Rts. L. Rep. 109, 114 (1996) (noting the shift in the legal conception of marriage from status to entitlement: "[W]omen . . . were entitled to an equitable share of the marital assets, not
which carries the stigma of dependency and weakness, equal division promotes spouses' sense of personal dignity by signaling equal ownership of all marital property.

Identifying the most compelling justification for the equal division rule is not just a theoretical exercise. As usual, getting the theory right has important practical implications. Understanding the point of the central rule of marital property helps us understand and evaluate other less central rules, at times providing reasons to reform them. Moreover, even with respect to the equal division rule itself, understanding its justification suggests its proper application. If, as we argue, equal division is best explained as a rejection of contribution and an endorsement of egalitarian liberal community, then it is better applied as a presumption (and a strong one, at that) rather than a starting point. It should also apply to all marital property (the scope of which we discuss below) rather than simply the family home or any other subset. Furthermore, this presumption should never be rebutted by any factor relating to contribution, as this would undermine the very point of its existence.

B. The Assets Subject to Division

As important as the rules governing property division are the assets that are subject to these rules: the "scope" of marital property. The equal division rule cannot support an egalitarian liberal community if important marital assets are excluded from division.

We include the central cases, such as existing balances from wages earned during marriage, property purchased and investments made with these marital funds, as well as the slightly more controversial category of wage substitutes such as pensions. We exclude from the scope of marital property many of those things that have traditionally been excluded—for instance, the emotional trauma of divorce. We restrict our efforts because they were dependent, but because they had earned it.

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135. See Singer, supra note 117, at 1117.
136. See Davis, supra note 134, at 143.
137. For instance, the ALI notes that states with equal division rules typically fail to include many categories of property in the division. See ALI Principles, supra note 8, at 23 (noting that strong presumptions of equal division are usually accompanied by limitations on inclusion of inherited property, preexisting property, and professional degrees and licenses within the marital estate).
138. This is the ALI's preferred rule, ALI Principles, supra note 8, § 4.08, at 712–13, and the justification for inclusion—that no principled distinction exists between these assets and wages earned during marriage—has elsewhere been persuasively given. See, e.g., Blumberg, supra note 106, passim (discussing different asset types and providing reasons for their inclusion in the marital estate).
139. See supra note 30 and accompanying text.
to fungible goods, focusing on three controversial types: earning capacity, preexisting property, and gifts and inheritances. Remaining inequities on the interpersonal plane are properly beyond the scope of the law.

1. Increased Earning Capacity. — One of the most contested, and most important, issues in marital property law is the proper division of a spouse's future earning potential gained during marriage.\(^\text{140}\) This is commonly called the "professional degree" problem, based on one way this earning potential is generated. But there is no reason to so confine the category; instead, it should extend to future earning potential generated during the time of marriage, however derived.\(^\text{141}\)

Currently, most jurisdictions refuse to include increased earning capacity within the marital estate.\(^\text{142}\) In fact, only New York has a clearly established rule making at least some of this asset—professional degrees obtained during marriage—eligible for division.\(^\text{143}\) Nor does the ALI recommend making such property divisible.\(^\text{144}\) Both state rules and the ALI compensate for this omission in other ways, primarily by making earning capacity changes relevant to alimony. But as we will show, these methods of dividing earning capacity are inadequate. A commitment to the ideal

140. Sugarman, supra note 87, at 149; see also Davis, supra note 134, at 115–16 (noting importance of human capital as asset of divorcing couple and discussing unsuccessful attempts to characterize future earning potential as marital property).

141. Lenore Weitzman has referred to increased earning capacity as a "career asset." Weitzman, supra note 67, at 110 (defining "career assets" as "tangible and intangible assets that are acquired as a part of either spouse's career or career potential," including professional licenses, benefits, insurance, and "entitlements to company goods and services"). Likewise, professional goodwill should be included in the marital estate. See id. In many jurisdictions, this is already the case. See ALI Principles, supra note 8, § 4.07 cmnt. d, at 699 (suggesting that professional goodwill is typically treated as marital property).

142. See, e.g., In re Marriage of Graham, 574 P.2d 75, 77 (Colo. 1978); In re Marriage of Francis, 442 N.W.2d 59, 60 (Iowa 1989); Drapek v. Drapek, 503 N.E.2d 946, 949 (Mass. 1987); Ruben v. Ruben, 461 A.2d 733, 735 (N.H. 1983); Hodge v. Hodge, 520 A.2d 15, 17 (Pa. 1986); Becker v. Perkins-Becker, 669 A.2d 524, 530 (R.I. 1996). But see Postema v. Postema, 471 N.W.2d 912, 915–16 (Mich. Ct. App. 1991) (noting the unsettled treatment of advanced degrees, but stating that most appellate panels have found that "fairness dictates that a spouse who did not earn an advanced degree be compensated whenever the advanced degree is the end product of a concerted family effort involving mutual sacrifice and effort by both spouses" (emphasis omitted)).

143. See O'Brien v. O'Brien, 489 N.E.2d 712, 713–14, 716 (N.Y. 1985) (holding that a medical license earned during marriage is marital property and stating generally that "an interest in a profession or professional career potential is marital property which may be represented by direct or indirect contributions of the non-title-holding spouse, including financial contributions and non-financial contributions made by caring for the home and family"). The O'Brien court actually went too far. "[B]y including the present value of the physician's entire future earning stream in the value of the marital asset, [it] included value that was partly attributable to future professional experience, skill development, and seniority." Scott & Scott, supra note 1, at 1322. Encumbering spouses' future career choices in such a way is inconsistent with a commitment to no-fault divorce.

144. ALI Principles, supra note 8, § 4.07(1)—(2), at 694 ("Spousal earning capacity . . . [is] not marital property. Occupational licenses and educational degrees are not marital property.").
of marriage as an egalitarian liberal community requires treating spouses' increased earning capacity as marital property, while tailoring property division rules to address the unique features of this asset. Because in many marriages, increased earning capacity is the only asset of any significant value, this proposal may be the most important reform we recommend.

The joint creation of careers is often one of the most important projects of marriage. Therefore, excluding earning capacity from the marital estate "makes a mockery of the equal division rule." It also exploits the spouse whose acceptance of burdens on behalf of the communal endeavor is transformed by the law into self-sacrifice. Additionally, where this spouse is the wife (the majority case), and a "traditional" wife at that, excluding increased earning capacity compounds the effects of pervasive gender inequality.

To a limited extent, existing alimony law already reflects these concerns. The ALI, echoing the rules of individual states, makes earning capacity relevant to the compensation spouses receive in some marriages of long duration. But compensation for individual expenditures or sacrifices is inappropriate for a marital community. Moreover, addressing the problem through the prism of alimony—even if cloaked under the name of compensation—is misguided. Alimony is associated with need and thus unjustifiably diminishes a spouse's entitlement to the other's increased earning capacity. By associating the claim to this marital asset with dependency, this practice sends the wrong cultural message.

145. Weitzman, supra note 67, at 388.
146. See, e.g., Parkman, supra note 128, at 7 ("[F]ailure to incorporate the effects of marriage on the human capital of the spouses... in any systematic way is a major cause for divorced women suffering a substantial reduction in their welfare."); Rhode & Minow, supra note 28, at 200 ("An approach that ignores future earning capacity in defining marital resources will reinforce gender disparities."); Williams, supra note 64, at 258-59 (noting the subordination of wives' careers to those of their husbands, and arguing that exclusion of human capital from property plays a role in impoverishment of women).
147. ALI Principles, supra note 8, § 5.05, at 833-34. For states making a spouse's increased earning capacity relevant to compensation, see, e.g., In re Marriage of Olar, 747 P.2d 676, 680-81 (Colo. 1987); DeLaRosa v. DeLaRosa, 309 N.W.2d 755, 758 (Minn. 1981); Mahoney v. Mahoney, 453 A.2d 527, 534 (N.J. 1982); Hubbard v. Hubbard, 603 P.2d 747, 752 (Okla. 1979).
148. Cf. Davis, supra note 134, at 143-45 (arguing that alimony is associated with dependency and subservience, while property entails autonomy, entitlement, and dignity); Ertman, supra note 4, at 83 n.23 (noting that alimony is based on need and is therefore "charity rather than entitlement"); Cynthia Lee Starnes, Victims, Breeders, Joy, and Math: First Thoughts on Compensatory Spousal Payments Under the Principles, 8 Duke J. Gender L. & Pol'y 137, 140-42 (2001) (characterizing need-based alimony as casting wives as "beggars" and compensatory alimony as casting them as "victims" or "breeders," depending on whether the ALI would grant them additional alimony for child care expenses).
149. In documenting the "traditional method of doling out money to women" common to most marriages at the turn of the last century, Viviana Zelizer notes that "the dole was defined as demeaning, appropriate as payment for subordinates but not for
More importantly, it has an undesirable material effect on the law. The ALI, for instance, makes entitlement to a portion of a spouse’s future earning capacity dependent on differences in post-divorce income, adjusting it in the case of events such as remarriage. But if each spouse is entitled to the other’s increased earning capacity, he or she should not forfeit these entitlements on remarriage, or because of hard work or simple good fortune.

