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THE TRANSFORMATION OF MARRIAGE AND THE LAW*

Max Rheinstein**

"Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

These are the words of the so-called Equal Rights Amendment (ERA) which was proposed by Congress in 19711 and which, by September of 1973, had been ratified by 30 states. If the amendment is ratified by thirty-nine states, it will become effective within two years.2

The adoption of an "equal rights" amendment has been under consideration for quite some time, a similar proposal having been introduced as early as 1923,3 and there has been much discussion and a good deal of speculation about the effects that such an amendment may have upon the law of the land. But in these long, drawn out debates, scant attention has been paid to experiences of other parts of the world. The movement of female emancipation, however, is by no means uniquely American; it is worldwide, and it has exerted its full force in all of the highly industrialized countries. The postulate of legal equality of the sexes is part of the constitutional law of some countries, and in others it is just as powerful without constitutional sanction. What have been the effects of such applications of the principle of equality? Have they required the massive changes in the civil law that some have predicted will be

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* This article was adapted from an address presented by Professor Rheinstein at the Northwestern University Law School on April 3, 1973.
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2 Id. § 3; U.S. CONST. art. V.
3 S.J. Res. 21, 68th Cong., 1st Sess., 65 CONG. REC. 150 (1923).
necessary as a result of the ERA? The answers to such inquiries may well help us to recognize the areas in which American law will have to be changed if, with or without constitutional amendment, we seriously undertake the actualization of the principle of sexual equality.

Changes may have to be made in many areas of the law, but the present article will deal with only one: that area which concerns the relationship between husbands and wives. What changes may be called for if we seriously try to remove the vestiges of the once marked inequality? Or, more precisely, what conclusions can we draw in this area from the experiences of foreign countries?

One must distinguish, first of all, between the property aspects of the husband-wife relationship and its purely personal, non-monetary elements. As far as property interests are concerned, the experiences of foreign countries may be of considerable value in predicting our own needs, but in the matter of purely personal affairs, the extensive foreign explorations and experiments will be of lesser interest. European statutes, for example, deal elaborately with such matters as the name or domicile of married women and with the allocation between husband and wife of the powers of decision in matters of marital life, but little law is found on these matters in American statutes or in published judicial opinions.

Thus, for example, and contrary to a widely held view, Anglo-American law does not force a married woman to adopt the surname of her husband. Indeed, we have little law concerning the use of names. By the common law, every person is free not only to assume any surname he pleases, but also to change it at any time. When Mary Brown marries John Green, by social custom she will probably style herself Mary Green or Mrs. John Green, but so far as the law is concerned, nothing prevents her from continuing to call herself Mary Brown or, if she prefers, Mary Brown Green or Mary Rockefeller or Mary Brzybitche. If she tires of that name, she may tomorrow call herself Mary Hinterstoesser.

5 See Stuart v. Board of Supervisors, 266 Md. 240, 295 A.2d 223 (1972). This is not to say, however, that a state may not require a married woman to use her husband's name for certain purposes. See, e.g., Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), aff'd per curiam, 405 U.S. 970 (1972) (driver's license application); In re Kayaloff, 9 F. Supp. 176 (S.D.N.Y. 1934) (vehicle registration); People ex rel. Rage v. Lipsky, 327 Ill. App. 63, 63 N.E.2d 642 (1945).
Most, if not all of the states have statutes that provide judicial proceedings for the changing of one's name, but unless such statutes have been held by a court of record to be compulsory, they merely provide one with a convenient means of proving his identity after the change. Decisions to the contrary appear to be exceedingly rare, and where no such decisions exist, no legal change is called for. A few states have divorce laws which incorporate express rules concerning the name of a divorced woman, but these too have rarely been treated in published judicial opinions, and in applying the ancient maxim that statutes in derogation of the common law should be strictly construed, such statutes would appear to be merely declaratory in nature, rather than mandatory. Nevertheless, if the postulate of sexual equality is to be adopted, it would probably be advisable to repeal such statutes wherever they exist.

Conceivably, the desire to make the equality of husband and wife explicit may result in the formal enactment of a rule that upon marriage, a woman's name will remain unchanged or that the husband may assume the surname of the wife or that both parties may call themselves by their combined surnames. Such a rule would, however, be superfluous. The present system of freedom in the choice of a surname, together with the availability of formal proceedings to facilitate proof of identity, has served well, even under our requirements of registration for Social Security and the federal income tax. Perhaps at some future time we shall think seriously about curing the defects in our present system of registering births, deaths and marriages, and at that time it may also be advisable to establish some clear rules concerning the names of married people. But for the time being, no such need exists.

