
INCENTIVIZING DIVORCE

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Incentives are a powerful thing. They suggest acceptable social and moral conduct, guide our behavior, shape our decision-making process, and often even spur us to action. In the legal sphere, an incentive is a favored tool of the lawmaker, one that he might use in a normative fashion to bring about a certain course of conduct.¹ And even when society fails to act on the incentives created by its laws, the incentives serve a valuable expressive purpose. They convey the lawmakers' desired message and provide aid in shaping societal views of certain legal institutions.²

Perhaps nowhere in the law is this hortatory, expressive bent more apparent than in the family law domain.³ Often, there is no real legal remedy available for the breach of obligations set out in laws regulating the family.⁴ And even when family law rules are enforceable, the possibility of compulsion is often less significant than the normative component of the rule.⁵ Law is used as a symbolic tool in family law.⁶ In the area of child support, for instance, the image of the "deadbeat dad" and the legal consequences associated with such a status are instructive.⁷ Certainly, the law provides a whole host of avenues for the collection of child support, including the garnishment of wages, a

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¹ Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 907 (1996) (describing law as a "norm manager").

² See generally Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000).

³ Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991, 1004.

⁴ Scott, *supra* note 2, at 1929.

⁵ *Id.* at 1929.

⁶ Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225, 237 (2004) (discouraging harmful social marital institutions is a necessary component of a "marriage law that actively reflects and communicates shared norms about marriage").

⁷ Sean E. Brotherson & Jeffrey B. Teichert, *Value of the Law in Shaping Social Perspectives on Marriage*, 3 J.L. & FAM. STUD. 23, 29 (2001).

relaxation of the typical rules of civil procedure to aid a party in collecting arrearages, and suspension of professional and other licenses of the obligor for nonpayment.⁸ But our lawgivers conjure the image of the deadbeat dad to send a message.⁹ The vast majority of child support in arrearages, for which a party may need to use the enforcement mechanisms detailed above, will never be collected.¹⁰ The avenues for collection exist, not solely for the purpose of aiding the collection of child support, but also to bring society to see the moral obligation of the debtor spouse to pay that support.¹¹ The legal rules of child support serve an important purpose, regardless of whether they are ever enforced.¹²

In this norm-shaping sense, the rules of family law are expected to bear a rather hefty burden. Here more than in other legal arenas, law must send a strong message.¹³ Society has an interest in seeing its rules punish reprehensible familial conduct and encourage responsible and beneficial behavior.¹⁴ In the context of the spousal relationship, specifically, divorce is likely to be among the conduct most strongly discouraged by the lawmaker. That this would be so is not surprising when one considers the societal cost of divorce. It has been estimated that a single divorce costs the public roughly \$30,000 and that the annual cost of divorce to the American taxpayers approaches \$30 billion.¹⁵ On the other hand, the economic and other benefits of marriage both on the spouses themselves, and on society at large, have been well-documented for many years.¹⁶

It is somewhat surprising, then, to find that the rules governing married parties' conduct toward each other provide a number of rather strong incentives to spouses to terminate their marital relationship at the earliest moment possible. Legal rules that either favor or disadvantage married persons are not difficult to find. They exist across all areas of

⁸ See generally Jonathan S. Jemison, *Collecting and Enforcing Child Support Orders with the Internal Revenue Service: An Analysis of a Novel Idea*, 20 WOMEN'S RTS. L. REP. 137, 138 (1999) (describing various state and federal schemes to enforce child support obligations).

⁹ Brotherson & Teichert, *supra* note 7, at 29.

¹⁰ Adam Clymer, *Child-Support Collection Net Usually Fails*, N.Y. TIMES, July 17, 1997, at A16.

¹¹ Brotherson & Teichert, *supra* note 7, at 29.

¹² *Id.*

¹³ Weisbrod, *supra* note 3, at 994 (“[W]e look at law because it can and ought to be used to teach specific things.”).

¹⁴ See generally Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111 (1999).

¹⁵ Rutgers University, The National Marriage Project, *The State of Our Unions*, p. 22 (July 2007). This cost estimate is “based on such things as the higher use of food stamps and public housing as well as increased bankruptcies and juvenile delinquency.” *Id.*

¹⁶ *Id.* (noting that married couples “create more economic assets on average” because of a “wealth-generation bonus” and that both divorce and unmarried childbearing “increase child poverty”).

law.¹⁷ Indeed, the United States Government Accountability Office recently identified more than one thousand legal rules which provided for either penalties or subsidies to married persons in the federal government arena alone.¹⁸ Rules which do not serve to benefit married persons, but instead incentivize divorce might be justifiable, or at the very least understandable, when they come about because of a necessary conflict in two vastly different areas of law. Thus, where the rules regarding illegal immigration and family law collide, it is easy to understand that one rule may have the unfortunate, and wholly unintended, effect of incentivizing divorce.¹⁹ Even within the sphere of family regulation, however, legal scholars have recognized perverse divorce incentives. One scholar has noted that the American Law Institute's Principles of the Law of Family Dissolution, in choosing to focus solely on financial aspects of the marital relationship and in the meantime ignoring the spouses' emotional ties, "endorse divorce."²⁰

Even more egregious is the notion that a number of rules of marital property, that area in which one might expect the law to be *most* protective of marriage, actually leave spouses better off divorced. This article focuses on precisely those pushes toward divorce, highlighting three of the most disturbing divorce incentives provided by rules of marital property.

Part I will explore the incentives one spouse living under a community property regime has to seek divorce in order to better her position vis-à-vis creditors of the other spouse. A rule of marital property that allows creditors to seize more of the spouses' property after divorce than was permissible during the marriage pushes spouses toward divorce. Part II focuses on the failure of most states' laws to provide a spouse with a much-needed unilateral method of terminating the marital property regime, yet remaining married. Part III examines a

¹⁷ A great number of provisions of law not detailed here provide spouses with rather substantial incentives to divorce. Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 9 (1990) ("Although divorce typically imposes formidable psychological and economic costs, there are few legal incentives to remain married, or even to consider thoughtfully the decision to end the marriage."). See, e.g., Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. ST. L. REV. 359, 396 (sunset provisions in matrimonial agreements); Douglas W. Allen, *The Effect on Divorce of Legislated Net-Wealth Transfers*, 23 J.L. ECON. & ORG. 580 (2007) (child support guidelines); David A. Isaacson, *Correcting Anomalies in the United States Law of Citizenship by Descent*, 47 ARIZ. L. REV. 313 (2005) (narrow citizenship rule); Marion Crain, "Where Have All the Cowboys Gone?" *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L. J. 1877 (1999) (shift toward equal sharing in breadwinning responsibilities).

¹⁸ SHOSHANA GROSSBARD-SHECHTMAN, *MARRIAGE AND THE ECONOMY* 76 (Shoshana Grossbard-Shechtman ed., Cambridge Univ. Press 2003).

¹⁹ See generally Isaacson, *supra* note 17.

²⁰ Katherine Baird Slibaugh, *Money as Emotion in the Distribution of Wealth at Divorce*, in *RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* 243 (Robin Wilson ed., Cambridge Univ. Press 2006).

rule, not precisely of marital property, but rather of preemption of state marital property rules. Specifically, Congressional legislation governing retirement plans, at least as that legislation has been interpreted by the United States Supreme Court, provides a rather strong divorce incentive in that it precludes the application of state marital property rules allowing a nonparticipant spouse with an interest in a community pension to make a testamentary transfer of her interest upon death.²¹ After exploring each of these divorce incentives in detail, Part IV offers some observations as to why marital property rules that incentivize divorce are so disturbing.

Many existing marital property rules simply send the wrong message about both marriage and the spouses' marital property regime.²² And even if no empirical evidence can be mustered to demonstrate that these incentives actually *cause* divorce,²³ a shift in thinking is desperately needed in this area. If the substantive marital property rules that incentivize divorce are not reversed entirely, then, at a minimum, lawmakers and legal scholars must begin an exploration of whether the consequences of each of these three marital property rules justify their costs. Quite simply, these marital property rules do more harm than good. They make divorce a more attractive option for married couples than continuing their marriage. And worse yet, they send an inept and unrepresentative message about the value of the marital relationship.

I. THE NARROWING OF CREDITOR ACCESS TO COMMUNITY PROPERTY AFTER DIVORCE

Marital property rules, particularly those of community property regimes,²⁴ sometimes provide couples a powerful incentive to divorce to

²¹ 29 U.S.C.A. § 1056(d)(1) (2006); *Boggs v. Boggs*, 520 U.S. 833 (1997).

²² The strong benefits of marriage to both society as a whole and the individual parties to it would lead one to believe that lawmakers would strive to “strengthen the foundation of marriage as a social institution by encouraging commitment to its success.” Brotherson & Teichert, *supra* note 7, at 50.

²³ Of course, there is no empirical evidence which demonstrates that these rules of marital property cause spouses who otherwise would have remained married to act otherwise.

²⁴ Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington have long been community property states. J. Mark Weiss, *Community Property Interests in Separate Property Businesses in Washington*, 40 GONZ. L. REV. 205, 207 (2004) (citing Nathan R. Long, *Community Characterization of the Increased Value of Separately Owned Businesses*, 32 IDAHO L. REV. 731, 759-61, 765 (1996)); see also Angela M. Bradstreet, *Marital Property Law in England and California: A Comparative Study and Critique*, 4 HASTINGS INT'L & COMP. L. REV. 143, 143 (1980). Wisconsin became the last American state to adopt a marital property regime that is considered “community” with its enactment of the Wisconsin Marital Property Act—heavily based on the Uniform Marital Property Act—in 1986. See Howard S. Erlanger & June M. Weisberger, *From Common Law Property to Community Property: Wisconsin's Marital*

improve their position relative to creditors. Specifically, a nondebtor spouse will have substantially more protection from the creditors of the debtor spouse if the marriage is terminated than he would have if the marriage remains intact. This bizarre incentive to divorce results from the existence of marital property rules in some jurisdictions that insulate the nondebtor spouse's property—only after divorce—for debts incurred by the other spouse.

The basic principle of the community property regime as it relates to debt collection is that all, or virtually all, of the community property of married persons is available for creditors of either spouse to seize in order to satisfy a debt incurred by either spouse during marriage.²⁵ There are certainly exceptions. Some states limit the seizeable community property to that within the management and control of the debtor spouse.²⁶ And some states allow seizure of the entirety of the community property only if the debt at issue is one incurred for the benefit of the community.²⁷ Further, some states insulate certain limited pieces of nondebtor property, such as the nondebtor spouse's earnings.²⁸ Still, it can hardly be disputed that the community property regime is exceptionally creditor friendly.²⁹ It makes far more property available to creditors for seizure than does the separate property regime.³⁰ Typically, the community property regime's creditor bent carries forward even beyond divorce and continues to give creditors pervasive

Property Act Four Years Later, 1990 WIS. L. REV. 769, 769-71 (1990).

²⁵ See, e.g., LA. CIV. CODE ANN. art. 2345 (2007); CAL. FAM. CODE § 910(a) (West 2007) (entirety of the community property may be seized for a debt incurred by either spouse during marriage in Louisiana and California). Both states allow even premarital creditors of a spouse to seize the entirety of the spouses' community property, though California generally immunizes the earnings of the nondebtor spouse for premarital debts. LA CIV. CODE ANN. art. 2345 (2007); CAL. FAM. CODE §§ 910(a), 911 (West 2007).

²⁶ These states include Idaho, Nevada, and Texas. See WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, *COMMUNITY PROPERTY IN THE UNITED STATES* 426 (6th ed. 2004); Elizabeth De Armond, *It Takes Two: Remodeling the Management and Control Provisions of Community Property Law*, 30 GONZ. L. REV. 235, 274 (1995). Idaho case law is unclear. Its courts have adopted a managerial approach since the early twentieth century, but have inexplicably, and perhaps even unintentionally, applied a community debt theory in a few recent cases. See Erik Paul Smith, Comment, *The Uncertainty of Community Property for the Tortious Liabilities of One of the Spouses: Where the Law is Uncertain, There is No Law*, 30 IDAHO L. REV. 799, 817-23 (1994).

²⁷ Arizona, New Mexico, Washington, and Wisconsin have adopted the community debt system. See REPPY & SAMUEL, *supra* note 26, at 444; De Armond, *supra* note 26, at 275; McDonald v. Senn, 204 P.2d 990, 998 (N.M. 1949).

²⁸ See CAL. FAM. CODE § 911 (West 2007) (insulating nondebtor spouse's wages from seizure for the prenuptial debt of the other spouse as long as the wages are segregated from other community property).

²⁹ See, e.g., Andrea B. Carroll, *The Superior Position of the Creditor in the Community Property Regime: Has the Community Become a Mere Creditor Collection Device?*, 47 SANTA CLARA L. REV. 1 (2007).

³⁰ *Id.* at 4.

seizure rights.³¹

However, at least two community property states—California and Idaho—deviate from the general community rule on creditor collection after termination of the marriage in a rather disturbing way.³² These rules are anomalous, and problematic, because they allow dissolution of the marriage to narrow the scope of assets available for creditor seizure from the entirety of the community property during the existence of the marriage³³ to merely the portion of the community property awarded to the debtor spouse after dissolution.³⁴ The reduction of property available to creditors for seizure post-dissolution essentially creates an incentive for spouses to divorce for the protection of the nondebtor spouse's assets.

The California and Idaho rules have different sources—one statutory³⁵ and the other jurisprudential³⁶—and the rationale for

³¹ This rule is statutory in two states. LA. CIV. CODE ANN. art. 2357 (2007); WIS. STAT. ANN. § 766.55(2)(c)(2)(2m) (West 2007). In five other community property states, the rule is jurisprudential. *Community Guardian Bank v. Hamlin*, 898 P.2d 1005, 1009 (Ariz. App. Div. 1 1995); *Marine Midland Bank v. Monroe*, 756 P.2d 1193, 1194 (Nev. 1988); *Moucka v. Windham*, 483 F.2d 914, 916-917 (10th Cir. 1973); *Stewart Title Co. v. Huddleston*, 598 S.W.2d 321, 323 (Tex. Civ. App. 1980); *Watters v. Doud*, 631 P.2d 369, 371 (Wash. 1981); *see also* *Mont E. Tanner, Twin Falls Bank & Trust v. Holley: Restricting Creditors' Rights under a Property Settlement Agreement--A Departure that Sets Ohio Apart*, 26 IDAHO L. REV. 595, 600 (1990); *Lamont C. Loo, Contractual Creditor Rights Upon Dissolution of Marriage: Revisiting Twin Falls Bank & Trust v. Holley, Proposal: A Tripartite Analysis*, 30 IDAHO L. REV. 777, 782 (1994).

The rationale behind the post-termination collection rule in most states is essentially that property which could have been seized as community property during marriage should maintain that same status after divorce. *See* Loo, *supra*, at 788. In most cases, this policy has an equitable justification. When a creditor contracts with a married person, he forms expectations based upon the asset base of the entire community. To allow a spouse to frustrate those creditor expectations by divorce would be inequitable to the creditor. No such equitable argument based on creditor expectations exists in jurisdictions that allow seizure of the spouses' community property for the premarital debt of one of the spouses, however. *See* Carroll, *supra* note 29, at 43-46.

³² While California and Idaho are the only two states that allow virtually no seizure of former community property in the hands of the nondebtor spouse after divorce, other states restrict post-termination collection from the nondebtor spouse. For example, in Washington and Wisconsin, while a creditor can seize former community property in the hands of either spouse, that access does not extend to any equity in the asset that has accrued after termination of the marriage. *Watters v. Doud* 631 P.2d 369, 371 (Wash. 1981); WIS. STAT. ANN. § 766.55(2)(c)(2)(2m) (West 2007) ("Marital property assigned to each spouse under [the dissolution] decree is available for the satisfaction of such an obligation to the extent of the value of the marital property at the date of the decree."). Furthermore, in Louisiana, a spouse may, by written act, assume responsibility for one-half of each community obligation incurred by the other spouse. LA. CIV. CODE ANN. art. 2357 (2007). Such an assumption allows the assuming spouse to dispose of former community property without incurring further liability for obligations incurred by the other spouse. *Id.*

³³ Loo, *supra* note 31, at 780 (divorce does not affect a creditor's right to seize property post-termination, but merely the quantity of the property accessible to the creditor).

³⁴ CAL. FAM. CODE § 751 (West 2007) ("The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing, and equal interests."); IDAHO CODE § 32-712(1)(a) (West 2007) (providing for a "substantially equal division in value" unless there are "compelling reasons" to otherwise allocate property).

³⁵ CAL. FAM. CODE § 916(a)(2) (West 2007).

narrowing the scope of creditor seizure powers after dissolution is slightly different in each state. At least one important common thread does exist, however. Neither state considered, at the time its rule was enacted or even since, what effect the rule might have in the way of incentivizing divorce. And neither state has taken any step to reduce the divorce incentives caused by the rules, or even to study the matter in sufficient depth to come to the conclusion that the rules are well-justified despite the divorce incentives they provide.

A. *California's Rule*

Family Code section 916, which became effective on January 1, 1985,³⁷ is the source of the rule limiting post-dissolution creditor collection efforts in California. That section provides:

The separate property owned by a married person at the time of the division and the property received by the person in the division is not liable for a debt incurred by the person's spouse before or during marriage, and the person is not personally liable for the debt, unless the debt was assigned for payment by the person in the division of the property. Nothing in this paragraph affects the liability of property for the satisfaction of a lien on the property.³⁸

The rule is a significant one because it is distinct from the California rule of creditor access to the community property of spouses in an intact marriage.³⁹ Creditors seeking satisfaction of debts incurred "before or during marriage" may freely seize the California spouses' community property, regardless of which spouse incurred the debt and regardless of the rights of the spouses to manage the property subject to seizure.⁴⁰ Perhaps even more importantly, section 916 represents a

³⁶ *Twin Falls Bank & Trust Co. v. Holley*, 723 P.2d 893 (1986).

³⁷ When the rule described here became effective in 1985, it was California Civil Code section 5120.160. It was moved to the Family Code in 1994, though the change was not substantive. Law Revision Commission Comments, CAL. FAM. CODE § 916 (West 2007).

³⁸ CAL. FAM. CODE § 916(a)(2) (West 2007). The community property that passes to the former spouse is not immunized when a lien has been placed on the former community property. *Id.* Even a lien from a judicial mortgage caused merely by recordation of a judgment before a division of property has occurred would subject the nondebtor spouse to the rights of the creditor under the lien. WILLIAM BASSETT, CALIFORNIA COMMUNITY PROPERTY LAW § 9:48 (West 2007). *See also* *Lezine v. Sec. Pac. Fin.*, 925 P.2d 1002, 1006-1007 (Cal. 1996).