Perhaps the most common objection to division of earning capacity on divorce is that it is not property. We, too, have limited the category of marital property to things that are fungible. But future earning capacity is not just a personal attribute: It is an income-generating asset. True, a spouse cannot sell her professional degree, but she certainly can sell a portion of her future earnings, even in advance. Future earning capacity is capable of treatment as property, and engaging in an essentialist inquiry into the nature of property simply masks the inherent normative choices.

The more serious objections to division of earning capacity are normative and arise from autonomy. Future earning capacity is seen as an individual accomplishment, indeed a constitutive component of the individual self. While we agree that career plays a role in individual autonomy and personhood, the development of careers during marriage is also centrally collective: Spouses move away from more desirable jobs, work fewer hours, sacrifice potential for advancement, and even give up partners in marriage.” Viviana A. Zelizer, The Social Meaning of Money 48–53 (1994). Likewise, by associating women’s claim to a share of men’s increased earning capacity with dependency, the law forces women “to play the ‘mendicant before a husband.’” Id. at 49; see also Davis, supra note 134, at 143–45 (Addressing wives’ share of husbands’ increased earning capacity through alimony rather than marital property “maintains their unequal relationship. It keeps her dependent on him and allows him to exert power over her. It also impacts adversely on her view of herself and the world’s view of her. It denies her personhood, her autonomy, and her free agency.”). The impact of this association is similar (though not compounded by gender inequality) where the roles are reversed (i.e., where the husband claims a share of his wife’s increased earning capacity).

150. See ALI Principles, supra note 8, § 5.08 & cmt. a, at 864–65.
151. See id. § 4.07 cmt. a, at 697; see also, e.g., In re Marriage of Graham, 574 P.2d 75, 77 (Colo. 1978) (stating that educational degrees are not property, and thus should not be included in the marital estate); Ellman, supra note 50, at 69 (arguing that degrees and licenses are not property).
152. Parkman, supra note 128, at 6.
153. Graham, 574 P.2d at 77.
154. Rhode & Minow, supra note 28, at 200–01; see also Charles A. Reich, The New Property After 25 Years, 24 U.S.F. L. Rev. 223, 226–27 (1990) (noting the application of property rights to protect parties in nontraditional contexts). Interestingly, the ALI concedes this point. See ALI Principles, supra note 8, § 4.03 cmt. b, at 652 (“The definition of marital property must follow from the policy choice; the policy choice is not determined by the definition.”).
Careers entirely for the good of the community.\textsuperscript{156} Careers involve collective decisionmaking and collective action; they require a difficult accommodation of the wills of two individuals, and thus solidify spouses' collective commitments. Dividing increased earning capacity is therefore important to the marital community as well as to the individual spouse.

Fortunately, inclusion of career assets within the marital estate leaves room for their individual aspect. Dividing the financial component of one's career still leaves her with the features of her career most essential to individual autonomy and personhood.\textsuperscript{157} The rule we endorse does not, and should not, attempt to take away a spouse's sense of satisfaction or achievement, intellectual interest, or the friendships and other engagements that come from a career. This rule leaves the constitutive aspects of one's career as the accomplished individual's entitlement and "collectivizes" only the resulting income.

Another autonomy objection concerns the constraint that entitlement to a portion of a spouse's future earnings may pose on that spouse's ability to make future autonomous choices.\textsuperscript{158} Is a spouse who received a prestigious medical degree during the pendency of marriage obliged to practice as a physician in order to pay her former spouse half of the earning potential they together generated?\textsuperscript{159} This would constitute a serious intrusion on exit by placing a heavy and unjustified burden on future decisions concerning one's career.\textsuperscript{160}

\textsuperscript{156} See, e.g., Ellman, supra note 50, at 61 (acknowledging the sacrifice involved in forgoing economic opportunities for the good of one's spouse); Barbara Stark, Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law, 89 Cal. L. Rev. 1479, 1519 (2001) ("[W]omen overwhelmingly put their children's interests and husband's careers before their own.").

\textsuperscript{157} We do not claim that these aspects of one's career are intrinsically more essential to personhood. Rather, as with all claims about personhood, situating a resource or activity along the continuum from constitutive to fungible depends on social meanings. See Hanoch Dagan, Qualitative Judgments and Social Criticism in Private Law: A Comment on Professor Keating, 4 Theoretical Inquiries L. 89, 99–102 (2003) (arguing that the law must necessarily act on socially contingent assumptions, but insisting that these assumptions must be constantly reexamined to justify the value attributed to them as opposed to alternatives).

\textsuperscript{158} It is the existence of this future autonomous choice that separates future earning capacity from wages earned during marriage but not collected until after divorce, which the ALI deems marital property. See ALI Principles, supra note 8, § 4.08, at 712–13.

\textsuperscript{159} See Margaret Jane Radin, Reinterpreting Property 33–34 (1993) (arguing that making degree-holding individuals compensate former spouses poses personhood difficulties—"the symbolic message, backed by powerful economic incentives, is that he is locked for life into the career he chose during marriage"); Milton C. Regan, Jr., Spouses and Strangers: Divorce Obligations and Property Rhetoric, 82 Geo. L.J. 2903, 2380 (1994) (noting that recognizing claims on post-divorce income "appears to compromise the post-divorce independence of the wage-earner"). One court has even gone so far as to suggest that such an award would constitute involuntary servitude in violation of the Thirteenth Amendment. See Severs v. Severs, 426 So. 2d 992, 994 (Fla. Dist. Ct. App. 1983).

\textsuperscript{160} See Dagan & Heller, supra note 5, at 600–01 (noting critically that heavy exit taxes can effectively "lock[ ] members into their current communities"); cf. Walzer, supra.
This objection, while valid, need not be fatal. Designating that earning capacity is only subject to division once it is realized—that is, if and when the money is actually made—preserves each spouse's ability to make whatever career choices he or she wishes.\(^{161}\) If a spouse chooses to benefit from decisions made and advantages gained by the marital community, both spouses should benefit. This is not just a technical compromise; rather, a realization-based rule properly reflects the nature of the entitlement—the reason to divide increased earning capacity equally is not to reward individual investment but to share the rewards of a joint life.\(^{162}\) Even during marriage, spouses may choose not to realize their career potential, and that is not necessarily a wrong to the community or the other spouse.\(^{163}\)

How would earning capacity be valued as a marital asset? As both spouses will experience some change in earning capacity through the

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\(^{161}\) The realization-based rule, however, interferes with the law's aspiration for spouses to have a "clean break" after divorce. See, e.g., Koelsch v. Koelsch, 713 P.2d 1234, 1241-43 (Ariz. 1986) (emphasizing the importance of a clean break in determining the method of property distribution); Dewan v. Dewan, 506 N.E.2d 879, 881 (Mass. 1987) (same); Haltom v. Haltom, 755 P.2d 876, 879 (Wyo. 1988) (same). Because the amount cannot be known in advance, spouses will continue to interact, at least through a check in the mail, and may even have to enter into negotiations or return to court to determine the precise amount realized. This objection should not be overstated, however, because a clean break is almost impossible (not to mention undesirable) for the many couples with children. Davis, supra note 134, at 131. Estimates of earning capacity combined with relatively stringent modification standards might also lessen the need for contact without overburdening individual career choices.

\(^{162}\) Admittedly, the fact that a spouse must split a portion of his future income with a former spouse decreases his incentive to remain in a career in which he has already invested, and may thus discourage the productive use of resources. See Parkman, supra note 104, at 164-65 (arguing that modifiable income sharing after divorce "creates disincentives for ex-spouses to seek their best employment opportunity since they will have to share their income with their ex-spouse").

\(^{163}\) This responds to the complaint that the realization rule is unfair to the other spouse. See, e.g., Joan M. Krauskopf, Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital, 28 U. Kan. L. Rev. 379, 416 (1980) (arguing that a "spouse who has benefited by acquiring an increased earning capacity that can be presently valued in dollars should pay to the investor [the other spouse] the value of the return that both expected the investor to enjoy"); Katherine Wells Meighan, For Better or for Worse: A Corporate Finance Approach to Valuing Educational Degrees at Divorce, 5 Geo. Mason L. Rev. 193, 195 (1997) ("[Spouses] expect their joint investment in the professional degree to considerably increase the student spouse's potential earnings and thus augment the couple's future standard of living. As such, courts should ensure that the spouses receive the benefit of their bargain by treating these contributions as a financial investment."). Although malicious underemployment is a possibility after divorce, it is relatively unlikely because it deprives the wage-earner of the same benefit. When such a problem arises, there is little marital property law can do to address it. We are reluctant to allow courts to ask the question for fear of requiring people to stay in jobs against their will. However, in pathological cases where abuse is clear, law should intervene.
course of their marriage, differences in both spouses' earning capacities at the time of marriage and the time of divorce should be aggregated. All increases in earning capacity generated during marriage must be eligible for division; making inclusion dependant on contribution of the other spouse would be anathema to the equal sharing principle. Thus, in a traditional family, one spouse would likely have an earning capacity gain, while the other would have an earning capacity loss. When the aggregate of these is positive, the difference should be split between the parties. When the aggregate is negative—which may occur due to poor career choices, as well as when spouses give up careers to care for children or engage in other nonwage pursuits—the difference should be a debt to be divided. In both cases, the calculation should appropriately leave endowments like intelligence or creativity, which are intrinsic to the individual, out of the marital pool.