The situation is similar with respect to the question of domicile. That concept upon which so much learning was once bestowed has recently all but evaporated. It is, of course, often necessary to determine the connection that may exist between an individual and a territory in order to ascertain where that individual is entitled to vote in elections, which community is to furnish him with relief, where he may sue or be sued, and what law will determine the intestate

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6 See, e.g., CAL. CIV. PRO. CODE §§ 1275 et seq. (West 1954); ILL. REV. STAT. ch. 96, §§ 1-3 (1971); WIS. STAT. § 296.36 (1969).
succession to his property. At one time it was thought that, for all of these purposes, the relevant tie between the individual and the territorial unit ought to be determined in the same way, and the concept of domicile was developed for the purpose of making such a unitary determination. This notion has since been discarded, but the term “domicile” has not yet disappeared from the lawyer’s parlance. We now increasingly speak of residence rather than domicile, but the continued use of the latter term still results in occasional misunderstandings.

The fallaciousness of such a lumping together of diverse considerations under a single term calls for a distinction in the use of the term “residence” for such purposes as the franchise, welfare legislation and the bringing of various types of civil actions. Most courts, while they are not always explicit, do tend to make these distinctions, but remnants of the unified concept linger on and occasionally result in such inappropriate decisions as that rendered by the Supreme Court of Arizona in Carlson v. Carlson.8 It was there held that a married woman is still required to share the domicile of her husband and that an exception to the recognized rule that a suit for divorce must be brought in the domicile of the plaintiff applies only in the case of a married woman who has left her husband against his will. As a result, a wife cannot sue for divorce at her separate residence when the separation has resulted from a mutual agreement. Such a decision is incompatible with the principle of equality and the result is clearly out of line with present trends.

As to powers of decision within the marital relationship, the statutes are silent. At one time it was taken for granted that such powers were the husband’s and that the wife had to obey, but that ancient rule has tacitly been relegated to the museum of legal antiquities. One still reads, it is true, that it is up to the husband to determine where the family is to live, a concept supposedly flowing from the notion that the wife of necessity shares her husband’s domicile. This notion, in turn, may well have had its origin in the idea, once taken to be self-evident, that a wife had to live with her husband and to follow him wherever he decided to go. But domicile, as a legal concept, is not the same as “home,” a concept out of the realm of fact, and even where it is still held that the choice of the home belongs to the husband, that proposition is qualified

8 75 Ariz. 308, 256 P.2d 249 (1953).
by the proviso that the husband's decision must be a reasonable one.\(^9\) Published decisions in this area seem not to have been rendered in modern times, except where a divorce is sought upon the ground of desertion, and in Clark's comprehensive treatise on the law of domestic relations,\(^{10}\) the problem of powers of decision is not discussed at all. It seems to be taken for granted that spouses have to make their decisions jointly and that in a case of irreconcilable differences, the courts are not to intervene to impose their own decisions on the parties. When neither spouse can prevail over the other, the marriage fails and the only court in which the parties will meet is the divorce court.

This American tendency of non-interference in the internal affairs of the marriage relationship is rarely expressed in so many words but is nevertheless clearly recognized, if not in judicial practice, then at least in the failure of private parties to bring these matters before the courts. It would be difficult, moreover, to find an American court qualified to deal with internal marriage quarrels other than, perhaps, the domestic relations courts whose domain has in the past generally been restricted to interspousal assault and battery, and complaints of non-support.

In contrast, a good many European countries expressly provide for the judicial arbitration of interspousal disputes. Such provisions seem to indicate that the notion of the indissolubility of marriage may still linger on in some areas, even in light of universally rising rates of divorce. In times when there was no possibility of being freed of the bond of marriage or when there existed widespread reluctance to resort to divorce, the availability of an authoritative arbiter of marital disputes may have been welcome, but today it would have little, if any, real use. In American surroundings, it would be particularly superfluous. Thus, with respect to the personal relationship between the spouses, foreign laws do not offer too many helpful suggestions. The American attitude of non-interference corresponds well with the postulate of sexual equality and with the modern view of marriage as being a free union of two individuals concerned with the preservation of their separate identities.

