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MARITAL REGIMES: A STORY OF COMPROMISE AND DEMORALIZATION, TOGETHER WITH CRITICISM AND SUGGESTIONS FOR REFORM

Judith T. Younger†

Although the European nations that settled America shared the Christian ideal of marriage, their legal systems differed. The common law prevailed in England, and the civil law prevailed on the continent.¹ Thus, the colonists brought to the new world either of two marital regimes,² grounded on the same ideal but in disagreement as to the treatment of wives. Three centuries later, the ideal has been eroded and the disagreement compromised. This Article traces the development of today's American marital regimes as they converged and came to eschew moral stands, examines their deficiencies, and proposes a number of reforms.

I

THE IDEAL AND THE DISAGREEMENT

To both the civil³ and common law systems marriage was the


¹ Wigmore included both in his catalogue of the world's 16 legal systems; he called the former “Anglican” and the latter “Romanesque.” 3 J. WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS 981, 1054 (1928).

² “Marital regimes” is used in the broadest sense to mean more than marital property rules. A marital regime includes all the legal rules dealing with marriage, marriage-like relationships, and the dissolution of both. There are 51 separate regimes in the United States—one in each state and one in the District of Columbia.

³ “Civil” as used here does not mean “Roman” but, rather, the then-prevailing law of France and Spain, which included the marital community and which Wigmore called “Romanesque.” See note 1 supra. This “civil” law was a composite of Roman and Germanic law. 3 J. WIGMORE, supra note 1, at 1037. The marital community came from the German branch. For its complete history, see Lobingier, The History of the Conjugal Partnership, 63 AM. L. REV. 250 (1929). American community property systems are primarily Spanish. French law was displaced by the Spanish system or by the English common law. W. DE Funiak & M. Vaughan, PRINCIPLES OF COMMUNITY PROPERTY 55 (2d ed. 1971) [hereinafter cited as PRINCIPLES]; see Pascal, Matrimonial Regimes, 36 LA. L. REV. 409, 410 (1976). But see Baade, Marriage Contracts in French and Spanish Louisiana: A Study in “Notarial” Jurisprudence, 53 TUL. L. REV. 3 (1978) (attributing primary influence to French law in Louisiana). In any event, the
exclusive sanctioned form of cohabitation, a divine, monogamous, life-long institution designed to produce and nurture children. Accordingly, ecclesiastical courts had jurisdiction of marriage, a religious ceremony was required to enter it, divorce was not generally available to dissolve it, criminal penalties were imposed for conduct that threatened

differences between French and Spanish systems were not great. Picotte v. Cooley, 10 Mo. 312, 318 (1847).

4 On marriage as the only permissible form of cohabitation, see 1 Corinthians 7:1, 9 (King James) (One should marry to avoid fornication; "[i]t is better to marry than to burn."). On the divine and therefore life-long, indissoluble nature of the bond, see Mark 10:9 (man cannot break a bond of marriage created by God); Matthew 19:5, 6 (man and wife become one when married). On monogamy, see Matthew 19:5 (man is joined to one wife); 1 Corinthians 7:2 (each man must have his own wife, and each woman, her own husband). On the function and organization of the family, see Genesis 1:28 (duty to multiply and raise children); 1 Timothy 2:15 (woman must bear children to be saved spiritually); Genesis 3:16 (wife must obey husband); 1 Corinthians 7:3 (mutual duty to render spouse his or her conjugal rights). But see G. Howard, A HISTORY OF MATRIMONIAL INSTITUTIONS 19-23 (1904) (noting inconsistencies in the Biblical views on the availability of divorce). The canon law that grew from these Biblical precepts became the dominant force governing marriage and divorce in England and other European countries. See H. Clark, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 281-82 (1968).

The conception of marriage as an indissoluble bond was an important influence in both England and Spain. Even after the Reformation in England in 1534, the Anglican Church maintained a strict divorce policy designed to preserve the indissoluble character of marriage. By 1603, the Church prohibited all divorce. 2 G. Howard, supra, at 83.

Catholic Spain and other civil law countries followed the doctrines of the Catholic Church and treated marriage as a sacrament creating an indissoluble bond. This was reflected in the early Spanish Code LES SIETE PARTIDAS part. 4, tit. IX, X (1263), cited in Principles, supra note 3, at 502 n.69.

5 By the middle of the twelfth century in England, the ecclesiastical courts claimed exclusive jurisdiction over marriage and its incidents. These courts passed this jurisdiction to the Anglican Church in 1534. Ecclesiastical jurisdiction was maintained until the Matrimonial Causes Act was passed in 1857. See Setaro, A History of English Ecclesiastical Law, 18 B.U. L. Rev. 102, 119-21 (1938), and sources cited therein.

After the repeal of the Edict of Nantes in 1685, France became a purely Catholic state once again. As a result, except for a few civil statutes requiring registration, the church completely governed marriage. M. Rheinstein, MARRIAGE STABILITY, DIVORCE, AND THE LAW 26, 194-201 (1972). The church retained its dominance until the French Revolution in 1789. At that time the concept of individual liberty encouraged the secularization of marriage for a portion of the community. Id. at 194-95.

In Spain, the Catholic Church took jurisdiction over marriage from the civil authorities between the thirteenth and fourteenth centuries. See C. Chapman, A HISTORY OF SPAIN 143-44 (1918) (founded on the Historia de España y de La Civilización Española of Rafael Altamira).

6 At the Council of Trent in 1563, the Church of England formally adopted the position that marriages would not be valid unless contracted in the presence of a priest and two witnesses. 1 G. Howard, supra note 4, at 315-16. A religious ceremony was required for a valid marriage in Spain. See Principles, supra note 3, at 94-95. In England, however, the necessity of a religious ceremony was not accepted, and informal marriages were apparently valid until the passage of Lord Hardwicke's Act in 1753. 1 G. Howard, supra note 4, at 435-60. This is true notwithstanding the opinions of several judges in Regina v. Millis, 8 Eng. Rep. 844 (Ire. 1843), asserting that a marriage without ceremony was never recognized in England.

7 For a history of divorce in England, see 2 G. Howard, supra note 4, at 109-15; M. Rheinstein, supra note 5, at 24 ("From the late seventeenth century on, parliamentary di-
it, and spouses were assigned sex-based roles within it reflecting husband's superior status and the family's expected function.

Emigration to America instantly made the ideal more worldly. There were no ecclesiastical courts and few clergymen in the new country; marriage thus became a matter for secular regulation. Early American laws authorized marriage by civil ceremony, divorce on the basis of fault, and alimony awards to innocent, needy wives. As in Europe, monogamy remained the only legal form of marriage, and

vorce developed into a regular practice. But the proceedings were so cumbersome and expensive that they were available only to the most affluent. The number of parliamentary divorces thus remained low, one to three a year.

Legal divorce came to France in 1792 although many did not wait for it. There was no absolute divorce in Spain. As to the civil law, see LAS SIETE PARTIDAS part. 7, tit. VIII, law VIII (abortion), tit. XVII, laws I-XV (adultery), tit. XVIII, laws XVII-XIII (incest), tit. XIX, laws I-II (seduction), tit. XX, laws I-II (sodomy), tit. XXI, laws I-II (procurating); K. BAR, A HISTORY OF CONTINENTAL CRIMINAL LAW 286-87 (1916) (adultery, bigamy, crimes against nature, pandering, and incest). As to the common law, see 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 619 (adultery, procuration, incest), 610 (unnatural offenses, bigamy) (1924); 4 id. 504 (sodomy, bigamy).

Married women were subordinate to their husbands under English common law. See 2 F. POLLOCK & F. MAIrLAND, THE HISTORY OF ENGLISH LAW 405-14 (2d ed. 1898) (criticizing reliance on Biblical concepts as justification but nevertheless characterizing the husband's role as wife's "guardian"); 1 AMERICAN LAW OF PROPERTY 760-62 (A. Casner ed. 1952) (noting that decisions by royal judges in this area hardened early notions of male protectiveness inherited from Germanic Law).

Spanish civil law also recognized the dominance of the husband in the family unit and supported his position by designating him head of the household and granting him authority over major family decisions. PRINCIPLES, supra note 3, at 328 (citing G. SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO 11 (1851)).

At first, the New England colonies required a civil marriage ceremony; eventually, they relaxed their stand and allowed either a civil or an ecclesiastical ceremony. 2 G. HOWARD, supra note 4, at 125-32, 135-40. Civil ceremonies also were authorized in the middle colonies of Pennsylvania, New York, and New Jersey. Id. at 267-327. In Louisiana, a statute granted civil authorities the power to solemnize marriages after 1807. Id. at 419-20.

As divorce grounded on fault became more widespread, legislative divorce became less attractive. By 1860, legislative divorce was a dead letter in most American states. 3 G. HOWARD, supra note 4, at 31-50, 96-101.


Marital monogamy withstood at least two early assaults. One came from the Mor-
spouses were assigned sex-based roles in the family. Husband was designated financial provider, obligated to support wife and children; wife was an economic dependent, obligated to perform domestic services. After agreeing on these basics, the civil and common law rules drew apart. The primary difference between the two was the legal status of wives during marriage. Under the civil law, wives were legal persons with separate proprietary capacity as well as partners with their husbands in certain specified family assets. Under the common law, however, wives were devoid of legal personality apart from their husbands. Consequently, they were incapable of managing realty or owning personally during marriage.

Civil law rules recognized wives and husbands as separate legal persons and marriage as an economic partnership that was under husband's management. Spouses had two kinds of assets. "Separate" assets were those each owned before marriage and those acquired after marriage by gift or inheritance. "Common" or "community" assets were those each owned before marriage and those acquired after marriage by gift or inheritance. "Common" or "community" assets

The second assault came from the Shaker sect, which rejected marriage in favor of celibacy and communal family life. Shaker communities peaked in the late 1800s and declined in the twentieth century. See generally M. Melcher, The Shaker Adventure (1941). For common law examples, see Neil v. Johnson, 11 Ala. 615, 618 (1847) (even though wife has dower estate); Shelton v. Pendleton, 18 Conn. 417, 420 (1847); Jones v. Gutman, 88 Md. 355, 364, 41 A. 792, 794 (1898); Keller v. Phillips, 39 N.Y. 351, 355 (1868). For community property examples, see Williams v. Williams, 29 Ariz. 538, 544, 243 P. 402, 404 (1926); Edmundson v. Smith, 13 Idaho 645, 650-51, 92 P. 842, 843-44 (1907); Callahan v. Patterson, 4 Tex. 61, 66 (1849).

See, e.g., Smyley v. Reese, 53 Ala. 89, 96 (1875) ("The wife is in subjection to, and dependent on, the husband; and from this subjection and dependence springs the duty to maintain her; as from the same relation of subjection and dependence arises the duty of maintaining the offspring of the marriage."); Brooks v. Brooks, 48 Cal. App. 2d 347, 119 P.2d 970 (1941) (in absence of statute, married woman cannot contract with husband to perform domestic services incidental to the marital relation); Mewhirter v. Hatten, 42 Iowa 288 (1875) (husband entitled to wife's labor and assistance in managing domestic chores and other duties arising from the marital relation); Coleman v. Burr, 93 N.Y. 17, 17 (1883) (statute authorizing married woman to carry on a business "on her sole and separate account" does not free her from duty of performing household services expected of married woman, and she therefore cannot contract with her husband for compensation in return for discharging her marital duty (quoting Act of March 20, 1860, ch. 90, § 1, 1860 N.Y. Laws 157)); Frame v. Frame, 120 Tex. 61, 36 S.W.2d 152 (1931) (husband's agreement to pay wife for performing domestic services imposed by the marital relation held violative of public policy).


See authorities cited in note 23 infra.

were those acquired by either spouse during the marriage otherwise than by gift or inheritance. Each spouse was sole owner and manager of separate assets, and the equal partner of the other in common or community assets, although husband had exclusive managerial power in the partnership during the marriage. Upon divorce, the marital part-

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19 Early American legislation used the term “common” for what we now know as “community” property. See, e.g., statutes cited in note 20 infra.


21 This was true under the Spanish system, PRINCIPLES, supra note 3, § 112, at 270, 274, but was changed with regard to the wife as a result of common law influence. See authorities cited in notes 64-65 infra.

22 See note 16 supra.

nership ended and community assets were divided between the spouses. Each spouse had power to will half the community assets; upon death of a spouse, the survivor, whether it was husband or wife, took the other half. A spouse’s intestate community and separate property passed to his descendants, or if none, to ascendants, or if none, to collaterals. Only if none of these relatives survived would the surviving spouse inherit the intestate community and separate property. This protected her in case the couple had little or no community property. Common law rules recognized husband and wife not as individuals, but as “one person in law.” Upon marriage, a woman became a “feme covert,” literally “a woman under cover” of her husband. Marriage stripped her of the capacity to own personalty and to deal with

N.M. STAT. ANN. § 40-3-14 (1973); currently, either spouse may manage except as provided in id. §§ 40-3-14B and 40-3-14C).

New Mexico and Louisiana required that the community assets be equally divided between the spouses regardless of the grounds for divorce. Beals v. Ares, 25 N.M. 459, 489, 185 P. 780, 789 (1919); LA. CIV. CODE OF 1808, supra note 18, book III, tit. V, ch. II, § IV, art. 68, at 336 (modern version at LA. CIV. CODE ANN. art. 2406 (West 1971) (repealed in 1980)). In other community property jurisdictions, however, the spouses' shares in the assets were modifiable depending on the facts of the case and the respective fault of the parties. McFadden v. McFadden, 22 Ariz. 246, 251-53, 196 P. 452, 454 (1921); Johnson v. Johnson, 11 Cal. 200, 205 (1858); Fitts v. Fitts, 14 Tex. 443, 449-50 (1855); Webster v. Webster, 2 Wash. 417, 421-22, 26 P. 864, 864-65 (1891); Act of Apr. 17, 1850, ch. 103, § 12, 1850 Cal. Stats. 254 (current version at CAL. CIV. CODE § 4800 (West Supp. 1980)); Act of Jan. 2, 1867, ch. IX, § 12, 1867 Idaho Sess. Laws 68 (current version at IDAHO CODE § 32-712 (Supp. 1981)); Act of Mar. 7, 1865, ch. 76, § 12, 1864 Nev. Stats. 241 (current version at NEV. REV. STAT. § 125.150 (1979)).


Cutter v. Waddingham, 22 Mo. 206, 259 (1855); PRINCIPLES, supra note 3, at 457.

PRINCIPLES, supra note 3, at 457.

Id. at 458.

Id.

1 W. BLACKSTONE, COMMENTARIES (pt. 2) 441 (G. Tucker ed. 1803).

IV THE OXFORD ENGLISH DICTIONARY 151 (1933).

realty;\textsuperscript{33} the law gave her husband these powers instead.\textsuperscript{34} The common law dealt with the death of a spouse by giving a surviving wife "dower"\textsuperscript{35} and a surviving husband "curtesy."\textsuperscript{36} These were life interests in one-third, in the case of dower, and all, in the case of curtesy, of the decedent's land. Dower and curtesy were secure against the decedent's will, inter vivos conveyances, and creditors.\textsuperscript{37} After 1670, wife

\textsuperscript{33} E.g., Coleman v. Waples, 1 Del. (1 Harr.) 196, 200 (1833); Cain v. Furlow, 47 Ga. 674, 675 (1873); Herrington v. Herrington, 1 Miss. (1 Walker) 322, 323 (1829); Matthew v. Puffer, 19 N.H. 448, 451 (1849); Lanier v. Ross, 21 N.C. (1 Dev. & Bat. Eq.) 39, 40 (1834).

\textsuperscript{34} See generally cases cited in notes 32-33 supra.

Whatever money is about the wife's person or under her control, and whatever other personal property she has in the like situation, become instantly his money and personal property, and her possession thereof is in law his possession. She, on the other hand, acquires no interest whatever in the like things of his.

I J. BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN § 52 (1871). "If they earned wages, the money legally belonged to their husbands; if they owned property prior to marriage, any personal estate went fully into their husbands' hands and any real estate came under their spouses' sole supervision." M. NORTON, LIBERTY'S DAUGHTERS 46 (1980).

\textsuperscript{35} Dower by the common law is defined to be an estate for life in the third part of the lands of which the husband was seized, either in deed or in law, at any time during the coverture, of a legal estate of inheritance in possession, which the issue of the wife might by possibility inherit, and which the law gives to every married woman, who survives her husband, to be enjoyed by her in severalty from the death of her husband; whether she have issue by him or not. The object of this estate is the sustenance of the widow and the nurture and education of her children, if any—and the right to it attaches immediately upon the marriage or as soon after as the husband becomes seized; and cannot be discharged by the husband without her concurrence.

Neil v. Johnson, 11 Ala. 615, 616-17 (1847).

Dower consists in the use, during the life of a widow, of one-third of the real estate whereof the husband was seized in his own right at any time during coverture, and which would be inherited by any child born of the marriage; it not being necessary, however, that there should actually be a child born.


\textsuperscript{36} [I]t is incontestibly [sic] settled that, by the common law, the husband, from the moment of his marriage, became entitled by virtue of his marital rights to an estate in the lands of inheritance of his wife during their joint lives; that immediately upon the birth of a living child capable of inheriting the lands, the husband became entitled to an estate in all the lands of which she might be seized at any time during the coverture for the term of his own life; that this estate of the husband during the life of the wife, which was known as tenancy by the curtesy initiate, upon the death of the wife, was called tenancy by the curtesy consummate, and that the tenancy by the curtesy initiate was one of the forms of estates known as freeholds, not of inheritance, which was created by construction and operation of law.