³⁹ *Compare* CAL. FAM. CODE § 916(a)(2) (West 2007) with CAL. FAM. CODE § 910(a) (West 2007). *See also* BASSETT, *supra* note 38 ("Thus, the principles of liability of community property during marriage are not applicable after division of the property upon dissolution.").

⁴⁰ CAL. FAM. CODE § 910(a) (West 2007). This statute expressly defines "during marriage" to exclude periods of physical separation that precede a legal separation or judgment of divorce. *Id.* at § 910(b); *see also* BASSETT, *supra* note 38 ("during marriage" lasts until separation, not final judgment"); S. Brett Sutton & Lee A. Miller, *Civil Code Section 5120.110(c): California's New Approach to Postseparation Obligations*, 23 PAC. L. J. 107 (1991) (describing the precursor section to California Family Code article 910(b)). *But see supra* note 112 (restriction on creditor

change from prior California jurisprudence,⁴¹ which had rather uniformly held that the entirety of the former community property may be seized by creditors even after divorce.⁴²

The United States Court of Appeals for the Ninth Circuit had occasion to interpret the provisions of section 916 in a bankruptcy case rather quickly after its passage. In the case of *In re Chenich*, Mr. and Mrs. Chenich were physically separated, but not yet divorced, when Mr. Chenich was involved in a car accident.⁴³ Shortly after Mr. and Mrs. Chenich's divorce became final, the victim of the accident received a judgment against Mr. Chenich in the amount of \$1.7 million.⁴⁴ A number of Mr. Chenich's post-divorce assets were seized in satisfaction of the debt, but those assets were not sufficient to fully satisfy the judgment, and Mr. Chenich filed a personal bankruptcy petition one year after he and Mrs. Chenich divorced.⁴⁵ Mr. Chenich died before the debt was fully satisfied.⁴⁶ The trustee in bankruptcy then sued Mrs. Chenich, arguing that she was required to relinquish the property she received in the community property settlement, either because it was seizable for Mr. Chenich's debt or because it was transferred to her fraudulently.⁴⁷ Thus, the court was required to confront the scope of the

access for prenuptial debts).

⁴¹ BASSETT, *supra* note 38; *see also* Law Revision Commission Comments, CAL. FAM. CODE § 916 (West 2007).

⁴² Bank of America Nat. Trust & Savings Assn. v. Mantz, 49 P.2d 279 (1935) (judgment creditor could seize former community property in the hands of a nondebtor spouse); *see also* Head v. Crawford, 202 Cal. Rptr. 534, 538 (Cal. Ct. App. 1984); Gould v. Fuller, 57 Cal. Rptr. 23 (Cal. Ct. App. 1967); Greene v. Wilson, 25 Cal. Rptr. 630, 633 (Cal. Dist. Ct. App. 1962); Harley v. Whitmore, 51 Cal. Rptr. 468, 471 (Cal. Dist. Ct. App. 1966); Lezine v. Security Pacific Fin. Serv., Inc., 44 Cal. Rptr. 2d 116, 122 (Cal. Ct. App. 1995), *aff'd*, 925 P.2d 1002 (Cal. 1996); M.P. Allen General Contractors, Inc. v. Kevin, 2002 WL 265060 at *2 (Cal. Ct. App. 2002); *Liability of Marital Property for Debts*, 17 Cal. L. Revision Comm'n Reports 1, 22 (1984).

⁴³ 87 B.R. 101, 103 (BAP 9th Cir. 1988).

⁴⁴ *Id.* *See also* *In re Braendle*, 46 Cal. App. 4th 1037 (Cal. App. 2d Dist. 1996). In *Braendle*, the husband was awarded community stock at the dissolution of marriage and was ordered to pay his former wife an equalizing payment, which the court ruled was to be secured by the stock. *Id.* at 1040. Husband was also allocated a \$58,000 debt to American Overseas (the husband's airfreight company, the stock of which he was allocated at partition). *Id.* The issue presented in the case was whether the former wife or American Overseas, both creditors of husband, had a priority interest in the stock. *Id.* at 1041. The court noted that the broad rule of creditor access to community property is modified when the parties divorce and California Family Code § 916 becomes applicable. *Id.* at 1042 (quoting the California Law Revision Commission's comments on intent of the provision (*see infra*, note 59)). Because the debt here was not assigned to the wife, the court held that § 916 prevents the seizure of her former community property for its satisfaction. *Id.* American Overseas could seize the stock in husband-debtor's hands, but wife had priority as a secured creditor. *Id.* at 1045.

⁴⁵ *In re Chenich*, 87 B.R. at 103.

⁴⁶ *Id.*

⁴⁷ *Id.* Under the applicable provisions of the Bankruptcy Code, the trustee could avoid the transfer of property by Mr. Chenich if the transfer could have been avoided under California law. *Id.* at 104.

liability of a nondebtor spouse's former community property.⁴⁸

The court noted that California law changed radically in 1985 to insulate the property a nondebtor spouse receives in divorce.⁴⁹ The change from full accessibility of former community property under the pre-1985 law was necessary, according to the court, because of serious tracing and valuation problems that existed under the old law.⁵⁰ Thus, relying on section 916, the court found the former community property Mrs. Chenich received in divorce free from seizure for the debts Mr. Chenich incurred during their marriage.⁵¹

California has given rather broad application to the policies effectuated by section 916. In addition to *In re Chenich*, the statute has been applied in a number of cases since its passage to restrict creditor access to both the nondebtor spouse's former community and separate property.⁵² And California courts have even held that the statute applies to restrict a creditor's collection efforts if the debt at issue was incurred before the section's 1985 effective date, so long as a collection attempt was made after it came into effect.⁵³

The rule carries such an obvious and negative suggestion to

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *See, infra*, text accompanying notes 54-60.

⁵¹ *In re Chenich*, 87 B.R. at 104.

⁵² *See, e.g.*, *M.P. Allen General Contractors, Inc. v. Kervin*, 2002 WL 265060, at *2 (Cal. Ct. App. 2002); *Stewart v. Edmunds*, 2002 WL 192911, at *2 (Cal. Ct. App. 2002). *See generally* *Gagan v. Gouyd*, 86 Cal. Rptr. 2d 733 (Cal. Ct. App. 1999), *disapproved of on other grounds by Mejia v. Reed*, 74 P.3d 166, 169 (Cal. 2003); *In re Marriage of Braendle*, 54 Cal. Rptr. 2d 397 (Cal. Ct. App. 1996); *Lezine v. Security Pacific Fin. Serv., Inc.*, 925 P.2d 1002 (Cal. 1996).

⁵³ CAL. FAM. CODE § 930 (West 2007) ("Except as otherwise provided by statute, this part governs the liability of separate property and property in the community estate and the personal liability of a married person for a debt enforced on or after January 1, 1985, regardless of whether the debt was incurred before, on, or after that date."); *see also* *American Olean Tile Co. v. Schultze*, 169 Cal. App. 3d 359 (Cal. Ct. App. 1985) (wife's former community property not seizable for satisfaction of business-related promissory note signed by husband while spouses were separated at the time the note was signed and husband was allocated the business upon divorce). In *American Olean Tile*, the husband executed a promissory note the month before the spouses' marital property settlement was incorporated into a judgment of divorce. *Id.* at 362. The court dispensed with the fact that California Civil Code sections 5120.160 and 5120.320 (now California Family Code sections 916 and 930) were meant to apply only after divorce by holding that under California Civil Code section 5118 (now California Family Code section 771), both the husband's income and obligations incurred in the operation of a separate property business were not community assets or liabilities. *Id.* at 364. Under the California jurisprudence, the execution of the marital settlement agreement, which was executed before the promissory note, transmuted the community property business into the separate property of the husband. *Id.* Furthermore, once the transmutation occurred, any creditor seeking to enforce a business debt incurred thereafter was restricted to enforcement from the separate property of the debtor spouse, provided that the agreement was not entered into to defraud the creditor and the creditor was not misled as to the nature of any assets that the creditor relies upon. *Id.* The court upheld the retroactivity of sections 5120.160 and 5120.320 (now California Family Code sections 916 and 930, respectively), given that equitable distribution of marital property is a significant state interest. *Id.* at 367.

spouses about how to best avoid their creditors that it is somewhat surprising that the California legislative history does not reveal a single discussion of the perverse incentives it creates. The California legislature, in studying its pre-1985 rule of full community property liability after divorce, viewed the scheme as one rife with both pragmatic and theoretical problems.⁵⁴ Practically, the rule was a difficult one because of the tracing issues it necessarily raised. Questions arose, for instance, as to whether increases in the value of former community property should be seizable, and whether liability should follow former community property if it changed in form after termination.⁵⁵ Theoretically, the California legislature was troubled by the notion that a nondebtor could be held liable for another's debt after divorce, when the very purpose of allocation of debts upon divorce is to designate a particular person from whom the creditor can satisfy his claim—typically, his debtor.⁵⁶ After much consideration, the legislature determined that, after a marriage has terminated, it is typically “unwise to continue the liability of spouses for community debts incurred by former spouses.”⁵⁷ Thus, the rule was changed to hold only the former community property in the hands of the spouse who is allocated the debt in a community property partition to be seizable by creditors.⁵⁸ The legislature's intent was that “in allocating the debts to the parties, the court in the dissolution proceeding should take into account the rights of creditors so there will be available sufficient property to satisfy the debt by the person to whom the debt is assigned, provided the net division is equal.”⁵⁹ The section effectively does exactly what the California legislature intended; it immunizes “the nondebtor spouse from liability as to former community property awarded to him . . . on dissolution.”⁶⁰

B. *Idaho's Rule*

Idaho's rule is far less clear than California's, largely because the rule is not statutory. Rather, the Idaho post-dissolution seizure rule is one that comes from the state's jurisprudence, which, on this point, is tortured at best.

The first Idaho case to set out the rule that creditor collection attempts are limited to the debtor spouse's interest in the former community property after divorce was *Twin Falls Bank & Trust Co. v.*

⁵⁴ See Comm'n Reports, *supra* note 42, at 23.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Dawes v. Rich, 60 Cal. App. 4th 24, 30 (Cal. Ct. App. 1997).

⁵⁸ CAL. FAM. CODE § 916 (West 2007).

⁵⁹ See Comm'n Reports, *supra* note 42, at 23 – 24.

⁶⁰ BASSETT, *supra* note 38.

Holley.⁶¹ In that case, Mr. Holley signed a \$125,000 promissory note for a loan related to his construction business while he was physically separated, but not yet divorced, from his wife.⁶² The note became due after the spouses were officially divorced, but rather than requiring Mr. Holley to pay the note when it became due, the creditor, Twin Falls Bank & Trust, executed an extension agreement with Mr. Holley which gave him almost an additional two months to pay.⁶³ Mr. Holley failed to repay the loan when the extended due date passed and thereafter filed for bankruptcy.⁶⁴ After collection efforts against him proved fruitless, Twin Falls sued Mrs. Holley, seeking to seize her former community property to satisfy the outstanding balance on the note.⁶⁵ Mrs. Holley argued that Twin Falls was required to limit itself to the property held by Mr. Holley for satisfaction of a debt it contracted solely with him.⁶⁶

Before turning to the resolution of Twin Falls' claim against Mrs. Holley, the Idaho Supreme Court first articulated the general rules that apply in Idaho when creditors try to collect from a spouse living under a community property regime. The court noted that creditors contract with members of the marital community individually, because the community itself is not a legal entity.⁶⁷ Therefore, the property available to creditors for seizure depends largely upon whether they contract with one or both of the spouses.⁶⁸ If the creditor contracts with only one of the spouses, only that spouse's separate property is seizable for the debt; the nondebtor spouse's separate property remains free from liability.⁶⁹ However, the entirety of the community property is available for seizure regardless of whether one or both spouses contracts the debt.⁷⁰ In essence, then, "the community property system merely makes

⁶¹ 723 P.2d 893 (1986).

⁶² *Id.* at 895.

⁶³ *Id.* at 895.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 896 ("The marital community is not a legal entity such as a business partnership or corporation.").

⁶⁸ *Id.* Whether a creditor contracts with one spouse or both spouses jointly affects only the availability of separate property of either spouse to satisfy the debt, since a creditor's seizure of community property is not dependent upon both spouses incurring the debt. *See supra* text accompanying notes 25-30.

⁶⁹ This rule is statutory in origin. Idaho Code § 32-912 (2008) provides:

Either the husband or the wife shall have the right to manage and control the community property, and either may bind the community property by contract . . . and any community obligation incurred by either the husband or the wife without the consent in writing of the other shall not obligate the separate property of the spouse who did not so consent. . . .

But see Loo, *supra* note 31, at 783, 785-86 (criticizing "community obligation" language of the statute as erroneously suggesting that Idaho is a community debt rather than a managerial system state).

⁷⁰ *Holley*, 723 P.2d at 895-96.

additional resources [beyond what would be available to a creditor in a separate property jurisdiction] (community property) available to a creditor from which to seek satisfaction of an unpaid debt.”⁷¹

The court viewed the creditor’s position in this case as altered, however, when Mr. and Mrs. Holley divorced. The precise language of the opinion here is important, as it seems to expand upon prior Idaho jurisprudence in a way that has significant implications for the rules of creditor collection in Idaho. In articulating a rule of creditor access to property after divorce, the court stated:

Absent allegations of . . . contractual liability, a creditor may not, with one exception, proceed against community assets distributed to [a nondebtor spouse] pursuant to a divorce decree. The sole exception to this rule was set forth in our case of *Spokane Merchants’ Ass’n v. Olmstead*.⁷² In that case, we held that where, pursuant to divorce proceedings, one member of the marital community is responsible for a community obligation but is not awarded sufficient community assets to satisfy such a debt, a creditor may properly seek satisfaction for the debt from community property distributed to the other spouse. Essentially, the holding of *Spokane Merchants’ Ass’n v. Olmstead*, *supra*, is that members of the marital community may not utilize divorce proceedings to perpetrate a fraud on creditors of the community.⁷³

Finding no evidence of a fraudulent transfer or insufficiency of assets at the time of the transfer, the court dismissed Twin Falls’ suit against Mrs. Holley.⁷⁴

The *Holley* court’s basic articulation of the result in a prior Idaho

⁷¹ *Id.* at 896.

⁷² 327 P.2d 385 (1958).

⁷³ *Holley*, 723 P.2d at 897. The court’s language is interesting, as it implies that a divorce settlement transferring insufficient assets to a debtor spouse is necessarily one that perpetrates a “fraud” on creditors. Asset insufficiency and fraud are certainly distinct concepts, and the language appears somewhat erroneous. However, in the fraudulent transfer context, these concepts are often intermingled. It is typically asset insufficiency that amounts to the only outward proof that a “fraud” occurred. See Amanda Barkey, Note, *The Application of Constructive Fraud to Divorce Property Settlements: What’s Fraud Got to do With it?*, 52 WAYNE L. REV. 221, 226 (2006) (describing the development of “constructive fraud” in marital property transfers). Given the difficulty of proving the presence of actual fraud upon a creditor, the Uniform Fraudulent Transfer Act incorporates constructive fraud, which exists when: 1) a transfer was made by the debtor; 2) for less than reasonably equivalent value; and 3) the debtor was insolvent at the time of transfer, or was made insolvent by the transfer. *Id.*

Although not mentioned in *Spokane Merchants’ Ass’n*, its rule does not apply to community realty subject to an encumbrance. Under Idaho Code section 32-912, both spouses must sign and acknowledge an instrument of encumbrance in order to properly encumber community realty. IDAHO CODE § 32-912 (West 2007); see also *Lowry v. Ireland Bank*, 779 P.2d 22, 25 (Ct. App. Idaho 1989).

⁷⁴ *Holley*, 723 P.2d at 898. The court did not reach the issue of whether the “extension agreement” the husband entered into after divorce bound the wife because the bank did not offer any evidence indicating that husband was awarded insufficient assets from which to satisfy the judgment. *Id.* at 896.

case, *Spokane Merchants' Ass'n*,⁷⁵ is correct. The *Spokane Merchants'* court did allow a creditor to reach the former community property of a nondebtor wife—specifically, land conveyed to her in a divorce settlement—after the marriage terminated in divorce.⁷⁶ But the context in which the creditor's right to seize that property was granted is important. The court in *Spokane Merchants'* noted that the question there was whether property awarded to a nondebtor spouse after a divorce and settlement agreement is “subject to the payment of community debts incurred prior to such settlement and decree.”⁷⁷ In finding that the creditor could seize the land wife held by virtue of the divorce decree, the *Spokane Merchants'* court relied heavily on the fact that the assets the debtor-husband took in divorce were insufficient to pay the community debts and cited Idaho's version of the fraudulent transfer laws.⁷⁸ Specifically, the court noted that transfers, including those between husband and wife, cannot be effective under Idaho law if they are perfected “with intent to delay or defraud any creditor.”⁷⁹ The *Holley* court was correct, then, in noting that *Spokane Merchants'* prevents spouses from divorcing “to perpetrate a fraud on creditors of the community.”⁸⁰

The problem is that *Holley* sets out a “general rule” of post-termination creditor collection that *Spokane Merchants'* does not. *Spokane Merchants'* does not clearly detail a general rule preventing creditors from seizing the former community property of the nondebtor spouse. The court there simply held that a divorce and attendant settlement agreement does not place the property awarded to the nondebtor out of the hands of the creditor in cases of fraudulent transfer, or debtor retention of assets amounting to a zero value.⁸¹ In other

⁷⁵ 327 P.2d 385 (Idaho 1958).

⁷⁶ *Id.* at 389.

⁷⁷ *Id.* at 388.

⁷⁸ *Id.*

⁷⁹ *Spokane Merchants'*, 327 P.2d at 388. Under IDAHO CODE § 55-906 (West 2007) (voiding any transfer of property with intent to delay or defraud any creditor), the burden of proof rests on the party alleging the fraud. *See generally* Kester v. Adams, 85 F.2d 646 (9th Cir. 1936). *But see* Chester B. Brown Co. v. Goff, 403 P.2d 855 (1965) (although the burden of establishing fraud is on the party alleging the fraud, it shifts to those seeking to uphold the transaction when numerous badges of fraud exist).

⁸⁰ *Holley*, 723 P.2d at 897.