We do not deny that such valuations will be difficult. But it will likely be no more burdensome (and the calculations will be no more uncertain) than similar valuations that are currently done, particularly in tort actions. As in tort law, rough-and-ready estimates based on averages can be used, provided they can be adjusted in demonstrably unique cases.

2. Preexisting Property. — The vast majority of American states, as well as the ALI, generally do not make premarital assets subject to division on divorce. Though the rule is widespread, its justification in light of the ideal of marriage as an egalitarian liberal community is, on its face, diffic-

164. See, e.g., Mahoney v. Mahoney, 453 A.2d 527, 532 (N.J. 1982) (noting that valuing a professional degree before the start of one's career "would involve a gamut of calculations that reduces to little more than guesswork"); Stevens v. Stevens, 492 N.E.2d 131, 133 (Ohio 1986) (recognizing the complexity of valuating a professional degree due to the speculative reduction of future value to present value); Schneider, supra note 1, at 252 (describing the difficulties of using statistical data and averages to calculate earning capacity in the alimony context); see also Singer, supra note 117, at 1116–17 (discussing problems encountered in "[e]xpanding the definition of marital property to include less tangible forms of career assets such as education and future earnings").

165. See Davis, supra note 134, at 118 ("On a daily basis, in courts all over the country, judges and juries calculate the value of various losses and interests . . . ."); Allen M. Parkman, The Recognition of Human Capital as Property in Divorce Settlements, 40 Ark. L. Rev. 439, 447 n.34 (1987) ("Economists are routinely called upon to estimate the value of future income streams of individuals in court cases dealing with wrongful death or personal injury."); see also Washburn v. Washburn, 677 P.2d 152, 163 (Wash. 1984) (Rosellini, J., dissenting) ("A court can easily extend the tort concept of valuation of future earning capacity to a situation in which the supporting spouse will lose the economic benefits of the degreed spouse's education upon dissolution of the marriage.").


167. See ALI Principles, supra note 8, § 4.03 cmt. a, at 650–51. The rest, "hotchpot" states, divide them only in the case of long marriages. See id. § 4.03 Reporter's Notes cmt. a, at 657.
cult. On the one hand, keeping preexisting property separate seems inconsistent with the mandate of broad sharing. On the other hand, division of preexisting property seems inconsistent with the commitment to autonomy reflected in no-fault divorce.

To see why the majority rule is coherent within the ideal of the egalitarian liberal community, it must be viewed in the context of the contemporary United States, where people often marry multiple times. If preexisting property were included in the marital community, the first marriage would be privileged over others that may come later. The first spouse would share not only the fruits of the marriage, but also the fruits of the other spouse’s premarital activities. To avoid the complete colonization of a spouse’s life, thus penalizing subsequent marriages, law must acknowledge the possibility, however undesirable, that the period of marriage (and thus sharing) may come to an end. Therefore, spouses should be expected to share the benefits and burdens of their life together, not those of their lives before (or after) the existence of the marital community.\(^{168}\)

However, the income generated during marriage by preexisting property must be part of the marital estate. Exempting such income would allow spouses to hold back the fruits of some of their marital labor from the marital community, compromising the ideal of broad sharing.\(^{169}\) Consider the analogy to earning potential—the capacity to gener-

\(^{168}\) Such an approach does not pose any special problem for equality within marriage. While there are wide disparities between the amounts of money owned by individuals, we assume that people can protect themselves against exploitation by refusing to enter into a potentially exploitative marriage. This is not true, however, if these disparities are based on gender inequality. As to the allocation of “family money,” disparity based on gender inequality does not appear to be a significant problem. See John H. Langbein, The Twentieth-Century Revolution in Family Wealth Transmission, 86 Mich. L. Rev. 722, 727 n.13, 756 (1988) (suggesting that as financial capital transmission within families decreased in importance with the advent of the modern economy and as feminist sensibilities spread, family wealth transmission to daughters increased, particularly in the form of investment in daughters’ education). But cf. Rose, supra note 68, at 246, 251 n.46 (suggesting that gender inequality provides incentives to invest more heavily in sons than in daughters, but citing sources showing that investment in sons’ and daughters’ education in America is virtually equal). Because men tend to marry later than women, see, e.g., U.S. Census Bureau, U.S. Dep’t of Commerce, America’s Families and Living Arrangements 9 (2001), available at http://landview.census.gov/prod/2001pubs/p20-537.pdf (on file with the Columbia Law Review) (noting the median age at first marriage for men, 26.8, and for women, 25.1), and command higher wages on the market, see supra note 66, any money separately earned before marriage may be a result of gender inequity, and therefore a source of such inequity within marriage. This, too, is one of the asymmetries we address with rehabilitative alimony.

\(^{169}\) See ALI Principles, supra note 8, § 4.04 Reporter’s Notes cmt. c, at 667. Contrary to the UMPA approach, Unif. Marital Prop. Act § 14, 9A pt. I U.L.A. 141 (1998) (making income from separate property marital property only when the labor that produced it comes from the non-owning spouse), this should be so regardless of which spouse’s labor it is. See, e.g., ALI Principles, supra note 8, § 4.04(2), at 663; J. Thomas Oldham, Divorce, Separation and the Distribution of Property § 6.04[2], at 6-20 to 6-21 (2003); William A. Reppy, Jr., The Uniform Marital Property Act: Some Suggested Revisions for a Basically
ate income based on human capital. While spouses are married, the fruits of this capacity (wages) are divided. But upon divorce, only the capital accumulated during marriage is marital property—preexisting earning capacity remains a spouse's separate property.\textsuperscript{170} This mirrors our approach to preexisting property more generally.\textsuperscript{171}

Furthermore, most states\textsuperscript{172} and the ALI\textsuperscript{173} allow for some transmutation of preexisting property into the marital community. This reflects the reality of marriage—many spouses do in fact intend to give some of their separate property to the community while it exists. This is due, we think, to two phenomena: the moral imperative to share all one has with a loved one in financial need (for instance, a spouse who refuses to pay for the costs of a medical crisis out of separate property has failed in the duties of love), and the fact that, over time, spouses feel less need and less desire to guard against the possibility of divorce and remarriage.\textsuperscript{174}

For the latter reason, we agree with the ALI and the practice in many states that the length of the marriage is in general a good proxy for intent

\textsuperscript{170} See Thomas R. Andrews, Income from Separate Property: Towards a Theoretical Foundation, Law \& Contemp. Probs., Spring 1993, at 171, 209–10; cf. Oldham, supra note 169, § 6.04(2), at 6–18 (arguing that preexisting assets should be treated as separate property, as "only property stemming from the efforts of either spouse during marriage should be divisible marital property").

\textsuperscript{171} One interesting question is whether income from separate property should be treated differently than standard appreciation—what the property would gain with no intervention by either spouse. There is no clear analogy with earning capacity here, as unutilized skills rarely have market value. If appreciation is to be set aside, as it is in most states, we think the best approach is that of the court in \textit{Pereira v. Pereira}, which held that separate property should be allowed a reasonable rate of return and any amount in excess should be attributed to the marital community. 103 P. 488, 491 (Cal. 1909); cf. ALI Principles, supra note 8, § 4.05, at 668–69 (subtracting "the amount by which capital of the same value would have increased over the same time period if invested in assets of relative safety requiring little management" from the increase in property value from the later of (1) time of purchase of such property and (2) time of marriage). The alternative is to compensate the other spouse for any labor performed. See Van Camp v. Van Camp, 199 P. 885, 889 (Cal. Dist. Ct. App. 1921). The \textit{Pereira} approach is favorable because it treats spouses as partial joint owners rather than as employer and employee. Cf. Reynolds, supra note 169, at 281 ("When the courts 'compensate' the community instead of allowing it to share in the increase in value, the courts ignore the community's right to share the fruits of marital labor."). For an in-depth discussion of the \textit{Pereira} and \textit{Van Camp} rules, see J. Thomas Oldham, Separate Property Businesses That Increase in Value During Marriage, 1990 Wis. L. Rev. 585, 593–605.

\textsuperscript{172} For a discussion of transmutation under current law, see Oldham, supra note 169, § II.

\textsuperscript{173} See ALI Principles, supra note 8, § 4.12(1), at 769–70.

\textsuperscript{174} Preexisting debts are also likely to be treated in such a way as to signal an intent to incorporate them into the marital community. Spouses may pay off a preexisting credit card debt, or, more significantly, take on debt that is associated with a particular asset—a piece of land or a professional degree—that was purchased by one spouse prior to their marriage. In these cases, it seems artificial to transmute the debt and not the asset.
to transmute separate property. Of course, spouses should be allowed to easily and unilaterally opt out of this default rule. We also support the relatively common "gift presumption"—that if a spouse's name is added to the title of separate property (or an item purchased in whole or in part with separate property), that property should be transmuted. Placing property into joint names is a symbolic act of shared ownership, as it typically carries with it rights to joint management, giving each spouse the ability to make major decisions that affect the value of the property, even alienation.