National Metropolitan Bank v. Hitz, 12 D.C. (1 Mackey) 111, 115-16 (1881) (emphasis in original); see Carrington v. Richardson, 79 Ala. 101, 104 (1885); Watson v. Watson, 13 Conn. 83, 86 (1839); McCorry v. King, 22 Tenn. (3 Hum.) 267, 273 (1842).

\textsuperscript{37} As to the widow's dower right, see, e.g., Steele v. Steele's Adm'r, 64 Ala. 438 (1879) (widow's claim for dower has priority over claims of creditors, devisees, and legatees); Winn v. Elliott's Widow, 3 Ky. (Hard.) 482, 487-88 (1808) (widow's right to dower cannot be barred by husband's execution of a bond for conveyance free from encumbrances); Smith v. Smith, 6
and children became heirs to husband's intestate personalty. No reciprocal provision for wife's intestacy was necessary because all her personalty became husband's upon marriage. Divorce terminated dower and curtesy and, at the least, returned to wife the control of her realty.

The divergence between the common law and civil law rules led to friction between the proponents of each system. A rivalry for pre-eminence ensued. At first, common law ideas seemed stronger; later, civil law ideas prevailed. Ultimately, civil law jurisdictions shook off the common law's early influence, while common law jurisdictions assimilated the civil law's treatment of spouses as separate persons and added partnership principles to their marital property systems. Thus, wife's legal position in the family improved in all states. But traces of husband's superiority persisted until the passage of equal rights amendments and the expansion of equal protection doctrine. With these developments, two important aspects of the original ideal underlying common and civil law marital systems disappeared: assigned sex-based roles and the inferior status of wives. Two other developments account for the final demise of the ideal: the blurring of legal distinctions between legally married and merely cohabiting couples and the increasing availability and ease of divorce.

Lans. 313 (N.Y. App. Div. 1872) (widow entitled to one-third share in land held by husband during coverture but conveyed to another without her participation in the conveyance).

As to the widower's right to curtesy, the wife's lack of capacity to own personalty or to deal with realty during her lifetime provided protection from inter vivos and testamentary dispositions. See notes 32-33 and accompanying text supra. For the differences between dower and curtesy, see 1 American Law of Property, supra note 9, at 770.


39 See T. Atkinson, supra note 38, at 42; note 32 supra.

40 E.g., Barrett v. Failing, 111 U.S. 523, 525 (1883); Jenkins v. Jenkins, 32 Ky. (2 Dana) 102, 105 (1834); Barber v. Root, 10 Mass. 260, 268 (1813); Gould v. Crow, 57 Mo. 200, 204 (1874).

41 Viser v. Betrand, 16 Ark. 296, 300 (1855); Starr v. Pease, 8 Conn. 541, 545 (1831); Legg v. Legg, 8 Mass. 99, 101 (1811); Pauly v. Pauly, 69 Wis. 419, 424, 34 N.W. 512, 513 (1874).
II

THE HISTORY: COMPROMISING THE DISAGREEMENT AND ERODING THE IDEAL

A. The Early Strength of the Common Law

The community property system existed "at one time or another in every one of the southern tier of states" as well as "on the northern border in states carved from the old Northwest Territory." In most of these states, however, common law ideas overpowered and drove out the community through legislation or judicial fiat. In Michigan, for example, the territorial legislature expressly repealed the custom of Paris "or ancient French common Law[] existing in this country." In Montana, the state supreme court administered the coup de grace when a widow asked the court to apply the plain language of the Probate Practice Act, which provided: "Upon the death of the husband one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband. . . ." Refusing the widow’s request, the court said:

We are clearly of the opinion that the few, vague, and indefinite allusions of the [Probate Practice Act] in reference to community property do not apply to the case at bar in such a way as to change the rights of the devisees under the will in question. We therefore do not feel called upon, in this action, to trace the question further, to determine what application these few statutory references to community property might have to other cases. This species of property right, called "community property," is certainly not indigenous to this jurisdiction; and, as an exotic, it has not been transplanted with sufficient root to develop a form having definite attributes or symmetrical proportions.

Even in jurisdictions where the civil law had sufficient root, definite

42 Lobingier, supra note 3, at 270; see cases cited in note 43 infra.
43 Lobingier, supra note 3, at 271. See also Commodores Point Terminal Co. v. Hudnall, 283 F. 150, 183 (S.D. Fla. 1922); McVoy v. Hallett, 11 Ala. 864, 869 (1847); McGee v. Doe, 9 Fla. 382, 398 (1861); McHardy v. McHardy’s Ex’r, 7 Fla. 301, 308 (1857); Kaskaskia v. McClure, 167 Ill. 23, 30, 47 N.E. 72, 74 (1897); Lorman v. Benson, 8 Mich. 18, 25 (1860); Cutter v. Waddingham, 22 Mo. 206, 256-57 (1855); Childress v. Cutter, 16 Mo. 42, 54-45 (1852); Riddick v. Walsh, 15 Mo. 519, 534 (1852); First Nat’l Bank v. Kinne, 1 Utah 100, 106 (1873); Coburn v. Harvey, 18 Wis. 156, 159 (1864).
45 Chadwick v. Tatem, 9 Mont. 354, 25 P. 729 (1890). For other judicial examples, see cases cited in note 43 supra.
attributes, and symmetrical proportions, common law principles threatened to supplant it. Louisiana, in order to defend its civil law heritage, expressly prohibited acceptance of the common law in its constitution of 1812.\footnote{LA. CONST. of 1812, art. IV, § 11.} In order to preserve the concept of wife’s separate estate, Texas,\footnote{TEX. CONST. of 1845, art. VII, § 19.} California,\footnote{CAL. CONST. of 1849, art. XI, § 14.} and Nevada\footnote{NEV. CONST. art. IV, § 31.} defined it in their state constitutions when they joined the union. The California provision is typical:

All property, both real and personal, of the wife, owned or claimed by marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife’s separate property.\footnote{CAL. CONST. of 1849, art. XI, § 14.}

The debate on this provision reflects the hostility of proponents of the common law to civil law ideas. Proponents of the common law argued that the concept of wife’s separate estate was contrary to nature,\footnote{There must be a head and there must be a master in every household; and I believe this plan by which you propose to make the wife independent of the husband, is contrary to the laws and provisions of nature—contrary to all the wisdom which we have derived from experience. J. BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION IN SEPTEMBER AND OCTOBER, 1849, at 260 (1850) (remarks of Del. Botts); \textit{id.} at 261 (“The very principle, Mr. Chairman, is contrary to nature. . . .”) (remarks of Del. Lippitt).} religious doctrine,\footnote{“By marriage” says Blackstone, “the husband and wife are one person in law.” . . . This is but another mode of repeating the declaration of the Holy Book, that they are flesh of one flesh, and bone of bone. That is the principle of the common law, and it is the principle of the bible. It is a principle, Mr. Chairman, not only of poetry, but of wisdom, of truth, and of justice. Sir, it is supposed by the common law that the woman says to the man in the beautiful language of Ruth: “Whither thou goest I will go; and where thou lodgest, I will lodge; thy people shall be my people, and thy God my God.” This, sir, is the character of that holy ceremony which gentlemen have considered as a mere money copartnership. \textit{Id.} at 267 (remarks of Del. Botts).} and the common law itself.\footnote{Id. at 259 (remarks of Del. Botts); \textit{id.} at 260-61 (remarks of Del. Lippitt).} They predicted that it would damage the family by encouraging strife between and separation of spouses.\footnote{Id. at 259 (remarks of Del. Botts); \textit{id.} at 261 (remarks of Del. Lippitt).} They said it would injure creditors by allowing husbands to attribute their assets to their wives and thus escape paying their debts.\footnote{Id. at 262 (remarks of Del. Lippitt); \textit{id.} at 268-69 (remarks of Del. Botts).} They insisted that making women economically independent would make them less loveable.\footnote{“Sir, if she had a masculine arm and a strong beard, who would love her? She had . . . .”}
ous subject of experiment”\(^5\) which, if tried at all, should be incorporated not into the constitution but into legislation, which could be more easily repealed.\(^6\) Their arguments have a familiar ring. Some of them were advanced against the state married women’s property acts;\(^6\) others were used against the nineteenth amendment to the United States Constitution\(^6\) and are being re-used against the proposed twenty-seventh amendment.\(^6\)

Adopted despite opposition, the California constitutional provision proved insufficient protection for wife’s separate estate. Statutes\(^6\) and decisions\(^6\) in California, Texas, Nevada, and the other

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\(^5\) Id. at 258 (remarks of Del. Botts).
\(^6\) Id. at 258 (remarks of Del. Lippit).

An identical constitutional provision in Nevada sparked only one objection. Mr. Sturtevant moved to strike the entire section. Mr. Johnson asked for his reason. Mr. Sturtevant, in his seat, replied, “I do not like he-women.” There was laughter, and the proposed deletion was defeated. NEVADA CONSTITUTIONAL DEBATES AND PROCEEDINGS 1864, at 153-54 (A.J. Marsh official reporter).

For examples of the “stock” arguments raised in Mississippi, see Comment, Husband and Wife—Memorandum on the Mississippi Woman’s Law of 1839, 42 MICH. L. REV. 1110, 1114-15 (1944) (injurious to husbands and creditors; contrary to nature—“female delicacy forbids their participation in the turmoils and strife of business”; danger of causing a “total and radical change in the settled law of the country”) (quoting Aberdeen Whig and North Mississippi Advocate, March 8, 1839, vol. 1, no. 31 (comments of Mississippi State Senator Tucker in floor debate)). For those arguments raised in New York, see Comment, The Origins of Law Reform: The Social Significance of the Nineteenth-Century Codification Movement and its Contribution to the Passage of the Early Married Women’s Property Acts, 24 BUFFALO L. REV. 683, 735, 737, 739-39 (1974-1975) (“productive of domestic unhappiness”; to be tried by legislation and not by constitutional amendment; contrary to common law and Christian precepts; damaging to the family).

See, e.g., E. FLEXNER, CENTURY OF STRUGGLE: THE WOMAN’S RIGHTS MOVEMENT IN THE UNITED STATES 151-52 (rev. ed. 1975) (contrary to nature and religious doctrine; damaging to the family); id. at 177-78 (damaging to the family; making women economically independent would render them less lovable); id. at 314 (dangerous “as a threat to established social, economic and political patterns”).

See, e.g., Freund, The Equal Rights Amendment is Not the Way, 6 HARV. C.R.-C.L. L. REV. 234 (1971) (constitutional amendment improper means); The Phyllis Schlafly Report, Vol. 6, No. 9, § 2, April 1973 (dangerous as cause of “radical” change, “social disruption”; damaging to the family); Pastor Fears ERA, Syracuse Post-Standard, May 20, 1975, at 4, col. 6 (contrary to religious doctrine; damaging to the family).

five community property states effectively nullified the concept. They vested management and control of wife’s separate assets in husband and required his consent before she could sell them. The Texas case of *Clay v. Power* illustrates the effect. In *Clay*, a husband sued his father-in-law and another man for a $1,000 note. Plaintiff husband alleged that the note was his and that he had given it to the other man as his agent. Defendants answered, alleging that the note was wife’s separate property, that they held it in trust for collection for her, and that there was no agency for husband. The court directed defendants to give plaintiff the note. The Supreme Court of Texas sustained the order, stating: “The answer of Clay alleges the note to be the property of Power’s wife. Whether it be his or his wife’s, he is entitled to the possession and control of it; and therefore the judgment of the court in his favor is correct.”

Common law ideas won another victory in *Dow v. Gould & Curry Silver Mining Co.* In *Dow*, defendant wife challenged a statute requiring husband’s written consent to wife’s sale of her separate property as contrary to the definition of wife’s separate estate in the 1849 California

Nov. 14, 1873, §§ 3-5, 1873 Wash. Terr. Laws 450-51 (repealed 1879). In Texas, wife had to register her property to achieve the same effect. Act of Apr. 29, 1846, § 6, 1846 Tex. Gen. Laws 154 (current version at Tex. Fam. Code Ann. tit. 1B, § 5.03 (Vernon 1975)).


Constitution. In adopting the constitutional provision, the framers were trying to protect and preserve civil law concepts, but the California Supreme Court attributed a common law viewpoint to them instead: "In order to give a proper construction to this section it must be looked at from the standpoint occupied by the framers of the Constitution, that of the common law." The Court recognized that by the use of the terms "separate property" and "common property"—terms of well-known signification both in the laws then in force and in the Constitution of Texas—and by declaring what should compose the separate property of the wife, [the framers] . . . swept out of existence many of the disabilities of the wife and some of the most important rights of the husband, growing out of the marriage relation at common law . . . .

If, as the California Supreme Court concluded, adding the definition of wife's separate estate to the California Constitution eliminated her com-

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75 See text accompanying note 52 supra.
76 I think that to strike this section out would be a very decided invasion upon the people of California. This very section not only stands upon the statute books of many of the old States, but is inserted in the Constitution of some of them . . . . It would be an unheard of invasion, not to secure and guaranty the rights of the wife to her separate property; and of all classes in California, where the civil law is the law of the land, where families have lived and died under it, where the rights of the wife are as necessary to be cared for as those of the husband, we must take into consideration the feelings of the native Californians, who have always lived under this law.

J. Browne, supra note 53, at 258 (remarks of Del. Tefit);

It will be remembered that this section proposed in the Constitution is, and always has been, the law of this country. When we propose, therefore, to put it in the Constitution, we are not stepping upon untried ground. We are only reiterating that which is already the law of the country. For this reason, I am in favor of making it a constitutional provision. It is no experiment in this country. The main reason which the gentleman from San Francisco, (Mr. Lippitt,) has so urgently presented against this provision, is that the common law will soon be the established law of this country. If that is to be so, it will make a great change over the laws as they now exist, and will materially affect the rights of women, unless we incorporate a portion of it so far as relates to this subject. Women now possess in this country the right which is proposed to be introduced in the Constitution. Blot it out, and introduce the common law, and what do you do? The wife who owns her separate property loses it the moment the common law prevails, and it is to avoid taking away that right of control over her property that I would wish to see this provision engrafted in the Constitution.

Id. at 262-63 (remarks of Del. Dimmick);

Sir, I suppose from the course that has been pursued here, and from the manifestations which I have seen of the sense of this House, that the common law is to be visited upon this country. Very well, sir; I can stand it; I have practised under it and can comprehend it; but do not, I entreat you, make women the subject of its despotic provisions.

Id. at 265 (remarks of Del. Jones).
78 Id. at 641 (construing California Constitution by reference to construction of same language in Texas Constitution).
mon law disabilities and husband's common law rights, wouldn't a constitutional amendment be necessary to restore them? Neither the legislature nor the court addressed the question; certainly neither was empowered to effect such an amendment.\textsuperscript{79}

Common law notions similarly worked to dilute wife's interest in community assets. Under Spanish law,\textsuperscript{80} the community, "translated into English legal terminology," meant "a present and equal ownership during the marriage between the spouses in the common property, with the power of administration of the common property placed in the husband's hands."\textsuperscript{81} In other words, husband was "the managing partner of the partnership property or managing agent of the conjugal partnership."\textsuperscript{82} Wife's ownership was nevertheless said to be "so full and complete that she might vigorously oppose and seek to correct any administration by the husband that was in fraud of or prejudicial to her interest, and upon occasion the administration of the entire community property might be shifted to her."\textsuperscript{83} In American community property states, husband's ownership interest was expanded and wife's diminished. The California Supreme Court described the alterations:

The title to such property rests in the husband, and for all practical purposes he is regarded by the law as the sole owner. It is true, the wife is a member of the community, and entitled to an equal share of the acquests and gains; but so long as the community exists her interest is a mere expectancy, and possesses none of the attributes of an estate, either at law or in equity.\textsuperscript{84}

The Louisiana Code reflected the same idea. Wife had "no sort of

\textsuperscript{79} A constitutional amendment could have been accomplished through legislative approval of the proposed amendment by a majority of each house in two succeeding sessions, and subsequent approval by a majority of voters in a referendum. \textit{Cal. Const.} of 1849, art. X, § 1. Alternatively, a new constitution could have been adopted. Such adoption would have required a recommendation by two-thirds of each house of the legislature and subsequent approval by referendum of both the calling of a constitutional convention and the new constitution. \textit{Id.} § 2.

\textsuperscript{80} See note 3 \textit{supra}.

\textsuperscript{81} \textit{Principles, supra} note 3, § 100, at 254-55.

\textsuperscript{82} \textit{Id.} § 100, at 255. Husband's management power "was an administrative duty only . . . and not in any sense the equivalent of the common law 'control' by the husband of the wife's property which made him virtual owner and gave him the right to appropriate its use to his own enjoyment and benefit." \textit{Id.} § 102, at 259 (citation omitted).

\textsuperscript{83} \textit{Id.} § 102, at 259.

\textsuperscript{84} Packard v. Arellanes, 17 Cal. 525, 538 (1861) (emphasis in original); \textit{see In re Rowland}, 74 Cal. 523, 525, 16 P. 315, 316 (1888); Van Maren v. Johnson, 15 Cal. 308, 312 (1860); Panaud v. Jones, 1 Cal. 488, 517 (1851); Hall v. Johns, 17 Idaho 224, 228, 105 P. 71, 72 (1909); Jacob v. Falgoust, 150 La. 21, 90 So. 426 (1922) (when wife's heirs disclaim the community share attributed to her on her death, her share remains in the husband because her interest during the existence of the community is merely inchoate); Guice v. Lawrence, 2 La. Ann. 226, 228 (1847); Reade v. de Lea, 14 N.M. 442, 463, 95 P. 131, 138 (1908), \textit{rev'd sub nom. Arnett v. Reade}, 220 U.S. 311, 320 (1911).
right" in community assets "until her husband be dead." Then she could sue his heirs if she could prove he had fraudulently sold community assets to injure her. Similarly, the American husband gained more than a managing partner's power over community assets. He had "the like . . . power of disposition," other than testamentary, over them as he had over his separate property. The American wife was not really a partner in the community assets, and her interest, however labeled, was deferred until the marriage ended.