American law also appears to embody the principle of equality in the manner in which it deals with the property aspects of the

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\(^9\) See, e.g., M. Ploscove, Foster & D. Freed, Family Law 831 (1972).

husband-wife relationship. But when we look to foreign experiences we can see that there is still a need for refinement.

The country whose experiences are especially helpful in this respect is the Federal Republic of Germany. When the private law of the German Reich was unified, the system of marital property that was applied to married couples who had not executed formal property agreements was not one which was based upon the precepts of spousal equality. Title to the assets of the husband and the wife remained separate, but control and management of the funds of both spouses were, with some exceptions, united in the hands of the husband. The husband was also entitled to the income from the wife's property and, he was in turn responsible not only for her support, but for the entire financial burden of the household. Only that which the wife might earn through her own, independent activities was exempt from the husband's control and usufruct, and from such independently earned income the wife had to contribute to the expenses of the household.\(^\text{11}\)

After World War II, when the Federal Republic was constituted, the command of sexual equality was incorporated in the German constitution. The Basic Law of 23 May 1949 tersely proclaimed that: "Men and women have equal rights," and that "nobody may be discriminated against or be given an advantage because of his sex."\(^\text{12}\) The drafters of the new constitution, recognizing that the implementation of full sexual equality might present problems and should not be carried out overnight, provided in Article 117 that those laws which were not in accord with the equality provision would nevertheless remain in effect until they would be explicitly amended. They added, however, that under no circumstances should any law incompatible with the command of equality remain in force beyond March 31, 1953. But when March of 1953 had passed, no law changing the marital property provisions of the 1896 Code had been enacted. In the Bundestag, conservative legislators, anxious to retain as much of the old law as politically practicable, and progressive advocates of radical equality had been so evenly balanced that no agreement on a new system of marital property law had been obtained. Since the legislature was deadlocked, the courts had to step into the breech.

\(^{11}\) BGB §§ 1363 et seq.
\(^{12}\) GRUNDEGESETZ art. 3, (2-3) (1949).
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The new supreme court, the Bundesgerichtshof, held that the old system of marital property had ceased to be the statutory regime and that the system of separation of assets had taken its place. For all practical purposes, the situation thus became identical to that currently found in most states of this country, where the husband owns his property and the wife owns hers. The obligations incurred by the husband are his debts, those incurred by the wife are hers and the expenses of the household are borne by both in proportion to their financial ability. This simple, or at least seemingly simple, system seems fully to correspond with the principle of equality. But does it?

It was not long before there grew up in Germany the feeling that made other European countries hesitate to adopt a separation of assets system as their normal regime of marital property: the feeling that formal equality is by no means the equivalent of "real" equality between husband and wife. The separation of assets system did not remedy one of the major faults of the former system. In the type of marriage traditionally regarded as normal, the husband was the breadwinner and the wife stayed at home and took care of the household and the children. The husband's earnings were his and whatever was saved belonged to him. The wife, on the other hand, had neither earnings nor savings of her own, and when the marriage was terminated, everything belonged to the husband while nothing belonged to the wife.

For centuries, the law had provided a remedy for this difficulty. At the death of the husband the wife was entitled to a share in his estate, and in Germany this share could not be taken away from her either by her husband's last will or by his inter vivos gifts. This system worked satisfactorily so long as death was the only, or at least the overwhelmingly most frequent, cause of marriage termination. But another mode of marriage termination soon became increasingly common: divorce. In the case of divorce, each spouse went his separate way with all the property that he or she owned, which usually meant that the husband took everything and the wife nothing. All that the wife possessed was an alimony claim against her husband, the enforceability of which was often doubtful, and if the divorce was pronounced against the wife on the ground of her marital misconduct, the claim for alimony was forfeited, either

\[\text{See 1 H. Dölle, Familienrecht 734 (1964-65).}\]
wholly or in part. The value of the right to alimony was also doubtful when the divorce was granted to the parties on the ground of mutual fault or upon the no-fault ground of three years separation, even where an alimony settlement was reached in passionately heated pre-trial bickering. All too often the husband's income, while it had sufficed as the spread for one bed, was inadequate as a cover for two. That situation, so well known to us here in the United States, was aggravated in Germany where a new wife's right to support had legal priority over that of the divorcée.

