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## Liberty and Community in Marriage: Expanding on Massey's Proposal for a Community Property Option in New Hampshire

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# ARTICLE

## Liberty and Community in Marriage: Expanding on Massey’s Proposal for a Community Property Option in New Hampshire

JO CARRILLO\*

### ABSTRACT

*This article argues that intimate partners should have the right to adopt a sharing economy within marriage. Forty-one U.S. states employ a separate property regime for property acquired during marriage; of these, only two allow married couples to opt out of the separate property system and hold their assets as community property. Nine U.S. states are community property states. To encourage equal partnership in marriage, Calvin Massey proposed that New Hampshire, a separate property state, enable a community property option. This essay expands on Massey’s proposal by comparing it to three other marriage reform proposals: two based on privatization, and another focused on equitable distribution laws. To be sure, all four reforms refer to market-metrics, but only the community property option proposal allows for the qualitative claim that an individual has a right to enter into and maintain a marriage between economic equals. Massey’s view was that the state should enable, not frustrate such a right. For this and other reasons, this essay develops a comparative and analytic foundation for Massey’s community property option proposal.*

### CONTENTS

|  |     |
|--|-----|
| INTRODUCTION .....   | 290 |
| I. RICHER AND POORER: MARRIAGE AND THE AUTONOMOUS<br>INDIVIDUAL..... | 292 |
| A. Proposals to Privatize Marriage.....                              | 295 |
| 1. A Proposal to Replace Marriage with Civil Union .....             | 296 |
| 2. A Proposal to Completely Abrogate Marriage and Civil Union ..     | 298 |

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|  |     |
|--|-----|
| B. A Proposal for Strong Enforcement of Equitable Distribution Laws at Divorce ..... | 305 |
| II. RICHER OR POORER TOGETHER: THE AUTONOMOUS INDIVIDUAL IN COMMUNITY .....          | 313 |
| CONCLUSION.....  | 319 |

## INTRODUCTION

Would legislative enablement of a community property option in a separate property state such as New Hampshire maximize individual liberty? Calvin Massey thought so for reasons he outlined in *Why New Hampshire Should Permit Married Couples to Choose Community Property*.<sup>1</sup> In this essay I develop a comparative and analytic foundation for Massey's community property option proposal.

Some think it contradictory to discuss marriage and individual liberty in the same breath. But, as it turns out, concerns about individuality are often the impetus for marriage reform proposals, including general ones that are critical of marriage as an institution and specific ones to do away with state-licensed marriage altogether. It may seem that marital property reform is of interest to only a small group of family law scholars, however, the topic potentially affects anyone who cares about retaining their individuality in the context of a committed relationship.

Two points before I begin. Each is fundamental to my analytic framework.

One, Massey did not argue for marriage privatization, and neither do I. In this essay I propose a legal-philosophical analysis of the concept of individual liberty within a discrete set of marriage and divorce reform proposals. I do not intentionally engage critical theory scholarship about whether marriage is good (or not) for a particular cohort.<sup>2</sup> Such inquiries are illuminating to be sure, but they tend to engage with the structural issues of a particular historical moment rather than with the deeper ideas underlying the institution of marriage, which means that the most influential of the "is marriage good for" analyses are sociological, not philosophical.

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<sup>1</sup> Calvin Massey, *Why New Hampshire Should Permit Married Couples to Choose Community Property*, 13 U.N.H. L. REV. 35 (2015).

<sup>2</sup> RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE (2011); June Carbone & Naomi Cahn, *Is Marriage for Rich Men?*, 13 NEV. L.J. 386 (2013).

Two, critical analyses explicitly concern themselves with what philosopher Elizabeth Anderson refers to as “durable hierarchies.”<sup>3</sup> Massey’s article does not. Nevertheless, I use Massey’s article as a starting point for my analysis because of how it calls out individual liberty as a prime reason to marry. Had Massey continued to explore the legal connection between marriage, individual liberty, and state action, I believe he would have developed a full blown equal protection argument, the premise of which might be that at key property transfer moments in an adult life, federal law treats married persons in forced separate property states differently than it treats married persons in community property states.<sup>4</sup> Such an equal protection argument is outside the scope of this essay; nevertheless, it influences my analysis.

In this essay I compare four marriage reform proposals for how and what kind of liberty each purports to maximize.

Part I examines two marriage privatization proposals and one enhanced equitable distribution enforcement proposal. I argue that each of these three proposals—the proposal to replace marriage with civil union; the proposal to do away with marriage; and the proposal to enhance equitable distribution enforcement at divorce—measures individual liberty by a market-metric such as the one enshrined in classical liberalism. Each proposal (I suspect unintentionally) also defends an economic morality identifiable by how it valorizes the needs of the autonomous individual at the cost of obscuring the needs of the community, in this case (at the very least) the community of the married couple.<sup>5</sup>

Marriage reform proposals that promote the individual over a community are recognizable by a distinct constellation of foundational premises: (a) resources are scarce; (b) a minimal state maximizes individual liberty; (c) the market is a necessary if not fair and just way to distribute material goods even when it comes to intimate partnerships; and (d) the social ideal favors the self-reliant individual.

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<sup>3</sup> Nick Pearce, *Interview with Elizabeth Anderson*, 19 *JUNCTURE*, no. 3, August-October 2012, at 188–93.

<sup>4</sup> Massey, *supra* note 1, at 36–43 (identifying four instances where there is disparate treatment between separate property and community property systems: (a) one spouse dies and the other spouse later sells an appreciating asset that was acquired by the decedent during marriage; (b) the decedent dies survived by issue; (c) the spouses want to act as economic equals; (d) the spouses change their domicile from a community property state to a separate property state. Massey says of disparity (a), “the disparity in treatment is significant.” *Id.* at 38.).

<sup>5</sup> DONALD E. FREY, *AMERICA’S ECONOMIC MORALISTS: A HISTORY OF RIVAL ETHICS AND ECONOMICS* (2009) (tracing the history of two rival schools of American normative ethics back three centuries to their Calvinist (later Puritan) and Quaker origins—the central tenet of Calvinist school is individual autonomy while the central tenet of the Quaker school is self in relation to others).

Each one of the three proposals I discuss in Part I is built upon these premises. Each regards marriage as a usurpation of individual liberty. And each regards divorce (or non-marriage) as liberty's return. The two privatization proposals do not explicitly discuss property while the enhanced equitable distribution enforcement proposal exclusively concerns itself with property division at divorce. All the same, because each proposal incorporates market-metrics as a measure of successful legal intervention, each defines liberty in relation to happiness, which in turn implies a state of being that flows from self-reliance, thrift, and property management. Consequently, each defines happiness in traditional relation to property rights in the form of acquisition, appreciation, and ultimately stability if not wealth—all familiar market-context concerns.

Part II analyzes Massey's proposal to enable a community property option in New Hampshire.<sup>6</sup> Massey's proposal discusses property rights not before or after but during marriage. Massey's article is concise and technical. I respond briefly to the technicalities raised. My main interest, however, is in Massey's implied theme that an individual has a right to form an equal economic partnership within marriage.<sup>7</sup>

One final note, the absence of an explicit engagement with the concept of gender removes Massey's article from the critical legal theory tradition, as pointed out above. Even so, the way in which Massey identifies individual liberty and community as elements to balance when understanding the state's role in marriage falls within a distinctly American Enlightenment lineage that broadly concerns itself with similar ideas.<sup>8</sup>

#### I. RICHER AND POORER: MARRIAGE AND THE AUTONOMOUS INDIVIDUAL

In 1859, around the time that the Western U.S. states were adopting their respective community property systems, John Stuart Mill wrote about the need for "a real discussion" about gender.<sup>9</sup> In the context of marriage (and of a law school-sponsored symposium) I do not interpret a real discussion to be

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<sup>6</sup> Massey, *supra* note 1.

<sup>7</sup> *Id.*

<sup>8</sup> See FREY, *supra* note 5, at 163–66.