Thus, common law ideas superseded civil law concepts in all but eight jurisdictions. In those eight, courts and legislatures modified marital property rules to conform to the common law by chipping away at wife's separate estate and her partnership interest in community assets. Ultimately, husband became manager of the former and virtual owner of the latter during marriage. American wives thus derived no practical advantages from the civil law's liberal theory. Neither did they suffer too much from the theoretical absolutism of the common law. Its theory was never literally adhered to in practice—at least not in America. Women in the colonies, "both married and single," have been described as "attaining a measure of individuality and independence in excess of that of their English sisters." The primary reason for their advantage was that "[t]he commercial revolution stamped its impress more speedily upon American legal economics than upon that of England, where the conservative policy of the common-law courts remained centuries behind economic progress." Thus, colonial wives conducted businesses, managed realty, acted as attorneys for their husbands, and escaped the rigors of common-law oneness through equitable remedies, private acts, and ante- and post-nuptial agreements. These were exceptions to the overall legal regime, however; its basic tenets resisted reform.

87 See note 23 supra.
88 See notes 24-25 and accompanying text supra.
89 R. Morris, Studies in the History of American Law 128-29 (1930). See also L. Friedman, A History of American Law 185 (1973) ("Colonial law treated married women much more as free souls than the law of England did; this American legal tradition never completely died out.").
90 R. Morris, supra note 89, at 128.
91 Id. at 129; E. Dexter, Colonial Women of Affairs: A Study of Women in the Business and the Professions in America Before 1776 passim (1924).
92 R. Morris, supra note 89, at 130.
93 Id. at 131-32. This practice was forbidden in Maryland in 1658. Id. at 133.
94 Id. at 129, 135-39.
B. The Civil Law Wins a Few Battles

The first intimation of change appears in the influential writings of James Kent, the "American Blackstone." 95 Forty years after the American revolution, he summed up his lecture on common law marital property rules with an encomium to the civil law's attitude toward wives:

Whatever doubts may arise in the mind of a person, educated in the school of the common law, as to the wisdom or policy of the powers which, by the civil law and the law of those modern nations which have adopted it, are conceded to the wife in matters of property, yet, it cannot be denied, that the preeminence of the Christian nations of Europe, and of their descendants and colonists in every other quarter of the globe, is most strikingly displayed in the equality and dignity which their institutions confer upon the female character. 96

The statement was commentary, however, not law reform 97—legal change took another twenty-one years.

In 1837, in Fisher v. Allen, 98 Mississippi's highest court upheld a married woman's capacity to own and transfer her assets. The litigants were husband's creditor 99 and wife's donee. 100 The issue was ownership of a slave. Wife, a Chickasaw Indian, gave the slave to her daughter in 1829, 101 one year before the Mississippi legislature passed a statute abolishing tribal laws and customs and extending Mississippi law to Indians. 102 Under the Chickasaw, but not Mississippi law, a wife "had a right to own separate property, to dispose of it at pleasure, to create debts and in most things act as a feme sole." 103 The court held that the

95 J. HORTON, JAMES KENT: A STUDY IN CONSERVATISM 1763-1847, at 264 (1939).
96 2 J. KENT, supra note 38, at 187.
97 Commentators take different views of the ultimate reforms. For example, "The married women's property acts ... did not signal a revolution in the status of women; rather, they ratified and adjusted a silent revolution." L. FRIEDMAN, supra note 89, at 186 (emphasis in original). According to J.D. Johnston, Jr., however, even at the end of the nineteenth century
98 3 Miss. (2 Howard) 611 (1837).
99 Id. at 612. According to L.M. Friedman, this case is typical of litigation "both before and after the married women's property acts" because it involved creditors' rights. L. FRIEDMAN, supra note 89, at 186. Concern for creditors seems to have played a part in the passage of Mississippi's Married Women's Property Act in 1839, text accompanying note 105 infra.
100 3 Miss. (2 Howard) at 612.
101 Id. at 615.
102 Id.
103 Id.

See Comment, Husband and Wife, supra note 61, at 1110, 1114-16.
Marital regimes statute could not "be construed to extend so far as to interfere with the rights to property previously acquired." Two years later, the Mississippi legislature extended Fisher v. Allen to include all Mississippi wives by enacting a Married Woman's Property Act. The act preceded its English counterpart by thirty-one years, was permissive rather than mandatory, and provided:

Be it enacted, by the Legislature of the State of Mississippi, That any married woman may become seized or possessed of any property, real or personal, by direct bequest, demise, gift, purchase, or distribution, in her own name, and as of her own property: Provided, the same does not come from her husband after coverture.

Some scholars suggest that the example of neighboring Louisiana prompted Mississippi's grant of proprietary capacity to wife. This may be so, but it is hard to prove. Certainly other common law states did not rush to follow the example. Not until five years later, in 1844, did Maine and Michigan pass married women's property acts.

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104 Id. at 615-16.
105 An Act for the Protection and Preservation of the Rights and Property of Married Women, ch. 46, 1838-1839 Miss. Laws 72 (current version at Miss. Code Ann. § 93-3-1 (1972)).
107 An Act For the Protection and Preservation of the Rights and Property of Married Women, ch. 46, § 1, 1839 Miss. Laws 72. The other four sections dealt with wife's slaves. "Control" of them and "direction of their labor" remained in her husband, and he had to join in any sale. Id. §§ 4-5.
Massachusetts was next in 1845. New York passed its version in 1848. Oregon, in 1857, and Kansas, in 1859, addressed the issue of wife's separate property in their constitutions. Oregon, like Texas, California, and Nevada, defined separate property and went on to exempt it from husband's debts and contracts. The Kansas provision directed the legislature to provide "protection" for wife's separate property. By the end of the nineteenth century, every state had a married
women's property act. The general effect in common law states was to separate the spouses into two legal persons by restoring wife's capacity to own property, and in civil law states, to undo the results of common law influence by restoring wife's power to manage and control her separate assets. The Georgia Supreme Court summarized these developments:

By the Common Law and by the Bible, which is the foundation of the Common Law, the union of man and wife was a junction of persons and fortunes — "no more twain, but one flesh." But this link which bound them in one bond, for better and for worse, has been broken, and, in the progress of civilization, a new principle has been introduced from the Roman Law, viewing husband and wife as distinct persons, with distinct property and distinct powers over it. Time will test the propriety of this innovation.119

Common law states thus accepted and community property states thus reaffirmed the civil law concept of spouses as separate individuals. How, thereafter, were the spouses to be treated with respect to property? To treat them as strangers would be as unrealistic as treating them as a single person. What was needed was a substitute theory, supportive of marriage as an institution yet consistent with the realities of married life. Perhaps the civil law idea of marriage as an economic partnership between equals could furnish a model. Such a model would have to provide for equal support obligations, equal rights to possess and manage the partnership property, free entry into and exit from the partnership based on agreement between the spouses, and equal rights to a return of contribution upon dissolution of the partnership, with equal division of profits or losses regardless of form or amount of contribution.

The Spanish and American community property systems fell far short of this model. The husband alone bore the support obligation and had sole management rights. Neither system recognized a mere agreement between spouses as sufficient to form the partnership. Although mutual consent of the spouses to marry was, of course, required by both, a prescribed religious or civil ceremony was also required. The Spanish system did accord marital benefits to "putative" spouses, 124

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118 "The last State to fall into line was Virginia, in 1877." J. SCHOULER, A TREATISE ON THE LAW OF HUSBAND AND WIFE 254 n.2 (1882). A collection of statutes in effect by 1878 appears in J. WELLS, A TREATISE ON THE SEPARATE PROPERTY OF MARRIED WOMEN 1-70 (2d rev. ed. 1879).


120 See notes 14-15 and accompanying text supra.

121 These were vested in him by statute. See notes 23, 85-86 and accompanying text supra.

122 Holmes v. Holmes, 6 La. 463, 470 (1834) (marriage is in the nature of a civil contract between parties based on the free consent of parties capable by law of contracting).

123 See notes 5-6 & 10 and accompanying text supra.

124 A putative marriage is one contracted in good faith without knowledge of an existing
but it did not recognize informal "common law" marriages; most American community property jurisdictions did. Divorce by mutual agreement was not countenanced by either the Spanish or American systems; it flew directly in the face of the underlying ideal of marriage as divine, lifelong, and indissoluble.

Only in the division of community assets did either system approach the model. Spanish and American systems gave the wife or husband half the community assets upon the other’s death or upon divorce of the spouses. Some American community property states deviated from the model by allowing the division to be unequal upon divorce. One state denied wife full testamentary power over her share of community assets; another gave husband continuing power over wife’s share of community assets, pending administration of her estate.

C. Incidental Progress Toward Partnership

Some progress toward this partnership model was made in the wake of the married women’s property acts, but none of it represented conscious implementation of the partnership concept. New statutes imposed support obligations on wives. Some of these made wife or her property liable for necessaries furnished to the family or for family expenses, others made her liable for husband’s support during marriage, and still others made alimony available to husbands. One impediment. Spanish law gave the putative spouse the same interest in acquisitions during marriage as it gave to the legally married spouse. Principles, supra note 3, § 56, at 96-97.

125 Id. § 55.1, at 95.
126 See notes 147-48 and accompanying text infra.
127 See note 4 supra.
128 See notes 24-25 and accompanying text supra.
129 See note 24 and accompanying text supra.
130 N.M. STAT. ANN. § 29-1-8 (1953) (repealed 1975) (current version at N.M. STAT. ANN. § 45-2-804 (1978)) provided:

Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by a judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband.

132 These are explained and summarized in 3 C. VERNIER, AMERICAN FAMILY LAWS § 160, at 102-08 (1935) (vols. 1-2 through 1930; vol. 3 through 1934).
133 These are explained and summarized in id. § 161, at 109-10. Although noting that none of the listed jurisdictions provided for the enforcement of this duty by the husband, Vernier listed two jurisdictions where the courts allowed an action in equity to compel a wife to provide support.
134 These are explained and summarized in 2 id. § 109, at 303-08. Despite these statutes, husband remained primarily liable for wife’s support. 3 id. § 161, at 110. Indeed, his duties in this regard were made heavier by the imposition of criminal liability. Id. § 162, at 112-17.
commentator described these as "merely limitations, in favor of the former law, upon the new statutory creation of [wife's] separate estate." More charitable observers described the legislation as an attempt to be fairer to family creditors and to husbands, and to make it easier for wives to get credit. In any event, by the early 1930s, twenty-three states had passed family expense statutes, seventeen had laws making wives liable for husband's support during marriage, and fifteen had laws making alimony available to husbands.

In a parallel development, nineteenth-century state legislatures substituted equal elective rights for both spouses for antiquated dower and curtesy. The legislative motivation in enacting these statutes was mainly the desire to eliminate clouds on land titles and concern for husbands' creditors, whose interests had always been subordinate to the widow's dower. By the early 1930s, twenty states had equal spousal elective rights.

The idea that marriage could be validated by the mere consent of the spouses gained strength from cases that blurred the distinctions between legally married and merely cohabiting couples. These decisions recognized informal or "common law" marriages and appeared in community property as well as in common law states. Despite

137 2 C. Vernier, supra note 132, § 109, at 304.
138 Id. § 160, at 104 ("Too, a statute of this kind is in reality a protection to the wife, as well as a burden. The common-law liability of the husband for necessaries is of doubtful assistance to her in dealing with a cautious trader.").
139 Id. § 160, at 102. Six states had more limited provisions.
140 Id. § 161, at 109.
141 2 id. § 109, at 304.
142 These are explained and summarized in id. § 189, at 351-70, § 216, at 532-37.
143 L. Friedman, supra note 89, at 375-76.
144 Id.
145 This is an approximation from the table in 3 C. Vernier, supra note 132, § 216, at 538-52. In some instances the old name was retained, though the nature of the interest had changed. E.g., id. at 540 (Iowa).
146 An 1809 decision by the New York Supreme Court of Judicature, Fenton v. Reed, 4 Johns. 51 (N.Y. Sup. Ct. 1809) (per curiam), provided the impetus for spread of the doctrine. The opinion was attributed to Chancellor Kent. O. Koegel, Common Law Marriage 79 (1922). In it, the court stated, "No formal solemnization of marriage was requisite. A contract of marriage made per verba de presenti amounts to an actual marriage, and is as valid as if made in facie ecclesiae," 4 Johns. at 53 (dictum). The court adopted the language of the ecclesiastical courts of England, which recognized the validity of a contract of marriage entered into without civil or religious ceremony. This recognition continued in England until abolished by statute in 1753. O. Koegel, supra, at 29. For criticism of Fenton's adoption of common law marriage, see id. at 79-81.
commentators' disapproval,\textsuperscript{149} a majority of states ultimately accepted this view.\textsuperscript{150}

Divorce similarly moved toward becoming a consensual matter as states experimented with new fault grounds,\textsuperscript{151} omnibus clauses,\textsuperscript{152} and shorter residence requirements.\textsuperscript{153} In the early 1930s, fifty of fifty-one

App. 519, 25 S.W. 673 (1894). \textit{See also} United States v. Tenney, 2 Ariz. 127, 11 P. 472 (1886) (overruled by ARIZ. REV. STAT. ANN. \S 25-111 (1976) (original version at CIVIL CODE OF 1913 ¶¶ 3833, 3844)); Sharon v. Sharon, 75 Cal. 1, 16 P. 345 (1888) (overruled by CAL. CIV. CODE \S 55 (West 1954) (as amended by Act of 1895, Stats. ch. 129, \S 1)); Holmes v. Holmes, 6 La. 463 (1834) (overruled by LA. CIV. CODE ANN. art. 88 (West 1952) (original version at Acts of 1868, no. 210, La. Acts 278)); State v. Zichfeld, 23 Nev. 304, 46 P. 802 (1896) (overruled by NEV. REV. STAT. \S 122.010 (1943)). \textit{But see In re Gabaldon's Estate,} 38 N.M. 392, 34 P.2d 672 (1934) (holding that the Act of 1876, 1929 Comp. Stat. \S 34-101, adopting the common law in New Mexico, did not introduce common law marriage to New Mexico, and that a ceremony is necessary to a valid marriage); \textit{In re McLaughlin's Estate,} 4 Wash. 570, 30 P. 651 (1892) (interpreting Rem. Comp. Stat. \S\S 8437-8454 (1854) as mandating statutory requirements for ceremonial marriage).


\textit{See, e.g.,} W. GOODSSELL, HISTORY OF THE FAMILY AS A SOCIAL AND EDUCATIONAL INSTITUTION 537 (1926); 3 G. HOWARD, \textit{supra} note 4, at 171 ("[n]o doubt our common-law marriage is thoroughly bad, involving social evils of the most dangerous character"); O. KOEGEL, \textit{supra} note 146, \textit{passim}; Committee on Uniform State Laws of the American Bar Association (1892) (states should not recognize common law marriage, but if they do, they should require a signed, witnessed document as evidence of the relationship) (\textit{cited in} O. KOEGEL, \textit{supra} note 146, at 167).

\textit{See, e.g.,} 1883 Me. Acts ch. 212, \S\S 1-2, ME. REV. STAT. 520-23 (1884) (setting out seven specific grounds for divorce); Act of Mar. 11, 1853, Ohio Laws [Swan] 324-28 (1854) (adding four new grounds for divorce to the existing six) (\textit{cited in} 3 G. HOWARD, \textit{supra} note 4, at 17-18, 114). \textit{See also id. at} 136-38 (discussing California's choice of the following six grounds for divorce: adultery, extreme cruelty, willful desertion, willful neglect, habitual intemperance, and conviction of a felony).

\textit{See, e.g.,} 1849 Conn. Pub. Acts 17 (allowing divorce for "any such misconduct . . . as permanently destroys the happiness of the petitioner, and defeats the purpose of the marriage relation"); 1798 R.I. Pub. Laws 477, 479 (allowing divorce for any "gross misbehaviour and wickedness in either of the parties, repugnant to and in violation of the marriage covenant"); Act of Jan. 23, 1860, Wash. Laws 318-20 (1860) (allowing divorce for "any other cause deemed by the court sufficient, or when the court shall be satisfied that the parties can no longer live together") (\textit{cited in} 3 G. HOWARD, \textit{supra} note 4, at 13-14, 135).

\textit{See, e.g.,} 2 IND. REV. STAT. pt. II, ch. 4, \S 6 (1852) (declaring a petitioner's affidavit sufficient to satisfy the requirement where the affidavit asserts residence on its face); 3 G. HOWARD, \textit{supra} note 4, at 131 (\textit{citing} a Utah statute that required only a declaration of intent to reside in the state to satisfy the residence requirement).

Experimentation with the grounds for divorce and residence requirements gave every state's divorce laws a unique character. The states of the Old Northwest had the most liberal divorce policy; New York and South Carolina were the most conservative. N. BLAKE, \textit{supra} note 11, at 63. For 200 years, South Carolina refused to enact any legislation on the subject of divorce. It then enacted a divorce statute, Act of Jan. 31, 1872, 1872 S.C. Acts 30 (\textit{cited in} 3 G. HOWARD, \textit{supra} note 4, at 77), but abandoned it six years later. 1878 S.C. Acts 719. New York allowed divorce solely on the ground of adultery. N. BLAKE, \textit{supra} note 11, at 64-79.