⁸¹ *Id.*; *see also* Tanner, *supra* note 31, at 595-96 (unclear in *Spokane Merchants'* whether facts evidencing a fraudulent conveyance were a “necessary prerequisite for the creditor to pursue the former community property” in the hands of the nondebtor spouse).

As authority for the proposition that a transfer between spouses can be voided if it defrauds creditors, the *Spokane Merchants'* court relied on *Bank of Orofino v. Wellman*, 143 P. 1169 (1914). In *Bank of Orofino*, creditors of Mr. Wellman attached and levied a judgment upon the separate property house and land of Mrs. Wellman (in which the spouses lived). *Id.* at 1169. Mrs. Wellman argued that the attachment was a cloud on her title; her husband argued that improvements made to the property out of community funds were also her separate property, as the improvements were a gift to his wife. *Id.* at 1171. The court found that the transfer was not

words, *Spokane Merchants'* could be read to *retain* the creditor's right to seize the entirety of the former community property for the unsatisfied debt of one spouse in *all* cases, with an even stronger rationale for doing so in cases involving fraudulent transfers or insufficient retention of assets by the debtor.⁸² A number of community property states' rules provide for just such a solution.⁸³

The interesting language in *Holley*, then, is that portion of the opinion in which the court states that "[a]bsent allegations of . . . contractual liability, a creditor may not, with one exception, proceed against community assets distributed to [a nondebtor spouse] pursuant to a divorce decree."⁸⁴ This is the central language of the *Holley* opinion. It is the language that is important to the resolution of the controversy between Twin Falls Bank and Mrs. Holley, since the facts of that case apparently did not raise the issue of insufficiency of assets or fraudulent transfer. And this general principle that a creditor's post-divorce access to former community property is limited to that in the hands of the debtor spouse absent special circumstances is what subsequent commentators seem to agree that the *Holley* decision stands for.⁸⁵

What is surprising about the court's resolution of this question is that the rule the court sets out has no prior basis in Idaho law. The court cites no authority for the rule it applies, save the possible exception of *Spokane Merchants'*. But earlier Idaho cases, including *Spokane Merchants'*, simply don't set out a rule of creditor access to the nondebtor's portion of the former community property absent allegations of fraudulent transfer or transferor asset insufficiency.⁸⁶ To resolve the dispute presented in the *Holley* case, it may have been necessary for the court to issue a legal ruling on a matter of first impression—the scope of creditor access to former community property absent an alleged fraudulent transfer. What is disturbing, however, is that the court fails to expressly, or even impliedly, recognize what a significant step the creation of this rule amounts to, particularly since it

intended to defraud the Bank, since at the time the gift was made, the husband did not have any indebtedness to existing creditors. *Id.* Thus, husband's creditors had no right to seize wife's separate property in satisfaction of husband's debt. *Id.* at 1172. *Bank of Orofino* stands for the proposition that a creditor cannot reach the *separate* property of the nondebtor spouse absent a fraudulent transfer. It does little to resolve the question as to whether former community property in the hands of the nondebtor spouse can be seized absent a fraudulent transfer.

⁸² Tanner, *supra* note 31, at 604 (arguing that *Twin Falls* failed to properly distinguish *Spokane Merchants'* as an insolvency case, and therefore erroneously relied on it as authority).

⁸³ See *supra* text accompanying notes 26-31; see also Tanner, *supra* note 31, at 601.

⁸⁴ *Holley*, 723 P.2d at 897.

⁸⁵ One commentator, for instance, remarked that "the court has disregarded the general rule in other community property states and has articulated new precedent in Idaho." Tanner, *supra* note 31, at 608.

⁸⁶ *Spokane Merchants'*, 327 P.2d 385; see also *Bank of Orofino*, 143 P. 1169.

deviates from the rule applied in a number of other community property jurisdictions.⁸⁷

It is perhaps particularly disturbing that this important, and anomalous, Idaho rule of reduced creditor access after divorce is set out against the peculiar *Holley* backdrop.⁸⁸ It seems to be another application of the now axiomatic view among lawyers that “bad facts make bad law.”⁸⁹ The *Holley* court sets out a rule limiting access to former community property for all creditors of Idaho spouses in the context of a case brought by a creditor which had a number of opportunities to collect from and perfect a security interest in the debtor’s property and failed to do so.⁹⁰ Moreover, the creditor in *Holley* extended the debtor’s repayment date, and even signed a new note with him to represent the new agreement after the marital relationship had terminated,⁹¹ raising questions of whether the extension makes it appropriate to even consider the nondebtor spouse’s liability at all.⁹² In short, there are plenty of reasons a court might have denied Twin Falls recovery against Ms. Holley, not the least of which was Twin Falls’ inaction and neglect. That the *Holley* case has created the Idaho precedent reducing all creditors’ access to former community property post-dissolution, even where those creditors are diligent, is troubling. The novel factual context in which the *Holley* rule was espoused should mitigate any scholarly reticence to revisit the rule—either legislatively or jurisprudentially.⁹³

C. A Rule Worth Its Negative Message?

Even setting aside the strange *Holley* background, scholars have debated the propriety of rules, such as those set out in California and Idaho, which limit creditor access to former community property upon

⁸⁷ See *supra* notes 26-31 and accompanying text.

⁸⁸ In *Holley*, the Bank had ample opportunity to satisfy its debt from the assets of Mr. Holley; however, the Bank chose to renegotiate with Mr. Holley, based solely on his post-termination status and assets. *Holley*, 723 P.2d at 893, 897. When the Bank lost its interest in his separate property to Mr. Holley’s bankruptcy trustee, it waited another two years before attempting to collect the debt from Ms. Holley. Tanner, *supra* note 31, at 608.

⁸⁹ See *Doggett v. United States*, 505 U.S. 647, 659 (1992) (Thomas, J., dissenting); *In re Sole*, 233 B.R. 347, 349 (E.D. Va. 1998); *Abcon Assoc., Inc. v. United States*, 49 Fed. Cl. 678, 690 (2001).

⁹⁰ *Holley*, 723 P.2d at 897.

⁹¹ *Id.* at 895.

⁹² *Id.*

⁹³ Even though the *Holley* decision has been a part of the Idaho jurisprudence for more than twenty years, there should not be a problem with long reliance on it. Perhaps because the court’s meaning is viewed as unclear and its opinion has been so heavily debated, few subsequent courts have relied on it; and most for minor propositions not germane to the issue at hand here. See, e.g., Tanner, *supra* note 31; Loo, *supra* note 31.

divorce.⁹⁴ Some have argued that divorce should not effect a reduction of the property available to creditors, as they are not parties to the action.⁹⁵ Due Process and other constitutional concerns are implicated when divorce prejudices non-party creditors.⁹⁶ Some further argue that the necessity of a divorce judgment that is definitive and finally settles claims must trump a creditor's ability to continue pursuing the former community property of a nondebtor spouse, perhaps even years after judgment of divorce is rendered, unless that spouse was allocated the debt in the judgment of divorce. Absent some cutoff of liability, the allocation of debts by the divorce court is virtually meaningless.⁹⁷

On the other hand, narrow rules of post-termination creditor access such as those applied in California and Idaho are occasionally lauded as just for the nondebtor spouse, typically with an admonition that "the purposes of community property law are not solely to improve a creditor's position, but are intended rather to provide a fair and balanced interest in the protection of creditors and of the nondebtor spouse."⁹⁸ Subjecting a nondebtor to the perpetual fear of seizure for a debt she did

⁹⁴ See, e.g., Tanner, *supra* note 31; Loo, *supra* note 31; REPPY & SAMUEL, *supra* note 26, at 447.

⁹⁵ Tanner, *supra* note 31, at 600 (quoting *Hanson v. Hanson*, 350 P.2d 859 (1960)); see also *Cnty. Guardian Bank v. Hamlin*, 898 P.2d 1005, 1009 (Ariz. Ct. App. 1995); *Donnell v. Donnell*, 567 So. 2d 1143 (La. Ct. App. 1990); *Broadway Drug Store of Galveston, Inc. v. Trowbridge*, 435 S.W.2d 268, 270 (Tex. Civ. App. 1968).

⁹⁶ See Tanner, *supra* note 31, at 604 (1990) (noting that creditors' rights advocates may find the rule "overburdensome and [] an unconstitutional restraint on creditors' rights"). *But see* *Arneson v. Arneson*, 227 P.2d 1016, 1017 (Wash. 1951) ("[T]here is no due process of law in a divorce action as to the rights of creditors of the spouses. The judgment can neither conclusively [sic] determine their rights, nor be made available on their behalf as a basis for any of the provisional remedies.").

In *In re Chenich*, 87 B.R. 101, 106 (BAP 9th Cir. 1988), the bankruptcy trustee argued that California's enactment of what is now section 916 retroactively abolished his right to enforce a valid debt and that the abolition was a violation of the Fifth Amendment's Due Process Clause. The court found that the trustee failed to meet his burden to show that the legislature acted arbitrarily. *Id.* According to the court, the legislature had not acted arbitrarily in creating a quick transition period away from a collection scheme it found "unsound." *Id.* at 106 ("A generalized statement that because creditors would be deprived of payment their due process rights are violated . . . is not good enough . . . to carry the burden of proof that the legislature acted arbitrarily and irrationally . . ."). However, the *Chenich* court addressed itself only to the effective date of section 916 and whether it could affect obligations not yet enforced, rather than to the constitutionality of the deprivation in general.

Tanner notes that there can be no vested rights in community property for an unsecured creditor that fails to either get both spouses' signatures or obtain a judgment and a writ of attachment against specific property. Tanner, *supra* note 31, at 609. Without a right in a specific piece of property, it seems unlikely that it can be a constitutional violation to deprive a creditor of the right to seize certain property by allocating it to the nondebtor spouse in a divorce proceeding. See also *In re Chenich*, 87 B.R. at 105 (noting that the California rule was passed with the due process rights of the nondebtor spouse, rather than those of the creditors, in mind).

⁹⁷ Tanner, *supra* note 31, at 601.

⁹⁸ Tanner, *supra* note 31, at 605; see also Loo, *supra* note 31, at 797-98 (arguing the anomalous Idaho rule should be the law in all community property jurisdictions).

not incur is difficult to consider just.⁹⁹

I have certainly argued elsewhere that the community property regime as it stands today is far too creditor-friendly, and on the merits, I tend to favor the California and Idaho rules as most equitable to the nondebtor spouse.¹⁰⁰ Creditors certainly do not need more protection from the marital property regime in the form of perpetual access to the entirety of the former community property.¹⁰¹ The issue in this context, however, is really not whether the rule is a sound one on the merits; rather, courts and policy-makers should acknowledge that, regardless of whether they view post-dissolution creditor access limitations to be sound policy, the rules act as an incentive to divorce. This incentive should be explored. Its effects should be studied. Courts should be expressing concern about the rule. Safeguards to protect against the incentive should be explored. Yet no California or Idaho court or legislative body has done that.

Policy-makers certainly should not overindulge in the worry that mass divorces will result from post-termination collection rules like those in California and Idaho. Divorce cannot act as an absolute shield from creditors and even the California and Idaho rules will not always insulate the former community property of the nondebtor spouse. Almost every state now has rules designed to prevent fraudulent transfers or conveyances,¹⁰² and several states have interpreted these rules to extend to transfers incident to divorce.¹⁰³ Thus, if spouses engage in “actual fraud,” meaning they divorce and enter into a property settlement agreement *for the purpose of delaying or defrauding their creditors*, the fraudulent transfer rules should allow the creditor to seize the former community property in the hands of the debtor spouse by

⁹⁹ “Subjecting a former spouse to this continuous fear years after the marriage has been terminated raises the issue of unconscionability.” Tanner, *supra* note 31, at 605-06.

¹⁰⁰ See generally Carroll, *supra* note 29.

¹⁰¹ *Id.*

¹⁰² Elaine A. Welle, *Is it Time for Wyoming to Update Its Fraudulent Conveyance Laws?*, 5 WYO. L. REV. 207, 228 (2005) (noting that by 2005, over 42 states had enacted the Uniform Fraudulent Transfer Act). A listing of the states that have adopted UFTA, and the statutory provisions for those states, is available from the Legal Information Institute at Cornell University. See Legal Information Institute, Uniform Business and Financial Laws Locator, <http://www.law.cornell.edu/uniform/vol7.html#ftrta> (last visited Jan. 13, 2009).

¹⁰³ See *Estes v. Titus*, 731 N.W.2d 119, 127-128 (Mich. Ct. App. 2006); *Filip v. Bucurenciu*, 28 Cal. Rptr. 3d (Cal. Ct. App. 2005) (fraudulent transfer statute extends to divorce property settlements in both California and Nevada); *Dowell v. Dennis*, 998 P.2d 206, 209 (Okla. Civ. App. 1999); *Greeninger v. Cromwell*, 915 P.2d 479, 482 (Or. Ct. App. 1996); *Kardynalski v. Fisher*, 482 N.E.2d 117, 122 (Ill. App. Ct. 1985); *In re Hoyt*, 97 B.R. 730 (Bankr. D.Conn. 1989) (Bankruptcy Code and Connecticut’s Fraudulent Transfer Law extend to transfers incident to divorce); *In re Fordu*, 201 F.3d 693 (6th Cir. 1999) (bankruptcy court can avoid a transfer between spouses pursuant to a divorce decree). See generally Amanda Barkey, Note, *The Application of Constructive Fraud to Divorce Property Settlements: What’s Fraud Got to do With it?*, 52 WAYNE L. REV. 221 (2006).

disregarding the transfer altogether.¹⁰⁴ Fraudulent transfer rules also protect creditors against “constructive fraud” by the spouses, which would require less subjective proof of malicious intent. Specifically, the Uniform Fraudulent Transfers Act (UFTA) recognizes as fraudulent any transfer, including one pursuant to a divorce settlement that is made “without receiving a reasonably equivalent value in exchange for the transfer” if the debtor was insolvent at the time of the transfer or became insolvent as a result thereof.¹⁰⁵ Courts have been reluctant to recognize transfers made pursuant to divorce settlements as constructively fraudulent, however, for a number of reasons, most of which relate to complications that arise from the requirement of proving lack of “reasonably equivalent value.”¹⁰⁶ A number of courts, at least in the bankruptcy context, have found issue preclusion an obstacle to a new court determining whether a transfer is fraudulent. The problem these courts have identified is that the central issue in a fraudulent transfer case—the equity of the transfer—is one on which a divorce court has already ruled.¹⁰⁷ Other courts have held that a court reviewing a divorce settlement for purposes of determining whether it violates the UFTA can avoid facing issue preclusion by merely making a “surface determination” that the parties’ settlement was within the range that would have resulted from litigation.¹⁰⁸ In short, the application of the UFTA in the divorce context, at least where there is no clear proof of actual fraud, is murky. These rules cannot be relied upon to set aside a large number of transfers made pursuant to divorce settlements.

Moreover, the couples we should truly worry about taking advantage of the creditor-restrictive post-termination rules in jurisdictions like California and Idaho are not those who desire to stay in a committed relationship but choose divorce for its advantages and are able to escape fraudulent transfer rules. Rather, it is the no-doubt more common situation of ambivalent spouses¹⁰⁹ that best demonstrates the troubling nature of the incentives some post-termination creditor collection rules provide. For many of these fringe couples, divorce is

¹⁰⁴ Uniform Fraudulent Transfer Act (UFTA) § 4(a)(1) (2005). *See, e.g.*, *Mejia v. Reed*, 74 P.3d 166 (Cal. 2003) (recognizing that application of the UFTA to divorce settlements complicates them and undermines the finality of divorce judgments, but applying the Act nonetheless).

¹⁰⁵ Uniform Fraudulent Transfer Act (UFTA) § 5(a) (2005).

¹⁰⁶ *In re Sorlucco*, 68 B.R. 748, 753-754 (Bankr. D.N.H. 1986) (noting that although it is clear that a transfer with intent to defraud could be challenged, it is not so clear that a challenge would survive in a case involving no actual intent). *But see* *In re Fordu*, 201 F.3d 693 (6th Cir. 1999); *In re Stinson*, 364 B.R. 278 (Bankr. W.D.Ky. 2007) (both cases casting doubt on *Sorlucco* insofar as it questions the ability of the court to set aside a constructive transfer).

¹⁰⁷ *Barkey*, *supra* note 103, at 231-232.

¹⁰⁸ *Id.* at 234.

¹⁰⁹ *See* *Sherman*, *supra* note 17, at 396-97 (arguing that prenuptial agreements with sunset provisions can goad an “ambivalent spouse” into divorce proceedings).

not a simple, black-and-white choice that is made overnight. It is, instead, an agonizing and lengthy process that involves the evaluation of a number of factors weighing both in favor of and against the decision. The relevant concern in this context is that the draw of the ability to escape liability from debts a spouse incurred (and for which community property could have been seized) either during or even before the marriage is almost irresistible. Divorce becomes an infinitely more attractive option with such a creditor collection rule.¹¹⁰ The rule tips the scales in a way that a marital property rule should not.¹¹¹

It may be tempting to reject divorce incentives as insignificant, at least absent evidence of a causal link between divorce and post-termination creditor access rules. Community property jurisdictions have failed to ignore such incentives in other, similar contexts, however. Indeed, a number of community property jurisdictions created a rule allowing full seizure of the entirety of married spouses' community property for a *premarital* debt incurred by just one of the spouses, precisely because of the negative incentives the contrary rule would offer.¹¹² The equity of holding a spouse's share in community for the payment of the other's antenuptial debt, likely not connected in any conceivable way to the marriage, is difficult to support. But jurisdictions which have passed rules allowing liberal seizure of community property for premarital debts have done so because they felt it was the only way to stop the practice of "marital bankruptcy."¹¹³

The unacceptable incentive at issue in the "marital bankruptcy" context was not that divorce could situate a spouse more favorably vis-à-vis a creditor, but rather that marriage might. Early in the American experience with the community property regime, the notion of seizure of community property for the premarital debts of one of the spouses

¹¹⁰ See generally Gary R. Stenzel & Jeff Banks, *Defunct Marriage: Its Possible Application in Idaho Divorce Law*, 30 IDAHO L. REV. 725, 727-733 (1994) (arguing that Idaho's failure to provide rules for accumulation of property and debt during a period when spouses are still married but living separate and apart creates equitable problems that can be avoided by divorce).

¹¹¹ Some would argue that marriages involving an ambivalent spouse are not worthy of legal focus and protection.

[L]egal control of marriage has no call to deal with hypothetical fungible legal spouses seen in the flattering mirror of the ought-to-be. Its business is with people as they are. Its first premise should be that the weak, the overbearing, the nasty, the selfish—those who have failed of decent effort to make a marriage go—are least likely prospects to rear well because of mere compulsion to stay in unsatisfactory marriage.