<sup>9</sup> John Stuart Mill, *The Subjection of Women*, in THE BASIC WRITINGS OF JOHN STUART MILL 143 (2002).

limited to legal doctrine.<sup>10</sup> Rather, I interpret that phrase to mean an analytic analysis that goes “descending to foundations.”<sup>11</sup>

To approach those foundations, I start with the link that Mill made between “marriage” and what he sometimes referred to as “amatory relationships.”<sup>12</sup> In the U.S., for all but a recent post-*Obergefell* era, marriage has cohered mainly around one course of action, one that defined legal marriage as between a “man” and a “woman.”<sup>13</sup> I use quotation marks around each gender label because when understood pre-theoretically, each is problematic in the extreme.<sup>14</sup> Indeed, for Mill, binary gender labels obscure the relationship between individual liberty and the state for at least one reason, namely that the category man constructs the category woman through education and legal marriage.<sup>15</sup> One single experience of gender relations is obviously significant. Nevertheless, all it proves, Mill argued, is that people have been able to exist under a system in which, by “a fatality of birth,” the social position of “woman” is marked inferior to the social position of “man.”<sup>16</sup>

It could be likewise be argued that one experience of gender inequality is acceptable so long as there is incremental change over time. After all—that argument might go—society has attained some “degree of improvement and prosperity” under one gender system.<sup>17</sup> But I would agree with Mill’s two-pronged response to such an argument. First, we don’t know the pace of improvement or the prosperity society might have attained under a gender-equal experience, a point that contemporary economists might well agree with.<sup>18</sup> And second, every improvement society has made “has been so invariably accompanied by a step made in raising the social position of [the

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<sup>10</sup> See, e.g., JO CARRILLO, *CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY LAW: MARRIAGE, PROPERTY, CODE* (2016); JO CARRILLO, *UNDERSTANDING CALIFORNIA COMMUNITY PROPERTY LAW* (2015); Jo Carrillo, *Financial Interpersonal Violence: When Assets and Transactions Become Weapons*, 22 *DOMESTIC VIOLENCE REP.* 17 (2016).

<sup>11</sup> Mill, *supra* note 9, at 143.

<sup>12</sup> *Id.* at 143–44.

<sup>13</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612–15 (2015).

<sup>14</sup> See generally ANDREW N. SHARPE, *TRANSGENDER JURISPRUDENCE: DYSPHORIC BODIES OF LAW* (2002) (discussing legal analyses of gender and human bodies).

<sup>15</sup> Mill, *supra* note 9, at 142.

<sup>16</sup> *Id.* at 142–43.

<sup>17</sup> *Id.*

<sup>18</sup> See generally GEORGE A. AKERLOF & ROBERT J. SHILLER, *ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS TO GLOBAL CAPITALISM* (2009); Stuart White, *Left Liberalism: Principles and Prospects*, 18 *RENEWAL: J. LAB. POL.* 28 (2010) (discussing traditional political philosophical theories and how they relate to wage labor).

pre-theoretical category] women” as to be notable.<sup>19</sup> In other words, despite one experience of gender relations, gender equality has nevertheless become a contemporary metric for determining a society’s commitment to individual rights.

What is interesting to consider is that while the U.S. has had only one experience with marriage as a gendered institution, it has had two empirically verifiable experiences with marriage as an economic institution. On one hand, forty-one U.S. states follow a separate property system originally adopted from England.<sup>20</sup> Of these states, only two (Alaska and Tennessee) enable a community property option for married residents.<sup>21</sup> On the other hand, nine U.S. states follow the community property system, a system whose cornerstone is a sharing principle that traces back to Nordic tribespeople by way of the Visigoths.<sup>22</sup> In the nine community property states, married persons consent to the community property system when they marry, but they also retain the freedom to contract out of that system, in whole or in part, at any time.

The forty-one separate property states, as I will discuss below, stress the importance of the autonomous individual even within the noncommercial relational context of marriage. Not surprisingly, proposals to reform marriage and divorce tend to react to that stress point by raising questions such as these. Why marry if one might not leave a marriage with property rights fully intact because of equitable distribution laws?<sup>23</sup> Or, on the flip side, why marry if one remains in a sort of losing commercial competition, so to speak, with one’s working or higher earning spouse?<sup>24</sup> These are important questions for those who stay in the paid labor force as well as for those who (for whatever reason) remove themselves by choice or find themselves removed by circumstance.<sup>25</sup>

But there is a set of questions specific to the spouse who is not gainfully employed. For example, one might ask where is the human dignity in an unequal intimate relationship? Does caring for others leave one at the risk of

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<sup>19</sup> Mill, *supra* note 9, at 143.

<sup>20</sup> See, e.g., Massey, *supra* note 1, at 35–36.

<sup>21</sup> *Id.* at 35.

<sup>22</sup> Jo Carrillo, *Imagination and Fate in the Origin of the Community Property Sharing Principle* (Feb. 14, 2017) (unpublished manuscript) (on file with author) <https://ssrn.com/abstract=2916737> [<https://perma.cc/3C4Z-KT6Q>].

<sup>23</sup> See generally Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996); Katharine Silbaugh, *Commodification and Women’s Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997) [hereinafter Silbaugh, *Commodification and Women’s Household Labor*].

<sup>24</sup> Silbaugh, *Commodification and Women’s Household Labor*, *supra* note 23, at 118–19 (discussing how judges ignore the economic value of home labor when they refuse to credit it as a voluntarily made contribution to family wealth).

<sup>25</sup> See, e.g., *id.* at 84–104 (discussing analytic philosophical arguments for and against the commodification of home labor).

exiting a marriage impoverished? Do spouses assume ethical obligations toward each other voluntarily, perhaps as a byproduct of romantic love? Must the state step in to ensure that a richer spouse supports a poorer spouse? Or, must it otherwise guard against one spouse taking advantage of the other in any transaction between them? And, if there is no real opportunity to choose an equal economic partnership for oneself within the institution of marriage—the sort of liberty Massey’s proposal argues for—what social good is gained from marriage, especially from the perspective of someone who values their individual freedom?

Part I, Section A and B discuss three marriage reform proposals. Two of those—the proposal to replace marriage with civil union and the proposal to do away with state-licensed marriage—argue for decreased state involvement in romantic relationships.<sup>26</sup> The third proposal to strengthen equitable distribution enforcement argues for increased state involvement at the end of marriage as a way to correct historical injustices to wives.<sup>27</sup>

#### A. Proposals to Privatize Marriage

Marriage has many critics; divorce has even more.

This section builds on a popular essay by philosopher Laurie Shrage in which she analyzes the nexus between marriage reform proposals and larger agenda for social change.<sup>28</sup> Shrage agrees, as do I, with marriage privatization and deregulation proponents that marriage should not be used by the state to establish religion, determine parentage, or avoid poverty. At the same time, Shrage disagrees, as do I, that the state has only a narrow interest in marriage and the family.<sup>29</sup> As the basis for her argument, Shrage examines replacing marriage with civil union.<sup>30</sup>

In the next two subsections, I rely on Shrage’s essay to frame the proposals that I compare with Massey’s community property option.<sup>31</sup> I use Shrage’s philosophical essay to help illuminate questions relevant to how marriage reformers envision individual liberty. Where Shrage identifies only one marriage privatization proposal (marriage is replaced by civil union), I see two distinct proposals (one, marriage is replaced by civil union; and, two, the state removes itself entirely from licensing marriage and civil union). Therefore, for reasons set forth in the next Section, I question Shrage’s

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<sup>26</sup> See, e.g., Laurie Shrage, *The End of “Marriage,”* in *THE STONE READER: MODERN PHILOSOPHY IN 133 ARGUMENTS* 636–41 (Peter Catapano & Simon Critchley eds., 2016).

<sup>27</sup> Joan Williams, *Do Wives Own Half? Winning for Wives after Wendt*, 32 *CONN. L. REV.* 249 (1999).

<sup>28</sup> Shrage, *supra* note 26, at 636–41.

<sup>29</sup> *Id.* at 639.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*



empirical claim that replacing marriage with civil union will necessarily deposit romantic partners into the realm of private contract.