The disparity among state divorce laws increased the incidence of "migratory divorce," whereby reasonably affluent citizens of conservative states could travel to other, more liberal
jurisdictions granted absolute divorce;\textsuperscript{154} South Carolina was the sole exception.\textsuperscript{155} All agreed on adultery as a ground;\textsuperscript{156} the other major grounds were cruelty,\textsuperscript{157} desertion,\textsuperscript{158} impotence,\textsuperscript{159} imprisonment or conviction of crime,\textsuperscript{160} intoxication,\textsuperscript{161} non-support,\textsuperscript{162} and insanity.\textsuperscript{163} In addition, there were thirty-one minor grounds for divorce recognized by one or more jurisdictions.\textsuperscript{164} Omnibus clauses had disappeared, but seven states\textsuperscript{165} provided for divorce when the parties lived apart for a fixed period of years. An Arkansas judicial decision recognized incompatibility as a ground for divorce although the Arkansas statute did not expressly make it one.\textsuperscript{166} Forty-nine states required definite residence periods for access to divorce courts; these varied in length from three months to five years.\textsuperscript{167}

Between the end of the nineteenth century and the early 1930s, women had been graduating from college,\textsuperscript{168} entering the work force,\textsuperscript{169} states to procure their desired divorces. Short or non-existent residence requirements and a wide variety of available grounds for divorce contributed to the popularity of “divorce colony” states such as Ohio, Indiana, and Illinois. \textit{Id.} at 116-29; Nolan, \textit{Indiana: Birthplace of Migrant Divorce}, 26 \textit{Ind. L.J.} 515, 515-19 (1951). Rhode Island, Iowa, and the District of Columbia also became popular destinations for divorce-seekers. N. Blake, \textit{supra} note 11, at 116-29. \textit{See generally} 3 G. Howard, \textit{supra} note 4, at 14-15, 78-79, 125-27.

\begin{itemize}
  \item \textsuperscript{154} 3 C. Vernier, \textit{supra} note 132, § 62, at 3-4.
  \item \textsuperscript{155} \textit{Id.}
  \item \textsuperscript{156} \textit{Id.} at 18.
  \item \textsuperscript{157} Forty-three of 51 jurisdictions expressly recognized cruelty as a ground for divorce; however, several jurisdictions limited the ground to husbands’ cruelty. \textit{2 Id.} § 66, at 24-31. Nevada and Florida used their cruelty provisions as substitutes for omnibus clauses by not requiring proof of specific instances of cruelty, or by giving cruelty a liberal interpretation based on the customs and temperament of the individual. N. Blake, \textit{supra} note 11, at 158, 168 and sources cited therein.
  \item \textsuperscript{158} Forty-seven jurisdictions allowed desertion as a ground for divorce, requiring desertion for a period ranging from six months to five years. \textit{2 C. Vernier, supra} note 132, § 67, at 31-38.
  \item \textsuperscript{159} Thirty-five jurisdictions allowed impotence as a ground for divorce. \textit{Id.} § 68, at 38.
  \item \textsuperscript{160} Forty-three jurisdictions allowed divorce on the ground of imprisonment or a criminal conviction. \textit{Id.} § 69, at 42.
  \item \textsuperscript{161} Forty jurisdictions allowed intoxication as a ground for divorce; only 18 listed the length of time that the intoxication had to continue. \textit{Id.} § 70, at 48-49.
  \item \textsuperscript{162} Thirty jurisdictions allowed divorce on the ground of non-support. Three employed the language “gross neglect of duty,” a phrase meant to encompass more than non-support. Three others required desertion or other acts in addition to non-support. The language used in the other statutes varied greatly. \textit{Id.} § 71, at 53-54.
  \item \textsuperscript{163} Seventeen jurisdictions expressly authorized insanity as a ground for divorce; depending on the jurisdiction, the condition had to exist anywhere from two to twenty years before the divorce was allowed. Other jurisdictions included insanity in their “miscellaneous” divorce provisions. \textit{Id.} § 72, at 58-60.
  \item \textsuperscript{164} \textit{Id.} § 73, at 70-71.
  \item \textsuperscript{165} Kentucky, Louisiana, North Carolina, Rhode Island, Texas, Washington, and Wisconsin. \textit{Id.} § 73, at 66-70.
  \item \textsuperscript{166} Clyburn v. Clyburn, 175 Ark. 330, 299 S.W. 38 (1927) \textit{(cited in} 3 C. Vernier, \textit{supra} note 132, § 156, at 66).
  \item \textsuperscript{167} 3 C. Vernier, \textit{supra} note 132, § 82, at 106.
  \item \textsuperscript{168} In 1870, of 9,371 bachelors or first professional degrees earned in the United States,
and joining unions\textsuperscript{170} in increasing numbers. They had won equal suffrage,\textsuperscript{171} and married working women in most common law states had gained control of their earnings.\textsuperscript{172} In community property states, which earlier had diluted their interest in community assets,\textsuperscript{173} wives were re-endowed as partners,\textsuperscript{174} though husbands retained managerial power.\textsuperscript{175} Despite these advances, the marital partnership principle did not make any direct impact on the marital property rules of common law states. It was not to do so until after the United States Supreme Court decided \textit{Poe v. Seaborn}.\textsuperscript{176}

7,993 went to men and 1,378 (14.7\%) to women. By 1930, of a total of 122,484, men had earned 73,615 and women had earned 48,869 (39.9\%). U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES 385-86 (1976).

In 1870, of 12,506,000 people in the total labor force, 10,670,000 were men and 1,836,000 (13.1\%) were women. By 1930, with 48,840,000 in the labor force, 38,078,000 were men and 10,752,000 (22\%) were women. \textit{Id.} at 127-28. In 1890, 13.9\% of the total female labor force was married. In 1930, the corresponding figure was 28.9\%. These figures do not include divorced or widowed women. \textit{Id.} at 133.


\textsuperscript{172} 3 C. VERNIER, \textit{supra} note 132, § 173, at 192-95. This control was not granted by the married women’s property acts. \textit{E.g.}, Seitz v. Mitchell, 94 U.S. 580, 584-85 (1876); Crozier, \textit{supra} note 135, at 37. In the community property states, wife’s earnings were part of the community, thus under her husband’s management and control. By this time only Texas had given wife control over her earnings. Scott v. Scott, 170 S.W. 273 (Tex. Civ. App. 1914). Although an 1881 Washington statute seemed to give wife control over her earnings, WASH. REV. CODE ANN. § 26.16.130 (West 1961) (repealed 1972), the statute was interpreted only to apply if wife was living apart from her husband or if husband had consented to characterize her earnings as separate property. \textit{See, e.g.}, Gage v. Gage, 78 Wash. 262, 138 P. 886 (1914) (agreement to characterize earnings as separate property); Fisher v. Marsh, 69 Wash. 570, 125 P. 951 (1912) (living apart from husband).

\textsuperscript{173} \textit{See} notes 84-88 and accompanying text \textit{supra}.

\textsuperscript{174} This occurred in 1926 in Louisiana. In Phillips v. Phillips, 160 La. 813, 826, 107 So. 584, 588 (1926), the Louisiana Supreme Court stated:

There are loose expressions, appearing in some of the opinions rendered by this court, to the effect that the wife’s half interest in the community property is only an expectancy, or a residuary interest, until the community is dissolved and liquidated. But that is contrary to the provisions of the Civil Code . . . and is contrary to the rule announced in every decision of this court since the error was first committed in \textit{Guixe v. Lawrence} . . . . It had been decided . . . that the wife had not a mere expectancy but the absolute ownership of half of the community property during the existence of the community, subject, of course, to the husband’s power of administration. The statement to the contrary in \textit{Guixe v. Lawrence} was an error . . . .

It was accomplished by statute in California in 1927. Act of Apr. 28, 1927, ch. 265, § 1, 1927 Cal. Stats. 484 (current version at CAL. CIV. CODE § 5105 (West Supp. 1981)). The dilutions in Idaho and New Mexico were more short-lived. \textit{See} Kohny v. Dunbar, 21 Idaho 258, 121 P. 544 (1912); Beals v. Ares, 25 N.M. 459, 185 P. 780 (1919).

\textsuperscript{175} These marginal powers were ultimately divested. \textit{See} notes 224-30 and accompanying text \textit{infra}.

\textsuperscript{176} 282 U.S. 101 (1930).
D. Conscious Implementation of Partnership Principles

_Poe v. Seaborn_ sparked the first conscious move by common law states to incorporate the partnership concept into their marital regimes. At issue in _Poe_ was the right of spouses in community property states to file separate income tax returns, each reporting half the community income, although it was all attributable to husband. The Commissioner argued that husband’s exclusive managerial powers over the community required that he report all income and pay all taxes; the taxpayers argued that their equal ownership of community assets under state law meant that each should pay taxes on only half the income arising from the community. The Court agreed with the taxpayers, relying on the principle underlying the community property system: husband and wife are equal partners, each with a present, one-half interest in community assets.

Spouses in community property states thus acquired a clear advantage over those in common law states. In the common law states, a spouse earning all the family income had to report all the income. Without the benefit of income-splitting, these families were in higher tax brackets than their counterparts in community property states. Between 1939 and 1949, the territory of Hawaii and the states of Michigan, Nebraska, Oklahoma, Oregon, and Pennsylvania reacted to _Poe_ by adopting community property systems. Other states might have followed suit, but Congress eliminated the need to convert by passing the Revenue Act of 1948. This act made “fundamental changes in

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177 Id. at 108-09, 111-12.  
178 Id. at 103-05.  
179 Id. at 106-08, 111.  
180 Id. at 118.  
181 Id. at 111.  
the federal taxation of the family group\textsuperscript{189} in common law states, allowing spouses to elect to be taxed on family income as if they were members of a marital partnership.\textsuperscript{190} Thereafter, Hawaii, Michigan, Oklahoma, Oregon, and Nebraska\textsuperscript{191} repealed their community property laws. Wives in common law states abandoned their previous attempts to secure tax advantages for the family by mastering "the details of the retail drug business, electrical equipment business, or construction business."\textsuperscript{192} They could "turn from their partnership 'duties' to the pursuit of homemaking."\textsuperscript{193} At least for federal income tax purposes, the family could be a partnership between equals and domestic services a sufficient contribution from an equal partner.

The next important support for the partnership principle also came from a federal source, the Committee on Civil and Political Rights of the President's Commission on the Status of Women. In its 1963 Report, the committee noted the existence of and defects in the "two types of matrimonial property systems in the United States."\textsuperscript{194} In common law states, a wife without earnings or property of her own was "completely dependent upon the husband's largesse for anything above and beyond her support needs."\textsuperscript{195} In community property states, even though the wife had an interest in the community owned property, hus-


\textsuperscript{190} \textit{Id.} at 1103-04. In addition to income-splitting between spouses, the act introduced, via the marital deduction, splitting of estates and gifts in an attempt to "produce tax results under common law property rules that [were] equal to the . . . tax situation under community property rules." \textit{Id.} at 1121.

The 1948 act was most helpful to traditional families in which one spouse earned all of the income. For such families, filing a joint tax return could result in a tax bill as much as 40% lower than that of an individual taxpayer with the same income. Other families in which both spouses earned income benefited less or not at all from joint filing, depending on their respective earnings. In 1969, Congress reduced the discrepancy between married taxpayers filing jointly and single taxpayers by creating new tax rates for single taxpayers; these were only 20% higher than the rates for married couples filing joint returns. The old tax rates for single taxpayers remained applicable, however, to married taxpayers filing separate returns.


\textsuperscript{191} \textit{See notes} 182-86 \textit{supra}.

\textsuperscript{192} Surrey, \textit{supra} note 189, at 1111. See \textit{Commissioner v. Tower}, 327 U.S. 280 (1946) and \textit{Lusthaus v. Commissioner}, 327 U.S. 293 (1946) for two such unsuccessful attempts.

\textsuperscript{193} Surrey, \textit{supra} note 189, at 1111.

\textsuperscript{194} \textit{Committee on Civil and Political Rights, Report to the President's Commission on the Status of Women} 15 (1963).

\textsuperscript{195} \textit{Id.} at 16.
band had "exclusive authority to manage and control" it.\textsuperscript{196} The committee thus saw a need for a "full reappraisal" of marital property rules in all jurisdictions.\textsuperscript{197} It adopted the following policy recommendation:

Marriage is a partnership to which each spouse makes a different but equally important contribution. This fact has become increasingly recognized in the realities of American family living. While the laws of other countries have reflected this trend, family laws in the United States have lagged behind. Accordingly, the Committee concludes that during marriage each spouse should have a legally defined and substantial right in the earnings of the other spouse and in the real and personal property acquired as a result of such earnings, as well as in the management of such earnings and property. Such right should survive the marriage and be legally recognized in the event of its termination by annulment, divorce, or death. This policy should be appropriately implemented by legislation which would safeguard either spouse against improper alienation of property by the other.\textsuperscript{198}

Here was an open endorsement of the marital partnership principle—not merely because it enabled couples to enjoy income tax advantages, but because the committee thought it better than other possible marital property schemes.

In 1966, New York moved toward legal recognition of the partnership principle, at least upon death of a spouse, by passing a statute\textsuperscript{199} to strengthen the survivor's elective share. The statute pulled back into the deceased spouse's estate, for the purpose of the surviving spouse's election, inter vivos transfers of property over which the deceased spouse had retained substantial control.\textsuperscript{200} In 1969, the Uniform Probate Code adopted this concept of the augmented estate.\textsuperscript{201} Seven common law jurisdictions now augment the deceased spouse's estate beyond probate assets when determining the surviving spouse's elective share,\textsuperscript{202} and twenty have set the surviving spouse's intestate share at exactly one-half of the decedent's estate.\textsuperscript{203}

\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} Id. at 18.
\textsuperscript{200} Id. § 5-1.1(b).
\textsuperscript{201} Uniform Probate Code § 2-202 (1969 version).
\textsuperscript{203} This assumes decedent is survived by descendants. The states are: Alaska, Colorado, Connecticut, Delaware, Florida, Hawaii, Kansas, Kentucky, Maryland, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Dakota, Oregon, Pennsylvania, Rhode Island, Wisconsin, and Wyoming.
The promulgation of the Uniform Marriage and Divorce Act was a further step toward legal recognition of the partnership principle. By adopting it, any state could automatically incorporate the partnership principle into its law of divorce. When the Commissioners first drafted the Act, about half the common law jurisdictions had statutes authorizing divorce courts to divide a couple's property regardless of which spouse had title. Most courts gave limited scope to these statutes, interpreting them merely to protect the interests of a spouse who provided the capital to acquire a particular asset and using them to "unscramble" ownership by giving the asset back. The Uniform Act went much further than unscrambling; its provisions reflected a different approach:

Alternatives A and B of section 307 of the Uniform Act accordingly reflect the partnership principle in the division of property upon divorce. Alternative A was "recommended generally for adoption." It creates a community of all the property belonging to either or both spouses, however and whenever acquired and regardless of title. Upon divorce, the court would divide the community between the spouses, not "equally" but "equitably" in accordance with specified factors. In addition, the section directs the court to consider "the contri-

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204 UNIFORM MARRIAGE AND DIVORCE ACT § 101 (first promulgated in 1970; approved by the American Bar Association in 1974).
205 R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS § B-1, at 35 n.280 (1969) (prepared for the Special Committee on Divorce of the National Conference of Commissioners on Uniform State laws) ("Appendix B, Property Divisions"—summary of statutes). For a discussion of whether these statutes give wife the kind of ownership required to make a property division on divorce free of capital gains tax as a division between co-owners, see Imel v. United States, 523 F.2d 853 (10th Cir. 1975).
207 Id. at 307(a) (Alternative A), 9A U.L.A. at 142.
210 Id. § 307(a) (Alternative A), 9A U.L.A. at 142.
211 Id., 9A U.L.A. at 142. The factors are:

duration of the marriage, and prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in
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bution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit."\footnote{212} The official comment to section 307 notes that the idea of including an "allowance for the contribution . . . of the 'homemaker's services to the family unit' . . . is a new concept in Anglo-American law."\footnote{213}

Alternative B "was included because a number of Commissioners from community property states represented that their jurisdictions would not wish to substitute, for their own systems, the great hotchpot of assets created by Alternative A . . . ."\footnote{214} Alternative B thus retains the distinction between the spouses' separate and community property, limiting division upon dissolution to community assets.\footnote{215} It, too, departs from true partnership principles in that it calls for a division in "just" rather than "equal" portions.\footnote{216} As under Alternative A, the court considers the "contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker,"\footnote{217} an idea familiar to the civil law.