Karl N. Llewellyn, *Behind the Law of Divorce: II—The Decay of the Traditional Marriage-Pattern*, 33 COLUM. L. REV. 249, 284 (1933). See also Robert M. Gordon, Note, *The Limits of Limits on Divorce*, 107 YALE L. J. 1435, 1435 (1998). A contrary view is set out, *infra*, Part IV.

¹¹² LA. CIV. CODE ANN. art. 2345 (2007); Action Collection Services v. Seele, 69 P.3d 173, 178 (Idaho Ct. App. 2003); CAL. FAM. CODE § 910(a) (West 2004).

¹¹³ This practice also became known as the \$2 bankruptcy, a phrase signifying the debt-insulation effect that could come merely from obtaining a \$2 marriage license. See Carroll, *supra* note 29, at 8-9 (citing Hines v. Hines, 707 P.2d 969, 971 (Ariz. Ct. App. 1985); Schilling v. Embree, 575 P.2d 1262, 1264 (Ariz. Ct. App. 1977)).

was virtually unheard of.¹¹⁴ That rule changed in some of the community property jurisdictions, and the reason it changed is that spouses could effectively contract marriage for the purpose of bettering their position with regard to creditors.¹¹⁵ A person with hefty premarital debts could simply marry, and because the entirety of the spouses' community property could not then be seized for debts incurred before marriage, his creditors would be largely frustrated.¹¹⁶ The marriage essentially afforded a cheap and simple avenue mirroring bankruptcy.

The notion that escaping creditors might be an incentive to marry has been taken very seriously in community property law. Ironically, both California and Idaho have used the possibility of the marital bankruptcy as the rationale for allowing creditor access to community property for premarital debts.¹¹⁷ The alternative—allowing creditor-escaping behavior to provide an incentive to marry—was simply viewed as unpalatable. It is odd that some rules of creditor collection, namely those involving seizure for premarital debts, have been created in such an incentive-focused way—assuming that spouses act (i.e., choose to marry) in part based on those incentives—while others, namely post-dissolution seizure rules that have exceptionally similar incentives, would be ignored in the divorce context. The incentives are similarly strong and similarly egregious. We must take the idea that spouses may divorce to gain insulation from creditors as seriously as we take the notion that they may marry to insulate themselves, and adequate steps should be taken to prevent not just the latter, but also the former occurrence.

II. THE LACK OF A MECHANISM FOR UNILATERALLY TERMINATING A COMMUNITY PROPERTY REGIME

Once the bond of the community property regime is established, most jurisdictions provide no means of escape absent divorce. The spouses will share as partners in the community property they have accumulated. Each has an ownership interest in the entirety of the

¹¹⁴ WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* 372 (2d ed. 1971); see also Carroll, *supra* note 29, at 8.

¹¹⁵ See, e.g., Recent Developments, *Community Property—Antenuptial Debts—Eliminating Immunity of Earnings and Accumulations of Debtor Spouse—R.C.W. 26.16.200 as Amended by Ch. 121, Laws of 1969, 1st Extraordinary Session*, 45 WASH. L. REV. 191, 192 (1970); see also Carroll, *supra* note 29, at 8.

¹¹⁶ Carroll, *supra* note 29, at 8.

¹¹⁷ See Carol S. Bruch, *Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform*, 34 HASTINGS L. J. 227, 247-48 (1982); Carroll, *supra* note 29, at 9.

community property.¹¹⁸ And the spouses “share” in the management of community property as well; the essence of the basic management scheme in all of the American community property states is that each spouse, acting alone, may manage community property on behalf of both spouses.¹¹⁹ Moreover, except in the case of a few serious transactions, one spouse may act in a way that binds the entirety of the spouses’ community property, and not just the acting spouse’s share.¹²⁰ The existence of a community property regime, then, can lead to some rather serious disadvantages for a spouse who did not take steps to contractually avoid the regime before marriage and yet finds himself married to a spendthrift.¹²¹ The spouses together may execute a

¹¹⁸ Mark Patton, *Quasi-Community Property in Arizona: Why Just at Divorce and Not Death?*, 47 ARIZ. L. REV. 167, 168 (2005).

¹¹⁹ See REPPY & SAMUEL, *supra* note 26, at 345-46.

¹²⁰ ARIZ. REV. STAT. § 25-214(B) (2007); CAL. FAM. CODE § 1100(a) (West 2007); IDAHO CODE § 32-912 (2007); LA. CIV. CODE ANN. art. 2346 (2007); N.M. STAT. § 40-3-14(A) (2007); NEV. REV. STAT. § 123.230 (2007); WASH. REV. CODE § 26.16.030 (2007). Although most states operate under an equal management scheme, several states have categories of property that are exempted from that scheme in some form. For example, spouses are generally required to concur in the sale or encumbrance of immovables (or real property). ARIZ. REV. STAT. § 25-214(C)(1) (2007); CAL. FAM. CODE § 1100(c) (West 2007); IDAHO CODE § 32-912 (2007); LA. CIV. CODE ANN. art. 2347 (2007); N.M. STAT. § 40-3-13 (2007); NEV. REV. STAT. § 123.230(3) (2007). Also, a spouse that operates a business enterprise over which he has primary control is generally afforded sole and/or exclusive control over that enterprise. CAL. FAM. CODE § 1100(d) (West 2007); LA. CIV. CODE ANN. art. 2350 (2007).

¹²¹ Community property states generally allow spouses to assert claims for damages against each other for certain egregious acts of mismanagement, even if the complained-of activity is that which one spouse may undertake alone under an equal management scheme. The legal standard for recovering these damages is often rather onerous, however, as the rules are designed to avoid familial litigation and to relieve courts of the burden of examining every transaction made by both spouses over the course of a long marriage. See REPPY & SAMUEL, *supra* note 26, at 407-08. In Louisiana, for instance, a spouse may only recover damages from the other for fraudulent or bad faith management of community property. LA. CIV. CODE ANN. art. 2354 (2007). Management decisions which unintentionally harm a spouse’s interest, and even those made from purely self-interested motives without regard to the likelihood that the other spouse’s interests will be prejudiced, are not sufficient to make the managing spouse liable in damages. See generally *Aymond v. Aymond*, 758 So. 2d 886, 890-91 (La. Ct. App. 2000). Similarly, Wisconsin merely requires a spouse to act in “good faith” in managing community property. WIS. STAT. ANN. § 766.15 (West 2007). See Alexandria Streich, *Spousal Fiduciaries in the Marital Partnership: Marriage Means Business but the Sharks Do Not Have a Code of Conduct*, 34 IDAHO L. REV. 367, 383 (1998) (discussing the difference between acting in “bad faith” and not acting in “good faith”). Both of these states, then, would impose damages for few acts of mismanagement, at least as compared with states which impose a fiduciary duty on spouses. See, e.g., *Mezey v. Fioramonti*, 65 P.3d 980, 989 (Ariz. Ct. App. 2003) (statutory rights to act with respect to community property remain subject to a fiduciary duty to the other spouse with respect to that property); *Roselli v. Rio Cmty. Serv. Station, Inc.*, 787 P.2d 428, 433 (N.M. 1990) (spouses’ management of community property subject to a fiduciary duty to the other spouse); Streich, *supra*, at 368 n.2 (calling for clarification of the fiduciary standard between spouses); Kelly Kromer Boudreaux, Comment, *So You’ve Married a Mismanager: The Inadequacy of Louisiana Civil Code Article 2354*, 68 LA. L. REV. 219 (2007) (arguing for a stricter standard of management during marriage in Louisiana (as compared to California’s fiduciary duty standard) that would make spouses more accountable for acts of mismanagement). Moreover, it is unlikely that a spouse in any community property state, regardless of the standard which must be met to

postnuptial agreement terminating their legal regime and establishing a regime of separation of property.¹²² But such an agreement would require the consent of both spouses.¹²³ If a mismanaging spouse does not desire a separation of property, divorce may seem the only option for the other spouse to protect his interest.¹²⁴

Theoretically, there is an alternative to divorce for a spouse in this situation, who desires to maintain the marital bond—a *unilateral* method of terminating the community property regime, yet remaining married. That remedy is the judgment of separation of property. If well-designed and well-applied, a judgment of separation of property might provide a useful alternative to divorce. Unfortunately, it is sanctioned by far too few of our American community property states.¹²⁵ Moreover, even in the states that do recognize a spouse's right to obtain a judicial separation of property, the remedy is not as simple and useful as it should be.

A. *The Origin of the Judgment of Separation of Property*

The judgment of separation of property originated in Roman law,¹²⁶ even though the Romans did not have a marital property scheme akin to a community property regime.¹²⁷ Under ancient Roman law, the property a wife brought into marriage—her dowry—was managed by

recover damages, will be able to recover significant damages from a spendthrift to protect her interests. The same acts of mismanagement which give rise to a claim for damages are likely to result in the near-complete depletion of the mismanaging spouse's assets. The availability of a damages remedy, then, is ineffective in solving the problem of unilateral mismanagement that is inherent in an equal management scheme.

¹²² Carroll, *supra* note 29, at 27-28.

¹²³ Moreover, courts will not always honor such agreements. See REPPY & SAMUEL, *supra* note 26, at 33-35.

¹²⁴ Some have proposed modification of the equal management scheme in community property jurisdictions to remedy these problems. See generally Lisa R. Mahle, *A Purse of Her Own: The Case Against Joint Bank Accounts*, 16 TEX. J. WOMEN & L. 45 (2006). Other scholars have argued that "the answer is not in legislation that would limit the rights of creditors or the rights of women and men in marriage to equal management and control." BASSETT, *supra* note 38. Making management rules more stringent and increasing judicial review of spousal activities may serve to increase spousal anxiety over management issues. "If worries about judicial second-guessing strike before marriage becomes troubled, they may lead to separation of property; if after troubles begin, they may expedite divorce." W.T. Tête, *A Critique of the Equal Management Act of 1978*, 39 LA. L. REV. 491, 544 (1979).

¹²⁵ LA. CIV. CODE ANN. art. 2374(A) (2007); WIS. STAT. ANN. § 766.70 (West 2007).

¹²⁶ DIG. 24.3.24 (Ulpian, Ad Edictum 33); see also MARCEL PLANIOL, 3 TREATISE ON THE CIVIL LAW, No. 1161 (Louisiana State Law Institute trans., 1938) (1959); Walter Loewy, *The Spanish Community of Acquets and Gains and its Adoption and Modification by the State of California*, 1 CAL. L. REV. 32, 37-38 (1912) (discussing the Spanish combination of the community of acquets and gains and the Roman dowry system).

¹²⁷ William Wirt Howe, *The Community of Acquests and Gains*, 12 YALE L.J. 216, 216 (1903).

her husband.¹²⁸ A wife was simply incapable of administering her own property.¹²⁹ The wife maintained an interest in the eventual return of that dowry throughout the existence of the marriage, however, and if she reasonably feared that her husband's mismanagement put her right to the return of that dowry at risk, Roman law allowed her to seek restitution of the dowry even while the marriage continued.¹³⁰

The basic idea behind that right to seek restitution of dowry for a husband's mismanagement was accepted by later societies operating under the community property regime, including both Spain and France,¹³¹ and the idea has manifested itself in the form of a judgment of separation of property, at least since the late sixteenth century.¹³² French law provides the clearest example of the evolution and persistence of the judgment of separation of property.¹³³

The notion that a spouse could unilaterally seek and obtain, with court approval, a separation of property during marriage was necessitated by the head and master scheme that persisted in France, and all other community property regimes, until the 1980s.¹³⁴ In the community property context, it was a way for a wife, and a wife only,¹³⁵

¹²⁸ DIG. 23.3.7.3 (Ulpian, Sabinus 31); Ernst Levy, *Reflections of the First "Reception" on Roman Law in Germanic States*, 48 THE AM. HIST. REV. 20, 27 (1942).

¹²⁹ *Id.* at 27.

¹³⁰ DIG. 24.3.24 (Ulpian, Ad Edictum 33); see also PLANIOL, *supra* note 126, at No. 1161.

¹³¹ Las Siete Partidas Part. IV, Tit. XI, Law XXIX; 1804 French C. CIV. art. 2425; see also PLANIOL, *supra* note 126, at No. 1161; Loewy, *supra* note 126, at 34 ("[T]he influence of Roman Law may be found throughout the history of Spanish law"); Julie Hardwick, *Seeking Separations: Gender, Marriages, and Household Economies in Early Modern France*, 21 FRENCH HIST. STUD., 157, 158 (1998) (detailing the 1674 request of Marye Lechou for a separation of property from her husband because he wasted her dowry of 200 livres).

¹³² Hardwick, *supra* note 131, at 162 (noting a petition for separation of property filed in the Natais, France court between 1598 and 1610). Hardwick also notes that in the late sixteenth century, two petitions for separation of property were made by husbands, one because he had been "imprisoned" for his wife's debts. *Id.*

¹³³ The judgment was a possibility under French customary law for centuries before it was incorporated into the first French *Code Civil*. Hardwick, *supra* note 131, at 160 (describing the judgment of separation of property in Burgundian and Breton customary law).

French law distinguished between a separation of property (*séparation de biens*) and a physical separation (*séparations de corps et de biens*). JULIE HARDWICK, *THE PRACTICE OF PATRIARCHY*, 111 (Pa. State Univ. Press 1998); see also RODERICK PHILLIPS, *FAMILY BREAKDOWN IN LATE EIGHTEENTH-CENTURY FRANCE*, 133 (Oxford Univ. Press 1980). When a French court granted a petitioning spouse a separation of property, that judgment did not provide an authorization for the spouses to enter different households. The spouses were to remain together, with the wife gaining only the ability to administer her property. Hardwick, *supra* note 131, at 161.

Modern Spanish law also retains the concept of such a judgment for acts of "fraud, damage, or danger" to the community interest of the other spouse. See CÓDIGO CIVIL art. 1393, available at <http://civil.udg.es/normacivil/estatal/CC/4T3.htm>.

¹³⁴ Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 125 (2004).

¹³⁵ Harriet S. Daggett, *The Wife's Action for a Separation of Property*, 5 TUL. L. REV. 55, 57 (1931). In an early Louisiana case, a husband petitioned for separation of property, arguing that wife was not contributing to the community and had become a "helpless burden." *Hotard v.*

who had no management capabilities and was subjected to her husband's whims as "head and master" of their community to ensure that her dowry would not be squandered¹³⁶ and that future acquisitions would remain available for her support.¹³⁷ With a judgment of separation of property, a wife could terminate the community property regime and seek immediate payment of the debt her husband owed to her.¹³⁸ The purpose of the judgment was "to take away from the husband any means of jeopardizing the property of his wife," and the mechanism whereby the judgment did that was to abolish the existing community regime between the spouses and to replace it with "a system in which the husband has no power over his wife's property"—a regime of separate property.¹³⁹

The French standard for proving entitlement to a judgment of separation of property has always been rather vague. Historically, the wife was required to prove that "the disorder of the husband's affairs" gave cause for concern that his estate may not be sufficient to meet the wife's rights and claims.¹⁴⁰ The husband's insolvency, his habitual and

Hotard, 12 La. Ann. 145 (1857). The court refused to grant the judgment, noting that:

It may be true that among the rude and hardy tribes of German origin who introduced the custom of the matrimonial community . . . the wife was the equal partner of her husband's toil. . . . [I]n the change of manners which a higher civilization has produced, this prime reason for the community law has ceased to exist, yet the institution remains. . . . [A]ll authors are agreed that the husband cannot sue the wife for a separation of property, that being a privilege conceded only to the wife against her husband.

Id. Thus, it seems that courts viewed the necessity of the remedy as stemming not only from the wife's legal incapacity to manage her separate estate, but also out of a desire to protect the weak and non-equal partner wife in a community regime. A husband was not completely without means to bring the community to an end, however. He was entitled to petition for a separation from bed and board, which would bring equivalent effects as a judgment of separation of property, though the spouses would also be physically separated. PLANIOL, *supra* note 126, at Nos. 1160-61.

¹³⁶ The judgment of separation of property was especially valuable to a wife with a sizeable inheritance or other family property to protect. Now, such protection is neither needed nor afforded by a judgment of separation of property. Under the modern community property scheme, anything brought into the marriage or inherited by one of the spouses is his separate property, which he alone manages and which is not bound for the debts incurred by the other. ARIZ. REV. STAT. §§ 25-213, 214(A) (2007); CAL. FAM. CODE § 770 (West 2007); IDAHO CODE §§ 32-903, 904 (2007); LA. CIV. CODE ANN. art. 2341 (2007); N.M. STAT. § 40-3-8 (2007); NEV. REV. STAT. §§ 123.130, 123.170 (2007); WASH. REV. CODE §§ 26.16.010, 26.16.020 (2007); WIS. STAT. ANN. §§ 766.31(8), 766.51(1)(a) (2007); TEX. FAM. CODE ANN. §§ 3.001, 3.101 (Vernon 2007). A judgment of separation of property today protects only against a mishandling of the petitioning spouse's share in community property.

¹³⁷ Daggett, *supra* note 135, at 58; *see also* Katherine Shaw Spaht, *Matrimonial Regimes*, 45 LA. L. REV. 417, 429 (1984).

¹³⁸ Daggett, *supra* note 135, at 61-63. In fact, seeking prompt execution of the judgment was a requirement of its continued effectiveness. *Id.*

¹³⁹ *See* PLANIOL, *supra* note 126, at No. 1183.

¹⁴⁰ French C. CIV. 1804 art. 1443. The evidence mustered by wife most often consisted of the testimony of neighbors and friends as to the husband's mismanagement. Members of the community were more willing to provide such testimony than one might expect. "While

extravagant spending, the sequestration of his property by court order, and his interdiction or insanity were considered sufficient forms of disorder.¹⁴¹ The legal formulation of the standard the wife had to meet to obtain a judgment of separation of property appeared rather onerous.