### 1. A Proposal to Replace Marriage with Civil Union

In many (if not most) U.S. states, a state-recognized civil union is state-licensed. In some states—California being one—registered domestic partnership is the equivalent of marriage for all legal purposes.<sup>32</sup> Just as registered domestic partners must obtain a state-issued license to initiate their legal partnership, so too must they obtain a court-issued judgment to terminate it.<sup>33</sup>

Legally speaking the rationale for replacing marriage with civil union is in large part historical, not empirical. The rationale goes like this: in the context of a romantic or sexual relationship, the linguistic term civil union is less laden with ambiguity than is the word marriage.<sup>34</sup> One strength of the civil union idea is that it might encourage the state to expand the institution to include familial relationships that are not romantic, amatory, or sexual; if so, it would be possible for civil unions to be created for practical reasons between parents and children, grandparents and grandchildren, collateral relatives, and so on.<sup>35</sup> That said, the civil union proposal I discuss here specifically calls for replacing marriage with civil union.<sup>36</sup>

Imagine State X where marriage opponents propose that civil union (or perhaps something called the registered domestic partnership) replaces marriage. The ostensible reason behind such a legal transition would be to prevent the state from regulating an institution that binds unrelated adults in what, at its core, the proposal assumes to be primarily (if not solely) a moral, cultural, and religious practice.<sup>37</sup> The economic dimensions of the institution of marriage are downplayed if not altogether ignored in this proposal.<sup>38</sup> But

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<sup>32</sup> CAL. FAM. CODE § 297.5 (2003).

<sup>33</sup> *Id.*

<sup>34</sup> Shrage, *supra* note 26, at 636–37 (identifying proponents of this approach as “Cass Sunstein, Richard Thaler, Martha Fineman, Tamara Metz, Lisa Duggan, Andrew March and Brook Sadler (to name only some of those who have put their views in writing) . . .”).

<sup>35</sup> *Id.* at 637–38.

<sup>36</sup> The proposal was more insistent prior to the United States Supreme Court decision legalizing same-sex marriage in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); to be clear, however, whether and how the basic civil union proposal might change in a post-*Obergefell* legal context is an important question, but it is one beyond the scope of this essay.

<sup>37</sup> Shrage, *supra* note 26, at 637.

<sup>38</sup> *Id.*

be sure that, if adopted, civilly united persons would still be required to begin and end their union under the state aegis.<sup>39</sup>

But what if State X is a state (like California) where pre-transition there exists no functional difference between marriage and civil union status?<sup>40</sup> The proposal to replace marriage with civil union would then leave questions of divorce, dissolution, and death unaddressed. One could productively ask: if State X were to repeal marriage-licensing laws and replace them with civil union registration laws, would the state also need to repeal existing end-of-marriage laws so as to usher in changes of consequence?<sup>41</sup> The answer is yes for the straightforward reason that if marriage is replaced by civil union but divorce remains unchanged, then post-transition civil union would (merely) become marriage by a different name since the same property dissolution rules that once governed divorce must continue to govern the termination of civil union.<sup>42</sup>

Where the goal of abrogating marriage is to preclude State X from using marriage as a tool to establish morals, culture, or religion, then proponents may need to think beyond civil union. Because if the point of entry and all points within marriage are sites where individual liberty is at risk of being infringed upon by state coercion, then so too is the point of exit. At the very least, formal divorce laws establish a state preference for serial monogamy; and equitable distribution laws establish yet another for market-based solutions to property dissolution at divorce. Moreover, if concepts like monogamy and the just market presumption are as grounded in religion as marriage opponents in State X say the institution of marriage is, then replacing marriage with civil union could address but not overcome the specter of establishment.

Indeed, so long as State X leaves dissolution, and probate laws unchanged, the civilly united remain as at risk for being coerced by the state as married persons once were. The risk remains particularly high if the civilly united must use the pre-transition divorce laws to regain their single status. The point is that divorce laws establish what Shrage calls “public values.”<sup>43</sup> Hence, because a civil union, as that term is used in the legal context, is licensed by the state, replacing marriage with civil union does not

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<sup>39</sup> Domestic Partner Rights and Responsibilities Act, CAL. FAM. CODE § 297.5 (2003). For more on DPRRA (2003) and its subsequent amendments, see, e.g., CARRILLO, UNDERSTANDING CALIFORNIA COMMUNITY PROPERTY LAW, *supra* note 10, §15.02.

<sup>40</sup> CAL. FAM. CODE § 297.5 (2003).

<sup>41</sup> Additionally, after *Obergefell*, an open question remains about whether a linguistic change in the licensing of romantic relationships would affect marital dissolution in any practical way, and if so how?

<sup>42</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

<sup>43</sup> Shrage, *supra* note 26, at 638–39.

necessarily mean that the state would no longer be involved in the licensing of romantic relationships, as Shrage contends.<sup>44</sup>

Moreover—and this is what I add to Shrage’s civil union analysis—we must first analyze marriage-exit laws before we can conclude that replacing marriage with civil union will drop romantic partners into the realm of private contract. This is because if State X passes the proposal to replace marriage with civil union, parties will no longer be free to marry, but they will be free to obtain a state-issued license in the form of a civil union. Correlatively, parties will not be free to simply walk away from their civil union, rather they will be required to terminate it through a state process. Therefore, the state that licenses civil unions also regulates personal status changes and property rights determinations. Excluding from the analysis domestic violence prevention statutes that protect without regard to marital status and parentage statutes that determine rights and obligations independently of marital status, the type of liberty that the proposal to replace marriage with civil union envisions is similar, if not equal, to the type of liberty that I discuss in Section B below in relation to the enhanced equitable distribution proposal.<sup>45</sup>

## 2. A Proposal to Completely Abrogate Marriage and Civil Union

For private contract to become the default method for formalizing intimate relationships, all state licensing of intimate relationships must be abrogated. The rationale for doing away with state-licensed intimate partnerships is as follows: in accordance with principles of substantive due process and equal protection, persons should be free to arrange their intimate partnerships in whatever way suits them.<sup>46</sup> Furthermore, the argument goes, the state licensing of intimate relationships infringes on individual liberty by how it narrows personal choice regarding relationship entry (and I add, duration, and exit) to state approved options. Protecting individual liberty, this argument concludes, requires that the state be prohibited from licensing intimate relationships altogether.

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<sup>44</sup> By contract-marriage I mean an agreement to formalize a relationship without the necessity of a state-license. Contract-marriage is different from the traditional state-licensed marriage contract. The former is not transmuted into a state-license; the latter, when filed in a public record, becomes a state issued marriage license that symbolizes continuing public interest in the licensed union.

<sup>45</sup> The Domestic Violence Prevention Act, CAL. FAM. CODE §§ 6200 *et. seq.*, was originally adopted in 1993 as part of the comprehensive California Family Code, which took effect in 1994; *see infra* Section I.B.

<sup>46</sup> *See generally*, RONALD C. DEN OTTER, IN DEFENSE OF PLURAL MARRIAGE (2015); Ronald C. Den Otter, *Three May Not be a Crowd: The Case for a Constitutional Right to Plural Marriage*, 64 EMORY L.J. 1977 (2015).

Elsewhere, in the context of personal choice, I explain the individual decision to forgo marriage as a “nonmarriage” option.<sup>47</sup> Here, in the context of analyzing concrete marriage reform proposals, I call that decision contract-marriage. My rationale for the label change is to underscore the point that if the proposal to abrogate marriage and civil union were to pass, intimate parties who seek to enforce promises between themselves (and between themselves and third parties) would indeed be left to contract law.<sup>48</sup>

An important aside. My habit is to think of romantic unions as being between two partners; however, the contract-marriage proposal discussed below is not necessarily limited to two partners. That said, in this essay I am not arguing for or against nonmarriage or plural marriage of any kind, or otherwise trying to speak for any person, community, or communities. Nor am I arguing for or against what is known as polyamory, a term that sociologist Christian Klesse explains is “an umbrella term for all ‘ethical forms of nonmonogamy.’”<sup>49</sup> Here, I simply make the descriptive point that contract marriage is a current legal alternative for persons who are of the opinion that marriage is an infringement on individual freedom for how it establishes one state-licensed union at a time, an idea that is itself implicitly premised on monogamy.