Although only a few states have adopted any part of the Uniform Act,\footnote{218} the basic concept gained favor. About forty common law states\footnote{219} now have statutes that empower courts to distribute property equitably, regardless of title, between the spouses upon divorce. Legislatures\footnote{220} passing these statutes, as well as courts applying them,\footnote{221} in-

\footnote{212} Id., 9A U.L.A. at 142.
\footnote{213} Id. (Commissioner's Comment 1973), 9A U.L.A. at 144.
\footnote{214} Id., 9A U.L.A. at 144.
\footnote{215} Id. § 307 (Alternative B), 9A U.L.A. at 143.
\footnote{216} Id., 9A U.L.A. at 143.
\footnote{217} Id. § 307(1) (Alternative B), 9A U.L.A. at 143.
\footnote{218} See Table of Jurisdictions Wherein Act Has Been Adopted, 9A U.L.A. 91; Action in Adopting Jurisdictions, id. at 144-46.
\footnote{219} Freed & Foster, Divorce in the Fifty States: An Overview as of August 1, 1980, 6 Fam. L. Rep. (BNA) 4043, 4051 (1980) (Table IVC).
\footnote{220} The new New York statute is illustrative. See note 272 and accompanying text infra. Both the Governor's memorandum and the Memorandum in Support of Legislation filed by sponsors of the bill support the partnership principle. Both are printed in full in A PRACTICAL GUIDE TO THE NEW YORK EQUITABLE DISTRIBUTION DIVORCE LAW (H. Foster, Jr. ed. 1980). The sponsors' memorandum states:
The basic premise for the marital property and alimony (now maintenance) reforms of this legislation (§ 236) is that modern marriage should be viewed as a partnership of co-equals. Upon the dissolution of a marriage there should be an equitable distribution of all family assets accumulated during the marriage and maintenance should rest on the economic basis of reasonable needs and ability to pay. From this point of view, the contributions of each partner to the marriage should ordinarily be regarded as equal, and there should be an equal division of family assets, unless such a division would be inequitable under the circumstances of the particular case.
\footnote{221} Id. at 605. The Governor's memorandum echoes the same basic theme: "The bill recognizes that the marriage relationship is also an economic partnership." Id. at 608.
\footnote{222} Campbell v. Campbell, 353 A.2d 276 (D.C. 1976) (court awarded wife sole title to
creasingly see themselves as implementing the principle of marital partnership. Only two common law states, however—Wisconsin and Arkansas—approach the true partnership concept and start from an equal division.

The original disagreement between common and civil law marital property rules was thus compromised. Wife emerged from the process more equal to husband during marriage. Nevertheless, husband remained the financial provider, manager of the community, and head of the family in a number of states until the advent of expanded equal protection doctrine and passage of equal rights amendments.

Beginning with Reed v. Reed in 1970, the Supreme Court invoked the equal protection clause to invalidate sex-based state legislation in a series of cases. Most recently, the Court struck down two such stat-

marital home despite husband's greater financial contribution; court approved a case by case determination considering the relative ability of parties to shelter themselves adequately, the contribution of each to the maintenance of the household, and what each contributed financially); Canakaris v. Canakaris, 382 So. 2d 1197, 1203-04 (Fla. 1980) (partnership concept specifically approved); In re Marriage of Anderson, 243 N.W.2d 562 (Iowa 1976) (court gave farming couple as close to an equal division of assets as possible without forcing sale of family farm); McCrory v. McCrory, 216 Kan. 359, 533 P.2d 278 (1975) (court divided couple's property after 44 years of marriage despite wife's objection that shares of stock were gifts or inheritances to her from her parents); Farmer v. Farmer, 506 S.W.2d 109, 112 (Ky. 1974) ("Her performance as a wife, housekeeper and mother also may have made such a contribution."); Downs v. Downs, 170 Mont. 150, 153, 551 P.2d 1025, 1026-27 (1976) (The court reversed an award to wife of 12.2% of the property accumulated during the 34 year marriage. The standard it enunciated was division "on an equitable basis regardless of who had title to the property . . . . [T]he court in making property divisions may consider property owned at the commencement of the marriage, financial contributions, the efforts of the parties, including the performance of duties and responsibilities requested of a wife.").

224 See notes 229 & 280 and accompanying text infra.
utes dealing directly with the family: an Alabama provision making alimony available only to wives229 and a Louisiana law making husband head of the family.230 These decisions, combined with equal rights amendments—fifteen jurisdictions now have state versions231 and thirty-five have ratified the federal amendment232—have completed wife's legal equalization with husband in the family. Husband's superiority and assigned sex-based roles in marriage, both important aspects of the ideal originally shared by common and civil law systems, have now vanished from American marital regimes.

Other facets of the old ideal—notably its view of marriage as an exclusive, special, protected status arising only on compliance with prescribed requirements233 and its view of divorce as a carefully regulated privilege available only on limited, prescribed grounds234—are similarly disappearing as a result of the continuation of trends begun in the nineteenth century. Although only fourteen jurisdictions235 now recognize common law marriage, legal distinctions between the married and unmarried continue to fade. The unmarried now have the same constitu-

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Louisiana, 419 U.S. 522 (1975); cf. Califano v. Goldfarb, 430 U.S. 199 (1977) (invalidating a social security provision allowing widows to collect survivor's benefits automatically, but requiring widowers first to prove that the wife provided three-fourths of the couple's support); Weinberger v. Wiesenfeld, 420 U.S. 636 (1973) (granting a widowed father the same child incare social security benefits provided to widowed mothers); Frontiero v. Richardson, 411 U.S. 677 (1973) (requiring the federal government to give married women in the uniformed services the same fringe benefits given to married men). But see Kahn v. Shevin, 416 U.S. 351 (1974); cf. Rostker v. Goldberg, 101 S. Ct. 2646 (1981) (all-male draft constitutional); Califano v. Webster, 430 U.S. 313 (1977) (per curiam) (upholding a more favorable social security benefit formula for retired female workers than for retired male workers); Schlesinger v. Ballard, 419 U.S. 498 (1975) (validating a rule guaranteeing female naval officers 13 years to earn a promotion before facing discharge, while at the same time discharging male officers for lack of promotion if they are "passed over twice" without promotion).

229 Orr v. Orr, 440 U.S. 268 (1979). The Court did not hold that sex can never be a valid proxy for need or that sex-based classifications can never be valid as compensation for past discrimination, but it held that such generalizations are improper in light of Alabama's individual hearings on the finances of divorcing spouses, during which the actual facts of need and past discrimination can be determined. Id. at 281-82.


231 ALASKA CONST. art. 1, § 3; COLO. CONST. art. II, § 29; HAWAII CONST. art. I, § 21; ILL. CONST. art. 1, § 18; LA. CONST. art. 1, § 3; MD. CONST. art. 46; MASS. CONST. pt. 1, art. 1 (amended 1976); MONT. CONST. art. II, § 4; N.H. CONST. pt. 1, art. 2; N.M. CONST. art. II, § 18; PA. CONSTIT. art. 1, § 28; TEX. CONST. art. I, § 3a; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI, § 1; WYO. CONST. art. 1, § 3.

232 For a list of the 35 states that have ratified the amendment, see Equal Rights Amendment Extension: Hearings on S.J. Res. 134 Before the Subcomm. on the Constitution of the Comm. of the Judiciary, 95th Cong., 2d Sess. 739-61 (1978). Of these 35, at least five have moved to rescind their ratifications.

233 See notes 4-9 and accompanying text supra.

234 Id.

tional rights as the married to obtain contraceptives and abortions. Their children, though illegitimate, now have substantial entitlements as well, including rights to death benefits, support, inheritance, and welfare. Various forms of discrimination on the basis of marital status are prohibited and state courts have begun to "divorce" the unmarried, dispensing marital benefits as they do so. Legislatures have repealed and courts have invalidated laws imposing criminal sanctions for sexual conduct inimical to marriage, and divorce has become easier than ever before. In 1966, New York expanded its divorce law, increasing the number of fault grounds and adding the no-fault ground of living apart pursuant to a separation agreement. In 1970, the Uniform Marriage and Divorce Act offered the no-fault ground of "irretrievable

238 Stanley v. Illinois, 405 U.S. 645 (1972). The Supreme Court has recognized that unmarried fathers should have the same right to veto their children's adoption as unmarried mothers. Caban v. Mohammed, 441 U.S. 380 (1979). But unmarried fathers need not be given the same veto right over their children that divorced fathers have. Quillon v. Walcott, 434 U.S. 246 (1978).
239 This is no longer true in the eight states that have adopted the Uniform Parentage Act. The Act eliminates the classification of illegitimacy altogether and provides that "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." Uniform Parentage Act § 2.
245 See notes 364, 371-73 and accompanying text infra. Indeed, unmarried cohabitants may be better off than legally married couples as a result of some of these developments. See the discussion of the Morone and Sagan cases in text accompanying notes 376-400 infra. See also the discussion of the marriage penalty, supra note 190.
246 Even where criminal penalties are still imposed, enforcement is often lax. See generally D. MacNAMARA & E. SAGARIN, SEX, CRIME, AND THE LAW ix-xi, 186-88, 190-92 (1977). Typical of the current legal tolerance is the opinion of the New York Court of Appeals in People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1981). In invalidating the provision of the New York Penal Law that made consensual sodomy a crime, the court held: "In sum, there has been no showing of any threat, either to participants or the public in general, in consequence of the voluntary engagement by adults in private, discreet, sodomous conduct." Id. at 490, 415 N.E.2d at 941, 434 N.Y.S.2d at 952.
247 An Act to Amend the Domestic Relations Law, ch. 254, 1966 N.Y. Laws 833. Previously, adultery was the sole ground available for divorce in New York. For a discussion of the ground of living apart pursuant to a separation decree, also added at that time, see note 282 infra. For the present grounds, see N.Y. Dom. Rel. Law § 170 (McKinney 1977).
breakdown” as cause for divorce. Today, all but two states have at least one no-fault ground for divorce. In many states divorce thus has become a frankly consensual procedure. In others, even consent is unnecessary—divorce is available at the option of one spouse despite the other’s objections.

So end more than 200 years of history which began with the emigration of the original common and civil law marital regimes to America. In the new country, physical proximity and opposing views led to arguments between the two. As with married couples, their early wars gave way to later peace. They deferred to each other on property questions and, together, discarded old beliefs. Their progeny are the marital regimes of today.

III
TODAY’S MARITAL REGIMES REFLECT THEIR HISTORY: A BIRD’S-EYE VIEW OF TWO EXAMPLES

Modern American marital regimes each began with a basis in either the European common law or civil law systems. Through a blending of “reformed” common and “reformed” civil law principles, the modern regimes have developed similar basic features. They blur the lines between marriage and other living arrangements and, within marriage, permit spouses to choose marital roles, proprietary rules, and easy divorce. Thus, they emerge from their histories free of their progenitors’ quarrels and moral judgments. Among them, Louisiana and New York are typical.

Both define marriage as a civil contract. Both provide for its solemnization and license, and both authorize the usual religious

248 Uniform Marriage and Divorce Act § 305.
253 The phrase means the civil law marital regime as modified to eliminate husband’s exclusive managerial power over community assets and otherwise equalize the spouses.
and secular authorities to officiate.\textsuperscript{257} New York carries the concept of
civil contract further than Louisiana, allowing marriage by written
agreement, which must be signed by the parties and two witnesses and
acknowledged before a judge of a court of record.\textsuperscript{258} Both states now
disapprove of and refuse to recognize common law marriages.\textsuperscript{259} Yet
both states have validated marriages despite noncompliance with statu-
tory requirements,\textsuperscript{260} and both award marital property benefits to par-
ties to null or void unions.\textsuperscript{261} Louisiana limits such awards to spouses
who in good faith believe their marriages to be valid;\textsuperscript{262} New York does

\textsuperscript{257} LA. CIV. CODE ANN. arts. 102 (West Supp. 1981), 103 (West 1952); N.Y. DOM. REL.

\textsuperscript{258} N.Y. DOM. REL. LAW § 11(4) (McKinney Supp. 1980).

\textsuperscript{259} New York first abolished common law marriage by An Act to Amend the Domestic
That, in turn, was repealed by An Act to Amend the Domestic Relations Law, by Providing
for Marriage Licenses, ch. 742, 1907 N.Y. Laws 1744. The effect was to permit common law
marriages thereafter. \textit{In re Hinman}, 147 A.D. 452, 131 N.Y.S. 861 (1911), \textit{aff'd on other grounds},
206 N.Y. 653, 99 N.E. 1108 (1912). Common law marriages were abolished again by An Act
to Amend the Domestic Relations Laws, in Relation to the Solemnization of Marriages, ch.
606, 1933 N.Y. Laws 1268 (effective Apr. 29, 1933) (current version at N.Y. DOM. REL. LAW

Louisiana never recognized the validity of common law marriages. To the contrary,
Louisiana courts have held decidedly that \textquotedblleft[m]arriages by private agreement, express or im-
plied, have never been recognized by the laws of Louisiana, which, on the contrary, have
always required that a contract of marriage shall be celebrated by a priest, minister or some
duly authorized public officer, in the presence of three witnesses." Johnson's Heirs v.
Raphael, 117 La. 967, 42 So. 470 (1906); Succession of Alexander, 4 Pelt. 272 (La. Ct. App.
1907); Hendry, \textit{Common Law Marriage in the United States}, 5 LOY. L.J. 31, 36 (1923). The court
in \textit{Johnson} further pointed out that the Act of 1868, no. 210, recognized the nullity of mar-
rriages by private agreement. This Act offered curative provisions under which couples then
living together as man and wife under invalid private agreements could contract a legal mar-
rriage. Act of 1868, no. 210, §§ 1, 5, La. Sess. Laws 278. See also LA. CIV. CODE ANN. art. 88
(1952). Non-recognition has been the consistent policy since. Succession of Marinoni, 177
La. 691, 148 So. 888, 894 (1933); Liberty Mut. Ins. Co. v. Caesar, 345 So. 2d 64 (La. Ct.
App.), cert. denied, 347 So. 2d 1118 (La. 1977); Humphreys v. Marquette Cas. Co., 95 So. 2d
common law marriage was a crime in Louisiana between 1960 and 1975. LA. REV. STAT.
common law marriage, they occasionally admitted evidence of a couple's extended marital
conduct as a basis for a rebuttable presumption of a valid marriage. Agreement to live to-
gether as man and wife, however, did not make a valid marriage. Powers v. Charnbury, 35
La. Ann. 204 (1883); Blasini v. Blasini, 30 La. Ann. 1388 (1878); Holmes v. Holmes, 6 La. 463
(1834).

Both states recognize common law marriages contracted in jurisdictions where they are
valid. \textit{E.g.}, Parish v. Minvielle, 217 So. 2d 684 (La. Ct. App. 1968); Leiblein v. Charles

\textsuperscript{260} Holmes v. Holmes, 6 La. 463 (1834); Parker v. Saileau, 213 So. 2d 190 (La. Ct. App.
1968); Maxwell v. Maxwell, 51 Misc. 2d 687, 273 N.Y.S.2d 728 (Sup. Ct. 1966); Springer v.

\textsuperscript{261} Johnson v. Johnson, 295 N.Y. 477, 68 N.E.2d 499 (1946); Zeitlan v. Zeitlan, 31

\textsuperscript{262} LA. CIV. CODE ANN. arts. 117, 118 (West 1952).
not make good faith a requirement.\textsuperscript{263} Although fornication is not a crime\textsuperscript{264} in either state, neither extends its marital regime per se to mere cohabitants.\textsuperscript{265} As a result of recent cases,\textsuperscript{266} New York cohabitants can enforce oral agreements providing for benefits like those incident to marriage, and Louisiana cohabitants can qualify as spouses for claiming worker's compensation.

Both states start the spouses in marriage as separate,\textsuperscript{267} equal\textsuperscript{268} persons, offering them a legal regime that recognizes two classes of assets: "separate,"\textsuperscript{269} and "marital"\textsuperscript{270} or "community."\textsuperscript{271} Both spouses

\begin{itemize}
\item[\textsuperscript{263}] Johnson v. Johnson, 295 N.Y. 477, 68 N.E.2d 499 (1946); Zeitlan v. Zeitlan, 31 A.D.2d 955, 298 N.Y.S.2d 816 (1969), aff'd, 26 N.Y.2d 833, 258 N.E.2d 84, 309 N.Y.S.2d 585 (1970). The Zeitlan court awarded alimony to wife even though she was an attorney who had been advised by another attorney before she entered the void marriage that the man she was about to marry had only an invalid, unilateral Mexican divorce from his former wife.
\item[\textsuperscript{264}] As used here, fornication stands for consensual sexual intercourse between single heterosexual adults. See Succession of Thompson, 367 So. 2d 796 (La. 1979); N.Y. PENAL LAW § 130-130.65 (McKinney 1975).
\item[\textsuperscript{268}] They are mutually liable for each other's support in both states. LA. CIV. CODE ANN. art. 119 (West 1952); N.Y. DOM. REL. LAW § 32(1), (2) (McKinney Supp. 1980). In Louisiana, each may manage the community assets. Matrimonial Regimes Act, LA. CIV. CODE ANN. art. 2346 (West Supp. 1981).
\item[\textsuperscript{269}] Separate property in Louisiana comprises:
property acquired by a spouse prior to the establishment of a community property regime; property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used; property acquired by a spouse by inheritance or donation to him individually; damages awarded to a spouse in an action for breach of contract against the other spouse or for the loss sustained as a result of fraud or bad faith in the management of community property by the other spouse; and damages or other indemnity awarded to a spouse in connection with the management of his separate property.
\item[\textsuperscript{270}] New York defines separate property as:
(1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;
(2) compensation for personal injuries;
(3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;
(4) property described as separate property by written agreement of the parties pursuant to subdivision three of this part.
\item[\textsuperscript{271}] Marital property in New York comprises:
all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a
have rights in marital or community assets, more or less like those of partners. Under Louisiana's legal regime, spouses can own both com-
matriotional action, regardless of the form in which title is held, except as otherwise provided in agreement pursuant to subdivision three of this part. Marital property shall not include separate property as hereinafter defined.


Louisiana defines "community" property as:

property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse; property acquired with community things or with community and separate things, unless classified as separate property under Article 2341; property donated to the spouses jointly; natural and civil fruits of community property; damages awarded for loss or injury to a thing belonging to the community; and all other property not classified by law as separate property.