In practice, however, at least early in the judgment's French existence, courts were willing to grant the judgment almost without exception.¹⁴² Virtually every petition for separation of property prayed for was granted.¹⁴³ That this is true is not surprising when one considers the state of family law in France in the sixteenth and seventeenth centuries. Divorce did not exist there until after the French Revolution.¹⁴⁴ And even when divorce became permissible, the possibility of a judgment of separation of property persisted, and the frequency with which courts granted judgments of separation of property demonstrates judicial commitment to "keep[ing] households together" where the rift between the spouses was not insurmountable.¹⁴⁵ The French concept of the unilaterally-sought judgment of separation of property, then, has long provided quite a nice alternative to divorce.¹⁴⁶

The effectiveness of the remedy has hinged upon its consequences. Obtaining a judgment of separation of property terminates the community property regime between the spouses.¹⁴⁷ And that termination has retroactive effect, dating back to the date of the filing of the request for judgment.¹⁴⁸ Thus, a spouse who has been awarded a

neighbors, kin, and the legal system tolerated a certain level of physical abuse, poor husbanding of the household's resources—in terms of handling financial affairs, disorderly behavior, or application to work—elicited negative responses from kin and neighbors, and their cooperative testimony" was not so difficult to come by. HARDWICK, *supra* note 133, at 112.

Contemporary French law has retained the disorder of affairs ground, but expanded a spouse's ability to seek judgments of separation of property to scenarios in which "the disorder of the affairs, misadministration or misconduct" of a spouse gives rise to the fear that the interest of the other will be imperiled. French C. CIV. art. 1580 (2008).

¹⁴¹ MARCEL PLANIOL, 2 TREATISE ON THE CIVIL LAW, Nos. 166-69.

¹⁴² Requests for judgment appear to have been rather frequently lodged, and typically used not by the poorest of French citizens, but rather by the middle class wives of urban, commercial types. Hardwick, *supra* note 131, at 163.

¹⁴³ One study of petitions for separation of property filed between 1600 and 1670 found not even a single petition denied (including those that were opposed). *Id.* at 162-63.

¹⁴⁴ *Id.* at 158.

¹⁴⁵ *Id.* at 175.

¹⁴⁶ *Id.* Mexico is another community property jurisdiction which allows a spouse to unilaterally petition for termination of the community property regime. To succeed in obtaining the judgment of separation of property, a Mexican spouse must offer proof that "the notorious negligence or poor administration of the managing partner threatens to ruin the other spouse, or diminish the common property considerably." Código Civil Federal [C.C.F.] [Federal Civil Code], as amended, art. 188, 2002 (Mex.) (English translation by Julio Romanach). *See generally* Loewy, *supra* note 126.

¹⁴⁷ "Separation abolishes in fact the system originally adopted, terminates the community of the spouses, and subjects them to a new system." PLANIOL, *supra* note 126, at No. 1173.

¹⁴⁸ *Id.* (discussing the retroactivity of the French judgment). For the rule of retroactivity in Louisiana, see LA. CIV. CODE. art. 2375 (2007). *See also* Harriet S. Daggett, *The Wife's Action for a Separation of Property*, 5 TUL. L. REV. 55, 66 (1931).

judgment of separation of property would be entitled to manage alone all of the property he acquires, to keep the fruits of his property for himself, to acquire assets without creating a claim of ownership to those assets in the other spouse, and to be free of the liabilities incurred by the other after the termination of the community property regime.¹⁴⁹ Essentially, though the spouses would remain married, their community regime would come to an end entirely and their property matters would be handled under the law applicable to ordinary co-owners.¹⁵⁰

B. *Contemporary Use of the Judgment of Separation of Property*

Only two American community property states provide such a unilateral mechanism for terminating the community property regime—Wisconsin and Louisiana.¹⁵¹ Wisconsin does not refer to the remedy, either in legislation or jurisprudence, as a judgment of separation of property. Still, Wisconsin law allows a spouse that can prove “gross mismanagement, waste, or absence” causing injury to get a court order terminating the mismanager’s ability to manage community property, reclassifying marital property as separate property, dividing obligations between the spouses, and limiting the property of the nondebtor spouse which can be seized for the obligations incurred by the other.¹⁵² The effect is essentially a judicial separation of property. The theoretical existence of this remedy in Wisconsin, however, has proved rather fruitless. Since the inception of the remedy in Wisconsin’s 1984 Marital Property Act, the remedy has not been considered in a single reported appellate decision.

Louisiana stands as the only state, then, in which the remedy not only exists, but is used with some regularity.¹⁵³ That Louisiana follows French law on this point is not surprising. The source of nearly all of Louisiana’s private law, including the marital property regime, is French and Spanish law.¹⁵⁴ In this regard, Louisiana law seems to have

¹⁴⁹ Daggett, *supra* note 135, at 68 (1931).

¹⁵⁰ For exceptions, see LA. CIV. CODE ANN. arts. 2370-76 (2007).

¹⁵¹ See J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage*, 56-SPG LAW & CONTEMP. PROBS. 99, 121-22 (1993) (describing the Louisiana and Wisconsin remedies as “sensibl[e] . . . means for a spouse to limit the management powers of the other when that spouse irresponsibly exercises management power”).

¹⁵² WIS. STAT. ANN. § 766.70(4)(a) (2007).

¹⁵³ See, e.g., *Cooper v. Cooper*, 509 So. 2d 616 (La. Ct. App. 1987) (husband granted judgment of separation of property for wife’s mismanagement in incurring numerous obligations by signing husband’s name without his knowledge); *Pan Am. Imp. Co., Inc. v. Buck*, 452 So. 2d 1167 (La. 1984) (husband granted judgment of separation of property for wife’s premarital embezzlement obligation after creditor sought garnishment of his earnings to satisfy the debt).

¹⁵⁴ See generally J.-R. Trahan, *The Continuing Influence of Le Droit Civil and El Derecho Civil in the Private Law of Louisiana*, 63 LA. L. REV. 1019 (2004).

copied French law quite closely.¹⁵⁵ Thus, Louisiana's first systemic written body of law, the Digest of 1808, provided that "[t]he wife may, during the marriage, petition against the husband for a separation of property, whenever her dowry is in danger, owing to the mismanagement of the husband, or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims."¹⁵⁶ That rule was carried forward without significant change until 1980.¹⁵⁷

By the early 1990s, Louisiana's head and master scheme had relatively recently been abolished and an equal management scheme substituted in its place.¹⁵⁸ The entirety of the state's matrimonial regimes legislation was redrafted in keeping with the new and different regime.¹⁵⁹ Entire institutions were jettisoned as outdated in the new equal management era.¹⁶⁰

The judgment of separation of property, however, retained its place in Louisiana law even in the revision.¹⁶¹ Indeed, the equal management scheme made the judgment of separation of property even more relevant under the modern community property law than it had been for centuries.¹⁶² Because the equal management regime gives spouses a great deal of power to manage the community in a way that may harm the other spouse's interest, the judgment of separation of property provides an otherwise unavailable method for a spouse who desires to stay married and simultaneously obtain much-needed protection from the other's acts of mismanagement.

Louisiana's community property revision did alter the judgment of separation of property, however, from its pre-1980 form. The remedy became gender neutral, with either spouse empowered to seek it upon

¹⁵⁵ Cf. 1804 French C. CIV. art. 1443. See also (Source Notes of) L. MOREAU, LISLET, A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS, 341 (Louisiana State University 1968) (noting the source materials of the 1808 La. Digest article).

¹⁵⁶ 1808 La. Digest art. 86.

¹⁵⁷ LA. CIV. CODE ANN. art. 2399 (1825); LA. CIV. CODE art. 2425 (1870). By La. Acts 1978, No. 627, amended Civil Code article 2425 was to become effective January 1, 1980 as Louisiana Revised Statutes section 9:2856(A). Acts 1978, No. 627 was repealed in its entirety by Acts 1979, No. 709, § 5, effective January 1, 1980. The latter Act enacted current Louisiana Civil Code article 2374(A).

¹⁵⁸ Katherine S. Spaht & Cynthia Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 LA. L. REV. 83, 84 (1980).

¹⁵⁹ See generally *id.* (detailing the change from Louisiana's head and master scheme to an equal management scheme).

¹⁶⁰ See Spaht, *supra* note 158, at 104-05.

¹⁶¹ See also Spaht, *supra* note 158, at 104 n.137 (and accompanying text).

¹⁶² Before the shift toward equal management in community property regimes, Marcel Planiol, in commenting on the possibility of expanding the management powers of women to rectify the problem of excessive power given to husbands under the head and master scheme, reasoned that the change "might result in producing two incapable persons instead of one." PLANIOL, *supra* note 126, at No. 911.

proving a legal ground.¹⁶³ Essentially, equal management required that the “protections previously afforded the wife against the husband’s mismanagement” be extended to the husband for the wife’s mismanagement as well.¹⁶⁴ Moreover, some onerous and somewhat bizarre requirements for obtaining the judgment and making it effective were removed from the law. For instance, both the old French law and the pre-revision Louisiana law required the party seeking the judgment of separation of property to publish notice of its issuance in a local newspaper three times for the judgment to be given effect.¹⁶⁵ After the revision, third party rights depend upon recordation, not publication.¹⁶⁶ Moreover, the old Louisiana law relating to judgments of separation of property did not allow spouses who had terminated their community property regime to reestablish it under any circumstances.¹⁶⁷ Now, that oddity is cured and spouses may reestablish the community property regime at any time by matrimonial agreement.¹⁶⁸ In short, what was historically an onerous cause of action in Louisiana has been made simpler.

More importantly, the grounds on which a unilateral petition for separation of property could be granted were expanded substantially

¹⁶³ Compare LA. CIV. CODE ANN. art. 2425 (1870) with LA. CIV. CODE ANN. art. 2374(A) (1980).

¹⁶⁴ Tête, *supra* note 124, at 528.

¹⁶⁵ 1804 French C. CIV. art. 1445. See also PLANIOL, *supra* note 126, at No. 1178; LA. CIV. CODE ANN. art. 2429 (1870).

¹⁶⁶ LA. CIV. CODE ANN. art. 2376 (2007).

Creditors of the spouses with rights acquired before the judgment of separation of property had under the old law and continue today to have the ability to set aside the judgment between the spouses if it is obtained “in fraud of their rights.” *Id.*; see also Daggett, *supra* note 135, at 64-65.

¹⁶⁷ Daggett, *supra* note 135, at 71. French law allowed for the reestablishment of the community regime between spouses after a judgment of separation of property, though the reestablishment could only take place with the consent of both spouses. PLANIOL, *supra* note 126, at No. 1200 (“Wife alone can not bring community back in operation if she thinks it advisable to renounce the separation. The separation judgment could have created a situation which is as advantageous to her husband as it is to her; hence it can be rescinded only by a mutual agreement.”).

¹⁶⁸ LA. CIV. CODE ANN. art. 2375(B) (2007). Such a reestablishment would bring its own problems. The constant possibility of modification of a couple’s marital problems creates unpredictability and instability.

Within the marriage the continuing possibility of change from whatever the present regime is, be it community or separation of property, could have the same effect as a pebble in one’s shoe—a constant source of irritation until one takes the thing off. The wife, having previously agreed to her husband’s demand for a regime of separation of property, may, as she perceives her security melting away, begin a campaign for the reinstatement of community. The husband, who may have initially decided to bear the inconvenience of a community, will always have the opportunity to change his mind and begin his own campaign for a revision of the regime. Third parties dealing with the husband will never be able to rely completely on the fact that he is separate in property.

Tête, *supra* note 124, at 534.

after the equal management revision.¹⁶⁹ Until 1980, Louisiana retained the French source provision's language on the requisite grounds for seeking the judgment. That is, a wife could obtain a judgment of separation of property only upon proof that her dowry was endangered by her husband's mismanagement or that "the disorder of his affairs" made her fear that his estate may not suffice to meet his legal duty to her.¹⁷⁰ Essentially, the wife was required to prove that her husband was in a state of "financial embarrassment." The existence of liabilities exceeding assets was enough.¹⁷¹ Further, a wife's showing "that her husband had suffered heavy losses (of slaves) and that the financial and economic conditions of the country were in a precarious condition" sufficed to satisfy her burden.¹⁷²

The modern version of Louisiana's article departs from French law and provides four different grounds on which a judgment of separation of property sought by a spouse may be granted.¹⁷³ Two of those grounds allow the court to grant a judgment of separation of property incident to the filing of a petition for divorce, or after a showing that the spouses have been living separate and apart for a statutorily prescribed period even without the filing of a petition for divorce.¹⁷⁴ Another ground allows the court to grant a spouse, on unilateral request, a judgment of separation of property where the other is an absent person.¹⁷⁵ All of those grounds are useful only for spouses no longer living together and can therefore have little effect in providing incentives to spouses either to divorce or to stay together. One ground, however, persists in the revision as available even for spouses intending to remain together and to maintain all aspects of their marital relationship other than the marital property regime. Specifically, modern Louisiana law allows either spouse to unilaterally request a judgment of separation of property "[w]hen [his] interest . . . in a community property regime is threatened to be diminished by the fraud, fault, neglect, or incompetence of the other spouse, or by the disorder of

¹⁶⁹ *Id.* at 529.

¹⁷⁰ See Daggett, *supra* note 135.

¹⁷¹ *Id.*

¹⁷² *Id.* at 59.

¹⁷³ LA. CIV. CODE ANN. art. 2374 (2007).

¹⁷⁴ LA. CIV. CODE ANN. art. 2374(C) & (D) (2007). The effect of a judgment of divorce in Louisiana is retroactive to the date of the filing of the petition on which judgment of divorce is granted. LA. CIV. CODE ANN. art. 159 (2007). Nonetheless, it may be valuable for a spouse to seek a judgment of separation of property incident to a pending divorce proceeding, because it may bring an earlier termination date of the community in the case of a disturbance of the initial filing date because of dismissal of a divorce petition or a reconventional demand on which judgment of divorce is granted. See KATHERINE S. SPAHT & RICHARD D. MORENO, 16 LOUISIANA CIVIL LAW TREATISE SERIES § 7.5 (Thomson West 3d ed. 2007).

¹⁷⁵ LA. CIV. CODE ANN. art. 2374(B). An absent person is a person who has no representative in this state and whose whereabouts are not known and cannot be ascertained by diligent effort. LA. CIV. CODE ANN. art. 47 (2007).

the affairs of the other spouse”¹⁷⁶

With the elimination of many of the antiquated and overly cumbersome features of the judgment of separation of property from Louisiana law, the remedy is much improved from its pre-1980 state. Still, because judgments of separation of property in Louisiana have always been regarded with a certain amount of disfavor,¹⁷⁷ they are not used in a manner that lives up to their potential as a disincentive to divorce. In recent years, the Louisiana courts have required rather serious acts before granting judgments of separation of property on grounds of mismanagement.¹⁷⁸ The disorder of a wife’s affairs stemming from her prenuptial embezzlement debt has qualified.¹⁷⁹ And a wife incurring multiple obligations by signing her husband’s name without his consent or knowledge, resulting in serious financial disarray of the community, led to a judgment of separation of property.¹⁸⁰ The severity of the mismanagement in these cases indicates that rather serious acts of mismanagement are required. In practice, the judgment of separation of property is simply granted on mismanagement grounds only in the most serious cases.

C. *A Call for More Extensive Adoption of the Remedy*

The theoretical utility of the remedy should not be underestimated. It provides perhaps the only means for a spouse who cannot obtain joint agreement to terminate the community property regime to gain a measure of protection from the other’s state of financial disarray,¹⁸¹ and yet to maintain the marital bond that modern society so clearly views as worthy of protection.¹⁸²

¹⁷⁶ LA. CIV. CODE. art 2374(A). For cases in which this standard has been found satisfied, *see supra* note 153.

¹⁷⁷ Daggett, *supra* note 135, at 64.

¹⁷⁸ Numerous judgments of separation of property are granted annually as incidental relief in divorce proceedings. *See, e.g.*, Brar v. Brar, 796 So. 2d 810 (La. Ct. App. 2001).

¹⁷⁹ Pan Am. Imp. Co., Inc. v. Buck, 452 So. 2d 1167 (La. 1984).

¹⁸⁰ Cooper v. Cooper, 509 So. 2d 616 (La. Ct. App. 1987).

¹⁸¹ Daggett, *supra* note 135, at 71 (“The action is available as the only method for doing away with the community system between spouses who do not like it. . . .”). That may have been true when the spouses could not perfect matrimonial agreements during the existence of their marriage. Since 1980, however, postnuptial contracts have been permitted in Louisiana. LA. CIV. CODE. ANN. art. 2329 cmt. (b) (2007). Thus, spouses who agree on setting aside the community property regime can, by simply executing a matrimonial agreement and complying with the proper procedure (including obtaining court approval), live separate in property. If it is merely one spouse dissatisfied with the regime, however, the possibility of entering into a matrimonial agreement to terminate the community property regime is of little use. A unilateral method such as the judgment of separation of property may be the only option.

¹⁸² There is some question as to the pragmatism of viewing a judgment of separation of property as a means of keeping spouses together that, absent its availability, may divorce. Some scholars have argued that a spouse’s mere allegation that the other has committed acts of

With the Louisiana and Wisconsin exceptions, a legal mechanism for a spouse to unilaterally seek termination of the community property regime is conspicuously absent from the American community property regimes. Remedies akin to a judgment of separation of property may be available in community property jurisdictions to spouses who have physically separated, and the existence of such remedies is certainly necessary for the protection of spouses headed toward divorce.¹⁸³ Moreover, at least one community property state—Nevada—allows for the issuance of a court order that functions much like a judgment of separation of property when an elderly spouse is “institutionalized,” for the purpose of providing an income stream to the spouse left at home and to allow the institutionalized spouse to qualify for certain governmental services.¹⁸⁴ Finally, every community property state now allows spouses to opt out of the community property regime by contract, even during marriage.¹⁸⁵ These methods of getting something akin to termination of the community property regime, however, are wholly insufficient to provide relief for the average spouses who are still living together and do not mutually agree upon the need for termination of the community property regime.

Quite simply, a court-monitored mechanism of terminating the community property regime that a spouse may unilaterally seek is needed in every community property state to preserve marriage. Such an institution need not be created from scratch. The judgment of separation of property stands at the ready to fill the gap in marital

mismanagement sufficient to warrant the grant of a judgment of separation of property may so fracture the spousal bond that divorce is inevitable. “One wonders how those who are responsible [for Louisiana’s revision of the judgment of separation of property rules] envision bedroom conversation between spouses after one has filed suit against the other alleging ‘fraud, fault, neglect, or incompetence.’” Tête, *supra* note 124, at 529. Tête argues that new undercurrents of distress in the family may even “tip the scale in favor of divorce.” *Id.* at 499. Though no empirical work has been done to record long-term outcomes for spouses who have sought judgments of separation of property in recent times, studies of spouses who sought the judgments early in French history seem to demonstrate no insurmountable impact on marital harmony. Couples wherein one spouse sought and obtained a judgment of separation of property unilaterally typically persisted in living together, and often had more children. Hardwick, *supra* note 131, at 177. For some couples, however, increased tension and disagreement about the financial implications of the judgment, the sharing of expenses in the future, and other uncertainties prompted physical separation. *Id.* at 178.