Klesse points out that even though polyamory has received significant scholarly attention since 1995, it is still an under-researched topic.<sup>50</sup> Even so, contract-marriage comes up in that large body of scholarship. On the progressive left, it comes up in discussions of polyamory.<sup>51</sup> On the religious right, it comes up in relation to polygyny, meaning the constellation of one male partner and multiple female partners.<sup>52</sup> Irrespective of politics, contract-marriage is also promoted by those persons who hold individual autonomy in far higher esteem as a value than relational community. What I notice after perusing recent legal scholarship is that proponents of plural marriage are keen to discuss the rights of the individual to engage in one or more intimate partnerships at the same time, but they are hardly, if at all, interested in the legal issues surrounding property management during or

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<sup>47</sup> CARRILLO, CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY LAW, *supra* note 10, at 253–74.

<sup>48</sup> See *infra* notes 64–68 and accompanying text.

<sup>49</sup> Christian Klesse, *Poly Economics—Capitalism, Class, and Polyamory*, 27 INT’L J. POL. CULT. & SOC’Y 203, 204 (2014), <https://goo.gl/EqcV7H> [<https://perma.cc/MRX9-DPST>].

<sup>50</sup> *Id.* at 204–08 (providing a literature review with citations).

<sup>51</sup> *Id.* at 204 n.1 (discussing Christian polygamists in the U.S. and Canada).

<sup>52</sup> See, e.g., *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1185 n.18 (D. Utah 2013), *vacated*, 822 F.3d 1151 (10th Cir. 2016); see also, John Schwartz, *A Utah Law Prohibiting Polygamy Is Weakened*, N.Y. TIMES (Dec. 14, 2013) [http://www.nytimes.com/2013/12/15/us/a-utah-law-prohibiting-polygamy-is-weakened.html?\\_r=1&](http://www.nytimes.com/2013/12/15/us/a-utah-law-prohibiting-polygamy-is-weakened.html?_r=1&) [<https://perma.cc/BY8M-4Y4X>].

property division at the end of such relationships.<sup>53</sup> The nascent vision is one that orbits marriage without being taken off course by talk of obligation or dissolution.

Imagine State Y proposes to prohibit the issuance of licenses for intimate relationships. If the proposal passes there will be no marriage or civil union (prospectively one assumes); but neither will there be divorce. Gone will be whatever statutory package of rights and duties once governed entry, duration, and exit points of marriage. Recall that in State X, the proposal to replace marriage with civil union is intended to prevent the state from establishing morals, culture, or religion; in State Y, by comparison, the proposal to do away with state-licensed intimate partnerships is intended to serve the purpose of maximizing individual liberty.<sup>54</sup> But even a state (State Y) that no longer regulates marriage or divorce by the issuance of licenses nevertheless continues to regulate intimate partnership break-ups through the law of contract enforceability.

So what happens if parties break up and want to disentangle or dissolve their financial ties? Here I am once again in agreement with Shrage, who points out that what will happen is that we will find ourselves in a legal environment of privately negotiated contracts that vary widely in their terms, the circumstances of their execution, and the likelihood of their enforceability.<sup>55</sup>

To reiterate: formal relationship exit is not yet on the plural marriage agenda. Polyamorous activists, legal scholars explain, represent their movement as one built on values of honesty, consent, integrity, community, and what I identify as an acceptance of the left libertarian premise that each individual exercises full ownership of his/her/their body.<sup>56</sup> So, one implicit (but not very plausible) argument in the contract-marriage proposal is that there is little utility in analyzing divorce in a subculture that is intentionally built on high-minded values. I strongly disagree. Despite this idealism, I recognize utility in (at the very least) hypothesizing that break-ups occur, and

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<sup>53</sup> See, e.g., Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. J. L. & GENDER 269 (2015) (omitting analysis of divorce); Hadar Aviram, *Make Love, Not War: Perceptions of the Marriage Equality Struggle Among Polyamorous Activists*, 7 J. BISEXUALITY 261 (2008) (interviewing a small sample of self-identified “poly activist” community members in a discrete community in San Francisco, California; omits discussion or analysis of legal obligations).

<sup>54</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (tethering the Court’s holding to the notion of individual liberty enshrined in the Due Process Clause).

<sup>55</sup> Shrage, *supra* note 26, at 639.

<sup>56</sup> Klesse, *supra* note 49, at 204. See e.g., Peter Vallentyne, Hillel Steiner, and Michael Otsuka, *Why Left Libertarianism is Not Incoherent, Indeterminate, or Irrelevant: a Reply to Fried*, 33 PHIL. & PUB. AFF. 201 (2005).

that some of the break-ups could involve property disputes between two or more partners.<sup>57</sup>

Klesse argues that differences of the sort that might initiate break-ups are a nonissue in the scholarship on polyamory to researchers who prefer identity politics to structural analyses.<sup>58</sup> Class, race, childbearing, childcare obligations, physical ability differences, human capital disparities, educational disparities: these are the types of structural issues Klesse says are overlooked in the scholarship; but are these issues especially divisive in communities that are more homogenous than not?<sup>59</sup> This is an empirical question. Parentage, it is accurate to say, is dealt with elsewhere in the law, so the rights of children remain the subject of public interest even in a state that would abrogate marriage.<sup>60</sup> Domestic violence prevention legislation covers persons regardless of marital status, so persons in need of protection will continue to be able to access state protection.<sup>61</sup> But the standard marriage and civil union abrogation (slash contract-marriage) argument otherwise devalues state protection.

To be fair, the poly partner with a trust fund, or a high paying job, or an income-enhancing education will not need post break-up financial support in the same way that the poly partner who is paralyzed, or differently educated, or discriminated against in society or in the workplace might. The poly partner whose name is on title to a house will have a superior legal claim to possession of that real estate over the poly partner whose name is not on title. The poly partner who obtains human capital with the help of one or more of the other poly partners will exit the relationship with that capital, free of any legal obligation to give back or otherwise compensate supporting partners. When it comes to nonmarriage or contract-marriage, then, it becomes evident that property/poverty questions that arise in that context would benefit from academic attention to structural issues.<sup>62</sup>

Contract-marriage proponents, seen from the light of their policy proposals, criticize the traditional constraints and obligations inherent in the ideal of legal marriage.<sup>63</sup> Many oppose the way in which the traditional concept of marriage assumes monogamy. Others view the terms of the

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<sup>57</sup> See, e.g., Shrage, *supra* note 26, at 639.

<sup>58</sup> Klesse, *supra* note 49, at 204.

<sup>59</sup> See generally Klesse, *supra* note 49.

<sup>60</sup> UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2002).

<sup>61</sup> See, e.g., CARRILLO, CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY LAW, *supra* note 10, at 514–24; CARRILLO, UNDERSTANDING CALIFORNIA COMMUNITY PROPERTY LAW, *supra* note 10, at §15.02; Carrillo, *Financial Interpersonal Violence: When Assets and Transactions Become Weapons*, *supra* note 10, at 25.

<sup>62</sup> See generally FREY, *supra* note 5, at 205–14 (discussing if and how these questions were connected in American moral theory).