If the position of the divorced wife were to be improved, if she were to be compensated for her toil in the home through which her husband had been freed to accumulate earnings and to invest in property, it seemed to be as just to give her a share of her husband's property in the case of divorce as it was in the case of his death. The answer seemed to lie in the system that constituted the legal regime of marital property in neighboring France and in a great many other countries as well: the regime of community property. This system was already in use in Germany as an optional alternative to the regime of management by the husband of the spouses' technically separate funds. Under it, whatever one spouse earned during the marriage was neither his nor hers but theirs, and when the marriage ended, either by death or divorce, the community fund was split between them. But this system presented a problem that had long created difficulties in France. By whom was the community fund to be managed?

In times before the movement for female emancipation had gained momentum, the answer was, of course, management by the husband. But that simple approach could no longer be maintained. In 1907, a statute was enacted in France which afforded a married woman the power to manage and dispose of that portion of the community fund consisting of her earnings through her own business activities and employment outside of the household. The law turned out to be a dead letter, however, because third parties had little chance of knowing whether the object of a particular transaction was part of the wife's reserved fund, part of the regular por-

15 Id. § 59.
16 CIV. CODE of 1896 §§ 1437 et seq., 1519 et seq., BGB 2213; C. Civ. art. 1400 et seq.
17 Id. art. 1421.
18 Law of July 13, 1907.
tion of the community or part of the wife’s separate estate. If it were either of the latter, she could not dispose of it without the consent of her husband. Thus, hardly anyone would contract with a married woman and no bank would allow her to withdraw anything from her account without the written consent of her husband.\(^{19}\) That situation was sought to be remedied by later legislation,\(^{20}\) but even after such reforms were carried out, the husband was still the manager of the main part of the community fund and of his wife’s separate property, other than her réservée.

For the German reformers, the French model thus held little attraction. While it gave the wife a fair share in the fund that had been acquired during the marriage, the amount of control left in the husband was still incompatible with the constitutional command of full sexual equality. How, then, could these two seemingly irreconcilable ideas be combined?

A possible alternative was available in the system adopted in Sweden in 1920 and in the other four Nordic countries shortly thereafter:\(^{21}\) the system of so-called deferred community. While the marriage lasts, the spouse’s funds are not only separately owned but are also separately managed. When the marriage ends, either by death or by divorce, the funds owned by each spouse are thrown together and the combined fund is then split into equal parts. While the principle looks simple, its implementation is not. The separation of assets system as we have it in the United States and as it initially emerged from the equal rights clause of the German Constitution can be seen to resemble two ships, independently navigated by two captains. The traditional community property system resembles one ship navigated by one captain. In deferred community, however, we have two ships, each navigated by its own captain, but the two ships are supposed to navigate together. How can they avoid collisions or a veering off course?

In dealing with their separate property, each spouse must keep in mind the fact that the other will someday share in it; thus, certain transactions cannot be entered into by one spouse without the oth-

\(^{19}\) See M. Planiol & G. Ripert, 9 Traité Pratique de Droit Civil Français 842 (1927).
\(^{21}\) Sweden: Law of June 12, 1920
Denmark: Law of Mar. 18, 1925
Finland: Law of June 13, 1929
Iceland: Law of June 20, 1923
Norway: Law of July 4, 1927
er's consent. The law must also consider that a lazy wife may neglect her house and children. Shall she be allowed to walk away with half of her husband's fortune? And what of the good-for-nothing husband of a professionally successful wife? Shall a husband be able to give the bulk of his fortune to the children of his first marriage or to his mistress so that there is nothing left for the current wife or her children to share when the marriage ends? And what about debts? Shall one spouse be able to burden the community fund with debts incurred for his or her own personal ends? Safeguards are necessary to avoid such inequitable results in any community system, whether it be of the traditional or of the Swedish deferred type, and the result can be legislation of considerable complexity.