We do not agree with some states that allow this presumption to be rebutted if a spouse can show an alternative benefit (such as a tax advantage) to be gained by placing title to property in joint names. The decision is still a significant collective move even if it is partly motivated by such a reason. A joint bank account, for instance, may enable two people to avoid checking fees by maintaining a higher average monthly balance, but people do not share bank accounts with strangers or even with close friends. Nor do we think the presumption should be rebutted by a showing that a spouse only put title to property in joint names

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175. See ALI Principles, supra note 8, § 4.12 cmts. a, b, Reporter's Notes cmt. a, at 771, 772, 781–82.
176. See Oldham, supra note 169, § 11.01 [2], at 11-4 & n.11.
177. See Oldham, supra note 95, at 100 (observing that title determines locus of decisionmaking authority in non-community-property states). On this logic, it is difficult to justify some states' restriction of the gift presumption to real property, Oldham, supra note 169, § 11.01 [2], at 11-6 n.11, or the less extreme exclusion of proceeds from separate property deposited into joint bank accounts, see, e.g., Mink v. Mink, 558 N.Y.S.2d 329, 330 (App. Div. 1990) (excluding from marital estate proceeds from sale of separate property deposited in joint bank account). The latter, in particular, gives rise to complex (and absurd) attempts to "trace" each dollar in a bank account to one spouse's funds or the other's.
178. See Oldham, supra note 169, § 11.01 [2], at 11-6 to 11-8 (noting courts rejecting the gift presumption where the owner spouse selected the joint title form for an estate planning purpose or convenience); see also, e.g., Alwell v. Alwell, 471 N.Y.S.2d 899, 901–02 (App. Div. 1984) (finding the presumption rebutted by evidence showing that title was placed in the husband's name for tax purposes only). But see Lynam v. Gallagher, 526 A.2d 878, 884–85 (Del. 1987) (holding that placing property in joint names for tax purposes did not rebut presumption as it did not constitute agreement between parties that property would not become marital property). For a discussion of these tax benefits, see Lowell S. Thomas, Jr., Tax Consequences of Marriage, Separation, and Divorce §§ 5.02(a), 5.03, 5.04, at 71–72, 77, 89 (3d ed. 1986).
179. This is especially true where the benefits of joint ownership are internal to the marriage. For instance, in Peterson v. Peterson, a husband added his wife's name to the title to his home because she refused to move in until he had done so. 595 S.W.2d 889, 890 (Tex. Civ. App. 1980). Based on this fact, the appellate court upheld the finding at trial that the family home was not marital property. Id. at 892–93. This conclusion is entirely inappropriate—spousal insistence on sharing in order to make a marriage work need not negate the meaning of the act as sharing. The creation and recreation of the marital plural self involves adjustment of individual spouses' understanding of and expectation from the marital community; bargaining, both implicit and explicit, is often part of this ongoing process. See supra note 37 (discussing the phenomenology of the decision to divorce).
assuming the marriage would last until death.\textsuperscript{180} A large amount of spousal sharing is, at one level, motivated by the assumption of lifelong marriage. That assumption sometimes proves to be false, but this does not mean that the sharing itself never happened. Of course, all this is not to say that the presumption should be irrebuttable—those who clearly specify when adding a spouse’s name that they do not intend to share should be in the clear. But the act of placing title to property in joint names is a powerful symbol of sharing that should not be undermined by standard mixed motives or unrealistic expectations alone.

While thus far we have focused on intent, there is one circumstance where property should be transmuted regardless of intent—when items are used during marriage. The most common example is the family home, but also included are furniture, automobiles, and other items used by the family. State acceptance of “transmutation by use” is mixed, with a healthy minority of states accepting it in at least some form.\textsuperscript{181} A spouse who has lived in a family home (and quite possibly raised children in it) perceives the property as an aspect of personhood—in constitutive rather than merely instrumental terms.\textsuperscript{182} Furthermore, it is not only important to individual identity, but also to identity as a member of the marital community.\textsuperscript{183} For the spouse who owns this property separately to claim

\begin{itemize}
\item \textsuperscript{180} See Oldham, supra note 169, § 11.01[2], at 11-4 & n.10 ("If it is determined that a spouse does not intend a joint title designation to constitute a completed unconditional gift to the other spouse, the gift could be perceived as one subject to a condition subsequent—that the marriage would endure until the death of one of the spouses.").
\item \textsuperscript{181} See id. § 11.02[2], at 11-18 to 11-19. The doctrine has been justified as “implied agreement,” see id., and though we agree that use often indicates intent, we think there is a more fundamental justification.
\item \textsuperscript{182} See, e.g., Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 959–61 (1982) (arguing that some “objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world” and providing examples of “a wedding ring, a portrait, an heirloom, or a house”). The “attachment” to which we refer is not sentimental; rather, it is constitutive of a person’s identity. See Jeremy Waldron, The Right to Private Property 343–89 (1988) (discussing the Hegelian argument that private property is needed to “sustain and develop the abilities and self-conceptions definitive of [one’s] status as a person”); Meir Dan-Cohen, The Value of Ownership, 9 J. Pol. Phil. 404, 434 (2001) (arguing that ownership contributes to the definition of the boundaries of the self).
\item \textsuperscript{183} For examples of communities claiming personhood value in property, see, e.g., Andrew Gray, Indigenous Rights and Development: Self-Determination in an Amazonian Community 117–22 (1997) ("The territory belongs to the spirits of those ancestors who are dead and those Arakmbut who are living, and provides the potential life for those who are yet to come."); Angela R. Riley, Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities, 18 Cardozo Arts & Ent. L.J. 175, 194 (2000) (arguing that artistic works in tribal societies are collective projects “through which all tribal members, living, dead and unborn, speak their voice and become a part of the tribal way”), and Jeremy Waldron, Superseding Historic Injustice, 103 Ethics 4, 19–20 (1992) (noting the priority of property claims by groups such as aboriginal tribes “where the dispossessed subject is a tribe or community, rather than an individual, and where the holding of which it has been dispossessed is particularly important for its sense of identity as a community").
\end{itemize}
PROPERTIES OF MARRIAGE

such property as her own and to treat it as such during marriage would undermine marital sharing, trust, and commitment. However, because both spouses are likely to have a personhood interest in the property, but both cannot leave with physical possession, applying the equal division principle in this instance is problematic. We therefore recommend giving the original owner a right of first purchase, reflective of her likely greater personhood interest.

3. Gifts and Inheritances. — Like preexisting assets, almost all states designate property acquired by one spouse by gift or inheritance during the marriage as separate. To be separate, the donor must intend the property for only one of the spouses—gifts and inheritances to both spouses are marital property as a matter of course. While donor intent currently determines the designation of such assets as marital or separate property, it should not be dispositive. After all, most employers intend to pay wages to only one spouse, but this is irrelevant to the classification of wages earned during marriage as marital property.

The most common justification given for treating gifts and inheritances differently is that neither requires spousal labor. Title to such property is "lucrative" rather than "onerous." But labor should not be the standard for inclusion in the marital estate—even the fruits of good luck, if they accrue to one spouse while married, ought to be marital property. Moreover, gifts do involve labor. Gift exchange can be seen as a form of market exchange involving "noncommodities such as status, obligation, 'psychic reward' or the like." In many contexts, gift exchange is implicitly reciprocal—gifts are given as payback for favors granted or in anticipation of favorable future treatment. Inheritances,
too, may be shaped by labor-related factors, such as one child's willingness to care for her parents in their old age. We are not so cynical as to suggest that all gifts are motivated wholly by a desire for something in return—quite the contrary. Still, given that labor plays a role, and that the lucrative/onerous distinction should not determine the scope of marital property, the complete exclusion of gifts and inheritances is unjustified.

Gifts and inheritances reflect marital good fortune or labor performed during marriage, but they do so only partially. Both the luck and the labor may precede the marriage. This is particularly true of gifts or inheritances from family members who have had lifelong relationships with the donee far exceeding the length of the marriage. Determining the precise extent to which a gift reflects a relationship cultivated during marriage is extremely complex. We thus recommend a bright-line rule for division of gifts, based on the relative lengths of the marriage and the relationship between donor and donee.

It might be argued that this treatment ignores another feature of gifts and inheritances—personhood value to the donee. Gifts and inheritances are relational, reflecting (and constituting) the relationship between donor and donee not only to the parties involved, but also to the world. Why should a wife receive half of a hunting rifle passed from father to son, or a husband half of an engraved locket given to his wife by her best friend? Even the plural self of marriage does not require that all personal relationships be collectivized. Preserving spouses' separate identities is good both for their autonomy as individuals and the marital com-

donee to give a return gift of equal or greater value" and arguing that neither gift-giving nor gift-receiving is voluntary—both are products of obligation and economic self-interest). States that rigidly define marital and separate property tend to account for the economic nature of gift-exchange by excluding from separate property gifts in consideration for past or future services or inheritances given in consideration of care granted before death. See Oldham, supra note 169, §§ 6.02[1], 6.03[2], at 6-3 to 6-4, 6-15.

194. See Anderson, supra note 21, at 151–52 (arguing that gift exchange "aims to realize a shared good in the relationship itself," and therefore "is responsive to the personal characteristics" of the recipient and to "particular qualities of the relationship").