<sup>63</sup> See generally Klesse, *supra* note 49, at 206–15.

traditional marriage contract as badly disclosed. They are not alone, historically speaking. The marriage contract, wrote Harriet Taylor Mill, John Stuart Mill's lifelong partner, is "the only contract ever heard of, of which a necessary condition in the contracting parties was, that one should be entirely ignorant of the nature and terms of the contract."<sup>64</sup> I interpret Taylor-Mill's point to mean that the provisions people agree to when they marry are coercive because, or if, there is a lack of disclosure or, more generally, cultural bias against either party engaging in due diligence about their prospective spouse.<sup>65</sup> Hence, in a state that does away with license-based marriage or civil union, what remains as the way to formalize a relationship is private contract, a tool that emboldens the autonomous individual by how it appears to take the state out of determining what categories of intimate relationships are (or are not) worthy of legal protection.<sup>66</sup>

With a private contract parties are free to formalize their relationship with a written document. Or, they can formalize it by doing nothing other than conducting their day-to-day lives.<sup>67</sup> Whether there is or is not a written contract, in other words, does not necessarily mean that the parties are not bound to keep their promises to each other, legally speaking.<sup>68</sup> In order to disrupt the close nexus between marriage, culture, religion, and economics on any given contract formality issue (like, for example, the enforceability requirement of who must sign the contract), the state relies on what Mill labeled "preappointed evidence" laws.<sup>69</sup> Ironically, these parallel laws are themselves problematic for those who hope to remain unencumbered by the state in their intimate relationships. For example, persons who identify as participants in a particular culture—perhaps a religious polygynist?—could argue that preappointed evidence laws infringe on individual liberty because they condition contract enforceability on mainstream cultural norms and

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<sup>64</sup> Jo Ellen Jacobs, *The Lot of Gifted Ladies is Hard*, in *HYPATIA'S DAUGHTERS: FIFTEEN HUNDRED YEARS OF WOMEN PHILOSOPHERS* 215, 236, 246 (Linda Lopez McAlister ed., 1994) (locating this Harriet Taylor Mill letter in Box III/77 of the Mill-Taylor collection, British Library of Political and Economic Science of the London School of Economics).

<sup>65</sup> The California Premarital Agreement Act, CAL. FAM. CODE §§ 1600 *et. seq.*, was included as part of the first comprehensive Family Code, which went into effect in 1994.

<sup>66</sup> See, e.g., *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013), *vacated*, 822 F.3d 1151 (10th Cir. 2016).

<sup>67</sup> *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (overruling the equitable marriage doctrine in California).

<sup>68</sup> *Id.*

<sup>69</sup> John Stuart Mill, *On Liberty*, in *THE BASIC WRITINGS OF JOHN STUART MILL* 2, 100–01 (2002) (crediting Jeremy Bentham (1748-1832) with the term).

behavior(s). In some U.S. subcultures, for example, elder family members may negotiate and sign the marriage contract, not the spouses themselves.<sup>70</sup>

We can dismiss the contracts that private ethnic, religious, or even political practices produce by labeling them illiberal. In the end, however, intimate partner contracts shall need to be recognized and enforced by the state if property rights and obligations are to be publically adjudged. Doing away with marriage will give private organizations more influence over individuals, as Shrage warns, but the law of contract enforceability will return those individuals to some semblance of public values, albeit as expressed in the realm of contract law. Eventually, as has happened in California, a collection of nonmarried intimate partner contract enforceability cases will arise to define what categories of relationship-related expectation the state will predictably enforce in the event of a break-up.<sup>71</sup>

How then do parties terminate their contract-marriage? Does one or more persons just walk away? If not, how must a contract be proved? What if one of the plural marriage partners has outstanding business with a third party, how does the plural partnership wind that business up?<sup>72</sup> What about the parties' subjectivities; how can parties respectfully be presented and represented in culture, courts, judicial opinions, and so on?<sup>73</sup> And, to pile on two last issues to this list of example issues: what if the contract provides for a set period of time, say ten years? Shall individuals remain contractually bound even if the relationship is over, or worse, dangerous?<sup>74</sup> The contract-marriage proposal leaves it to contract law to answer such questions.<sup>75</sup>

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<sup>70</sup> See, e.g., *In re Marriage of Noghrey*, 215 Cal. Rptr. 153 (Cal. Ct. App. 1985) (litigating the enforceability of a premarital contract signed not by the parties but by their cultural agents).

<sup>71</sup> CARRILLO, CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY LAW, *supra* note 10, at 271–76.

<sup>72</sup> See, e.g., *id.* (discussing *Planck v. Hartung*, 159 Cal. Rptr. 673 (Cal. Ct. App. 1979), in relation to cohabitation as the basis for an implicit joint venture claim and/or imputed negligence based on joint venture).

<sup>73</sup> NIAL RICHARDSON, CLARISSA SMITH & ANGELA WERNDLY, *STUDYING SEXUALITIES: THEORIES, REPRESENTATIONS, CULTURES* 74–75 (2013) (applying invention of sexuality theory to popular television shows that represent lesbians (*Will and Grace*), and heterosexuality (*The L Word* and *Sex and the City*)).

<sup>74</sup> Rachel Moss, *Could 10-Year Relationship Contracts Replace Life-Long Marriage?*, HUFFINGTON POST (June 12, 2016, 3:52 PM), [http://www.huffingtonpost.co.uk/entry/10-year-relationship-contracts-instead-of-marriage\\_uk\\_5846c09fe4b05ac3d038c515](http://www.huffingtonpost.co.uk/entry/10-year-relationship-contracts-instead-of-marriage_uk_5846c09fe4b05ac3d038c515) [https://perma.cc/64YY-MCJB] (discussing a UK case in which the parties signed a 10-year marriage contract, and quoting sex and relationship experts and bloggers who opine that there would be fewer divorces if more people could make up their own rules about marriage).

<sup>75</sup> See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 112–15 (Cal. 1976) (discussing the rights of intimate cohabitants to contract over property and support); *In re Marriage of Bonds*, 5 P.3d 815, 823 (Cal. 2000) (holding that a premarital contract between



It may be wise to concede that not all state action impermissibly infringes on individual liberty. When it comes to marriage, the state facilitates the business of marriage in small and large ways for three clear reasons: to assist and protect spouses in the acquisition and management of property; to give third parties confidence to transact business with married persons; and to protect the public interest. But while doing away with state-licensed marriage may sound hip, modern, and low-risk, this is only because proponents so far have relied on popular culture as their guide.<sup>76</sup> In doctrinal actuality, a contract-marriage is a high-risk legal set of agreements (some written down and some not) that leave legal issues between the parties undetermined. The risk stems from two sources. Private contracts are negotiated on a relationship-by-relationship basis, which creates factual complexity. And, reducing the expectations of nonmarital partners to a written contract is tricky enough to require the involvement of lawyers since nonmarital partners must first prove a confidential relationship in fact or else contract at arm's length. Yet popular culture portrays nonmarital relationships in the same happily-ever-after, free-to-be-you-and-me way that popular media (still) represent sexuality, romantic intimacy, relational community, and (more to the point) the financial consequences of break-ups.

Thus, the proposal to do away with the state licensing of marriage and civil union is at its depth a nonanalytic (sentimental?) hacking trope that strikes a note something like this: the abrogation of marriage will give rise to forms of romantic coupling that transcend marriage as we know it. That said, for all their purported bells and whistles, contract-marriage proposals look very much, to me at least, like what is (still) called marriage.<sup>77</sup> The marriage-hack has not yet happened, especially since marriage-like (or marriage-lite) relationships can expect to encounter many of the same legal issues that state-licensed unions deal with at dissolution.

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prospective spouses, which under California law is negotiated at arm's length, is enforceable so long as that contract, at execution, is (a) not unconscionable and (b) voluntarily executed); *In re Marriage of Pendelton and Fireman*, 5 P.3d 839, 848–49 (Cal. 2000) (holding that a premarital contract that waives post-dissolution spousal support rights is not per se unenforceable so long as the parties are similarly situated in terms of education, property, earning potential, and each was represented by independent counsel when the contract was signed).

<sup>76</sup> See, e.g., EMILY WITT, *FUTURE SEX: A NEW KIND OF FREE LOVE* (2016); Alexandra Schwartz, *What She's Having: Emily Witt's Adventures in a Sexual Wonderland*, *NEW YORKER* (Oct. 17, 2016), <http://www.newyorker.com/magazine/2016/10/17/future-sex-adventures-in-an-erotic-wonderland> [<https://perma.cc/WT5M-WK9U>].

<sup>77</sup> FREY, *supra* note 5, at 42–46 (discussing the ascendance of concerns about autonomy and the simultaneous extinguishment of concerns about relationship in the secular work of American Francis Wayland (1796-1865), and the relationship between that work and the social contract theory proposed by John Locke (1632-1704)).

If State Y passes the proposal to do away with marriage, nonmarried partners will not be entitled by virtue of their single status to the protections that marriage and divorce-specific laws once provided. Breaking-up without a statutory safety net will be the steep price that the individual pays to retain legal status as a single person relative to one or more intimate partners.