West Germany found it necessary to adopt such a deferred system, albeit with certain modifications. Following firm Scandinavian traditions, the community fund in the Swedish system embraces all property of both spouses: property acquired during the marriage, property owned by either spouse at the beginning of the marriage, and "windfall" property, acquired during the marriage by gift or inheritance. Even the Swedish system, however, exempts some property from the community fund, such as assets legally inalienable and assets specifically exempt from the community by virtue of a premarital agreement. As a result, determining whether a particular asset belongs to the deferred community fund can be difficult. In Germany, where the universal community of assets ran contrary to tradition, it became necessary to limit the divisible fund to the assets acquired by either spouse through his or her gainful activities during the marriage. On the other hand, the German system was fashioned so as to be simpler than the Swedish in at least one important respect. The equal sharing that applies in the case of divorce does not normally apply in the case of death, where the interests of a surviving spouse are sufficiently protected by a generous fortifying of the survivor's statutory share in the decedent's estate as protected against defeasance by the predeceasing spouse's last will or inter vivos gifts.

In France, the pressure for reform of the legal regime of marriage...
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ital property was also irresistible, not only because of the demand for sexual equality, but also because of a growing dislike for the inclusion in the community fund of all moveable assets owned by either spouse at the beginning of the marriage. Official discussions were initiated at the end of World War II, but it took nearly twenty years for reform to emerge—years that were filled with passionate debates in various commissions, in the National Assembly and even among the public at large. The main problem encountered was how to combine a sharing of acquests with the independence of the married woman.

Adoption of a system of deferred community patterned after the German model was strongly advocated, but it was decided that such a system would be so different from the ingrained French tradition that it should not be imposed too abruptly upon the country. As a result, the reform law\textsuperscript{24} allows each couple to choose, by formal agreement, a system of deferred community, the details of which are spelled out in the statutory text.\textsuperscript{25} In the absence of such an agreement (and thus in the great majority of cases), the law imposes a new "legal" regime that is essentially a modified version of the old French system.\textsuperscript{26} Its main difference from the old system is that the community fund, which formerly consisted not only of the marital acquests but also of the pre-maritally owned moveables, is now limited to those acquests which are made during marriage through the gainful activities of either spouse. The wife's power to manage and dispose of assets acquired through her outside activities has thus been clarified, but the distinctive feature of the new French system is that the power of managing and disposing of the bulk of the community fund, while it still remains with the husband, is now subject to the requirement that the wife must consent to most acts of alienation and encumbrance. This has resulted in a curious situation. By a series of reforms, French law has abolished the husband's headship of the household.\textsuperscript{27} He may no longer unilaterally determine the mode and standard of the family's life, the place where the family is to live or even the education of his children. In all such respects the husband and wife must cooperate and if they cannot, separation or divorce is the only way out. But in the management of the community, the husband remains the pre-

\textsuperscript{24} Law of July 13, 1965.
\textsuperscript{25} C. Civ. art. 1569-80 (amended).
\textsuperscript{26} Id. 1400-91.
dominant partner. The system is complicated and the future will have to show how well or how poorly it will work.

I have dwelt upon these foreign experiences because they may suggest some of the changes needed in our own system if the Equal Rights Amendment becomes effective or, even without constitutional command, by virtue of the exigencies of the times. The problem of modifying present American laws of marital property if they are fully to respond to the demand of equality differs, however, with respect to those states whose present systems require a separation of assets and with respect to the nine jurisdictions whose present regime is that of a community of acquests.\footnote{28} In the separation of assets states, the death situation is fairly well, though not completely, under control. The surviving spouse is usually given a generous share in the estate of the decedent and is generally protected against defeasance by the predeceasing partner's last will.\footnote{29} But protection against defeasance by \textit{inter vivos} gift is either nonexistent or only rudimentary at best.\footnote{30}

Much more precarious is the situation created by divorce. The usual practice is that each party walks away from a marriage with the property that he or she owns, but in a great many cases the wife actually “owns” little or nothing. This situation is sought to be corrected by giving her a claim for alimony, but that claim may be, and often is, unenforceable. In some states, the court may order a property settlement giving the wife a portion of the husband's estate. If that is not permissible under the law, the court may still grant her such a share under the guise of alimony by ordering its payment in a lump sum or by ordering a conveyance of property in lieu of alimony. In the overwhelming majority of cases, this problem is avoided by arranging property settlements, alimony and child support in pre-trial negotiations—negotiations in which the spouse seeking the divorce tends to pay dearly for his freedom. But when the award is made by the court, distribution depends upon the unpredictable discretion of the judge, and where a settlement is sought through bickering, the outcome often depends largely upon such factors as the comparative skill of the attorneys, the urgency with which the divorce is sought to be obtained and the decency or greed of the parties.