Matrimonial Regimes Act, LA. CIV. CODE ANN. art. 2338 (West Supp. 1981). It also includes the "natural and civil fruits of the separate property of a spouse, minerals produced from or attributable to a separate asset, and bonuses, delay rentals, royalties, and shut-in payments arising from mineral leases" unless the spouse "reserve[s] them as his separate property by a declaration made in an authentic act or in an act under private signature duly acknowledged." Id. art. 2339.

Under the present legal regime in Louisiana, the spousal partnership in community assets is stronger and more equal than it was under the traditional civil law idea. Each spouse owns a "present undivided one-half interest" in community assets. Matrimonial Regimes Act, LA. CIV. CODE ANN. art. 2336 (West Supp. 1981); see note 271 supra. There is a presumption that things in possession of a spouse during a community regime are community assets unless either spouse can prove them separate. Id. art. 2340. Neither spouse alone may "alienate, encumber, or lease" community assets to a third person. Id. art. 2337. Nor may a court partition the community before the regime ends. Id. art. 2336. The power to manage community assets is no longer vested exclusively in husband. Id. art. 2346. Either spouse may now manage, but both must agree to some transactions. Id. art. 2347. A spouse may renounce the right to agree or manage. Id. art. 2345. A court may authorize one spouse to act alone "upon showing that such action is in the best interest of the family and that the other spouse arbitrarily refuses to concur or that concurrence may not be obtained due to the physical incapacity, mental incompetence, commitment, imprisonment, or absence of the other spouse." Id. art. 2355. If a spouse acts without his mate's required agreement, the mate can void the transaction. Id. art. 2353. The acting spouse will be liable to his mate for any loss or damage caused by fraud or bad faith in the management of the property, id. art. 2354, but the law protects other parties who dealt with the sole actor. Id. art. 2354. Death, judgment of divorce, separation from bed and board, and separation of property terminate the community. Id. art. 2356. The law provides for satisfaction of community and separate obligations before dividing assets. Id. arts. 2357-2368. Upon termination, each "spouse owes an accounting to the other spouse for community property under his control . . . ." Id. art. 2369. A surviving spouse takes intestate community property only if the decedent leaves no surviving children or parents. Id. art. 915. The surviving spouse does have usufruct in community property inherited by children until remarriage. Id. art. 916.1.

Husband and wife continue to own their separate assets. Matrimonial Regimes Act, LA. CIV. CODE ANN. art. 2341 (West Supp. 1981). They may manage them during marriage and keep them upon divorce. The owner may leave separate assets by will subject only to the children's forced share. Id. art. 1493 (West 1952). A surviving spouse takes intestate separate property only if decedent leaves no surviving lawful descendants, ascendants, or collateral relations. Id. art. 924 (West Supp. 1981). When "a spouse dies rich in comparison" to the survivor, however, the survivor is entitled to claim a "marital portion" from the decedent's estate. Id. art. 2432.

A marital regime of separate assets—which Louisiana offers as a contractual alternative, see note 278 infra—is the starting point for New York's legal regime, a reformed common law position under which marriage does not affect spouses' property. The legislature modified the
community and separate property during marriage. Separate property of a spouse is "his exclusively." Partnership principles govern community assets; the spouses are equal partners in these assets during marriage and take equal shares upon death or divorce. Under New York’s legal regime, the spouses’ assets are separate until divorce. Then partnership principles come into play, requiring an equitable distribution of the couple’s newly labeled “marital” assets; these roughly parallel community assets in Louisiana. Upon death of a spouse, there is no classification of any assets as “marital,” but partnership principles nonetheless affect the decedent’s separate property by entitling the survivor to an elective or intestate share.

Neither state makes the legal regime exclusive. Indeed, both Louisiana and New York invite couples to fashion individual agreements reflecting their own preferences. Louisiana sets out a scheme of regime in 1966 to create an augmented estate upon death of a spouse, see notes 199-200 and accompanying text supra, and has just done so again to create a deferred community in “marital property.” N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney Supp. 1980); see note 270 supra. Although “marital property” in New York approximates “community assets” in Louisiana, see notes 270-71 supra, the New York community arises only when a court ends the marriage. N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney Supp. 1980). Marital assets then become subject to an equitable distribution. Id. § 236(B)(5)(c). The court making the distribution is supposed to consider “the circumstances of the case and of the respective parties.” Id. The court also must consider nine specific factors as well as “any other factor which the court shall expressly find to be just and proper.” Id. § 236(B)(1)(d), (1)-(10). The partnership principle is expressed in subdivision (6), which requires consideration of “any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party.” Id. § 236(B)(5)(d)(6). In order to facilitate distribution, both parties are required to disclose their finances. Id. §§ 236(A)(1), 236(B)(4). When a spouse dies, no community of marital assets arises; title again governs, subject only to the surviving spouse’s right to take an intestate or elective share. N.Y. EST. POWERS & TRUSTS LAW §§ 4-1.1, 5-1.1 (McKinney 1967 & Supp. 1980). On the latter, see text at notes 199-200 supra.

In Louisiana, couples may make “matrimonial agreements” before or during marriage by “authentic” act or by “an act under private signature duly acknowledged by the spouses.” Matrimonial Regimes Act, LA. CIV. CODE ANN. art. 2331 (West Supp. 1981). (An authentic act is one executed in the presence of a notary and two witnesses. LA. CIV. CODE ANN. art 2234 (West 1953). An act under private signature is one signed by the parties but not validly authenticated. Id. art. 2235). A couple may thus establish a regime of separate property or a regime combining separate and community concepts or, as the statute calls it, a “partly legal and partly contractual” regime. Id. art. 2326. Any provisions of the legal regime that the spouses have not “excluded” or “modified” remain effective. Id. art. 2328.

In New York, the new § 236 is replete with references to spousal agreements. It provides that couples may contract out of part or all of the legal regime before or during marriage. Such agreements are specifically made enforceable in matrimonial actions if written, subscribed by the parties, and acknowledged or proven in the manner required for recording a deed. N.Y. DOM. REL. LAW § 236(B)(3) (McKinney Supp. 1980). New York exhibits less concern than Louisiana about protecting a decedent spouse’s family members, see note 279
“separation of property,” which spouses can adopt by contract. Both states impose some procedural and substantive limits on agreements between spouses, but couples in each enjoy considerable contractual freedom and can design identical regimes. This permissive attitude is not limited to proprietary rules but extends to spousal roles during marriage and to divorce. Spouses are left to cast themselves, while married, in whatever roles they please, and divorce is available on both fault.

Couples may provide for “custody, care, education and maintenance of any child of the parties” subject to § 240 of the Domestic Relations Law. Section 240 gives the court discretion to provide for child custody and support as “justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child.”

In Louisiana, certain subjects are beyond the reach of spousal agreements. Spouses may not renounce or alter the statutory marital portion or the established order of succession. Neither can they limit, with respect to third persons, the right of one spouse, under the legal regime, to obligate the community or to alienate, encumber, or lease community property.

Within these limits, prospective spouses may make a matrimonial agreement without court approval. Spouses may at any time subject themselves to the legal regime without court approval. Out-of-state spouses who become domiciled in Louisiana may make a matrimonial agreement without court approval within a year. Spouses, however, may not modify or terminate a matrimonial regime while married unless they jointly petition a court. The court must find that it “serves their best interests [to terminate the contract] and that they understand the governing principles and rules.”

In New York, § 236(B)(3)(3) of the New York Domestic Relations Law incorporates the restrictions imposed by N.Y. GEN. OBLIG. LAW § 5-311 (McKinney Supp. 1980). Thus, spouses may not agree “to alter or dissolve the marriage.” Prohibited agreements are defined narrowly, however, to include only those that contain “an express provision requiring the dissolution of the marriage” or that provide “for the procurement of grounds for divorce.” In fact, agreements to divorce are common practice; they are made as oral supplements to written separation agreements and are never reduced to writing. Neither may spouses agree to relieve each other of mutual support obligations in such a way as to leave each other “incapable of self-support and therefore . . . likely to become a public charge.” Spouses’ agreements must also be “fair and reasonable” when made and “not unconscionable at the time of entry of final judgment.”

This change occurred surprisingly recently in both states. In the eyes of the law, husband was still financial provider and wife his economic dependent in Louisiana until passage of the Matrimonial Regimes Act, LA. Civ. CODE ANN. arts. 2325-2432 (West Supp.
and no-fault grounds. Both states allow divorce on terms that amount to consent of the parties after one year of living apart. Both award discretionary, post-divorce alimony (Louisiana) or maintenance (New York) regardless of the sex of the recipient. Neither state considers the children's welfare on the question whether to divorce their


281 In Louisiana, the fault grounds are adultery, conviction of a felony, and sentence to death or imprisonment at hard labor. LA. CIV. CODE ANN. art. 139 (West Supp. 1980). In New York, the fault grounds are cruelty, abandonment for one or more years, imprisonment for three or more consecutive years, and adultery. N.Y. DOM. REL. LAW §§ 170(1)-(5) (McKinney 1977). See note 282 infra.

282 In Louisiana, the pertinent provisions are LA. REV. STAT. ANN. § 9:302 (West Supp. 1980), which allows divorce after the spouses have lived apart for a year pursuant to a separation decree, and LA. CIV. CODE ANN. art. 138(9), (10) (West Supp. 1980), which allows separation from bed and board, respectively, when "husband and wife have voluntarily lived separate and apart for one year and no reconciliation has taken place during that time," or when the spouses have lived six months separate and apart, voluntarily and without reconciliation; provided that both spouses shall execute an affidavit attesting to and testifying that they have so lived separate and apart and that there exists irreconcilable differences between the spouses to such a degree and nature as to render their living together insupportable and impossible.

In New York, the pertinent provisions are N.Y. DOM. REL. LAW §§ 170(5), (6) (McKinney 1977). Subdivision 5 allows divorce when husband and wife have lived apart pursuant to a separation decree for a year, and plaintiff has substantially complied with it. Because judicial separation is available in New York only on fault grounds, id. § 200, this is not really a no-fault ground. Subdivision 6, however, does provide a no-fault ground, allowing divorce when the parties have lived apart pursuant to a written separation agreement executed with prescribed formalities and filed as set forth in the statute. Plaintiff must prove substantial compliance with the agreement.

283 See note 282 supra.

284 In Louisiana, alimony may be awarded only "[w]hen a spouse has not been at fault and has not sufficient means for support." The alimony shall not exceed one-third of the paying spouse's income. LA. CIV. CODE ANN. art. 160 (West Supp. 1980). In making awards, courts must consider the income, means, and assets of the spouses; the liquidity of such assets; the financial obligations of the spouses, including their earning capacity;! the effect of custody of children of the marriage upon the spouse's earning capacity; the time necessary for the recipient to acquire appropriate education, training, or employment; the health and age of the parties and their obligations to support or care for dependent children; any other circumstances that the court deems relevant.

In determining whether the claimant spouse is entitled to alimony, the court shall consider his or her earning capability, in light of all other circumstances.

Id.

New York imposes no statutory maximum on maintenance, but an informal rule of thumb limits awards to about the same amount as the Louisiana statutory limitation. Foster & Freed, "Marital Property Reform in New York: Partnership of Co-Equals?" 8 FAM. L.Q. 169, 178 (Summer 1974). A maintenance award must "meet the reasonable needs of a party . . . in such amount as justice requires, having regard for the circumstances of the case and of the respective parties." N.Y. DOM. REL. LAW § 236(B)(6)(a) (McKinney Supp. 1981). Fault is a proper consideration but not an absolute bar. See id. In making awards, courts are directed to consider the following factors:
parents, although both make the children's best interests the standard for determining custody.

IV
THE DEFEATS OF TODAY'S MARITAL REGIMES AND A FEW SUGGESTED REFORMS

In their present, permissive stance, modern marital regimes reflect their own past and new American attitudes about family life. The

(1) the income and property of the respective parties in [sic] including marital property distributed pursuant to subdivision five of this part;
(2) the duration of the marriage and the age and health of both parties;
(3) the present and future capacity of the person having need to be self-supporting;
(4) the period of time and training necessary to enable the person having need to become self-supporting;
(5) the presence of children of the marriage in the respective homes of the parties;
(6) the standard of living established during the marriage where practical and relevant;
(7) the tax consequences to each party;
(8) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
(9) the wasteful dissipation of family assets by either spouse and;
(10) any other factor which the court shall expressly find to be just and proper.

Id. §§ 236(B)(6)(a)(1)-(10).

Neither does any other American state. See [1981] FAM. L. REP. (BNA) 400-51. Louisiana does have a statute providing that neither separation nor divorce shall "in any case deprive the children born of the marriage, of any of the advantages which were secured to them by law, or by the marriage contract of their father and mother . . . ." LA. CIV. CODE ANN. art. 158 (West 1952). It has been applied, however, solely to support rights. See, e.g., Wingo v. Cook, 306 So. 2d 370 (La. Ct. App. 1975) (parents have obligation to support and maintain child even if extraordinary expenses exceed prior support award in divorce); Meyers v. Bohrer, 176 So. 2d 3 (La. Ct. App. 1965) (father has primary duty to support and educate his children from his first marriage regardless of his right to remarry). The statute has not been interpreted to create a right in children to have their parents stay married. See text accompanying notes 327-29 infra.


Examples are everywhere, though this footnote is limited to a few from the realms of entertainment and politics. American movie audiences so appreciated the antics of the owner of a homosexual nightclub and his transvestite lover in La Cage Aux Folles that its producer released a sequel, La Cage Aux Folles II, and the show is now scheduled for a Broadway musical production expected to cost close to $2,500,000. Lawson, Broadway, N.Y. Times, May 8, 1981, § C2, col. 2. The same American audiences applauded Meryl Streep in Kramer v. Kramer, playing a wife who left her child and husband to pursue self-realization. American voters elected Ronald Reagan president despite his divorce and remarriage. President Reagan, in turn, chose William F. Baxter for Assistant Attorney General in charge of the Department of Justice despite Mr. Baxter's lifestyle. The New York Times reported about Mr. Baxter in the Sunday Business Section, apparently without fear that readers would be shocked: "Mr. Baxter has three children from a marriage that ended in divorce. He now lives with Carol Treanor, a statistician and computer expert from Stanford's Center For Advanced Study in the Behavioral Sciences. Mr. Baxter said he avoided remarriage for tax
new attitudes might be summed up as "anything goes if you think it will make you happy." That philosophy is apparent in individual conduct as more Americans live together without marrying—and those who do marry, divorce more freely than ever before. There is nothing wrong with the new attitudes and conduct or with marital regimes that harmonize with them, unless the combination injures children. So far, it has had a dramatic effect on the families in which children live. As parents act out the new philosophy under the permissive modern regimes, the proportion of minor children living in traditional nuclear families declines and the proportions living in one-parent and reconstituted families climb.

reasons: 'It would cost us many thousands of dollars a year.'" Pear, Trust Buster: William F. Baxter, Justice Dept.'s Antitrust Chief, N.Y. Times, Apr. 26, 1981, § 3 (Business Section) 6, at 7, col. 2. Fifteen years ago, homosexuals and runaway wives could not have been the subjects of successful movies or Broadway musicals; American voters would not have elected a divorced, remarried man president; the President would not have appointed a man with Mr. Baxter's lifestyle, nor would a national newspaper have quoted him so candidly.

In 1979, there were an estimated 1,346,000 households shared by two unrelated adults of the opposite sex (referred to here as "unmarried-couple households"), more than twice the estimated 523,000 in 1970... Three-fourths of these households in 1979 consisted of two adults only, and the remaining one-fourth consisted of two adults and one or more children under 14 years old. Most of the growth in the number of unmarried-couple households during the decade has been among those with no children present. Thus, while unmarried-couple households with children present increased by 84 percent, the increase for those with no children rose by 200 percent between 1970 and 1979....

Despite the spectacular nature of the recent increase in the unmarried-couple living arrangement, the 2.7 million "partners" in these 1.3 million households represented a very small portion (3 percent) of all adults in married or unmarried couples who were living together in 1979.


The National Center For Health Statistics reports that the number of divorces granted in the United States nearly tripled in the last 20 years reaching 1.181 million in 1979, the highest national divorce total ever observed; the 1979 divorce rate of 5.4 per 1,000 population was nearly two and one-half times the 1959 rate. 30 NATIONAL CENTER FOR HEALTH STATISTICS, NO. 2 ADVANCE REPORT OF FINAL DIVORCE STATISTICS (Supp. 1981). Divorce is now such a readily available commodity that it is treated like ice cream and lawnmowers. E.g., What You Should Know About Divorce Today, CONSUMER REP., June 1981, at 327.

Nuclear families are those in which children are living with two natural parents both married once.

In one-parent families, only one parent lives with a minor child or children. Most children in one-parent families live with their mother and more than half live with a mother who is either divorced or separated. See SERIES P-20, NO. 349, CURRENT POPULATION REPORTS, supra note 288, at 6 (Table H).