195. The ratio—length of marriage to length of donor/donee relationship—determines the portion of the gift or inheritance that is marital property. In the case of a gift from a parent to a child who is fifty-two years old, and who has been married eight years, for instance, 8/52 (or 2/13) of the gift's value should be marital property.

196. See Anderson, supra note 21, at 151 ("The goods exchanged and jointly realized in friendship are not merely used but cherished and appreciated, for they are expressions of shared understandings, affections, and commitments. . . . Gift exchange affirms and perpetuates the ties that bind the donor and the recipient."). But see Menachem Mautner, A Justice Perspective of Contract Law: How Contract Law Allocates Entitlements, 10 Tel Aviv U. Stud. L. 239, 251–57 (1990) (describing donees as "passive" and "non-sacrificing" and therefore less invested in gifts than in bargained-for exchanges).
This dilemma arises in the context of earning capacity and has a similar solution in this context. Including the financial manifestations of earning capacity as marital assets does not jeopardize one's personhood interest in a career because the personal attributes remain separate property. The same can be said for gifts and inheritances: Dividing their financial value does not deprive either spouse of the attachments they reflect. To the extent that gifts or inheritances have personhood (constitutive) value to the receiving spouse (for instance, a family heirloom), that spouse should be entitled to a right of first purchase as part of the marriage settlement. A difficult case arises where the value of the personhood property is greater than half of the marital estate (for instance, where the gift is of ancestral lands), so that the interested spouse cannot purchase the good with her fifty-percent share. Must a spouse forfeit her constitutive property unless she can gather enough extra funds to buy the other spouse out of his portion? Here, we think personhood interest should trump the other spouse's claim, and the spouse with the constitutive interest should be allowed to retain the property even if it constitutes more than her share.

C. Alimony

Alimony awards have fallen out of favor with courts in recent years. Those few awards of alimony are almost entirely time-limited. In particular, there has been a recent trend toward "rehabilitative alimony"—alimony awards crafted to enable former spouses who assumed a non-market role during marriage to receive education or job training to start a new career.

The disfavored status of long-term alimony has followed the move to no-fault divorce and corresponds to the law's decision to allow free exit from the marital community. The ability to exit must not be purely for-
mal, but must be reflected in marital property law. Not only the marriage, but also the property implications that flow therefrom, must come to an end on divorce.\textsuperscript{202} Thus, for the same reasons we support no-fault divorce, we generally endorse the end of alimony.

We also reject the conventional justification for alimony as compensatory: that the losses associated with the end of marriage should be allocated equally among the parties. On this theory, some feminist scholars argue for income sharing—equalizing spouses’ post-divorce living standards.\textsuperscript{203} Similarly, the ALI attempts to protect spouses from the loss of the marital standard of living upon the end of long marriages,\textsuperscript{204} where the marriage ends before an individual spouse’s contributions have been recouped,\textsuperscript{205} or in certain situations where the disparity in living standards post-divorce is “unfairly disproportionate.”\textsuperscript{206}

But the question whether a particular post-divorce allocation is fair or just requires a determination of each individual spouse’s entitlement.\textsuperscript{207} Compensation theories thus pose a baseline problem.\textsuperscript{208} Some income sharing proposals, as well as the ALI’s recommended rule for compensation in marriages of significant duration, assume as a baseline the standard of living enjoyed during marriage,\textsuperscript{209} presupposing a right to live financially as though one continued to be married.\textsuperscript{210} This contradicts the principle of free exit reflected by no-fault divorce—spouses should be able to choose to make their joint lives come to an end.\textsuperscript{211}

\textsuperscript{202} See Sugarman, supra note 87, at 152.

\textsuperscript{203} Many of these scholars support time-limited remedial alimony. See, e.g., Okin, supra note 63, at 183 (suggesting that living standards should be equalized for at least as long as gendered division of labor continued); Singer, supra note 117, at 1117 (advocating equal income sharing for a period of time half the length of the marriage). A few have put forth proposals for permanent income sharing. See Sugarman, supra note 87, at 160 (arguing for a permanent limited interest in joint income); Jane Rutherford, Duty in Divorce: Shared Income as a Path to Equality, 58 Fordham L. Rev. 539, 577-81 (1990) (recommending permanent sharing based on spouses’ expectation to share income over a lifetime, but limiting her proposal to situations involving homemakers).

\textsuperscript{204} ALI Principles, supra note 8, § 5.03(2)(a), at 798.

\textsuperscript{205} Id. § 5.03(3)(a), at 798.

\textsuperscript{206} Id. § 5.03(3)(b), at 798.

\textsuperscript{207} Cf. Dagan, supra note 2, at 18-26 (criticizing for similar reasons the frequent reference to “the principle of preventing unjust enrichment” as an independent justification of legal rules or outcomes).

\textsuperscript{208} ALI Principles, supra note 8, § 5.02 cmt. a, at 788.

\textsuperscript{209} The ALI’s proposal allocates the loss in standard of living equally between the parties, making these proposals numerically identical. See id. § 5.03(2)(a), at 798.

\textsuperscript{210} Cf. J. Thomas Oldham, The Economic Consequences of Divorce in the United States, in Frontiers of Family Law 139, 146-47 (Andrew Bainham & David Pearl eds., 1993) (arguing that equality of result is based on the “questionable assumption that marriage is a lifelong commitment”); Carbone, supra note 75, at 374 (“Central to the [income sharing] proposal is recognition of a community of economic interest that continues beyond the divorce.”).

\textsuperscript{211} True, parties expect and solemnly promise to spend the rest of their lives together. To the extent that the promise has been acted upon, this should be reflected in the division of existing marital goods. But law is not generally in the business of protecting
Other ALI proposals suggest a different baseline—the situation had the marriage never occurred. This theory underlies the return of money paid for education or training if the fruits of that investment have not yet materialized, and compensation for expenditures made and opportunities lost for the common good.²¹² Returning spouses to their premarital financial situation and thereby “erasing” the decisions they made during marriage is problematic, however, because it ignores community. Spouses ought to share in the liabilities and the benefits of joint life. Concomitantly, a doctrine committed to the communal ideal of marriage should not allow reimbursement for a spousal investment as if the relationship were an arm’s length transaction between strangers rather than a joint marital project.

Despite all this, however, we ultimately recommend an alimony scheme insofar as it is tailored to address the problem societal gender discrimination poses for marriage. As previously discussed, serious disparities exist between the post-divorce financial status of men and women. These disparities give men greater bargaining power within marriage, raising the specter of subordination. Rehabilitative alimony can help ameliorate this difficulty.

If men and women entered marriage with equal abilities to earn income in the market, and left marriage the same way, the rule of equal property division, combined with the clean break approach to alimony, would be perfectly consistent with the vision of equality within marriage. Even in our imperfect world, the equal division rule supports equality by sending a message of equal entitlement and partially equalizing men’s greater market power with respect to the resources of the marital community. But this is not enough. The problem is that this rule does not equalize men’s relative power with respect to matters outside the marital community. Formal equal division of marital property does little to resolve the deeper substantive inequality between men and women.²¹³ After divorce, women are still left disadvantaged by other phenomena, such as workplace wage discrimination.²¹⁴

Because this Article brackets policies external to the marital community, we express no view on the use of divorce law to address gender imbalances in society more generally. But we cannot ignore the problem of gender subordination entirely. Because gender inequality is not just a

²¹¹ See ALI Principles, supra note 8, §§ 5.12 & cmt. a, 5.13, at 889–90, 896–97.
problem for women individually, but a problem for marriage itself, marital property law must take notice. Insofar as alimony can equalize spouses' financial positions upon divorce, it has the potential to ameliorate the serious problems gender inequality causes in the marital relationship. These problems should not be addressed through income equalization because such a solution imposes a massive burden on spouses' ability to exit the relationship and start new lives. Requiring former husbands to equalize their wives' financial situations for the remainder of their lives makes exit from marriage too costly. Imposing a prohibitive exit tax on men wishing to leave the marital community undermines not only spouses' autonomy, but also the community itself, constituted as it is of voluntary attachments. Securing gender equality within marriage while not compromising exit or community is thus one of the most difficult challenges facing marital property law. The most the law can hope for, we think, is a reasonable compromise.