B. A Proposal for Strong Enforcement of Equitable Distribution Laws at Divorce

Unlike marriage privatization ideas, proposals to strengthen the enforcement of equitable distribution laws at divorce accept the ongoing usefulness of marriage as an institution. What they argue against is what Massey called the forced separate property system, a system in which earnings, purchases, acquisitions, and human capital (without reimbursement) are assigned to the wage earner during and at the end of marriage.<sup>78</sup>

In a 1997 law review article *Do Wives Own Half? Winning for Wives After Wendt* (“*Do Wives Own Half?*”), Joan Williams became a spokesperson for clearing up “our cultural confusion about ownership within the family.”<sup>79</sup> *Do Wives Own Half?* framed its argument with an empirical claim that state courts are more willing to split marital property in half in modest net-worth divorces than in high net-worth divorces.<sup>80</sup> *Do Wives Own Half?* cites community property cases throughout, but the article does not demonstrate a functional awareness of the main distributive difference between community property and separate property systems. Do wives own half? Well, it depends, half of what and where? A wife owns a present, vested, one-half interest of community property in a community property state; so, yes, wives own half by default in nine U.S. states. However, a wife owns only what she earns, inherits, creates, generates, or has title to in a separate property state; so, no, wives do not own one-half by default in forty-one U.S. states.

Philosophers had and have since made the argument that human capital is a co-created asset.<sup>81</sup> Williams did not place her argument in that lineage. Advocacy was Williams’s goal. To that end, *Do Wives Own Half?* was a call

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<sup>78</sup> See *infra* text accompanying notes 114–124. CAL. FAM. CODE. § 2641 (1994) creates a statutory right of reimbursement for direct contributions made by the community in furtherance of one spouse’s income enhancing education or training. Up until the ten-year mark between the education and the dissolution, the nonconclusive presumption is in favor of reimbursement. At the ten-year mark, the (still) nonconclusive presumption is against reimbursement.

<sup>79</sup> Williams, *supra* note 27, at 250.

<sup>80</sup> *Id.*

<sup>81</sup> See, e.g., Susan Moller Okin, *Political Liberalism, Justice, and Gender*, 105 ETHICS 23 (1994).

to avoid divorce outcomes like the one in the case of Lorna Wendt, a wife who was awarded alimony rather than property after a lifetime spent facilitating her husband's corporate career.<sup>82</sup>

*Do Wives Own Half?* specifically wanted to communicate that equitable distribution statutes, as applied, continue historic injustices against married women by how those statutes divest women of property at divorce.<sup>83</sup> The article goes on to propose that family court judges regard all property as potentially divisible at the end of marriage.<sup>84</sup> Presumably all means everything: assets, rents, issues, proceeds, inheritances, personal injury awards, appreciation, human capital, and anything else that either party may own.

*Do Wives Own Half?* is (currently) excerpted in a casebook used in undergraduate courses.<sup>85</sup> For that reason, I think it necessary to identify and expand upon the proposal that tends to get credited to Williams alone, but that fairly could be labeled a general proposal to enhance equitable distribution enforcement. What I add to the discourse is that this proposal has an implicit burden shifting aspect that would flip the tables on who gets vested at the end of an equitable distribution proceeding. Rather than require that the nonowning spouse prove an asset is concurrently owned—as current statutes provide<sup>86</sup>—the *Do Wives Own Half?* proposal would put the burden on the owning spouse to prove an asset is solely owned.

In the Millian sense, marriage laws justifiably infringe on individual liberty if they prevent future harm to one or both parties. A valid marriage license marks a consensual change in status from single to married, so, in that sense, marriage infringes on each spouse's liberty to legally conduct him or herself as a single person. For the wage-earning spouse in an equitable distribution state, the liberty to earn, acquire, and dispose of property during marriage remains strong notwithstanding the fact of marriage. Whereas for a spouse who labors in the home or facilitates the other spouse's career without pay, as Lorna Wendt did for her spouse Gary, marriage is borne as a weightier infringement. The non-earning spouse has the right to make an

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<sup>82</sup> *Wendt v. Wendt*, No. FA96 0149562 S, 1998 WL 161165, at \*252 (Conn. Super. Ct. Mar. 31, 1998); *see also* *Wendt v. Wendt*, 757 A.2d 1225, 1230–31 (Conn. App. Ct. 2000) (litigating whether a spouse is entitled to an equitable share of the career spouse's corporate earnings and proceeds therefrom where the spouses met while still in college, the nonearning spouse facilitated the earning spouse's extremely lucrative corporate career, the nonearning spouse cared for the couple's home and children, and the marriage lasted for decades before it ended in divorce).

<sup>83</sup> Williams, *supra* note 27, at 250.

<sup>84</sup> *Id.* at 265–66.

<sup>85</sup> For example, GENDER LAW POLICY (Katharine T. Bartlett, Deborah L. Rhode, Joanna L. Grossman, and Samantha L. Buchalter eds., 2014), is an assigned text, for example, in Sociology 270 201 at the University of Michigan; syllabus on file with author.

<sup>86</sup> N.H. REV. STAT. ANN. § 458:16 (2016).

equitable distribution claim, yes; but whether that right will culminate in a property award remains an open question until the trial court exercises its discretion in the claimant's favor in a final judgment.

Community property states do not enable equitable distribution; instead, they rely on the community property sharing principle. Some separate property states have adopted uniform laws, such as the Uniform Marriage and Divorce Act, with the intent to replicate one or more aspects of the community property sharing principle; New Hampshire has not.<sup>87</sup> Nor has New Hampshire adopted legislation that quantifies (or commodifies, depending on your perspective) a housekeeping spouse's contribution to acquisitions made during the marriage. Rather what a majority of U.S. states, including New Hampshire, rely on is the traditional separate property rule that earnings and accumulations obtained during marriage are the sole property of the acquiring spouse unless the non-acquiring spouse can prove otherwise. And just as property acquisition is on an asset-by-asset basis during marriage, so too is equitable confirmation at the end of marriage. Finally, because only two separate property states offer a community property option, thirty-nine U.S. states maintain a forced separate property system.<sup>88</sup>

So, how is it that the equitable distribution statute infringes on individual liberty? From the earning spouse's perspective the answer is that an equitable distribution statute frustrates the wage-earning spouse's expectation to exit marriage without having to share (wages and what was acquired with wages during marriage) with the nonearning spouse. Historically, this infringement has been considered justifiable on two grounds. The first is a doctrinal ground: equitable distribution does not divest the owning spouse of property, it merely authorizes a judge to confirm and formally document the nonowning spouse's proven equitable (moral) right to a claimed asset.<sup>89</sup> The second is a policy ground: equitable division protects the public from having to support a non-titled spouse who might otherwise become dependent on public assistance.<sup>90</sup>

Despite the nonowning spouse's statutory right to make a moral claim to the earning spouse's property (albeit on an asset-by-asset basis) there runs a deep *laissez-faire* theme in an equitable distribution system. It is one that popular culture obsesses over. To be clear, I do not (at all) support or agree with the *laissez-faire* argument. I merely articulate it here so as to highlight the differences between the four proposals discussed in this paper. The *laissez-faire* argument is that spouses make choices during marriage that end up benefitting them (or not) at divorce. The argument applies the label

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<sup>87</sup> UNIF. MARRIAGE AND DIVORCE ACT (UNIF. LAW COMM'N 1970).

<sup>88</sup> Massey, *supra* note 1, at 35–36.

<sup>89</sup> N.H. REV. STAT. ANN. § 458:16-a (2016).

<sup>90</sup> CARRILLO, UNDERSTANDING CALIFORNIA COMMUNITY PROPERTY LAW, *supra* note 10, at 261 (discussing the Uniform Premarital Agreement Act of 1983).

*virtuous* (even if implicitly) to the market-based choices of the wage-earning spouse and the label *idle* to the choices of the spouse who is not gainfully employed. By doing so, equitable (fair) division gets recast as unfair and, sequentially, alimony gets called into question as coercive. In this point of view, alimony is not spousal support for a divorce transition; it is rather (mis)characterized as a direct infringement on the earning ex-spouse's liberty to keep one hundred percent of post-divorce earnings. Otherwise, alimony, like the state enablement of equitable distribution, is justified as a way to prevent harm to the poorer spouse, to any third parties who transacted with either spouse for family support, and to the general public.