Reconstituted families contain at least one parent who has remarried and at least one child from a previous union. Children in these families are thus either living with two natural parents, one or both of whom has remarried, or with one natural parent and one stepparent. Statistics on such families are hard to find. Reconstituted families are not reflected as a category in current census reports. The 1978 statistics given here are primarily from unpublished Current Population Survey data. See Glick, Children of Divorced Parents in Demographic Perspective, 35 J. OF SOC. ISSUES 170 (1979). Thanks to Paul C. Glick, Senior Demographer at the Census Bureau, and James Weed, Chief of the Marriage and Family Statistics Branch of the
In 1979, the percentage of minor children living in one-parent families was 18.5%, up from 11.9% in 1970.\textsuperscript{293} This means that 11,544,000 children, or almost one out of every five minor children in the United States, lived in one-parent families in 1979.\textsuperscript{294} Experts estimate that if current trends continue, children born in the mid-1970s will have about a 45% chance of living in a one-parent family for at least several months before they reach eighteen,\textsuperscript{295} and that 25% of all minor children will be living in such families by 1990.\textsuperscript{296}

Social scientists have observed the one-parent family for some time. Its rising incidence has generated much advice to parents, most of it optimistic, about how to get themselves and their children through the experience unscathed.\textsuperscript{297} A new study by the Kettering Foundation and the National Association of Elementary School Principals\textsuperscript{298} suggests, however, that such optimism is unfounded. Covering 18,000 children in twenty-six schools in fourteen states, the study concludes that children in one-parent families are “at risk.”\textsuperscript{299} They have more trouble in school than children from two-parent families;\textsuperscript{300} they are lower achievers, more often late,\textsuperscript{301} and more often truant.\textsuperscript{302} They are more likely to be

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Census Bureau for their help in finding the statistics on reconstituted families used in this Article and their assurances (telephone interview, June 25, 1981) that they are the most recent available.

\textsuperscript{293} Id. at 5.

\textsuperscript{294} There were approximately 62,000,000 children under 18 in the United States in 1979.

\textsuperscript{295} U.S. BUREAU OF THE CENSUS, DEPT OF COMMERCE, SERIES P-23, NO. 84, DIVORCE, CHILD CUSTODY, AND CHILD SUPPORT 3 (1979).

For most children in one-parent families, this living arrangement is a temporary one, spanning a period of a few years, usually until their custodial parent remarries, reconciles or marries for the first time. Only a minority of children under 18 are likely to spend a major portion of their childhood in a one-parent family. Nevertheless, to the child living with only one parent for a few years, this period represents a psychologically and socially significant part of his or her life span.

\textsuperscript{296} Glick, supra note 292, at 171 (Table 1).


\textsuperscript{298} One-Parent Families and Their Children: The School's Most Significant Minority, supra note 295, at 32.

\textsuperscript{299} Id. Part of the problem, of course, is income. As the study points out, in these families “there is only one adult—usually the mother—available to earn income.” Id. at 33. These families are also likely to have “less time than two-parent families with the same number of children simply because there is one less adult in the household.” G. MASNICK & M. BANE, THE NATION'S FAMILIES: 1960-1990, at 121 (1980).

\textsuperscript{300} One-Parent Families and Their Children: The School's Most Significant Minority, supra note 295, at 33.

\textsuperscript{301} Id. at 33-34.

\textsuperscript{302} Id.
sent to the office for discipline, more likely to be suspended, and more likely to be expelled. It seems that, despite children's resilience and single parents' efforts, two parents are more successful at child-raising than one.

Due to their parents' remarriages, many children who have lived in one-parent families will also spend part of their childhoods in reconstituted families. The percentage of all minor children living in families with one natural parent and one stepparent rose from 8.6% in 1960 to 10.2% in 1978. Thus, 6,447,012, or one out of every ten children, experienced such living arrangements in that year. Eleven percent of all minor children are expected to live in such reconstituted families by 1990. Adding the children living with two natural parents, one or both of whom are remarried, brings the 1978 figure to 9,228,076, or one out of every seven children, and the combined estimated percentage for the year 1990 to 15%. In sharp contrast, the percentage of minor children living with two natural parents in a first marriage declined from 73.3% in 1960 to 63.1% in 1978. By 1990, it is expected to drop to only about 56% of all minor children in the United States.

Experts have just begun to examine the effects of life in the reconstituted family. But even before their results are in, there are signs

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303 Id. at 34.
304 Id.
305 Id.
306 Id.
307 This is hardly surprising. Childcare is a difficult job. As Jeremy Bentham described it:

The feebleness of infancy demands a continual protection. Everything must be done for an imperfect being, which, as yet, does nothing for itself. The complete development of its physical powers takes many years; that of its intellectual faculties is still slower. At a certain age it has already strength and passions, without experience enough to regulate them. Too sensitive to present impulses, too negligent of the future, such a being must be kept under an authority more immediate than that of the laws . . . .

J. BENTHAM, THEORY OF LEGISLATION 209 (C. Ogden ed. 1931).
308 See supra note 292, at 171 (Table 1).
309 There were approximately 62,000,000 children under 18 in the United States in 1979.
310 Id.
311 Id.
312 Id.
313 Id.
314 Id.
315 Created by divorce and remarriage, and common to millions of Americans in every section of the country and on every rung of the social and economic ladder, the new American extended family has attracted the attention of social scientists nationwide. In the first flurry of research, they have given it a variety of names—conjugal continuation, second-marriage family, stepfamily, blended family, reconstituted family and metafamily. Whatever the label, it challenges some of the most basic notions about family life . . . .
that the reconstituted family is a poor environment for the young. The adults in reconstituted families are fighting legal battles to secure rights of access to the children, and to determine what their names should be and who shall adopt them.\textsuperscript{316} The resulting tensions are bound to disturb the children, who have their own problems,\textsuperscript{317} and to affect the stability of their families. According to one commentator, these families are often beset by jealousies and conflicts of loyalty not found in traditional families. Sometimes, children who resent the experience of divorce either cannot adapt to the new family or try to tear it apart. And many husbands and wives carry into their second marriage the attitudes and behavior that ruptured their first.\textsuperscript{318}

Living in reconstituted families is apparently difficult for adults and children;\textsuperscript{319} such families show a high divorce rate.\textsuperscript{320}

Some would say that child-raising is far too important a task to be entrusted to parents. The Spartans thought so and made it a state function.\textsuperscript{321} In contrast, our society assigns the whole job to parents, protecting their privacy in performing it as a fundamental constitutional right.\textsuperscript{322} The state intrudes to protect children only in cases of extreme parental failure and articulates only minimal expectations about the quality of parental performance. Child support,\textsuperscript{323} compulsory education,\textsuperscript{324} and child abuse\textsuperscript{325} laws embody these expectations and tell par-
ents that the state expects them to support their children, send them to school, and refrain from abusing them or risk state interference in their families. Support, education, and good treatment are important to the welfare of children, but so, apparently, is having both parents complete the child-raising job. Yet current law does not even suggest that society expects parents to stay married long enough to finish the task. Indeed, it allows parents of minor children to divorce just as easily as couples who are childless or whose children are grown. Under current law, the children's welfare plays no part in the court's decision to grant or deny the divorce. It bears only on the question of custody and, in making custody determinations, courts more often than not

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Edu. Law §3212 (McKinney 1981) (imposing a duty on those in a "parental relation" to a child to compel the child's attendance at school).

325 See, e.g., La. Rev. Stat. Ann. § 14:403 (West Supp. 1981) (requiring anyone who suspects child abuse to report it to the state so that protective proceedings may be initiated); N.Y. Penal Law § 260.10 (McKinney 1980) (making it a crime for anyone to endanger the physical, moral, or mental welfare of a child).


327 See note 285 and accompanying text supra.

328 Divorce reformers earlier considered and rejected the idea of making child welfare a factor—but they were working in the sixties, before the dramatic changes in family structure occurred.

As the Archbishop of Canterbury's group explained it:

We need hardly say that the interests of any children of a marriage alleged to have broken down have been much in our minds. It has sometimes been suggested that divorce should not be available for any cause to spouses with children still of school age. We cannot think it just, however, that there should be one law of divorce for those with children and another for those without. If there were, it is by no means inconceivable that, at any rate in some marriages, childbearing might be inhibited by desire for divorce or precipitated by a wish to avoid it. But, that possibility apart, there exists no significant evidence to show which is the worse for children, to live with parents who are at odds with each other, or to be given into the charge of one parent after divorce. We certainly have no reason to believe that it would invariably be to the benefit of children to live with parents who had been refused a divorce on their account.

Putting Asunder: A Divorce Law for Contemporary Society 40 (1966). As Professor Levy's analysis for the Uniform Commissioners on Uniform Marriage and Divorce Legislation explained it:

When the issue is whether to impose an absolute ban [on divorce for couples with minor children] or to take account of the father's present and likely future financial circumstances, there is no basis for differentiating children from wives—it is not sound to deny a divorce to a father with several children simply because his income is marginal. It would make more sense to try to insure that he did not remarry after the divorce—although that course also has obvious risks. The most appropriate course is to design child support enforcement doctrines which are fair, flexible and expeditious.

R. Levy, supra note 205, at 110. The Uniform Marriage and Divorce Act does provide that a divorcing court may set aside a portion of the parents' joint or separate estates in a separate fund "for the support, maintenance, education, and general welfare" of minor, dependent, or incompetent children. Uniform Marriage and Divorce Act § 307(b) (Alternative A).
merely "rubber stamp" the parents' agreement.329 The message the law now conveys to parents is that their right to divorce is unrelated to their children's welfare and that divorce before the children grow up is perfectly acceptable conduct. The only justification for this attitude is the overbroad assumption that living with two unhappy parents is worse for children than the effects of divorce. But the evidence suggests that the children's post-divorce living arrangements, to the extent that they are in one-parent or reconstituted families, may be worse than continued life with two parents in a strained marriage. The law should require at least an individual determination of how a divorce will affect minor children; their welfare should bear directly on their parents' rights to end their marriage.

A. The Marriage For Minor Children

To correct the law's misinformation to parents, I propose the legislative creation of a special marital status: the marriage for minor children. It would be accorded to all couples upon the birth of their first child and would continue until their last child reached eighteen. Its legal incidents would differ from those of other marriages in two ways: the grounds for divorce and the governing marital property rules.

Divorce to terminate a marriage for minor children would be hard to get. In addition to establishing the usual grounds for divorce, couples with minor children would have to establish that continuing the marriage would cause either or both spouses exceptional hardship and would harm their minor children more than the divorce. The more stringent ground would encourage parents to compromise their differences in the interests of their children, yet it would not perpetuate marriages in which parental discord damages the children more than divorce. It would enable the courts to explore the possible effects of the divorce on the children, an inquiry they do not make under current law. Children's interests would become a crucial factor not only in deciding custody, but also in deciding their parents' rights to divorce.

Similarly, marital property rules governing the marriage for minor children would differ from those governing other types of marriage. Like the current laws prescribing divorce grounds, laws imposing economic rules upon married couples make no distinction between marriages with minor children and others. Yet parents of minor children have special needs. Their marriages call for economic incidents that reinforce the idea that they are partners in the joint endeavor of raising their children, and that the continuing efforts of both parents are necessary for optimum performance of the task.

329 At least, the court does not become deeply involved in undisputed cases. See Mnookin & Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950, 954-56 (1979), and sources cited therein.
Therefore, during the children's minority, each spouse should be an equal partner in all the earnings and property of both, whenever and however acquired. All their property would be under their joint control during marriage. Upon the death of one or upon divorce, the property would be divided equally regardless of differences in the spouses' contributions to the marriage. Neither spouse acting alone could defeat the other's partnership rights by transferring property. This partnership between spouses is broader than any now created by the laws of community property states. It also differs in requiring joint management of assets by both spouses. Parents would have equal support obligations for each other and for their children. They could not "contract out" of these rules by agreements between them.

Existing judicial powers to grant alimony and child support to dependent family members would be expanded for marriages with minor children to allow the courts to order continuation of the economic partnership between ex-spouses in the children's interest. A divorcing court could thus delay ultimate property division between parents until all the children reached eighteen. The more difficult divorce standard and the immutable partnership rules would apply during the minority of all children. Thereafter, the couple could divorce as easily as couples without minor children and alter their economic relations by agreement if they chose.

Legislation of this type invites compromise between liberals and conservatives now fighting over legal regulation of the family. Liberals, riding high on their achievements of the past twenty years—no-fault divorce and permissive abortion laws—currently object to any attempts to legislate standards of private morality. Conservatives urge sweeping federal intrusion into private morality in the name of "family." They support the Anti-Abortion Amendment, the Family Protection Act, and the Human Life Bill. The fiasco of Prohibition illustrates

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330 This approach mirrors Alternative A of the Uniform Marriage and Divorce Act. UNIFORM MARRIAGE AND DIVORCE ACT § 307(a).
331 See text accompanying note 214 supra.
332 Compare the language of the statutes in note 23 supra.
333 This is contrary to the current trend. See notes 277-79 supra.
334 For comparison, see UNIFORM MARRIAGE AND DIVORCE ACT § 307(b) (Alternative A), supra note 328. Alimony is, in a sense, a continuing lien on spousal earnings after divorce. Once awarded, however, it is "final" unless modified by court order in light of changed circumstances. This proposal differs in that all earnings of both spouses would continue to be available, if the court so directed, to satisfy partnership claims without limit. Continuing the partnership, like joint custody, involves the ex-spouses in continuing contact. Continuity runs counter to the wisdom underlying the preference for rehabilitative and lump-sum over continuous, periodic alimony. Generally, it is best to separate the spouses as definitively as possible upon divorce.
the folly of too much legislative interference in moral issues. But laws allowing parents to divorce regardless of the welfare of their children are equally foolish. Distinguishing marriages with minor children from others by imposing a tougher divorce standard and different economic consequences in an attempt to make them longer lasting and thus better vehicles for raising children is a sensible middle ground.

Some would argue that a different divorce standard and marital property regime for couples with minor children affect the constitutionally protected, private decisions to procreate and to marry. Married couples might base their decisions to have children on their desire to avoid, or to incur, the stiffer divorce standard and the prescribed marital property rules. Unmarried couples who want to have children or divorced people with minor children might let similar desires affect their decisions to marry. These situations may evoke due process and equal protection.

State legislation prescribing a more stringent divorce standard and an immutable partnership regime for married couples with minor children should withstand constitutional attack. A due process argument should fail, because the proposed legislation places no direct governmental obstacles in the way of choosing to procreate or marry. This immediately distinguishes it from the statutes in Zablocki v. Redhail and Roe v. Wade. At most, the proposed legislation might encourage couples not to marry and have children unless they are prepared to assume the responsibilities, economic and other, associated with bringing them up and might discourage them from divorce or remarriage until their children are grown. This is nothing more than "alternative activity deemed in the public interest." Current laws requiring parents to support their children certainly might encourage couples to assess the economic burdens of parenthood before having children, yet no one would seriously contend that they are unconstitutional. Laws prescribing divorce grounds and making spouses responsible for each other's support might discourage divorce and remarriage, yet these laws seem constitutionally secure. As the Supreme Court said in Harris v. McRae, a free choice protected by due process shields "against unwarranted government interference with freedom of choice," but "does not confer an entitlement

341 410 U.S. 113 (1972).
343 Harris v. McRae, 448 U.S. 297 (1980).
to such funds as may be necessary to realize all the advantages of that freedom," and in Zablocki, "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."

An equal protection challenge to the proposed legislative scheme should also fail. The equal protection clause forbids statutory discrimination through unreasonable, arbitrary classifications. The law has long distinguished between married people with and without minor children. Those with minor children, for example, have the burdens of supporting and educating their children, and they are subject to a greater risk of state intrusion into their family privacy on the children's behalf. On the other hand, they enjoy benefits that other married couples do not receive, such as income tax deductions and draft deferments based on their children's dependency. Consequently, couples with minor children should not be characterized as a suspect class; therefore, strict scrutiny should not apply. Even if they are a suspect class, the state has a longstanding, compelling interest in protecting the welfare of minors; this should be enough to sustain the new divorce standard and proprietary rules. Under the more appropriate rational basis test, a more stringent divorce ground and an immutable equal partnership regime are surely rationally related to the legitimate governmental objective of assuring the future of dependent children. They are as well tailored to their goal as are the laws that now limit divorce to specified grounds and impose support and alimony obligations.

One state has recently recognized that not all married couples should be accorded the same legal treatment. For childless couples with short marriages, little property, and few obligations, California

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344 Id. at 317-18.
345 434 U.S. at 386.
346 E.g., Reed v. Reed, 404 U.S. 71 (1971).
347 See authorities in notes 323-24 supra.
348 See note 326 supra.
349 I.R.C. §§ 151(e), 152.
354 "Short" would mean less than five years. CAL. CIV. CODE §§ 4550(d)-(e) (West Supp. 1981).
355 No real estate, no community property worth more than $10,000, no more than $10,000 of separate property each, excluding encumbrances and automobiles. Id. §§ 4550(e), (g).
356 No more than $3,000 of obligations, excluding those for automobiles. Id. § 4550(f).
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has designed a special form of quick divorce, available so long as wife is not pregnant.\textsuperscript{357} The logical next step would be the application of similar specially tailored legislation to marriages with minor children, to make such marriages better for taking care of the children they produce. The longer these marriages last, the longer both parents will be engaged in child-raising and the greater the likelihood that both will see the task through to completion. If children need both parents in order to grow up right, the law should give parents that message and encourage them to heed it. Children deserve the opportunity to grow up in the best possible environment. A special legal status might provide it more often, and thus, the marriage for minor children deserves a chance.