A practice similar, but not identical, to rehabilitative alimony can help address this challenge. Rehabilitative alimony awards support lesser-earning spouses' receipt of education or training that will enable them to better support themselves after divorce. Such awards are inherently time-limited, thus limiting the impact they have on exit. Unlike some time-limited income sharing suggestions, moreover, rehabilitative alimony has the advantage of being expressly aimed toward self-sufficiency. Because rehabilitative alimony is based not on continuing the financial obligations of marriage beyond divorce, but rather on the importance of giving women the tools to overcome their market disadvantages, the measure of recovery for rehabilitative alimony should be calculated with this specific goal in mind. Moreover, rehabilitative alimony

215. See ALI Principles, supra note 8, § 5.05 cmt. c, at 809–11.
216. This is one instance where balancing (rather than accommodating) the values underlying the egalitarian liberal community is necessary. See supra notes 16–17 and accompanying text (positing the ability to accommodate particular conceptions of equality, autonomy, and community without resort to balancing).
218. We do not endorse any alimony scheme that overly constrains women's choices, such as the requirement that spouses seeking rehabilitative alimony follow a specific rehabilitative plan. See, e.g., Hanrahan v. Hanrahan, 618 So. 2d 779, 780 (Fla. Dist. Ct. App. 1993) (overruling the trial court's rehabilitative alimony award because "the evidence and the findings in the appealed judgment [were] legally insufficient to support a specific plan of rehabilitation").
219. Consistent with this view, rehabilitative alimony is not necessarily cut off by remarriage. Frye v. Frye, 385 So. 2d 1383, 1390 (Fla. Dist. Ct. App. 1980). Also, in certain cases, the form that rehabilitative alimony should take is a full or partial exemption for wives from sharing with their husbands the value of the increased earning capacity the wives gained during the tenure of marriage. Consider, for example, the case of a wife whose human capital was significantly enhanced during marriage but—given the even more significant disparity in the spouses' situation at the beginning of their marriage—is still less well-off upon divorce. The wife in such a case has, in a sense, already realized her right to rehabilitative alimony prior to divorce. In other words, had she left the marriage
is neither about compensation nor about contribution—with very few exceptions, courts approving rehabilitative alimony awards do not consider spouses’ premarital standards of living or the contributions that a spouse made to the other’s earning potential.\textsuperscript{220}

Such a system admittedly places some of the burdens of societal gender discrimination on the alimony-paying spouse. We do not think this is unfair, however, because he too benefits from the arrangement. To the extent that he desires the unique goods arising from communal marriage, he benefits from lessening the threat to genuine community posed by gender inequality. A limited alimony obligation enables him to participate in and benefit from a good marriage without unduly compromising his autonomy. He also benefits from other features of gender discrimination—greater wages due to the salary gap and the gendered division of labor that allows him to more cheaply obtain household services\textsuperscript{221}—and divesting him of some of these ill-gotten gains is not unfair.

The exercise of discretion necessary in determining the precise amount of alimony requires courts to make concrete the compromise we endorse. How much rehabilitative alimony a former spouse receives, and for how long, depends on the balance between the need to facilitate wives’ new beginning and the need to minimize the burden on husbands. Courts do not presently think of the issue in these terms.\textsuperscript{222} Although the amount is not readily susceptible to a bright-line rule, courts will better exercise their discretion if they directly consider these motivating concerns.

Finally, rehabilitative alimony should be limited to distributions from men to women. While men may sometimes have fewer resources and opportunities than their spouses, they are not compelled to enter into such a marriage by the external forces of gender discrimination. As a realistic matter, however, existing Supreme Court precedent would not

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\textsuperscript{221} Marion Crain and Ken Matheny observe:

Th[e] gendered division of labor more than merely dominates or oppresses women solely for gender power; it exploits women. Men appropriate the value of women’s unpaid services in the home, while they also profit from the higher wages paid in occupations from which women are excluded by virtue of their unpaid care-taking duties.


\textsuperscript{222} See Divorce and Separation, supra note 220, § 857.
\end{footnotesize}
allow a state to limit alimony to women. \(^{223}\) Practically, then, states would have to make this sort of alimony available to men as well as women, a practice that goes beyond its justification. \(^{224}\)

D. Property Governance During Marriage

There are two major regimes of marital property governance in the United States—community property and equitable division. \(^{225}\) A third regime based on title theory—where goods are allocated to individual spouses based on nonmarital ownership rules—is no longer part of the law. \(^{226}\) The majority of states are common law equitable division states. \(^{227}\) In equitable division states, title theory still governs property questions during an intact marriage, while equitable principles govern the allocation of entitlements upon divorce. \(^{228}\) Nine states are community property states, providing for joint ownership during marriage. \(^{229}\) While currently the differences between these regimes are not significant for property division, \(^{230}\) there are significant differences between these regimes in terms of property governance. In equitable division states, title determines ownership and therefore determines powers of management and alienation during marriage. \(^{231}\) By contrast, the basic principle of community property is that "[t]he respective interests of the husband and wife . . . during continuance of the marriage relation are present,


\(^{224}\) It also provides further reason to question the constitutional commitment to formal equality. For a critique of this focus, see Neil Gotanda, A Critique of "Our Constitution is Color Blind," 44 Stan. L. Rev. 1 (1991), arguing that a commitment to constitutional "color-blindness" fosters subordination of racial minorities.

\(^{225}\) Jesse Dukeminier & James E. Krier, Property 382 (5th ed. 2002).

\(^{226}\) See ALI Principles, supra note 8, at 21–22; see also Turner, supra note 111, § 2.03, at 33 (conceding that "title theory does a poor job of implementing modern notions of both individualism and sharing").

\(^{227}\) Dukeminier & Krier, supra note 225, at 382.


\(^{230}\) Oldham, supra note 95, at 99.

\(^{231}\) See id. at 100; Turner, supra note 111, §§ 2.07–2.08, at 40–44 (noting that marital property rights never vest in equitable distribution regimes, except when spouses divorce). To some extent, tenancy by the entirety can provide a substitute for community property. See Hanoch Dagan, The Craft of Property, 91 Cal. L. Rev. 1517, 1541–43 (2003) (noting that tenancy by the entirety approximates the attributes of community property).
existing, and equal interests."\(^{232}\) Spouses are thus *equal owners* of all property acquired during marriage, regardless of how the property is nominally titled.\(^{233}\)

On our theory, the choice between these two approaches is easy. A regime that grants each spouse an immediate half interest in the marital estate recognizes the special relationship between the spouses and reinforces each spouse's sense of equal participation in the marriage. By contrast, a system of separate property treats spouses as proprietors in their relationships with one another, and furthermore, places the non-proprietary spouse in a dependent subordinate position.\(^{234}\) To be sure, the history of community property is less happy than this ideal. Until very recently, the husband was treated as "head and master" of the community and given exclusive power to administer the estate.\(^{235}\) The Supreme Court struck down this flagrantly unjust practice in 1981.\(^{236}\) In equitable division states, by contrast, a version of this rule remains: Spouses—in particular, wives—have no management rights over property titled in the other spouse's name, even if this property will eventually become part of the marital estate for the purposes of division.\(^{237}\) This difference illustrates the significance of conceptualizing ownership of marital property as vesting immediately in both spouses.

As a long-term liberal commons, our ideal management regime for marital property governance must include mechanisms for dynamically

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\(^{233}\) Oldham, supra note 95, at 100; Lawrence W. Waggoner, Marital Property Rights in Transition, 59 Mo. L. Rev. 21, 24 (1994).

\(^{234}\) Waggoner, supra note 233, at 24-25, 27. In contrast, scholars have noted that the community property regime promotes community, autonomy, and equality. See, e.g., Grace Ganz Blumberg, Community Property in California 7 (3d ed. 1999) (emphasizing the symbolic force of this regime in dignifying the contributions of both spouses); Garrison, supra note 73, at 265-67 (noting that a joint and equal management regime "is democratic and egalitarian; it strikes a reasonable balance between the goals of autonomy and community"); cf. Ray August, The Spread of Community-Property Law to the Far West, 3 W. Legal Hist. 35, 35 (1990) (attributing development of community-property systems in western states to the separate forces of migration of Spanish and French custom and women's rights movements among western pioneers aiming "to lure industrious and independent women from the East").

\(^{235}\) See, e.g., Judith Areen, Family Law 329 (4th ed. 1999); Ira Mark Ellman et al., Family Law 142 (3d ed. 1998) (describing the original American community property system where the "husband was given sole management authority over all community property").


\(^{237}\) See Ellman et al., supra note 235, at 141.
adjusting the management of marital resources to respond to changing circumstances. These liberal commons mechanisms are divided into two spheres of decisionmaking: a sphere of collective self-governance and a sphere (or rather, spheres) of individual dominion.

Some decisionmaking power—particularly when decisions have grave consequences, economic or otherwise—should be joint in order to ensure that decisions indeed reflect the interests of the community. Moreover, requiring joint decisionmaking reinforces the development of the plural self. Joinder rules do not threaten the general reluctance to require excessive judicial intervention within functioning marriages, because in most cases they do not require judicial enforcement. Rather, where joint management is required, banks and other third parties are likely to insist on joinder before they enter into the transaction.