\footnote{28} Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas and Washington.  
\footnote{30} See W.D. MacDonald, \textsc{Fraud on the Widow's Share} (1960).
In England, which is also a separation of assets jurisdiction, the need for reform is being felt much more acutely than in this country, where there reigns a curious state of acquiescence (an acquiescence which may, however, be shaken by ratification of the Equal Rights Amendment). Part of the problem is due to English dissatisfaction with the present system of distributing marital assets upon the death of a spouse. In contrast to the law of the United States, English law provides neither dower nor an indefeasible share for the surviving spouse. The widow’s only remedy is to induce the court to order her husband’s estate to pay her income or to give her a part of the property itself, but this remedy is entirely within the discretion of the court. In the case of a divorce, English law provides the wife with some protection against ejectment from the marital home, and each spouse is entitled to keep the property that he or she equitably owns. But who owns, let us say, the furniture, the savings account or the house? As long as a marriage functions, spouses of modest means rarely earmark their assets as “his” and “hers.” The pay envelopes go into a joint account, savings are jointly invested and the house is often jointly owned. Disputes as to who owns what are not uncommon, but if they go into court at all, in the United States they tend to arise less in the case of divorce than they do in the case of death where the litigants are the surviving spouse and the administrator of the decedent’s estate.

But, a great deal of litigation has occupied the English divorce courts and the House of Lords has established the basic principle that for each asset the court must ascertain the intention with which it was acquired. Was it “really” meant to belong to the husband? Was it meant to belong to the wife, or was it meant to belong to both? If intended to belong to both, then in what proportions? The trouble is that the parties usually have no such specifically defined intention, or if they do, their intentions cannot be subsequently ascertained. So, just as in the United States, the outcome ultimately depends upon the unpredictable discretion of the judge. Small wonder that the Law Commission, recently charged with the task of proposing a new system of marital property, is

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31 Inheritance (Family Provision) Act of 1938, 1 & 2 Geo. 6, c. 45; Intestates’ Estates Act of 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64.
32 Family Provision Act of 1966, c.35.
33 Matrimonial Homes Act of 1967, c.75.
seriously thinking of adopting a community property regime.\textsuperscript{36}

The problems inherent in such a system, so amply illustrated by the European experiences, also exist in the nine community property jurisdictions of the United States. The crux of these problems, as we have seen, is how to combine equality of the parties with efficiency in the management of the community fund. California has adopted a system similar to the French idea of reserving to the wife the management and disposition of that part of the community fund which she earned through her own activities outside the household.\textsuperscript{37} Texas has recently adopted a system that, for all practical effects, is one of deferred community of acquests and which goes so far as not to impose any restrictions whatsoever upon either spouse in dealing with his or her own portion of the common fund.\textsuperscript{38} Such a scheme, however, endangers one of the principal advantages of community property, viz., the secured participation of the housewife in the acquests of the husband-breadwinner.

Another aspect of American community property law that will create problems under the ERA is the question of property settlements in the case of divorce. Is a fifty-fifty split proper under all circumstances including the case of a short-lived marriage of, let us say, a highly paid movie star to a lazy bum? If not, and if the property settlement is to continue to depend upon judicial discretion or upon a judicial finding of "guilt," a woman will be unable to know in advance in what financial position she will find herself if she puts an end to the unfortunate marriage.

Thus, it may seem that the task of designing a system of marital property law that corresponds to the notion of marriage as the total community of life as well as to the tenets of women's liberation is as insoluble as the problem of squaring the circle. But if we give the matter further thought, a solution may yet appear to be possible. Perhaps we need an approach different from that pursued by those reformers who have regarded the scheme of community property as the only one compatible with the principle of equality of the spouses.

When the principle of equality became dominant in the Federal Republic of Germany, and even when it was elevated to a rule of constitutional law, it was taken for granted that it necessarily re-

\textsuperscript{36} LAW REFORM COMM'N, REPORT ON FAMILY PROPERTY LAW, Working Paper No. 42, at 3 (1971).
\textsuperscript{37} CAL. CIV. CODE § 162 (West 1954).
\textsuperscript{38} TEX. FAMILY CODE § 5.22 (1969).
required a system in which the wife shared in the acquests of the husband. But recently, doubts have arisen concerning the validity of that premise. The type of marriage that the European reformers have had in mind is what is called in German the *Hausfrauenehe*, that is, a marriage in which the husband and wife have different roles. The husband is the breadwinner and the wife the stay-at-home who takes care of the household and the children. But that traditional scheme is no longer the only, nor even the prevailing one. More and more married women are entering the labor market and are working outside the home to increase the family income with an income independently earned. Any scheme of community property, regular or deferred, is bound to be complex. Is such a scheme, therefore, necessary or even appropriate to this new type of *Doppelverdienerehe*? Is not this type of marriage better served by a system of separation of assets? Or would the equality command of the ERA require that system's replacement by a system of community property?