Alimony is available in separate property states, including New Hampshire.<sup>91</sup> And yet it is inscribed as a dependency issue ("an allowance to the wife upon termination of the marital relation by divorce") despite good faith efforts to update marital law.<sup>92</sup> The gendered understanding of alimony survives statutory amendments, in other words, to live on as a mangled misunderstanding about alimony as a watered-down proxy for (more) equitable distribution. Seen this way, alimony is not neutral; nor, as far as either spouse is concerned, is it beneficial in the abstract. Here, the fear is that alimony represents a negative uncertainty that can morph into gender-based wealth redistribution, in one direction or the other.

Equitable distribution and alimony brings us back to the main question of this essay: what kind of liberty is up for discussion in a proposal that presumes that the market is a morally relevant baseline for determining distributions of income and wealth at the end of marriage?<sup>93</sup> In a forced separate property state, a spouse who works for wages is entitled by default to his or her earnings, purchases, asset appreciation, human capital, investment profits, and so on. The nonearning spouse is too, but only in a formal sense, since the nonearning spouse's gains over the course of the marriage will be considerably less than the earning spouse's gains. True, the property rights of the earning spouse are balanced by the nonearning spouse's right to claim equitable division, alimony, or both. But when the equitable division claim fails, the request for alimony reveals that starkest of legal realities: not all rights are equal. If alimony is requested, the wage-

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<sup>91</sup> *Id.* § 458:19.

<sup>92</sup> See, e.g., *Wallace v. Wallace*, 72 A. 1033, 1033 (N.H. 1909); Honey C. Hastings, *Marital Property Division in New Hampshire: Recent Developments*, 36 N.H.B.J. 16, 17, 23 (1995) (analyzing how in New Hampshire "[t]he statutory basis of awards from 1842 to 1985 was RSA 458:19 and its predecessors;" how on "January 1, 1988 the New Hampshire property division case law was codified in RSA 458:16-a" with alimony provisions set forth in RSA 458:19; and how "[o]therwise case law and statutory codification have not significantly changed New Hampshire property division marital law").

<sup>93</sup> See JAMES BOYD WHITE, *HERACLES' BOW* 29 (1985) [hereinafter *HERACLES' BOW*].

earning spouse will nonetheless exit marriage at divorce with market-transferable property rights and human capital, whereas the nonearning spouse might exit with a nontransferable (because it is a payment that one ex-spouse makes to the other over time) alimony award.

*Do Wives Own Half?* argues in favor of enhancing state protection for wives like Lorna Wendt who, for Williams, stand at the symbolic head of a long line of historical injustices men have imposed upon women via divorce.<sup>94</sup> I agree that human capital investments—because they are typically made for the benefit of the family—either should be reimbursed or allowed as a basis for property offsets at divorce. However *Do Wives Own Half?* goes two steps further. It promotes an implicit burden shift in the equitable distribution laws, as discussed above. And, by doing so, it promotes doing away with equitable distribution in favor of what it calls “a new vision of morality.”<sup>95</sup> That new morality, it turns out, is not so new. It actually has a name; it is called universal marital property.

Universal marital property accepts the market as a fair method for distributing wealth at divorce.<sup>96</sup> What makes the cure (separate property with strong equitable distribution enforcement) different from the sickness (separate property with weak equitable distribution enforcement), however, is that the cure goes way beyond any traditional community property model known in the U.S. today.

Community property limits property dissolution at divorce or death to what was acquired during marriage, by either spouse, by labor. A universal marital property system, by comparison, treats all property, whenever acquired, as divisible at divorce. That said, a universal marital property system is not unrealistic. Wisconsin enabled a close variant of such a system when it adopted the Uniform Marital Property Act in 1984; still, even the Wisconsin system distinguishes between property acquired before marriage (called individual property) and property acquired during marriage (called marital property).<sup>97</sup> The proposal in *Do Wives Own Half?* does not.

Nor is *Do Wives Own Half?* particularly theoretical on the issue of gender. For one, it uses the term wife in a pre-theoretical way.<sup>98</sup> Perhaps in the late 1990s the word wife had a determined meaning, but today that word’s certainty can no longer be projected onto every married person who identifies as female. The word wife does not signify a biological fact, a fixed

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<sup>94</sup> Williams, *supra* note 27.

<sup>95</sup> *Id.* at 253.

<sup>96</sup> *Id.* at 269.

<sup>97</sup> WIS. STAT. § 766.31 (1)-(4) (2016) (providing that after the date of marriage “all property of spouses” and not just the property acquired during marriage “is marital property except that which is classified otherwise.” WIS. STAT. § 766.31 (7) (2016) (providing the general definition of excepted property, and labeling that category of property “individual property.”).

<sup>98</sup> See, e.g., Sharpe, *supra* note 14, at 4.

gender assignment, or a social marker. It works, sometimes ironically, as an economic statement. As such, the word wife could describe the spouse who obtains no or less value for home labor relative to the husband; likewise, the word husband could describe the spouse who obtains some or higher value from wage labor relative to the wife.<sup>99</sup> Spouses can change their relative earning possibilities over time. But even with this clarification, I find myself at odds with the proposal to strengthen the equitable distribution system by replacing it with a universal property system.

A feminist rationale for the equitable distribution enforcement proposal is that it remedies historical harms women experience in marriage and at divorce. But in any exercise of judicial discretion, what justifies categorically benefitting one spouse, no matter their gender, over the other? How does the *Do Wives Own Half?* proposal work, for example, if the female spouse is the high earner and the male spouse the low or non-earner?<sup>100</sup>

Would a feminist proposal such as the one in *Do Wives Own Half?* retreat from its advocacy of equal division in a case where to do so would vest a biological man with property at the biological female's expense?<sup>101</sup> What about where a female spouse obtains an inheritance during marriage? Would the feminist proposal retreat from its advocacy of universal marital property? What happens if the male spouse claims alimony from a female spouse? Does the proposal continue to prefer property division to a temporary annuity? And, last but not least, how does the proposal apply in a post-*Obergefell* context?

In light of these questions, I am left to wonder what the *Do Wives Own Half?* gender-specific proposal is intended to remedy. Does it remedy historical gender biases, as it claims? Is it intended to remedy injustices that arise from not treating housework, childcare, and career facilitation as fungible with market labor, as gets raised if the proposal is restated in gender-neutral language? The proposal does not raise or answer such framing questions. Instead, it cautions against community property for how community property systems use commercial metaphors to describe marriage. As *Do Wives Own Half?* explains, “commercial metaphors are jarring when applied to family life”<sup>102</sup> as they “send the message that to

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<sup>99</sup> See, e.g., Silbaugh, *Commodification and Women's Household Labor*, *supra* note 23, at 84–85 (1997) (discussing ELIZABETH ANDERSON, *VALUES IN ETHICS AND ECONOMICS* 72–81 (1993)).

<sup>100</sup> See, e.g., *In re Marriage of Finby*, 166 Cal. Rptr. 3d. 305, 307–09 (Cal. Ct. App. 2013) (where the female spouse was the high income earner relative to the male spouse).

<sup>101</sup> *Id.*

<sup>102</sup> Williams, *supra* note 27, at 253.

justify entitlements for wives we must commodify the marital relationship in ways most people find distasteful.”<sup>103</sup>

Fortunately there are more than a few scholars from multiple disciplines who critique the short shrift that home labor gets in market-based talk.<sup>104</sup> As someone acclimated to community property law, the arguments I find persuasive turn on the idea that market-metrics have expressive significance that (unfairly) convey a preference for wage labor over home or unpaid caring labor.<sup>105</sup> Moreover, because marital property laws are wrapped up in market-based rhetoric, these scholars point out that market-talk “habituate[s] its user to thinking in terms of self-interest as a central principle.”<sup>106</sup> Legal scholars criticize these philosophical arguments as being “conversation stoppers.”<sup>107</sup> I disagree. Philosophers may be focused on more foundational issues than legal scholars are accustomed to working with, but in my research on community property law I find that philosophical work encourages, if not facilitates, inquiry into whether and how U.S. marital property law and its critics are enthralled with the autonomous individual and the application of market-based metrics even in the realm of intimate partnerships.