But not all decisions regarding marital property can, or should, be made jointly. First, there should be room for individual decisionmaking about management and consumption, where each party can act on her own. Such a sphere of individual dominion is needed for the practical reason that joint decisionmaking tends to be cumbersome. It also has intrinsic value, as it both preserves the ability of each spouse to act in the

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238. See Dagan & Heller, supra note 5, at 593–94.
239. Cf. id. at 582–96 (discussing the importance of mechanisms for dynamic adjustment in liberal commons settings).
240. See id. at 591 (arguing that joint management cultivates cooperation, as well as interpersonal relationships and interpersonal capital); Elizabeth De Armond, It Takes Two: Remodeling the Management and Control Provisions of Community Property Law, 30 Gonz. L. Rev. 235, 249–51, 259–60, 287 (1994/1995) (opining that community management fosters “balanced growth of the marriage and its personality as well as the character of the marriage’s participants”). Unlike other liberal commons, the marital community, comprised of only two people, obviously cannot use a majority rule. Unanimity, however, poses a familiar anticommons problem. See Michael A. Heller, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, 111 Harv. L. Rev. 622, 624 (1998) (arguing that when too many individuals have rights of exclusion, resources are “prone to underuse—a tragedy of the anticommons”). One possible solution is to follow the rule in California and Louisiana, where if a proposed transaction is in the best interests of the family, and consent has been arbitrarily refused (or cannot be obtained due to the other spouse’s incapacity or absence), judicial approval of the transaction can substitute for spousal consent. See Cal. Civ. Code § 1101(e) (West 1994); La. Civ. Code Ann. art. 2355 (West 1985); see also N.M. Stat. Ann. § 40-3-16 (Michie 1999) (addressing only the issue of the other spouse’s absence).
241. For the leading case on the importance of marital privacy, see McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953).
242. See Dagan, supra note 231, at 1549–51 (noting that contractual creditors can protect themselves by requiring joinder).
243. But see De Armond, supra note 240, at 256, 262–63, 268–69, 278–80, 288 (arguing that equal management legal systems increase the power of the spouse with greatest access to marital property, and proposing a regime in which individual decisionmaking is confined to cases where there is notice and consent).
244. See Oldham, supra note 95, at 106–07, 109 (emphasizing the logistical problems involved in joint management, as well as the increased burden it may place upon commerce).
PROPERTIES OF MARRIAGE

In some other contexts, mostly regarding businesses, there may be a need for a third category. Spouse specialization and the benefit to outside transacting parties arising from dealing with a single decisionmaker may justify a realm of exclusive management authority. Likewise, spouses should be able to agree to carve out certain resources from the marital estate in order to create realms of separate activity.

This tripartite structure—joint, equal, and sole management—reflects the emerging law in community property states. By and large, we espouse the view of this emerging consensus regarding the jurisdictional boundaries between these governance spheres. First, we endorse the rule that joint management should apply to "a set of transactions that generally involve substantial amounts of money (such as sales of community real estate or a community property business) or important items (such as household furnishings or clothing)," because of the significance of these decisions. This will not pose a substantial impediment in most cases in which this rule is applied—real estate transactions and business sales—because they already involve complicated and lengthy procedures. Moreover, the personhood value to the community and to individual spouses of some of this property—in particular the marital residence and its contents—holsters the requirement of joint consent.

245. See Ellman et al., supra note 235, at 146–47; Oldham, supra note 95, at 112–13, 124; see also Carol S. Bruch, Management Powers and Duties Under California’s Community Property Laws: Recommendations for Reform, 34 Hastings L.J. 229, 275–74 (1982) (“In a number of situations, sound management requires sole rather than joint management and control.”).

246. See Dagan, supra note 231, at 1540–41, 1555 (discussing the need to allow spouses “to shape respective spheres of separate and communal activities”).

247. See Oldham, supra note 95, at 106–07.

248. Id. at 109.

249. See id. at 107–09.

250. The rule we recommend is somewhat expansive vis-à-vis the rules of most community property states. As in most states, it applies to the sale or encumbrance of all marital realty, where both the economic significance rationale and the personhood justification typically apply. See, e.g., Cal. Fam. Code § 1102 (West 1994) (requiring both spouses to join in sale of marital realty); La. Civ. Code Ann. art. 2347 (West 1985) (same); Nev. Rev. Stat. Ann. 123.230(3) (Michie 1998) (same). But joint management should also govern in cases where only one of these rationales applies, and it is here that our preferred rule diverges from the majority position. Where only the economic rationale is strong—where spouses purchase marital realty or sell a marital business—only a minority of community property states require joinder. See, respectively, Wash. Rev. Code Ann. § 26.16.030 (West 1997) (prohibiting purchase of real property as well as purchase or sale of “good will of a business where both spouses participate in its management” by one spouse alone); La. Civ. Code Ann. art. 2347 (requiring concurrence for disposing of “all or substantially all of the assets of a community enterprise”). Likewise, when only personhood value is strong—for instance, when the contents of the marital home are sold or encumbered—joinder is the minority rule. See, e.g., Cal. Fam. Code § 1100(c) (prohibiting one spouse from disposing of certain types of “community personal property” such as clothing and furniture without written consent of the other spouse); La. Civ. Code
Sole management is tricky because it often entails an inequitable allocation of power that can subordinate the non-managing spouse. Accordingly, absent spousal agreement to the contrary, the scope of sole management should be strictly limited to cases where the commercial necessity rationale applies. Jurisdictions that do not take care to certify this condition—by, for example, classifying businesses as sole management property based on title or on a factual determination that only one spouse is indeed managing the business—risk reintroducing a version of title theory, with undesirable effects both on the community and, typically, on women's place within it.

Ann. art. 2347 (requiring concurrence for disposition of furniture in family's home). We also endorse a rule that bars a spouse from conveying or encumbering her interest in marital property subject to joint management without the other's consent. Such a unilateral transaction may detrimentally affect the other spouse, either by substantially reducing the value of his equity, or by subjecting him to joint ownership of a personal resource with a stranger. By contrast, we do not support the expansive (minority) view regarding gifts, according to which all gifts of marital property are to be made jointly, irrespective of their value. See, e.g., Cal. Fam. Code § 1100(b) (prohibiting one spouse from making gift of community personal property without written consent of other spouse). Joinder is unnecessary respecting gifts comprising an insignificant portion of the marital estate. See Oldham, supra note 95, at 110, 141–42 (arguing that joint management should only extend to transactions involving a "significant community concern"). Moreover, forbidding a spouse to give any gift out of marital property without the other's consent may prevent spouses from acting as individuals, and may signal deep interspousal distrust. For both reasons, we prefer the majority view—"only a gift of more than a 'reasonable' amount of the community requires mutual consent." Id. at 138; see also id. at 138–46 (noting exceptions in cases of unilateral gifts to children from previous marriages, paramours, and relatives).

See Oldham, supra note 95, at 106 n.32, 107, 113; see also De Armond, supra note 240, at 269–70 (discussing the "troubling" nature of state laws permitting one spouse to exercise exclusive control over businesses owned "50-50" by both spouses).

See, e.g., La. Civ. Code Ann. arts. 2350–2352 (allowing one spouse alone to dispose of community property in a business, property registered in his or her own name, or property he or she holds as a partner); Nev. Rev. Stat. Ann. 123.230(6) (allowing one spouse alone to acquire or dispose of assets of a business where only he/she participates in its management); N.M. Stat. Ann. § 40-3-14(B) (Michie 1999) (allowing the title-holding spouse to dispose of community personal property, or either spouse to acquire or dispose of community property described in an agreement with a third party when the agreement is with that spouse); Unif. Marital Prop. Act § 5(a), 9A pt. I U.L.A. 124 (1998) (allowing one spouse "acting alone" to "manage and control" certain types of property). This backdoor revival of title theory is also accomplished elsewhere, such as in transactional and banking law. See Carol S. Bruch, Protecting the Rights of Spouses in Intact Marriages, 1990 Wis. L. Rev. 731, 733 ("[S]tates directing banks to deal only with the named account holder effectively precluded nonwage earners from access to the community property funds placed in such accounts by their spouses."); Richard W. Effland, Arizona Community Property Law: Time for Review and Revision, 1982 Ariz. St. L.J. 1, 15 (discussing property in stock where only one partner is listed on the certificates, in unincorporated businesses, and in partnerships between one spouse and a third party, as cases where one spouse will typically have de facto control, despite the true communal nature of the property involved); Oldham, supra note 95, at 125–26 (noting limitations arising from corporate and partnership law on joint management of corporations and partnerships in community property states).
To be sure, the external interests of purchasers for value who rely on an asset's title with neither knowledge nor reason to suspect that the asset is part of a marital estate may justify some protection. But this sensible limitation on joint management does not extend to cases in which such a third party has not yet departed with any significant value or has acted notwithstanding his knowledge of the conflicting claim of the formal owner’s spouse. It is in any case irrelevant insofar as the bilateral relationship between the spouses is concerned. By the same token, while rules that protect commercial transactors who rely in good faith on the management authority of the managing spouse may be justified from an external perspective, this again is far short of a full-blown entitlement to sole management.

In any event, as long as these third-party concerns are properly addressed, a spouse should be able to shift any given marital resource to the joint management sphere. Marital property law should approve of a request to join in by a spouse who thus far has been passive regarding the management of a marital business, because such participation both enlarges the realm of interspousal interaction and contracts the realm of interspousal inequality and exclusion with its attendant detrimental consequences. A few state legislatures have started developing ways to achieve this goal without jeopardizing the legitimate interests of third


255. For similar rules in the context of marital property, see, e.g., Ariz. Rev. Stat. Ann. § 14-2804(B) (West 1995); Cal. Fam. Code § 852(b); Wis. Stat. Ann. § 861.17(4). For analogous rules in business settings, see generally Morgan D. King & Jonathan H. Moss, Avoiding Tax Liens on Personal Property in Bankruptcy: A Look at the Interplay Between the Bona Fide Purchaser Provisions of the Tax and Bankruptcy Codes, 31 Cal. W. L. Rev. 1 (1994) (examining when a trustee or debtor can avoid a lien on personal property by applying the bona fide purchaser and lien avoidance provisions of the Tax and Bankruptcy Codes, respectively); Gregory E. Maggs, The Holder in Due Course Doctrine as a Default Rule, 32 Ga. L. Rev. 783, 783–84 (1998) (explaining the longstanding “holder in due course doctrine” that enables a purchaser who buys a negotiable instrument in good faith and without notice of certain facts to take ownership free from competing claims).