¹⁸³ See, e.g., N.M. STAT. § 40-4-3 (2007).

¹⁸⁴ NEV. REV. STAT. § 123.259 (2007); see also *Hearing Before the Senate Committee on Judiciary*, 65th Sess. 1430 (Nev. 1989) (testimony of Hank Cavallera, Senior Law Center, Washoe County); *id.* at 1431 (testimony of Nancy Angres, Deputy Attorney General, Nevada State Welfare Division). The Nevada legislature specifically recognized the need for such a statute to disincentivize divorce. In the discussions surrounding the passage of § 123.259, “Senator Wagner told of a case dealing with the division of assets where the wife was told her only recourse to provide a division of assets was to divorce her husband of 60 plus years.” *Id.* at 1432.

¹⁸⁵ Carroll, *supra* note 29, at 26 n.130 (and accompanying text) (2007).

property law.¹⁸⁶ It is an ancient creation that is too infrequently used today. Implicit in the allowance of a judgment of separation of property is the notion that, even in community property states, “there might be both a family and a marriage relationship without there being a community relationship.”¹⁸⁷ The remedy provides an almost ideal balance for a community property state. Allowing a spouse to unilaterally seek a judgment of separation of property adequately serves the community property state’s need to channel couples into the marital property regime the state sanctions, while still allowing them to set aside that regime when they might otherwise have to resort to setting aside their union altogether.

III. THE INABILITY OF A SPOUSE TO MAKE A TESTAMENTARY TRANSFER OF HER INTEREST IN THE OTHER SPOUSE’S RETIREMENT PLAN

When it comes to the death of a spouse, state community property rules in and of themselves do not do much to incentivize divorce. Rather, it is the federal government which plays the primary role in sending the wrong message about marriage after the death of a spouse in community. Specifically, when it comes to pensions,¹⁸⁸ the federal rules of preemption provide some spouses with a rather strong economic push toward divorce.

Each of the nine American community property states recognizes pensions as an asset of the community, at least to the extent the right to the pension was earned by the labor of a spouse during the existence of the community property regime.¹⁸⁹ In so doing, community property states recognize the nonparticipant spouse’s interest in the pension, which is thus shared between the spouses, either equally or equitably,¹⁹⁰ regardless of which spouse is directly responsible for the pension’s existence.¹⁹¹ This treatment of pensions is consistent with the

¹⁸⁶ Daggett, *supra* note 135, at 72.

¹⁸⁷ Harry M. Cross, *The Community Property Law in Washington*, in *COMPARATIVE STUDIES IN COMMUNITY PROPERTY LAW* 169 (Jan P. Charnatz & Harriet S. Daggett eds., 1955).

¹⁸⁸ The term “pension” in this section is intended in its broadest sense—to signify any retirement benefit provided to an employee, whether public or private, defined benefit or defined contribution.

¹⁸⁹ Cynthia A. Samuel & Katherine S. Spaht, *Fixing What’s Broke: Amending ERISA to Allow Community Property to Apply upon the Death of a Participant’s Spouse*, 35 *FAM. L.Q.* 425, 431.

¹⁹⁰ Arizona, Texas, Washington, Nevada, and Idaho are equitable division community property states. *Martin v. Martin*, 752 P.2d 1038, 1043 (Ariz. 1988); *Hailey v. Hailey*, 176 S.W.3d 374, 379 (Tex. App. 2004); *In re Marriage of Tower*, 780 P.2d 863, 865; *IDAHO CODE* § 32-712(1)(a) (2007). Louisiana, California, Wisconsin and New Mexico all provide for equal division. *LA. CIV. CODE ANN.* art. 2336 (2007); *CAL. FAM. CODE* art. 2550 (West 2007); *WIS. STAT. ANN.* § 766.31(3); *Ruggles v. Ruggles*, 860 P.2d 182, 192 (N.M. 1993).

¹⁹¹ Samuel, *supra* note 189.

overarching aim of the community property regime—to treat spouses as partners sharing in the risks and rewards that a life in common brings.¹⁹² And, in many cases, at least, that recognition of the nonparticipant spouse's interest accrued during marriage continues regardless of when the marriage ends and under what circumstances. If the spouses divorce, for instance, the nonparticipant spouse in a community property state may be recognized as owner of her interest in the participant spouse's pension and may be able to exercise management prerogatives over that interest.¹⁹³ Death as a cause for termination of the community property regime typically brings a similar effect. If the nonparticipant spouse's death ends the marriage, some community property states will continue to recognize the interest the nonparticipant spouse had in the other's pension during the marriage, insofar as state law may respect a testamentary transfer of that interest to a third person upon the nonparticipant spouse's death.¹⁹⁴

Perhaps not surprisingly, federal law does not share the same view of the nonparticipant spouse's relationship to the participant spouse's pension. The most significant piece of federal legislation regulating pensions, the Employee Retirement Income Security Act (ERISA),¹⁹⁵ has been held to preempt the application of state community property law,¹⁹⁶ and ERISA's treatment of the nonparticipant spouse is, in many cases, substantially different than that in the community property states.¹⁹⁷

ERISA operates in much the same manner as state community property law in the case of divorce. The nonparticipant spouse's interest is recognized, and he or she is given ownership, control, or some combination thereof over her interest in the divorce judgment.¹⁹⁸ If the nonparticipant spouse predeceases the participant, however, the United States Supreme Court has interpreted ERISA in a manner quite unfavorable to the nonparticipant spouse. Specifically, the Court has held that the purpose of and policies supporting ERISA preclude any recognition of the ability of a nonparticipant spouse to make a

¹⁹² Samuel, *supra* note 189, at 433 (describing marriage as “an economic partnership”).

¹⁹³ *Id.* at 440-41.

¹⁹⁴ For example, in *Allard v. Frech*, the Texas Supreme Court held that a nonemployee spouse's community property interest in a private pension passed to her heirs at her death, when her death was the event that terminated the marriage). 754 S.W.2d 111 (Tex. 1998); *Snyder v. Tuscon Police Public Safety Personnel Ret. System Bd.*, 32 P.3d 420 (Ariz. 2001) (share of an employee spouse's pension being paid to the divorced nonemployee spouse does not terminate with the death of the nonemployee spouse).

¹⁹⁵ 29 U.S.C.A. § 1001 *et seq.* (2006).

¹⁹⁶ *Boggs v. Boggs*, 520 U.S. 833 (1997). *Boggs* arrived at the Supreme Court after a circuit split as to the ability of a nonparticipant spouse to transfer her interest in a spouse's pension by testament. See *Alabamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991) (ERISA preempts testamentary transfer); *Boggs v. Boggs*, 82 F.3d 90 (5th Cir. 1996) (testamentary transfer permissible).

¹⁹⁷ Samuel, *supra* note 189, at 429-30.

¹⁹⁸ 29 U.S.C.A. § 1056(d)(3) (2006).

testamentary transfer of her interest in the participant spouse's pension.¹⁹⁹ The ultimate effect of ERISA and the jurisprudence interpreting it is to give greater rights to divorced nonparticipant spouses in their former partners' pensions than those afforded to predeceasing spouses.²⁰⁰ As such, ERISA, and the United States Supreme Court's interpretation of its preemptive effect in community property states, may incentivize divorce, particularly in cases in which the nonparticipant spouse is expected to die before the participant spouse.²⁰¹ The aim of such a divorce would be to regain the testamentary control of which ERISA and the federal rules of preemption deprive nonparticipant spouses.

A. *The Ugly Result of the Supreme Court's Interpretation of ERISA in Boggs*

In its 1997 decision in *Boggs v. Boggs*,²⁰² the United States Supreme Court changed the landscape of interaction between state community property rules and federal rules governing pensions in a significant way. The *Boggs* case pitted the second-wife-designated beneficiary of a participant spouse's pension against the sons of the participant's predeceasing first wife, who attempted to transfer the interest she earned during her community with the participant in her will.²⁰³

The applicable state law on community property—Louisiana's—recognized such testamentary transfers made by the nonparticipant spouse.²⁰⁴ But ERISA governed the pension at issue in *Boggs*, and ERISA's anti-alienation provisions preclude a pension administrator from disbursing funds (either in the nature of a survivor's annuity or monthly annuity payments that the participant spouse receives when he retires) to a person other than the participant or his designated beneficiary, unless an express exception is provided.²⁰⁵ The state and federal rules regarding the nonparticipant spouse's ability to transfer her interest in a pension upon death seemed to directly clash in *Boggs*, and the United States Supreme Court granted certiorari to tackle the issue of whether the two systems could be afforded any harmonious interpretation, or if they could not, which system of rules trumped.

In a decision that has been more criticized than lauded since its

¹⁹⁹ *Boggs*, 520 U.S. at 843-44.

²⁰⁰ Samuel, *supra* note 189, at 426.

²⁰¹ See *infra* text accompanying note 249.

²⁰² 520 U.S. 833 (1997).

²⁰³ *Id.* at 836-837.

²⁰⁴ *Id.* at 838.

²⁰⁵ 29 U.S.C.A. § 1056(d)(1)-(3) (2006).

promulgation,²⁰⁶ the Court held that ERISA preempts the application of state community property rules governing pensions.²⁰⁷ To reach that result, the Court considered the language of ERISA itself, which contains a preemption provision that is exceptionally broad: “The provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in . . . this title.”²⁰⁸ And even beyond the text of that preemption provision, the Court viewed the purpose of ERISA, which it articulated as “to provide a stream of income to participants and their beneficiaries” as incompatible with a state law which allowed someone other than a participant or beneficiary to acquire an interest in a pension.²⁰⁹

The result was a disturbing one, both for the litigants in *Boggs* and for all nonparticipant spouses in community property states. The first wife in *Boggs* was married to the participant for thirty of the thirty-six years of employment that resulted in his ultimate pension benefit.²¹⁰ During her life, she was entitled to recognition of her ownership interest in the pension, which would have neared 50 percent.²¹¹ But the *Boggs* court’s interpretation of ERISA ultimately divested her of all ownership rights in and control over this valuable asset²¹² which she helped to accrue during thirty years of marriage. Had the first Mrs. Boggs survived, even if she had divorced her husband, she would have fared much better. Congress has written an exception into ERISA’s rules which free a plan administrator, normally authorized to disburse pension benefits only to the participant spouse or his designated

²⁰⁶ Compare Tristan E. Propst, *Boggs v. Boggs: The Fifth Circuit Finds ERISA Does not Preempt Louisiana Community Property Law*, 71 TUL. L. REV. 1005 (1997), and Julie McDaniel Dallison, *Disappearing Interests: ERISA Impliedly Preempts the Predeceasing Nonemployee Spouse’s Community Property Interest in the Employee’s Retirement*, 49 BAYLOR L. REV. 477 (1997), and Alvin J. Golden, *A Preliminary Analysis of Boggs v. Boggs—and the Problems it Does Not Answer*, 23 ACTEC Notes 97 (1997), and Tony Vecino, *Boggs v. Boggs: State Community Property and Succession Rights Wallow in ERISA’s Mire*, 28 GOLDEN GATE U. L. REV. 571 (1998), and Erica S. Phillips, *Equality in Life, Inequality in Death: The Ramifications of the United States Supreme Court Decision in Boggs v. Boggs*, 34 IDAHO L. REV. 623 (1998), and Heather J. Rose, *Boggs v. Boggs: Creating Real-Life Cinderellas*, 33 J. MARSHALL L. REV. 271 (1999), and Samuel, *supra* note 189 (all criticizing *Boggs*), with Meridith H. Bogart, *State Doctrines of Substantial Compliance: A Call for ERISA Preemption and Uniform Federal Common Law Doctrine*, 25 CARDOZO L. REV. 447 (2003), and Stephen F. Befort & Christopher J. Kopka, *The Sounds of Silence: The Libertarian Ethos of ERISA Preemption*, 52 FLA. L. REV. 1 (2000), and Sam H. Roberson, *Supreme Court’s Boggs Decision Makes Sense*, NAT’L L.J., Jul. 7, 1997, at A17 (endorsing the Court’s resolution of the conflict in *Boggs*).

²⁰⁷ *Boggs v. Boggs*, 520 U.S. 833, 854 (1997).

²⁰⁸ 29 U.S.C.A. § 1144(a) (2007); *Boggs*, 520 U.S. at 841.

²⁰⁹ *Id.* at 852-53.

²¹⁰ *Id.* at 836.

²¹¹ *Sims v. Sims*, 358 So. 2d 919, 920 (La. 1978). The nonparticipant spouse is entitled to the “portion of pension attributable to creditable service during existence of community . . . / pension attributable to total creditable service x ½ x annuity (or lump-sum payment).” *Id.* at 924.

²¹² Vecino, *supra* note 206, at 572.

beneficiary, to pay a former spouse in community who has obtained a qualified domestic relations order (QDRO) upon divorce.²¹³ In cases of termination of the community regime by divorce, then, ERISA recognizes the contributions of the nonparticipant spouse during marriage.²¹⁴ The *Boggs* court found it significant that Congress made no such exception in ERISA, either in the QDRO provisions or elsewhere, which allowed a nonparticipant spouse in community to retain her interest and to control it by testament if she predeceased the participant.²¹⁵ The ultimate effect of the *Boggs* decision, then, is to strip nonparticipant spouses in community property states “of their property rights in the [participant] spouses’ pension plans, except when the spouses divorce.”²¹⁶

The *Boggs* decision is troubling because the court’s holding that ERISA preempts the application of state community property rules regarding testamentary transfers by nonparticipant spouses “creates an absurd dichotomy between marriages that end in divorce and marriages that end by death.”²¹⁷ The Supreme Court acknowledged that inconsistency, but held that “Congress has decided to favor the living over the dead and we must respect its policy.”²¹⁸ One might question whether that is true. A predeceasing *participant* spouse is empowered under ERISA to make a testamentary transfer of her interest in the pension.²¹⁹ About this inconsistency, the Court simply noted that “ERISA does not concern itself with what a pension fund beneficiary . . . does with his pension money at his death.”²²⁰ Inconsistencies in treatment abound, and the Supreme Court did nothing in *Boggs* but perpetuate unjustified distinctions between participant and nonparticipant ability to control the interest each has earned under state law and between treatment of spouses in marriages ending with divorce and those ending with the death of the nonparticipant.

Even beyond these inconsistencies in treatment, the effect *Boggs* has on state community property law is disturbing. “Pension law is

²¹³ 29 U.S.C.A. § 1056(d)(3) (2006). The QDRO exception to ERISA was enacted as part of the 1984 amendments to the REA (Retirement Equity Act) to define a nonparticipant spouse’s community property interest in a pension plan covered by ERISA. *Boggs*, 520 U.S. at 849-50.

²¹⁴ *Id.* at 848.

²¹⁵ *See id.* at 847-848.

²¹⁶ Phillips, *supra* note 206, at 624.

²¹⁷ *Id.* at 645.

²¹⁸ *Boggs*, 520 U.S. at 854. *But see* Samuel, *supra* note 189, at 442 (“The comparison where testamentary power is concerned is not between a living spouse and a dead spouse but between two dead nonparticipant spouses, one of whom had been divorced from the participant and the other had not. If Congress’s intent was to favor the former, then Congress has favored the divorced over the undivorced.”).

²¹⁹ Phillips, *supra* note 206, at 644-45. This is not true of a survivor’s annuity however. *Id.* *See also* 29 U.S.C.A. § 1055(d)(1)(A) (2006).

²²⁰ *Boggs*, 520 U.S. at 864-65.

federalized”²²¹ under the *Boggs* court’s interpretation of ERISA, and the result is to “unexpectedly alter[] an otherwise predictable system of property ownership and succession under state law and, in its wake, leave[] many married couples with uncertain future estate plans.”²²² Lest one think that such an effect is insignificant, it should be recalled that there are roughly 90 million residents, “with perhaps \$1 trillion in retirement plans” in the nine American community property states.²²³ “[T]he Supreme Court has effectively eliminated the community property states’ definitions of property, at least as it pertains to property interests acquired by the marital community in ERISA qualifying pension plans” for each of those eighty million residents.²²⁴

Boggs even carries unfortunate implications for the forty-one non-community property states. The United States Supreme Court’s view that ERISA preempts the application of state law is not limited to the law in a community property state that recognizes a nonparticipant spouse’s interest in a pension.²²⁵ The Court’s broadly articulated view of preemption would likewise prevent the application of all state law regarding beneficiary designation, for instance.²²⁶ The law of several states provides that a spouse designated as a beneficiary on a participant’s pension loses that designation, either by waiver or a doctrine of revocation, upon divorce, even if the participant spouse does not act to change the beneficiary designation before his death.²²⁷ Because state law on beneficiary designation may “relate to” ERISA plans, one would expect the Supreme Court to afford to ERISA’s preemption clause the same broad reading it did in *Boggs*, and to find state law preempted.²²⁸ Congress’ failure to expressly approve of testamentary transfers by the nonparticipant spouse was a part of the

²²¹ Phillips, *supra* note 206, at 639.

²²² Vecino, *supra* note 206, at 572.

²²³ *Boggs*, 520 U.S. at 840. Justice Kennedy estimated the population of community property states at 80 million in 1997. *Id.* Population estimates for 2007 by (community property) state are: Arizona – 6,338,755; California – 36,553,215; Idaho – 1,499,402; Louisiana – 4,293,204; Nevada – 2,565,382; New Mexico – 1,969,915; Texas – 23,904,380; Washington – 6,468,424; Wisconsin – 5,601,640. GCT-T1 POPULATION ESTIMATES, US CENSUS BUREAU POPULATION ESTIMATES PROGRAM (2007), <http://factfinder.census.gov>. Ninety million residents is therefore a more accurate estimate today.

²²⁴ Phillips, *supra* note 206, at 624. Justice Breyer questioned the majority’s view that Congress intended such an effect: “Obviously, Congress did not intend to pre-empt all state laws that govern property ownership. After all, someone must own an interest in ERISA plan benefits. Nor, for similar reasons, can one believe that Congress intended to pre-empt state laws concerning testamentary bequests. . . . The question, ‘who owns the property?’ needs an answer. Ordinarily, where federal law does not provide a specific answer, state law will have to do so.” *Boggs*, 520 U.S. at 861 (Breyer, J., dissenting).

²²⁵ 29 U.S.C.A. § 1144(a) (2007).