The new marital regimes have another defect: They prescribe no rules for the increasing number of couples who live together and act as if they were married but who have omitted the formalities. There are two reasons traditionally given for excluding these couples from marital regimes: they are engaged in a meretricious relationship and are therefore undeserving of legal protection;\textsuperscript{358} and they should be allowed the freedom to choose not to marry and thus avoid the legal incidents of marriage.\textsuperscript{359} The first reason is archaic in light of modern conduct.\textsuperscript{360} Courts, if not legislatures, recognize this\textsuperscript{361} and no longer describe these relationships as "meretricious."\textsuperscript{362} The second reason loses force when cohabitants themselves\textsuperscript{363} come into court claiming entitlement to a variety of marital benefits. They seek divorce and accompanying property settlements,\textsuperscript{364} credit advantages,\textsuperscript{365} income tax exemptions for each

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\textsuperscript{357} Id. § 4550(c).
\textsuperscript{358} E.g., Rehak v. Mathis, 239 Ga. 541, 543, 238 S.E.2d 81, 82 (1977).
\textsuperscript{360} See notes 287-89 and accompanying text supra.
\textsuperscript{362} As the New York Court of Appeals stated in Morone:
\begin{quote}
Much of the case law speaks of such a relationship as "meretricious." Defined as "Of or pertaining to a prostitute; having a harlot's traits" (Webster's Third New International Dictionary Unabridged, p. 1413), that word's pejorative sense makes it no longer, if it ever was, descriptive of the relationship under consideration, and we, therefore, decline to use it.
\end{quote}

50 N.Y.2d at 486 n.2, 407 N.E.2d at 440 n.2, 429 N.Y.S.2d at 594 n.2.

\textsuperscript{363} Some, but not all of them, actually ask for divorce. E.g., Hewitt v. Hewitt, 77 Ill. 2d 49, 52, 394 N.E.2d 1204, 1205 (1979); Warren v. Warren, 94 Nev. 309, 310, 579 P.2d 772, 773 (1978) (per curiam). With these cases compare Joan S. v. John S., 427 A.2d 498 (N.H. 1981), in which plaintiff asked the court to decree the relationship of the parties a void marriage and "impose the obligations and restrictions upon the defendant pursuant to the statutory
other as dependents, benefits upon each other’s death, and damages for loss of each other’s consortium. Courts in all but fourteen jurisdictions are now deciding these questions without the benefit of the old doctrine of common law marriage. Under that doctrine, many of these couples would be treated as if they were legally married. No court so far has applied state marital regimes per se to cohabitants but some courts nevertheless grant benefits that resemble those reserved for legal spouses. The “divorce” cases confront the courts most frequently and present the problem in the clearest context.

In some states, unmarried cohabitants may invoke express or implied contract, constructive or resulting trust, or quantum meruit to settle property disputes arising in the wake of dissolving relationships. Instead of the marital regime, they thus have, as one court put it, the “creative application of traditional common-law and equitable principles” to help them. In other states, cohabitants, though not within the marital regimes, can recover on express oral contracts that provide for property rights like those incident to legal marriage. Still other states refuse any relief at all. These decisions have two undesirable laws of the State... with regards [sic] to alimony, child support, property division and injunctions... as may be just and equitable.” Id. at 499. Some allege oral agreements that mirror the legal marriage bargain. E.g., Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979); Morone v. Morone, 50 N.Y.2d 481, 407 N.E.2d 438, 429 N.Y.S.2d 592 (1980).

See Markham v. Colonial Mortgage Serv. Co., 605 F.2d 566 (D.C. Cir. 1979) (discussing cohabitants’ rights to aggregate income on a mortgage application as if they were married).

See Ensminger v. Commissioner, 610 F.2d 189 (4th Cir. 1979).


See note 235 supra.

Common law marriages require a present agreement to be man and wife and mutual and open assumption of the marital relationship. H. CLARK, supra note 4, at 47-48.


In Marvin, the trial court refused relief on the basis of implied contract, but under an equitable remedy theory awarded plaintiff $104,000 for rehabilitation. The California Court of Appeals overturned this award, finding no equitable or legal basis for it. Marvin v. Marvin, 122 Cal. App. 3d 871 (1981). See also Court Reverses $104,000 Award for Ex-Companion of Lee Marvin, N.Y. Times, Aug. 13, 1981, at A12, col. 2.

See Carlson v. Olson, 256 N.W.2d 249, 251 (Minn. 1977).


See Rehak v. Mathis, 239 Ga. 541, 238 S.E.2d 81 (1977); Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979). See also note 379 infra. With these cases compare Joan S. v. John
effects. First, they send cohabitants forum-shopping among states for a sympathetic court, in much the same way married couples search for easier divorce and more favorable marital property rules. Second, within individual states, these decisions produce anomalous results by according different legal incidents to essentially the same objective conduct. This is true in states that give cohabitants relief as well as in those that do not.

In New York, for example, unmarried cohabitants who come to court to dissolve their relationships are entitled to enforce contracts governing their economic relations. Such contracts may be oral and no formalities are required. There are no substantive or procedural limits except the traditional principles of contract law. In contrast, married couples' agreements must satisfy legislative standards. To be valid and enforceable in divorce proceedings they must be written and formally executed, and they are subject to substantive and procedural restrictions. In addition, they must withstand an unspoken judicial bias against contracts between spouses. Two recent New York cases illustrate the result. In Morone v. Morone, an unmarried woman brought an action against the man with whom she had cohabited for twenty years and with whom she had had two children. Her complaint alleged an oral "partnership" agreement with provisions closely resembling the economic incidents of legal marriage. She alleged that she had promised to furnish domestic services while defendant was to be in charge of business transactions; defendant had promised to "support, maintain and provide for plaintiff in accordance with his earning capacity . . . take care of the plaintiff and do right by her." The complaint further alleged that the couple had agreed that net "partnership profits"
would be shared equally. According to the plaintiff, defendant breached the agreement and refused to account to her for “partnership” profits. The defendant moved to dismiss the complaint. The motion was granted by the supreme court, and the appellate division affirmed. The New York Court of Appeals reversed, holding that an express agreement between unmarried cohabitants is enforceable and that the court should allow plaintiff the opportunity to prove the agreement and defendant’s breach.

Less than a year later, the same court decided the same question in Sagan v. Sagan, a case involving a married couple. The couple had a nine year marriage and one child. In this case, the couple had drafted a detailed, hand-written agreement. It provided, among other things, for custody and property division and gave plaintiff more than she probably would have received under the applicable marital regime. When plaintiff sought to enforce the agreement, husband argued that it was intended to be only an “agreement to agree” and that subsequent negotiations between the parties’ attorneys demonstrated that the parties had abandoned it. Husband moved for summary judgment and a dismissal of the complaint. The trial court denied the motion, but husband prevailed on appeal in both the appellate division and the court of appeals. Whether the parties had intended an agreement and whether the agreement had been abandoned were both issues of fact. Nevertheless, the court of appeals, in a memorandum opinion, held as a matter of law that the terms of the agreement and the subsequent negotiations by the parties rendered it incomplete and unenforceable. The court apparently ignored the well-estab-

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384 Id.
385 Id.
390 Id.
391 Id.
392 Before the New York legislature adopted the current Equitable Distribution Act, see note 280 supra, New York courts could not distribute spouses' property in matrimonial actions without regard to legal title. Kahn v. Kahn, 43 N.Y.2d 203, 371 N.E.2d 809, 401 N.Y.S.2d 47 (1977). Thus, Mrs. Sagan at best would have received alimony under N.Y. Dom. Rel. Law § 236(A) (McKinney 1980), probably amounting to no more than one-third of Mr. Sagan's earnings. See note 284 supra on the informal rule limiting alimony awards in New York. The agreement, on the other hand, gave her half his income from salary, and from book, article, record, movie, television, and other royalties and lecture fees.
394 Id.
395 Sagan v. Sagan, 73 A.D.2d 509, 510, 422 N.Y.S.2d 98, 99 (1979). The court held that "the husband was entitled to summary judgment dismissing the complaint."
397 Compare Sagan with Owen v. Owen, 427 A.2d 933 (D.C. App. 1981) (upholding a simi-
lished principles that on a motion to dismiss, plaintiff is entitled to "the benefit of every favorable inference"398 and that summary judgment may not be granted if there is any material issue of fact.399 Defendant himself swore in an affidavit submitted at an earlier stage of the proceedings that there "were serious questions of fact to be litigated in the action."400 The courthouse doors, open to unmarried "Mrs. Morone," were thus closed to married Mrs. Sagan.

The same unjustifiable disparity in treatment between married and unmarried couples engaging in identical conduct appears in states that refuse to give this type of "matrimonial" relief to unmarried cohabitants. In these states, however, married couples have the legal advantage. In Illinois, for example, the Marriage and Dissolution of Marriage Act governs matrimonial actions by married couples.401 Under the Act, they may divorce on fault grounds,402 seek discretionary alimony403 and property division,404 and settle their financial affairs by agreements within prescribed limits.405 Although spouses who believe in good faith that they are legally married come within these rules,406 cohabitants engaged in married conduct do not. Thus, in Hewitt v. Hewitt,407 an unmarried, female plaintiff who had three children with the male defendant and who, for fifteen years, had "lived . . . a most conventional, respectable and ordinary family life,"408 was turned away from court when she sought judicial help in effecting a property division at

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399 N.Y. CIV. PRACT. LAW § 3212(b) (McKinney Supp. 1980). The court's real reasons for its decision may have been completely different from those articulated in its memorandum. It may have been concerned that the action was not framed as a matrimonial action but rather as a contract action, see Sagan v. Sagan, 53 N.Y.2d 635, 420 N.E.2d 974, 438 N.Y.S.2d 782 (1981), that because the agreement lacked the requisite formalities and had not been filed it could not be the basis for a divorce under N.Y. DOM. REL. LAW § 170(6) (McKinney 1977) (living apart for one year pursuant to a separation agreement), see note 282 supra, and that because the agreement lacked the requisite formalities it would not be valid and binding in a divorce proceeding brought after the effective date of the new Equitable Distribution Act, see note 380 supra.
400 Carl Sagan affidavit of Sept. 5, 1978, submitted in opposition to plaintiff's motion for a trial preference and payments of the amount called for by the agreement pending trial. The motion was denied.
402 Id. § 401(2).
403 Id. § 504.
404 Id. § 503.
405 Id. § 502.
406 Id. § 305 (putative spouses).
408 Id. at 54, 394 N.E.2d at 1206 (quoting Hewitt v. Hewitt, 62 Ill. App. 3d 861, 863, 380 N.E.2d 454, 457 (1978)).
the end of the couple's relationship. The Illinois Supreme Court denied plaintiff the opportunity to prove a property agreement and defendant's breach of it because of the Illinois legislature's decision to exclude unmarried cohabitants from the Marriage and Dissolution Act.\(^{409}\)

The New York Court of Appeals expressed no dissatisfaction with the result it reached in the Sagan case, but the Illinois Supreme Court acknowledged that its result in Hewitt might not be entirely equitable.\(^{410}\) It concluded, however, that according legal incidents to "marriage-like relationships" is a legislative rather than a judicial function.\(^{411}\)

B. A Test For Applying Marital Regimes to Unmarried Couples: "Are They Engaged in Married Conduct?"

Legislatures should act on the subject of unmarried cohabitants.\(^{412}\) They should pass statutes directing courts dealing with cohabitants to decide a single question: Was the couple engaged in married conduct? If the answer is "yes," the rules applicable to married couples and their contracts should govern. If the answer is "no," the couple's living arrangement should not be a factor in granting or denying relief.

Legislatures would, of course, need to define "married conduct," but not, one hopes, as they have defined legal marriage. Legislative definitions of legal marriage,\(^{413}\) like judicial definitions of common law marriage,\(^{414}\) make the essence of the status an agreement between the parties. To require a similar agreement to identify "married conduct" would only assure a swearing contest between the "spouses," one testifying to an agreement (naturally not in writing), the other stoutly averring there was none.\(^{415}\) Married conduct should be susceptible to proof by more reliable evidence. Thus, in defining it, legislatures should require essentials other than the agreement of couples. To support a conclusion that a couple has engaged in married conduct, a court should have to make the following findings.

First, the couple must have had a common life together of substantial duration. Perhaps courts could use the median duration of marriage for their own purposes.\(^{409}\) 77 Ill. 2d at 64, 66, 394 N.E.2d at 1210, 1211.

\(^{410}\) Id. at 66, 394 N.E.2d at 1211.

\(^{411}\) Id. at 61, 394 N.E.2d at 1209.

\(^{412}\) Some legislatures have considered the subject. See Hearings of November 28, 29, 1979, Assembly Comm. on the Judiciary, Family Law, Confidential Marriage Certificates, Cohabitation Contracts, Interlocutory Judgment in Marriage Dissolution, No. 769; 7 FAM. L. REP. (BNA) 2278 (1981) (Iowa bill introduced to establish guidelines for enforceable property contracts between unmarried cohabitants).

The National Conference of Commissioners on Uniform State Laws is working on uniformity in marital property rules for married couples only. The January 1, 1981 Draft "Marital Property Act" does not apply to mere cohabitants.

\(^{413}\) Those of Louisiana and New York, set out in note 254 supra, are typical.

\(^{414}\) See note 370 supra.

\(^{415}\) See sources cited in note 373 supra.
riages in that year as a standard. The purpose of this requirement is to distinguish between true married conduct and mere affairs. The couple's children would be some evidence of their common life.

Second, during their common life together, the couple must have exhibited attitudes of mutual obligation, assistance, and support toward each other. The purpose of this requirement is to distinguish between casual living arrangements and those in which the parties have some greater commitment. Testimony of friends, coworkers, landlords, neighbors, doctors, dentists and others who knew the couple could prove the requisite attitude.

Third, during their common life together, the couple must have lived as an economic unit, showing financial interdependence. The purpose of this requirement is to confine the marital regime and its attendant benefits to dependent “family” members, those who actually need protection. Banking and other records could, of course, prove the requisite financial relationship.

To test the proposed definition, consider some hard cases. Mary Ann Evans and George Lewes lived together for twenty-three years, clearly shared a common life, and, according to Evans's biographers, certainly exhibited attitudes of mutual obligation, assistance, and support; they also handled their finances as an economic unit. Lewes remained legally married to another woman throughout his relationship with Evans. Nevertheless, he and Mary Ann were engaged in married conduct under this definition. His legal marriage should not preclude its application, though his prior obligations to his legal wife and children should have, and did in fact, take precedence over those he owed to Evans.

How might the definition apply to other famous, problem couples—Gertrude Stein and Alice B. Toklas, for example? To date,

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416 The median duration in 1979 was 6.8 years. NATIONAL CENTER FOR HEALTH STATISTICS, supra note 289, at 2.

417 An unmarried couple with minor children engaged in married conduct would become subject to the rules of the marriage for minor children.


419 (1817-1878), English philosophical writer and literary critic remembered for his theories on positivism and his liaison with George Eliot. G. Haight, supra note 418.

420 See, e.g., id. at 366-70, 393.

421 See, e.g., id. at 370.

422 See, e.g., id. at 132, 516.

423 Lee Marvin still was married when his relationship with Michelle Triola began. Marvin v. Marvin, 18 Cal. 3d 660, 666, 672-73, 557 P.2d 106, 111, 115, 134 Cal. Rptr. 815, 820, 824 (1976).

424 See, e.g., G. Haight, supra note 418, at 370, 460-61.

425 Expatriate American author Gertrude Stein (1874-1946) and her companion Alice B.
only one court has been willing to "divorce" such same-sex couples and settle their financial affairs in the process. Demand for such relief increases, however, as the stigma attached to such relationships decreases. Thus, inclusion of these couples within the scope of a legislative definition of married conduct seems reasonable. The relationship of Stein and Toklas would clearly qualify as married conduct. Applying the definition to the recently publicized relationship between Billy Jean King and Marilyn Barnett might yield a negative finding. The required common life of substantial duration is missing. Although the relationship allegedly lasted seven years, unlike Lewes, King never separated from her spouse; their shared life continued despite Barnett. Similarly, King and Barnett did not function as an economic unit. Barnett was an employee rather than a dependent family member. Her relationship with King might more appropriately be characterized as a "protracted affair," like that of Madame Viardot and Ivan Turgenev. Turgenev followed Viardot about Europe for forty years; all that time she kept his devotion, her career, and her husband.

Opponents of this proposal inevitably will argue that treating the unmarried as married denigrates marriage. The answer is simple. The damage is done; marriage is no longer an ideal status. Courts, legislatures, and the American public have toppled it. History attests to its fall. It is best to face the historical fact and look to the future. Modern marital regimes should have two goals: to stay out of family morals, except for a few vital issues, and in addressing those few issues, to be sure to convey the right message. The marriage for minor children would restore to marital regimes a vital statement that is now missing—children need both parents to grow up right. The test of married conduct for applying marital regimes to unmarried cohabitants would eliminate

Toklas enjoyed a relationship that was "in the nature of a marriage." J. MELLOW, CHARMED CIRCLE: GERTRUDE STEIN & COMPANY 130 (1974).


Their common life together lasted 40 years; during it, they manifested the requisite attitudes toward each other, and they functioned as an economic unit. Alice ran the household and Gertrude did the writing. J. MELLOW, supra note 425, at 163-64, 397-401. Alice lived on alone until her death at 90. Id. at 469-77.


Id. at col. 3.

The celebrated opera singer Pauline Garcia, see 22 ENCYCLOPAEDIA BRITANNICA 360 (1969).

(1818-1883), the first Russian novelist to be read and admired in Europe, Turgenev wrote Rudin, Fathers and Sons, and On The Eve. 22 ENCYCLOPAEDIA BRITANNICA 360 (1969).
a now dated, discredited statement—marriage is better than cohabita-
tion. Both suggested reforms address the welfare of groups who need
protection: minor children and dependent unmarried "spouses." Both
should be adopted.

CONCLUSION

When they settled in America, the original civil and common law
marital regimes took the same strong stand on the nature of marriage
and the family, but disagreed on the treatment of wives. During more
than two centuries of coexistence, their views mellowed and merged. As
a result, modern marital regimes are neither rigid nor judgmental. But
they omit an important moral message about the welfare of minor chil-
dren and retain an outmoded one on cohabitants. The message on chil-
dren should be added to marital regimes in the form of a new marital
status—the marriage for minor children. The message on cohabitants
should be revised to furnish a new test for including them in marital
regimes—that of married conduct.