256. Cf. De Armond, supra note 240, at 248–49 (advocating greater joint spousal management to promote development of individuals and marital community).
parties. Most important among these developments is the ability of a spouse to petition a court to have his or her name added to the title of marital property held in the name of the other spouse.\textsuperscript{257} This remedy should not be applied frequently, but its mere existence is crucial to facilitating a more equitable interspousal equilibrium.\textsuperscript{258} We therefore share Thomas Oldham’s critique of unjustified restrictions currently applied to this add-a-name remedy.\textsuperscript{259} A difficult question arises regarding management of a spouse’s increased earning capacity, assuming that our view that it should be part of the marital estate is accepted. Should the strong presumption against sole ownership of marital property also apply with regard to this type of resource? Should the career choices of individual spouses be subject to a regime of joint management?\textsuperscript{260} The economic significance of each spouse’s career choices to the well-being of the other and to the marital community cannot be overstated, so joint decisionmaking may seem appropriate. But as already emphasized, career choices are also extremely personal decisions. Therefore, while consultation is surely appropriate, these decisions should not be regulated by formal decisionmaking procedures that afford veto power to another person. Although the community in question is the most intimate association people have, a commit-

\textsuperscript{257} Cal. Fam. Code § 1101(c); Wis. Stat. Ann. § 766.70(3). By providing notice to third parties, the add-a-name remedy already accommodates their legitimate concerns.

\textsuperscript{258} See Oldham, supra note 95, at 117–18 (arguing that availability of this remedy may incentivize interspousal negotiation and reconciliation).

\textsuperscript{259} As Oldham notes, there is good reason for not covering interests in partnerships and professional corporations, namely, the legitimate interests of the other principals who chose to do business or practice a profession with one particular individual. But there is no similar reason to categorically exclude other types of businesses, even though in particular cases a judge may justifiably refuse to grant, or may postpone, an add-a-name remedy if the petitioning spouse does not have the requisite training or experience to manage the business competently. See id. at 124–25.

Alongside this important remedy, a doctrine supportive of marriage as an egalitarian liberal community should incorporate ancillary rules that facilitate the possibility of requiring joinder in the future. Spouses should have, in Carol Bruch’s words, both a “right to know” about the marital estate and a “right of access” to all its components. Bruch, supra note 245, at 254–36, 279–80; see also, e.g., Cal. Fam. Code § 721 (requiring spouses be given full access to information regarding community property transactions); id. § 1100(e) (defining spousal fiduciary duty to include equal access to information); id. § 1101(b) (authorizing court orders for full accounting of community property); Wis. Stat. Ann. § 766.70(2) (same); Unif. Marital Prop. Act § 15(b), 9A pt. I U.L.A. 143 (1998) (authorizing courts to order an accounting and to “determine rights of ownership in, beneficial enjoyment of, or access to, marital property”); cf. Bruch, supra note 253, at 738–39, 747–48, 751–54 (considering and rejecting objections to “right to know” and “right of access” norms). A number of other community property states impose a fiduciary duty on spouses in managing community property. See, e.g., Unif. Marital Prop. Act § 2 cmt., 9A pt. I U.L.A. 114–15 (discussing the California rule).

\textsuperscript{260} It is surely inconceivable to think that they will be governed by a regime of equal management.
ment to marriage as an egalitarian liberal community must leave these decisions, from a legal point of view, in the realm of sole management.261

Finally, the residual sphere of management includes those decisions that can be made by either spouse.262 This sphere, like any liberal commons sphere of individual dominion, raises the specter of overuse, and thus triggers policing concerns. Although ideally the individual's conduct will not diverge from the communal good, marital property law should follow the liberal commons prescription of providing a safety net that protects each spouse from extreme cases of opportunistic, overly self-regarding, or otherwise irresponsible behavior by the other.263 Thus, where one spouse's continuous financial irresponsibility may actually threaten the well-being of the other, an extreme measure of ordering sole management or dissolving the marital estate may be required.264 In other less extreme cases, judicial intervention should still be available to prevent intentional depletion of the marital estate where it can be shown that the acting spouse's primary goal cannot plausibly be to benefit the marital community.265

261. Cf. Rodrigue v. Rodrigue, 218 F.3d 432, 435 (5th Cir. 2000) (holding that "an author-spouse in whom a copyright vests maintains exclusive managerial control of the copyright but . . . the economic benefits of the copyrighted work belong to the community while it exists and to the former spouses indiseision thereafter").


While management decisions of one spouse might injure the other, extremely irresponsible or overly self-interested consumption decisions might also be detrimental. To be sure, the fundamental premise of sharing without accounting makes normal consumption by a spouse unproblematic even if it is not equal to the consumption of the other spouse. But the law should anticipate pathological cases and protect individuals from their spouses' abusive consumption choices. This includes gambling, drinking, and drug use, activities from which only one spouse stands to benefit and which threaten the integrity of the marital estate. But cf. Oldham, supra note 95, at 161–64 (distinguishing gambling as merely a risky investment and emphasizing the distinction between lawful and unlawful activities).

263. See Dagan & Heller, supra note 5, at 577–79, 583–86 (discussing the role of legal policing mechanisms as safety nets).


265. See Oldham, supra note 95, at 155, 157 (advocating a spousal duty to manage community property in good faith and arguing that spouses should not be allowed to intentionally destroy community property); Alexandria Streich, Note, Spousal Fiduciaries
While these safeguards are important, a higher standard of care for active spouses—making them liable for negligent or unwise decisions—is neither required nor desirable.266 The active spouse's own self-interest should normally suffice to ensure his or her best efforts. A legal duty of care in the marital context might even be counterproductive. A negligence rule might encourage active spouses to operate in an exceedingly conservative fashion; it also obliterates the important distinction between professional managers, who are paid for their management, and active spouses, who are not and should not be paid and who should enjoy the protective solidarity of the marital community for their unfortunate decisions (mirroring the treatment of successful decisions, the fruits of which should also be shared).267

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266. Cf. Streich, supra note 265, at 385 (suggesting that California, Louisiana, and Washington courts have held spouses to level of fiduciary duty equivalent to that of business partners). A more parsimonious interpretation of the sources Streich references, however, suggests that California, Louisiana, Washington, and the other community property states require nothing quite so stringent as a fiduciary duty, but rather prohibit only bad faith, recklessness, and gross negligence. See, e.g., Ira Mark Ellman et al., Family Law 100 (2d ed. 1991) (outlining less stringent standards of care in California, New Mexico, and Texas); K. Edward Greene, A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?, 18 Campbell L. Rev. 203, 216–17 (1996) (asserting that negligence does not constitute a breach of good faith under California marital law).

267. See Oldham, supra note 95, at 140, 155–60 (advocating a “sensible” solution requiring only good faith in the context of unilateral management transactions). Contra Bruch, supra note 253, at 757 (calling for enactment of a “fiduciary duty standard of care
Conclusion

In this Article, we have explored the vision of marriage as an egalitarian liberal community and have articulated its doctrinal implications. This ideal uniquely accommodates community, autonomy, and equality—the values exalted in academic and popular discussions of marriage—but breaks away from the endless and ultimately futile debates among proponents of each of these important concerns. In addition to reconciling these values, the vision of marriage as an egalitarian liberal community provides the best defense for the rule of equal division upon divorce and also supports the current practice of rehabilitative alimony. Finally, marriage as an egalitarian liberal community entails important reforms, particularly respecting the inclusion within the marital estate of earning capacity gained during the tenure of marriage and marital property governance.

Although we have recommended significant reforms to existing marital property doctrine, we do not believe that our proposal is radical. On the contrary, this Article can be read as an interpretive theory of marital property that isolates the most normatively appealing justification for existing doctrine. True, the reforms we propose are numerous. But the success of an interpretive theory should be judged by the quality of the fit, not by the quantity of rules that fit. In defending the most central rules of marital property law—in particular the equal division norm—the ideal of marriage as an egalitarian liberal community reflects important values already implicit in the law. We hope that our explicit articulation of this ideal and of its doctrinal implications will facilitate reforms that allow marital property law to live up to its promise.

fully comparable to that applied between business partners”); De Armond, supra note 240, at 273–74, 280–83 (arguing for a higher standard of care).

268. As noted by John Rawls, because interpretive theories aim at both understanding existing practice and directing its evolution, they necessarily focus on operative regulative principles. See John Rawls, A Theory of Justice 19–20, 48–49 (rev. ed. 1999); see also Don Herzog, Poisoning the Minds of the Lower Orders 18 (1998) (arguing that the shape of legal doctrine “is made and remade as its narrative continues to unfold,” and that “even apparently surprising lurches can be integrated seamlessly”).