²²⁶ See Samuel, *supra* note 189, at 437-38.

²²⁷ See UNIF. PROBATE CODE § 2-804(b)(1) (2007), (adopted by eighteen states).

²²⁸ Phillips, *supra* note 206, at 646.

Court's rationale for finding them unauthorized by ERISA,²²⁹ and the same failure to expressly approve of waivers or revocations of beneficiary designation may cause problems here. The Court has granted certiorari to resolve precisely this issue in a case to be heard during its 2008 term.²³⁰ And while the *Boggs* holding that ERISA preempts the application of state law will undoubtedly not be overruled in this case, it is hoped that the Court will shed some light on the scope of ERISA's preemption provision. Perhaps such a clarification would aid our understanding of precisely what community property rules ERISA preempts.

B. *State Law Alternatives*

If the preemption held by *Boggs* to preclude the application of state community property rules were lifted, nonparticipant spouses would generally gain testamentary control over the pension interests they own in community property states.²³¹ In six of the nine American community property states, pensions provided by private employers would be classified as community assets even when that classification occurs after the community has terminated by death.²³² And "in these community property states, it follows from the classification of the retirement plan as community property that half of the plan earned by [a participant spouse] during the marriage is subject to [the other spouse's] testamentary disposition just as is half of the community house or any other community asset."²³³ It is nothing more than the application of ERISA, then, that deprives the nonparticipant spouse of the ownership of an asset that the principles of community property protect for her as a result of her efforts exerted during marriage to the participant spouse.

²²⁹ *Boggs*, 520 U.S. at 847.

²³⁰ *Kennedy v. Plan Adm'r for Dupont Sav. & Inv. Plan*, No. 07-636 2008 WL 423542, at *1 (Feb. 19, 2008).

²³¹ Samuel, *supra* note 189, at 426.

²³² *Id.* at 431 n.28. See also CAL. FAM. CODE § 2610 (West 2007) (abolishing California's terminable interest rule); *Alabamis v. Roper*, 937 F.3d 1450, 1461 (9th Cir. 1991) (Fletcher, Circuit Justice, dissenting); LA. REV. STAT. ANN. § 9:1426 (2008) (by implication); *Wolff v. Wolff*, 929 P.2d 916, 920 (Nev. 1996); *Allard v. Frech*, 754 S.W.2d 111 (Tex. App. 1988), *cert. denied*, 488 U.S. 1006 (1989); WIS. STAT. ANN. § 766.31(3) (2007) (nonparticipant spouse's interest terminates at the death of the nonparticipant spouse if he or she predeceases the participant spouse); *Ruggles v. Ruggles*, 860 P.2d 182 (N.M. 1993); *Carpenter v. Carpenter*, 722 P.2d 230 (Ariz. 1986).

Fewer states would allow a nonparticipant spouse to make a testamentary transfer of her interest in the participant's pension plan offered by a public employer. See also Samuel, *supra* note 189, at 432 n.29 (describing the rationale behind treating public and private pensions differently in this context, including that most governmental plans are defined benefit plans with a narrower range of distribution options than that possible under a defined contribution plan).

²³³ Samuel, *supra* note 189, at 431-32.

C. *Proposals for Rectifying the Boggs Inequities*

This disconnect in the testamentary control afforded a nonparticipant spouse under state community property rules, on the one hand, and ERISA, on the other, needs to be remedied. The *Boggs* decision created so many inconsistencies and inequities that it naturally sparked a great deal of interest in the issue.²³⁴ Still, despite repeated calls for change by an overwhelming number of scholars in the field,²³⁵ both Congress and the United States Supreme Court have failed to intervene.

Boggs could be overruled. The United States Supreme Court could relax its interpretation of ERISA as preempting the application of state community property rules, at least insofar as the testamentary control of the nonparticipant spouse's interest goes. After all, ERISA is silent on the matter of testamentary transfers, and state law might be viewed in a light that makes it compatible with ERISA.²³⁶ This will almost certainly not happen. With the tenth anniversary of the *Boggs* decision now behind us, the rule the case establishes, flawed as it may be, has come to be firmly entrenched in the pension arena.²³⁷ It's unlikely that the modern Supreme Court, even with the turnover of two justices since the rendering of the *Boggs* decision, will feel any less hamstrung by the broad preemption clause in ERISA than the 1997 Court did.²³⁸

A more plausible solution for remedying the inappropriately divergent solutions provided by ERISA and state community property law is for Congress to amend ERISA.²³⁹ A number of scholars have called for just such a change in the wake of *Boggs*, and some have

²³⁴ Several states have created guidelines to help employees navigate *Boggs*. See, e.g., Marjorie A. Rogers et al., *Overcoming the Boggs Dilemma in Community Property States*, TAX ADVISER (September 1, 1999); Cheryl Weller, *Supreme Court Rules that State Statute Invalidating Designation of Ex-Wife as Beneficiary upon Divorce is Preempted by ERISA*, 7/01 METRO. CORP. COUNS. 22, col. 1 (2001); Susan M. Kayser, *The Pre-emption Problem: Lower Courts Will Continue to Struggle with Critical ERISA Questions Since Several Cases This Term Left Them Unanswered*, 23 CONN. L. TRIB. 16 (July 21, 1997).

²³⁵ Samuel, *supra* note 189, at 426.

²³⁶ In Samuel, *supra* note 189, at 446, the authors suggest that state community property rules might be harmonized with ERISA by allowing the heirs of the nonparticipant spouse to seek satisfaction of her share, not from the plan administrator, which would run afoul of ERISA, but rather from the beneficiary himself through some reimbursement of other monetary claim.

²³⁷ A March 2008 Westlaw Keycite of *Boggs* yielded 1,638 results.

²³⁸ Justice Sandra Day O'Connor and Chief Justice William Rehnquist no longer sit on the Court. Both Justices joined Justice Stephen Breyer's dissent in *Boggs* (voting to affirm the judgment of the Fifth Circuit). *Boggs*, 520 U.S. at 854.

²³⁹ Such an amendment would not alleviate all divergence in rules regarding testamentary control of the nonparticipant spouse. See *supra* notes 231-233 and accompanying text. Still, an amendment to ERISA would be a vast improvement, as it would eliminate the frustration of the general community property policy—sharing of the acquets and gains of the marriage—that the *Boggs* decision caused.

provided detailed proposals for modification.²⁴⁰ Expanding ERISA's existing definition of QDROs to include probate orders, for instance, which would allow the plan administrator to transfer an interest to a person other than the designated beneficiary, has been proposed.²⁴¹ Narrowing ERISA's preemption clause is an even more popular proposal.²⁴² Most scholars view the extreme breadth of that provision as the source of the problem with *Boggs*.²⁴³ When ERISA was initially considered in the United States House of Representatives, its preemption clause spoke to "matters expressly covered by the federal law, such as reporting, disclosure, fiduciary and funding duties, and vesting and nonforfeitability provisions."²⁴⁴ This narrow clause was consistent with the purpose of ERISA's passage—to remedy rampant pension administrator abuses and to protect employees from abuse of this significant asset.²⁴⁵ By the time of ERISA's enactment, however, the preemption provision had been expanded to include its current "relation" language.²⁴⁶ The purpose of the change was to "prevent litigation over the scope and meaning of the clause. . . . Obviously, this attempt at avoiding litigation has failed. Since the Supreme Court's first preemption decision [in 1981] it has handed down an average of one opinion on the subject per year."²⁴⁷ Congress could take steps toward solving the problem either by reverting to the preemption language included in the original bill,²⁴⁸ or by developing still different language that narrows the domain of ERISA's preemption of state community property rules.

D. *The Divorce Incentive Underlying Boggs*

What is perhaps most disturbing about the *Boggs* court's

²⁴⁰ Two law professors' proposal for change even resulted in a bill to amend ERISA which was introduced into the United States Senate. See S. 1616, 108th Cong. (2003). The bill was referred to the Committee on Health, Education, Labor, and Pensions, where it has remained without amendment or further action.

²⁴¹ Samuel, *supra* note 189, at 445; see also Vecino, *supra* note 206, at 625; *Eller v. Bolton*, 895 A.2d 382 (Md. Ct. Spec. App. 2006) (court amended QDRO after the death of the nonparticipant spouse on an ERISA-qualified pension).

²⁴² See, e.g., Samuel, *supra* note 189, at 449-50; Vecino, *supra* note 206, at 625; Phillips, *supra* note 206, at 647-48.

²⁴³ See, e.g., *Boggs*, 520 U.S. at 861 (Breyer, J., dissenting).

²⁴⁴ David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. PITT. L. REV. 427, 454 (1987); see also H.R. 2, 93d Cong., 1st Sess. § 7 (1974); H.R. REP. NO. 93-533 (1974), as reprinted in 1974 U.S.C.C.A.N. 4639, 4655.

²⁴⁵ Gregory, *supra* note 244, at 443.

²⁴⁶ Jay Conison, *ERISA and the Language of Preemption*, 72 WASH. U.L.Q. 619, 619-20 (1994). See also Phillips, *supra* note 206, at 640.

²⁴⁷ Phillips, *supra* note 206, at 647.

²⁴⁸ *Id.* at 648.

interpretation of ERISA's interaction with state community property law is not its arguably unfair deprivation of the nonparticipant spouse's ownership interest in a pension earned during a community property regime. Rather, a more insidious and less obvious effect exists. The problem is caused by the fact that ERISA, at least as *Boggs* interpreted it, treats divorced nonparticipant spouses better than predeceasing nonparticipant spouses. This disparate treatment provides a substantial incentive to divorce.

"After the *Boggs* decision, an estate planning lawyer must seriously consider whether he should advise a quickie no-fault divorce if a nonparticipant spouse is expected to die before the participant. At least one author has suggested, 'Failure to present this estate planning opportunity carries with it at least the theoretical possibility of an allegation of malpractice.'"²⁴⁹ A quickie divorce may be the only way for the nonparticipant spouse to gain testamentary control over her interest in the participant's pension and to assert an ownership interest in the asset she helped to produce during the existence of her community property regime with the participant spouse.

The possibility that the nonparticipant spouse will act upon the incentive created by *Boggs* and ERISA is magnified when one considers the significance of pensions to the economic wellbeing of the average American couple.²⁵⁰ The effect of *Boggs* and ERISA is to divest nonparticipant spouses in community of "their rights in what is often the largest, single asset in the marital community."²⁵¹ Financial instability has long been viewed as a serious and legitimate threat to the longevity of any marriage, and as a relevant factor in signaling the demise of a couple's life together. That the rules of marital property, not so much in their pure state form, but as overridden by federal policy, would add to that instability by creating an economic boon for a nonparticipant spouse with a hefty interest in her spouse's pension to divorce is rather surprising.

Still, neither Congress nor the majority in *Boggs* (or any other reported appellate decision) has expressed any recognition of the incentive created. Justice Breyer did articulate concern over the

²⁴⁹ Samuel, *supra* note 189, at 444 (quoting *Boggs v. Boggs Holds that a Predeceasing Nonparticipant Spouse Has No Property Interest in an ERISA Pension Plan*, ERISA LITIG. RPT. Rep. 4 (August 1997)).

²⁵⁰ See generally Employee Benefit Research Institute, *The Retirement System in Transition: The 2007 Retirement Confidence Survey*, EBRI Issue Brief No. 304, p. 16 (April 2007), available at http://www.ebri.org/pdf/briefspdf/EBRI_IB_04a-20075.pdf ("Almost 3 in 10 workers say they expect that most of their money in retirement will come from a work-place retirement savings plan, such as a 401(k) (28 percent)"). See also Phillips, *supra* note 206, at 648 ("While ERISA was not created as a wealth-transfer mechanism, the growth of private pensions in this country has effectively created a situation in which pension plans are the primary means of collecting wealth for families.").

²⁵¹ Phillips, *supra* note 206, at 648.

disturbing effect of the majority opinion in his *Boggs* dissent: “[I]t would be anomalous to find a congressional purpose in ERISA—despite the absence of express statutory language and any indication that Congress even considered the question—that would in effect deprive [a nonparticipant spouse] of her interest because, instead of divorcing [the participant spouse], she stayed with him till her last breath.”²⁵²

It is certainly possible that the policies supporting a rule of preemption be explored and determined to take precedence over the merely theoretical—and, some may even argue, remote—possibility that a rule of preemption encourages divorce in a narrow factual setting.²⁵³ The policies that the *Boggs* court found Congress sought to foster through ERISA may simply be viewed as more important and more real than any theoretical concern over driving spouses toward divorce. That weighing of interests, however, has not been conducted by any court. The incentive to divorce needs to be either corrected, or given express recognition in the context of a decision to favor the rule of preemption over a rule that provides far fewer incentives to divorce. As long as neither happens and *Boggs* continues to percolate,²⁵⁴ the largely unremedied and unrecognized encouragement to divorce looms.

IV. THE NEED FOR A REEVALUATION OF MARITAL PROPERTY RULES THAT ENCOURAGE DIVORCE

The rules described here provide clear incentives for spouses in a community property regime to terminate their marriage, perhaps not because they desire that course of action, but because it is the only course of action that will provide them legitimate relief from some of the harsh effects of the rules of marital property. That the government provides these incentives to divorce is disturbing, in light of the evidence surrounding the benefits of marriage. Economists have long recognized the economies of scale inherent in joint consumption to be a significant financial benefit of marriage.²⁵⁵ Moreover, the encouragement marriage gives to the achievement of gains caused by the specialization of each spouse improves both the spouses' and society's financial picture.²⁵⁶ In essence, “society has a stake in the

²⁵² *Boggs*, 520 U.S. at 868 (Breyer, J., dissenting); see also Samuel, *supra* note 189, at 444.

²⁵³ It would be illogical to change the rules of all pension plans to allow the nonparticipant spouse testamentary control in order to remove the divorce incentive. State statutory plans are likely to have different purposes than those provided by private employers, for instance, and special concerns may militate against nonparticipant testamentary control here.

²⁵⁴ Samuel, *supra* note 189, at 443.

²⁵⁵ GROSSBARD-SHECHTMAN, *supra* note 18, at 5.

²⁵⁶ David Lam, *Marriage Markets and Assortative Mating with Household Public Goods*, 33 J. OF HUM. RESOURCES 462, 481 (1988); Sherman, *supra* note 17, at 372.

stability of marriage,” owing to the reduced societal burden brought by “the financial security, emotional support, and mutual care that marriage partners provide to one another over time.”²⁵⁷ It is a stake that should be protected.

A. *Channeling Parties into Entering and Remaining in the Marital Relationship*

The rules of family law, and especially the marital property rules, should be encouraging and incentivizing marriage, not divorce.²⁵⁸ These rules can serve a channeling function, pushing spouses into an institution like marriage, which serves such a strong social purpose, and providing encouragement to remain there.²⁵⁹ Those channeling techniques might take many forms. The rules of marital property, for instance, might provide advantages to married individuals that other parties do not have. The rules might disfavor the use of competing institutions. They might penalize parties who choose divorce.²⁶⁰

Those who question the propriety of the state endeavoring to guide behavior through substantive laws often argue that the state should remain as “hands off” as possible with regard to marital property.²⁶¹ For those who subscribe to this view, the rules of marital property should facilitate spousal desires and do nothing more.²⁶² This theory has been somewhat well-received in the family law sphere in general. The past twenty years has seen a trend referred to as the “dejuridification of marriage,” marked by the repeal of many norm-setting laws surrounding marriage and family life.²⁶³ It is not possible in this context, however, for the state to act in a hands off manner. There *must* be rules governing the seizure of marital property by third party creditors upon divorce.²⁶⁴ Testamentary transfers of the nonparticipant spouse’s interest in the other’s pension plan either are or

²⁵⁷ Scott, *supra* note 2, at 1958.

²⁵⁸ Examples of channeling rules in the family law sphere abound. *See, e.g.*, Brotherson & Teichert, *supra* note 7, at 41 (describing the messages sent by rules of covenant marriage, same sex marriage, no fault divorce, and paternity testing, among others).

²⁵⁹ Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 505 (1992).

²⁶⁰ *Id.* at 503. For a discussion of a number of ways in which states have encouraged marriage, see Brian H. Bix, *State Interest and Marriage—The Theoretical Perspective*, 32 HOFSTRA L. REV. 93, 100-02 (2003).

²⁶¹ *See generally* Carolyn J. Frantz, *Should the Rules of Marital Property be Normative?*, 2004 U. CHI. LEGAL F. 265 (2004).

²⁶² *Id.*

²⁶³ MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW*, 64 (1987).

²⁶⁴ *Id.* at 139 (family law cannot be “neutral . . . for refusing to take a moral position is a moral stand in itself”). *See also* Frantz, *supra* note 261, at 289 (particularly with regard to “property division and support upon divorce,” one rule or another must be set).

are not permissible. The state must either leave spouses to fend for themselves upon mismanagement of a spouse, or provide a unilateral, albeit court-supervised, means of retaining the marital relationship but terminating the community property regime. Dejuridification is simply not an option here. Lawmakers must necessarily develop rules that either incentivize divorce, or encourage spouses to remain married.²⁶⁵

A number of community property jurisdictions have acted in a similar context, not to disincentivize divorce, but rather to remove an incentive to parties to marry for the wrong reasons.²⁶⁶ Creditor-avoidance-based incentives to marry were found objectionable rather early on, and community states changed their rules of debt collection in the marital context for the purpose of removing the incentives. Precisely the same thing should happen where the debt collection rule regarding the property available for seizure after termination of the community property regime incentivizes divorce.

In the context of the three marital property rules described herein, it is clear how each might be modified to remove inappropriate divorce incentives. First, the debt collection rules of California and Idaho should be modified to eliminate the boon a spouse in community receives upon divorce. After termination of the marriage, a nondebtor spouse's former community property should be seizable for debts the other incurred during the marriage, just as they are if that same creditor seeks to collect during the marital relationship. Second, all community jurisdictions should develop a method whereby a spouse can unilaterally, and even over the objection of the other, seek termination of the community property regime while remaining married. To force a spouse into divorce solely to obtain relief for the other spouse's continuing mismanagement is misguided. Third, either the text of ERISA or the interpretation afforded it by the Supreme Court needs to be modified to give a nonparticipant spouse, at least in narrowly-tailored circumstances, the possibility of disposing of her interest by testament. Treating nonparticipant spouses at death worse than their divorcing counterparts creates an inconsistency that should drive thinking persons toward divorce.

Changing each of these rules might solve particular inequities. Of course, the changes might create inequities as well.²⁶⁷ Holding the

²⁶⁵ See GROSSBARD-SHECHTMAN, *supra* note 18, at 75.