We must also consider that the *Doppelverdienerehe* is still not the universal type of marriage. A substantial number of households are still conducted in the manner of the *Hausfrauenehe*, even in the Soviet Union where a good deal of pressure is put upon women to drive them into the labor force. A number of recent proposals would turn the *Hausfrauenehe* into a *Doppelverdienerehe* by raising the status of "housewife" to the level of a trade or profession, thus providing the married woman with an "income" that she could spend or save just as she could an income earned outside the home. Out of this income she would have to contribute to pension and social security funds so that she would have the same economic independence as a "working woman." Her wages would, of course, have to be paid by the husband and she, in turn, would have to contribute her appropriate share to the expenses of the household. In a way, such a scheme already exists in that vast number of American households where the husband hands the pay envelope to the wife, lets her pay out of it the expenses of the household and then deposits such savings as there may be in a joint bank account, or invests them in a home or in securities held jointly by the spouses with the incident of survivorship. But again we must remember that this type of marriage is by no means the only one.

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We live in a pluralistic society in which married couples can and do arrange the style of their marital lives in many different ways. We may well come to the ultimate conclusion that, with or without the ERA, it is in our best interests to retain our present system and to leave married couples free to work out their own schemes of holding property, using income and bearing the household burdens. By force of economic, social and ideological developments, women hopefully will continue to increase those traits of personality that enable them to deal with their husbands as equal partners.

In matters of marital property, freedom of contract thus appears to be the system most appropriate to a free society. But if the ERA takes effect, or if we simply wish to implement fully the principle of sexual equality, some changes in the present law may still be called for. In the case of death, for example, one spouse can, by *inter vivos* gift, still defeat the indefeasible share to which the surviving spouse is entitled, and a housewife thus cannot be sure of sharing in her husband's marital acquests. Her share can be secured by making the gifts of one spouse made within a certain period prior to death subject to annulment by the other. The harsh effects that such a rule might have upon an innocent recipient can be avoided by giving a defense of change of position to a bona fide donee.

In the case of divorce the housewife can be protected only by a change in the rule, which still obtains in a good many states, that each party gets only that property which he or she owns at the time of the divorce. But what new rule should take its place? One possibility would be simply to divide the spouses' combined funds, or at least their combined marital acquests, in half; but in the case of marital acquests, there would still be certain difficulties of proof. Which assets are acquests and which were owned before the marriage? Few couples are likely at the time of their marriage to draw up inventories. Community property states resort to the presumption that all assets are deemed to be acquests until the contrary is shown, but as we have seen, unfairness can still result. So it seems that in each case judicial discretion ought to determine how the combined assets of the spouses should be partitioned. That solution, however, holds not only the risk of arbitrariness but also the drawback of unpredictability. Another possibly workable solution

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40 Such changes would necessarily mean that the financial costs of marital life would no longer be borne by the husband alone, but by both spouses, in proportion to the respective incomes of each. Also, the husband would no longer preponderate in the direction of the family's affairs.
might provide for a splitting into equal parts as the general rule, subject to judicial power to order a different distribution upon convincing proof of special circumstances.\textsuperscript{41} If such changes are made, our present system of separation of assets will become fully compatible with the postulate of sexual equality.

What, we may finally ask, will become of the institution of marriage? Is "to love, honor and obey until death do us part" to be changed into "to relate, respect, yet be your own person, until perchance, affections erode?"\textsuperscript{42} I wonder whether we have indeed reached a turning point that is any more decisive than were those crises of the past, all of which were successfully survived by the institutions of marriage and the family.

\textsuperscript{41} Law of June 18, 1957, admits of an exception to the general rule of equal splitting in a case of "gross unfairness," especially where a spouse has for some period of time inexcusably failed to perform the duties of the marital relationship.

\textsuperscript{42} The New Yorker, Mar. 31, 1973, at 80.