²⁶⁶ See *supra* text accompanying notes 112-117, describing the "marital bankruptcy."

²⁶⁷ It is certainly possible that the changes in the marital property rules suggested herein might cause more spouses to enter into matrimonial agreements for the purpose of avoiding the new rules. That possibility does not undermine the call for change. First, while the rules of marital property are typically suppletive rules that the parties can contract around, there are some things that simply may not legally be done by matrimonial agreement. Not all community property states allow the spouses to set a debt collection rule that must be respected by their creditors, for instance. Carroll, *supra* note 29, at 26-37 (describing varying rules in community property states

entirety of the community property once owned by spouses for the debt of just one even after the marriage has terminated, for instance, is not without philosophical problem. Nonetheless, the changes would “send a social message about the nature of marriage itself that would become incorporated into the meaning of the institution, thus shaping the behavior of present and future couples.”²⁶⁸ The message would be a communal one.²⁶⁹ It is the message that is the very core of the community property regime: spouses are in it together, sharing and contributing to a marital partnership.

The effect of changes such as those suggested here to marital property law would “be immediate on those already married. As for new entrants in the marriage market, they will be able to adjust in advance to the change in law and will react differently after the change in law relative to how they would have reacted if the law had not changed.”²⁷⁰ The law would be acting as Aristotle envisioned it—a persuasive tool for shaping human conduct.²⁷¹

Not everyone agrees that law should embrace a normative, behavior-shaping function.²⁷² Accepting this channeling function depends, in part, upon a view of marriage as not merely a private institution, but rather a state one.²⁷³ It is perhaps easier to accept the

on whether to enforce matrimonial agreements against creditors). Moreover, the spouses could not by agreement force an ERISA-qualified plan administrator to pay benefits to a nonparticipating spouse’s legatees. Second, the reality is that very few people actually contract out of the legal regime of community property. The most recent estimates put that segment of the population at roughly five percent. Frantz, *supra* note 261, at 274; *see also* Sherman, *supra* note 17 at 372 (1990s statistics). *But see* American Academy of Matrimonial Lawyers, *Survey of Nation’s Top Divorce Lawyers Reveals a Surge in Prenuptial Agreements* (2006), available at http://www.aaml.org/files/public/Prenuptial_Surge_10-10-2006.htm (“An overwhelming 80% of divorce attorneys cited an increase in prenuptial agreements during the past five years in a recent poll of American Academy of Matrimonial Lawyer (AAML) members.”). However, as long as negative social views surround the execution of matrimonial agreements, these numbers are not likely to increase substantially. Third, the default rule is important for psychological reasons, regardless of how many couples opt out of it. Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 *LAW & INEQ.* 109, 132 (2008). Marital property rules are “essential for facilitating trust and shaping expectation,” even if they can be contracted around. Carolyn Frantz & Hanoch Dagan, *On Marital Property*, N.Y.U. Law Sch., Pub. Law and Legal Theory Working Paper Series, Res. Paper no. 45, at 38 (2002), available at <http://ssrn.com/abstract-id=325062>. The manner in which the state sets the default rules is significant. Frantz, *supra* note 261, at 273. Here, the state has done it in a way that favors everyone but the spouses.

²⁶⁸ Frantz, *supra* note 261, at 275.

²⁶⁹ *Id.*

²⁷⁰ Shoshana Grossbard-Shechtman, *Property Division at Divorce an Demographic Behavior: An Economic Analysis and International Comparison*, American Economics Association (2002), at 3-4. Small numbers of couples may contract out of the community property regime entirely. For a discussion of that possibility, *see* text accompanying *supra* note 267.

²⁷¹ Brotherson & Teichert, *supra* note 7, at 24.

²⁷² *See, e.g.,* MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 36 (1993) (describing a shift away from norm-influencing family law rules since the Victorian era).

²⁷³ Frantz, *supra* note 261, at 291-92.

channeling function of law in the community property context, however, which is already heavily norm-laden, than it is in other areas. The community regime, in each of the American states which has adopted it, is a regime with the purpose of projecting a certain image of marriage.²⁷⁴ The regime is lauded for its gains in treating spouses equally, for recognizing the value of all forms of contribution to the running of a household (monetary and otherwise), and for treating the spouses as partners working toward a common goal and sharing equally in the risks and rewards of their future.²⁷⁵ The marital property of the other forty-one states cannot be said to have as substantial of a normative background.

From these base notions of community, it is really only a small step in the direction of normativity to modify three marital property rules to remove the incentives to divorce that they carry. The change would merely serve to further emphasize to existing and future spouses in community that they are partners. Creditors with whom one spouse creates relationships during the existence of the community property regime should not be eluded by divorce. Acts of mismanagement by one spouse should allow the other a method of protecting himself by escaping the community property regime, but should not force him to resort to divorce. And the interest a spouse in community earns in the other's pension should not be relinquished merely because nonparticipant testamentary transfers are not recognized. The aims of the already quite normative community property regime would be furthered with these changes, and spouses would be channeled into maintaining the marital relationship that so benefits both the two of them and society in general.

B. *The Limits of Marital Property Law to Shape Human Conduct*

This is, perhaps, an overly optimistic goal. The degree to which changing the rules of marital property, or any other rules in the family law arena, for that matter, can have an actual, real-world impact on spouses is somewhat questionable. After all, even if marital property rules provide spouses with incentives to divorce, there is no evidence that spouses act on those incentives with any regularity.²⁷⁶ The most

²⁷⁴ Michael J. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 27 (1967) ("A rational process of thought culminated in the decision that the wife should have equal property rights in marital property acquisitions. Community of property is the application of this thought, and the phrase itself is merely a shorthand rendition of the whole concept that the husband and wife are equals.").

²⁷⁵ Samuel, *supra* note 189, at 428-29.

²⁷⁶ See Douglas W. Allen, *The Impact of Legal Regimes on Marriage and Divorce*, in THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE, 191 (Antony W. Dnes & Robert Rowthorn

substantial limit of the channeling function is that its success cannot be measured.²⁷⁷ “No one can chart with confidence the ways in which law, customs, new lines of behavior, ideas about law, and ideas about morality reciprocally influence each other.”²⁷⁸ The decision to divorce a spouse is not a simple economic decision. There are a number of interconnected factors that must be considered, including the rearing of children, living arrangements, expenses, and a whole host of emotional factors.²⁷⁹ Some of these factors are considered carefully and rationally, and some are not.²⁸⁰ And if divorce decisions are not rationally made, then the state can’t meet any channeling or norm-shaping aims with the modification of legal rules. “[M]arital property law is [just] too remote from people’s actual marriages to make any difference.”²⁸¹

Still, devotees of the law and economics movement have long considered the decision to divorce, like that to marry in the first place, as a utility calculus that each individual makes.²⁸² Parties considering exiting a marriage weigh, if subconsciously, all of the barriers to exit, including the financial, moral, and social cost of divorce, against the benefits of remaining in the marital relationship. Of course, even economists recognize that some decisions to divorce will be made impulsively and immaturely, by parties without any real knowledge of the legal ramifications either of remaining married or of divorcing.²⁸³ But law and economics has morphed our view of the divorce decision into one that is “essentially a consumer decision, one that involves a comparison of the costs and benefits of marriage versus single life.”²⁸⁴ It is possible, with such a view of divorce, to shape behavior and to

eds., Cambridge Univ. Press, 2002) (describing the difficulty of measuring the empirical effect of law on the divorce decision). A number of studies in the last twenty years have sought to assess the impact of the movement towards no-fault divorce on actual divorce rates. *See id.*; Ian Smith, *European Divorce Laws, Divorce Rates, and Their Consequences*, in *THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE*, 212 at Table 12.1 (Antony W. Dnes & Robert Rowthorn eds. 2002) (European study of impact of no-fault divorce on divorce rates).

²⁷⁷ Schneider, *supra* note 259, at 512-13.

²⁷⁸ GLENDON, *supra* note 263, at 138.

²⁷⁹ GROSSBARD-SHECHTMAN, *supra* note 18, at 95; *see also* Scott, *supra* note 17, at 42 (“Withdrawal, boredom, pursuit of other relationships, immersion in career, and conflict over finances, children, and other family may all weaken the resolve to sustain a lasting relationship and may ultimately lead to the marital breakdown.”); Slibaugh, *supra* note 20 (criticizing the American Law Institute’s Principles on the Law of Family Dissolution for their failure to recognize that even financial decisions suffer from an emotional taint when a marriage dissolves). Parties may remain in unsatisfying marriages for any number of reasons that have absolutely nothing to do with financial considerations. *Id.* at 242-43.

²⁸⁰ *See* Frantz, *supra* note 261, at 272 (spouses do not freely choose between staying married or divorced “based on the desirability” of the rules governing each status).

²⁸¹ *Id.* at 285; *see also* Weisbrod, *supra* note 3, at 1005 (“[L]aw [is] not a prime determinant of behavior in relation to marital stability.”).

²⁸² *See, e.g.*, GROSSBARD-SHECHTMAN, *supra* note 17, at 44 (on the decision to enter into the marital relationship).

²⁸³ Scott, *supra* note 17, at 56.

²⁸⁴ Wilkinson-Ryan & Small, *supra* note 267, at 112.

promote the institution of marriage, in some small way at least, merely by modifying marital property rules that send inappropriate messages about marriage.

But the problem with the notion that bettering rules of marital property will send a message that encourages spouses to remain married is exacerbated by the fact that any rule which seeks to change behavior is dependent upon the relevant parties' actual knowledge of the governing rule. For marital property law to succeed in a normative capacity, "it must communicate well."²⁸⁵ There is certainly sociological evidence which suggests that the rules of marital property fail to meet this challenge. Spouses do not know a great deal about the details of divorce law.²⁸⁶ Thanks to popular culture, however, they know more about laws relating to divorce than almost any other area of law.²⁸⁷ And there is good reason to believe that spouses will become aware of many marital property rules before a decision to divorce is made. If the marital property rules herein explored are at issue, that necessarily means that the spouses either have some substantial debt of which creditors are seeking satisfaction, one spouse is mismanaging the marital assets rather seriously, or a nonparticipant spouse is concerned with protecting her interest in the other's retirement benefits. In all of these scenarios, parties are likely to consult with a lawyer before taking any serious action. It is not reasonable, then, to assume that the marital property rules detailed here cannot cause divorce because spouses lack knowledge of the rules. Spouses are likely to hear of the applicable rules from their estate planning lawyers, those professionals aiding them in defending a debt collection, or others. It is likely, then, that the law communicates well enough in this area to steer parties in one direction or another. The question merely becomes one of how marital property rules will steer them—toward remaining married or toward terminating their relationship?

C. *The Utility of a Marriage-Incentivizing Expressive Rule*

Even if spouses lack knowledge of the marital property rules that govern them and fail to act rationally in making divorce decisions, such that no legitimate argument may be made that the state shapes conduct

²⁸⁵ Cass R. Sunstein, *On the Expressive Function of Law*, U. PA. L. REV. 2021, 2050 (1996).

²⁸⁶ Lynn A. Baker & Robert Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 441 (1993). In fact, at least one study suggests that spouses know less about marital property than they do about most other aspects of divorce, including child custody and child and spousal support. *Id.* The more "minute and technical" the details of the marital property rule are, the less likely the rules are to shape human behavior. Frantz, *supra* note 261, at 276.

²⁸⁷ Baker & Emery, *supra* note 286, at 442.

through marital property law, there may be good reason for setting aside rules of marital property which incentivize divorce. In addition to channeling parties into social institutions which have desirable outcomes, law can serve an expressive purpose.²⁸⁸ This view of the role of marital property law is not dependent on its ability to modify behavior. The expressive function of law might be appropriately exercised even absent any change in conduct resulting from the expression.²⁸⁹ In this sense, the “law performs a pedagogical role”²⁹⁰ and even if its students are unresponsive, there may be value in the message. The rules of marital property can encourage responsible behavior.²⁹¹ They can contribute to social dialogue,²⁹² which, in this case is likely to center around the respective contributions and roles of the spouses in marriage. The message communicated by marital property law, particularly in a community property regime, should be one that emphasizes and encourages sharing and working together as partners in a relationship that has beneficial societal effects.²⁹³

And even if all of this encouragement and dialogue results in no change in attitudes about divorce, there is value in such an expression itself, grounded in an individual interest in integrity.²⁹⁴ The state’s integrity is grounded in supporting and promoting the institution most beneficial for its citizens. In the marriage context, that is most certainly not divorce.

CONCLUSION

With the advent of no-fault divorce, barriers to exit that once

²⁸⁸ Schneider, *supra* note 259, at 498 (describing expressive function of law as imparting ideas). Many are critical of state expressionism, though expressive theories of law have been afforded “renewed salience” in the literature in recent years. *See, e.g.*, Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1369 (calling for a more general argument against expressivism); Scott, *supra* note 2, at 1929 (lauding expressive theory as particularly relevant in the family law context, despite its criticisms, because of the great number of rules that are not formally enforced).

²⁸⁹ *See generally* Sunstein, *supra* note 285, at 2024-25 (defining the “expressive function of law” as “the function of law in ‘making statements’” even absent behavioral control).

²⁹⁰ GLENDON, *supra* note 263, at 139; Weisbrod, *supra* note 3, at 994.

²⁹¹ Brotherson & Teichert, *supra* note 7, at 34.

²⁹² *Id.* at 24.

²⁹³ Samuel & Spaht, *supra* note 189, at 428-29; *see also* Frantz, *supra* note 261, at 284 (regardless of parties’ satisfaction with the changes, the state might justifiably modify the rules of marital property to make marriages “morally better”). One scholar has described modern family law as militating quite in the opposite direction, “reinforc[ing] a pessimistic account of contemporary marriage as a relationship involving minimum commitment and maximum self-gratification.” Scott, *supra* note 17, at 22.

²⁹⁴ Sunstein, *supra* note 285, at 2026-27.

existed in the marital relationship have been all but eliminated.²⁹⁵ Both entry into and exit from marriage are now legally free.²⁹⁶ Not many people seriously argue today that no-fault divorce should be abolished.²⁹⁷ On the contrary, easy exit from the marital bond has come to be viewed as an individual freedom that should not be abrogated.²⁹⁸ As long as society has an interest in promoting marriage, however, steps can and should be taken to address the risks opened by free exit.²⁹⁹ Marital property rules can play a central role in addressing those risks.³⁰⁰ But they cannot serve the institution of marriage if they encourage and incentivize divorce.

Of course, not every marriage should be saved. In exercising both its channeling and expressive functions, family law must be cognizant of the fact that some spousal relationships are simply “outside the communal idea of marriage”³⁰¹ and unworthy of protection.³⁰² Lawmakers must be careful not to commit “the error of the doctor who, to preserve the health of his healthy patients, places them on a regime for the ill.”³⁰³ Before the three marital property rules herein discussed are changed to remove the perverse divorce incentives they bring, for instance, the effect on functional families, and not just those on the verge of divorce, must be considered.³⁰⁴ The rules of marital property and divorce are so closely associated that any evaluation or modification of one set of rules without consideration of the other brings a strong likelihood of spousal suffering, either in marriage or divorce.³⁰⁵ Thus far, neither lawmakers, judges, nor scholars have undertaken that study. And the result is a mass of marital property law which undermines the very fabric of the matrimonial regime it is designed to support.

²⁹⁵ Karen Turnage Boyd, *The Tale of Two Systems: How Integrated Divorce Laws Can Remedy the Unintended Effects of Pure No-Fault Divorce*, 12 CARDOZO J.L. & GENDER 609, 612 (2006) (noting that all states had some form of no-fault divorce by 1985).

²⁹⁶ Frantz & Dagan, *supra* note 267, at 15.

²⁹⁷ *But see* Paul T. Davis, *The 2002 Legislative Session: A Midterm Report*, 71 J. KAN. BAR ASS'N (April 2002) (describing a failed move in the Kansas Senate to abolish no-fault divorce for couples with children).

²⁹⁸ Frantz & Dagan, *supra* note 267, at 15.

²⁹⁹ *Id.* at 20-21. In the business context, for example, arrangements are open-ended, but the law encourages parties to commit to these relationships by “assuring their investments are protected if the other breaches.” REGAN, *supra* note 272, at 139. The same strategy should be employed in the marital relationship.

³⁰⁰ Frantz & Dagan, *supra* note 267, at 20-21.

³⁰¹ Frantz & Dagan, *supra* note 267, at 18.

³⁰² *But see* Sherman, *supra* note 17, at 394 (arguing that even a bad marital bargain may be better than none).

³⁰³ Tête, *supra* note 124, at 541. Some believe it is folly to object to a legal rule simply because its existence may cause people to alter their behavior in calculating ways. *See* Sherman, *supra* note 17, at 396.

³⁰⁴ *See* Brotherson & Teichert, *supra* note 7, at 26.

³⁰⁵ Simon Clark, *Law, Property, and Marital Dissolution*, 109 ECON. J. C41, C53 (1999).

The limit of law is important to recognize in this context.³⁰⁶ No matter how marital property rules are modified, they cannot be structured to protect spouses “from the collapse of the emotional core of their relationship.”³⁰⁷ But marital property rules can operate in the background, providing a “safety net that minimizes certain incentives for opportunism” and encourages continuity in marriage.³⁰⁸

A critical reevaluation of the rules of marital property is needed, with a particular emphasis placed on whether some of those rules are justified. At least with regard to post-dissolution creditor access to former community property, the unilateral ability of a spouse to remain married but bring the community property regime to an end for the other’s mismanagement, and the possibility of the nonparticipant spouse making testamentary transfers of her interest in an ERISA-governed pension, the results of that reevaluation are likely to call for a change. These rules do not succeed in “promoting their accepted values.”³⁰⁹ Indeed, each of them seems to undermine the ideals of the community property regime. And worse yet, they push spouses, unnecessarily, toward divorce, an indirect attack on marriage³¹⁰ with which we should all be concerned.

³⁰⁶ “[T]here is something in family law that [is] peculiarly difficult. The problem is centrally that we care so much, and that law, finally, can do so little.” Weisbrod, *supra* note 3, at 1007.

³⁰⁷ Frantz & Dagan, *supra* note 267, at 38.

³⁰⁸ *Id.* at 40.

³⁰⁹ Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1561 (2003).

³¹⁰ Samuel, *supra* note 189, at 442-443 (describing indirect attack on marriage as one “made through the enactment of laws that redefine or undermine marriage or deny recognition to its inherent nature”).