So, what can be done to resist thinking about marriage as something more than a quantifiable property bargain between autonomous individuals?<sup>108</sup>

Marital property laws affect more than just the individuals who marry or divorce; they set policy for the state. They manage complex dependencies, as contrasted with what Silbaugh and others have called the “relentless essentialism” that economic models too often rely on.<sup>109</sup> They influence culture. Thus, to the degree that marital property laws stress the individual autonomy of spouses to the exclusion of the relational equality between them, even implicit references to market-metrics operate to establish a state

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<sup>103</sup> *Id.*

<sup>104</sup> See, e.g., ANDERSON, *supra* note 99; MARTHA NUSSBAUM, *LOVE’S KNOWLEDGE* (1990); HERACLES’ BOW, *supra* note 93; see also Silbaugh, *Commodification and Women’s Household Labor*, *supra* note 23, at 81, 83–84, 83 n.4, 84 n.8 (1997) (discussing Elizabeth Anderson, Martha Nussbaum, and James Boyd White).

<sup>105</sup> ANDERSON, *supra* note 99, at 17.

<sup>106</sup> JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* 58 (1990).

<sup>107</sup> Silbaugh, *Commodification and Women’s Household Labor*, *supra* note 23, at 86 (“By condemning talk as well as trades, skeptics take away the opportunity to make the affirmative case for the benefits of an economic perspective.”); *id.* at 120 (“[T]he commodification critique is often a conversation stopper.”).

<sup>108</sup> WHITE, *supra* note 106, at 164.

<sup>109</sup> Silbaugh, *Commodities and Women’s Household Labor*, *supra* note 23, at 91; see also Jacobs, *supra* note 64, at 236–37.



preference for an autonomy-based morality if not culture in the jurisdiction.<sup>110</sup>

Forced separate property regimes, to be sure, have historically engendered property. Home laboring spouses are made poorer by the fact of marriage to a wage-earning spouse. So far, the doctrinal corrective is alimony.<sup>111</sup> But, as discussed above, alimony leaves the poorer spouse with a nontransferable entitlement that is dynamic (meaning modifiable) and fragile (meaning terminable) in a way that the transferable property right is not. The wealth disparity in marriage, when confirmed by the state at divorce, gives domino effect credence to the worry that relational community in marriage is a road to financial ruin and coercion.<sup>112</sup> Marriage becomes feared as the institution at the end of which no one comes out ahead.<sup>113</sup>

What liberty does marriage infringe upon from the perspective of the spouse who labors at home without pay? To be sure, a forced separate property state deposits that spouse, whom *Do Wives Own Half?* characterizes as having sacrificed a wage-based career to care for others, into an abject and dehumanizing accounting. Sacrifice implies choice. Choice implies voluntariness and disclosure. Therefore, it is fair to ask, in the tradition of Harriet Taylor Mill, whether the home laboring spouse agreed to such a life-altering choice based on full knowledge. So, too, it is fair to ask whether the home laboring spouse understood that by opting out of wage labor a socioeconomic class rift would start and grow in the marriage by operation of law, and possibly be confirmed by a judge at divorce or death.<sup>114</sup>

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<sup>110</sup> Massey, *supra* note 1, at 40–41; FREY, *supra* note 5, at 3–4, 35, 39–40, 44 (discussing autonomy bias, its popularization by JANE MARCET, CONVERSATIONS ON POLITICAL ECONOMY (1816), an introductory text; and its secularization by FRANCIS WAYLAND, THE ELEMENTS OF POLITICAL ECONOMY (1837), a bestselling American textbook).

<sup>111</sup> N.H. REV. STAT. ANN. § 458:16 (2016).

<sup>112</sup> MARGARET JANE RADIN, CONTESTED COMMODITIES 95–101 (1996) (presenting the “domino theory” that market and non-market explanations cannot coexist because eventually one (the market explanation) will extinguish the other (the non-market explanation)).

*See generally* Silbaugh, *Commodification and Women’s Household Labor*, *supra* note 23, at 83–84 (taking view that market and non-market explanations can co-exist in the discourse about wage labor and home labor in marriage. I share Silbaugh’s view, and I add that the two strands of explanation do co-exist in the California community property system. At the same time, I find Radin’s domino theory especially explanatory of the doctrinal tensions at play in the forced separate property context being discussed in this paper.).

<sup>113</sup> *See, e.g.*, Ira Mark Ellman, *Should the theory of Alimony Include Nonfinancial Losses and Motivations?*, 1991 BYU L. REV. 259, 274 (1991).

<sup>114</sup> Compare Elizabeth Anderson, *What is the Point of Equality*, 109 ETHICS 287 (1999), with Samuel Scheffler, *What is Egalitarianism?* 31 PHIL. & PUB. AFF. 5 (2003).

To sum up, separate property/equitable distribution systems ostensibly put forth a social ideal, namely that a nonearning spouse should be permitted to bring an equitable (moral) claim to property acquired by the other spouse during the marriage. Indeed, even though equitable distribution laws soften the original common law of separate property, they also use a market-based metric to assess the needs and the virtues of the wage-earning spouse. Many times the cost of using that metric is that the needs and contributions of the spouse who works in the home without pay are obscured. *Do Wives Own Half?* calls for a different ideal at the same time that it relies on the market as a symbol of fair property division at divorce. A lot of legal change to circle back to a status quo point of departure.

## II. RICHER OR POORER TOGETHER: THE AUTONOMOUS INDIVIDUAL IN COMMUNITY

Massey's thesis is that a state, such as New Hampshire, would maximize individual freedom if it were to enable a community property option for married residents.<sup>115</sup> Massey points to Alaska and Tennessee as examples.<sup>116</sup> Alaska allows a private community property option to be exercised by a community property trust or contract.<sup>117</sup> Tennessee allows the option to be recognized (only) by creation of a trust.<sup>118</sup> Massey also points to the nine community property states as sources of reliable doctrinal and policy information on how community property works: these states collectively bank hundreds of years of statutory law, case law, commentary, and scholarship.<sup>119</sup>

Thus, for Massey, if we add the two U.S. community property option states (Alaska and Tennessee) to the nine community property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin (by passage of the Uniform Marital Property Act)) we have eleven U.S. states that give married residents an option—a personal choice—to govern their marriage by community property principles.<sup>120</sup> Consequently, if we subtract those eleven states from fifty states total, we are left with thirty-nine U.S. states in which “married couples are forced to accept separate property” as the default economic system of their marriage.<sup>121</sup> Massey's use of the word forced in this context is the reason I find his proposal a useful entryway into how it is that individual liberty and marriage can be connected.

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<sup>115</sup> See Massey, *supra* note 1, at 36, 47.

<sup>116</sup> *Id.* at 35.

<sup>117</sup> ALASKA STAT. ANN. § 34.77.010 (West 2016).

<sup>118</sup> TENN. CODE. ANN. § 35-17-101 (West 2016).

<sup>119</sup> See Massey, *supra* note 1, at 36, 47.

<sup>120</sup> *Id.* at 35–36.

<sup>121</sup> *Id.* at 36.

In an actual separate property state, couples have no choice but to govern their marriage by an autonomy morality.<sup>122</sup> (They can perhaps get around this problem by the use of a trust, a solution that requires its own law review article). As discussed above, market-based and driven, autonomy morality creates property inequality in a marriage over time.<sup>123</sup> The wage-earning spouse, by default, becomes richer relative to the spouse who labors at home. Moreover, as Massey points out, by marrying in or moving to a separate property state a couple is implicitly coerced into accepting for their marriage a default asymmetrical economic system.<sup>124</sup>

Assume State N, a separate property state. In State N, if a married person buys a house and takes title in his or her name alone, that spouse owns legal title to the house with exclusive rights to management and control. The legal right to manage includes the right to convey, certainly the right to devise, the right to exclude, and perhaps even the right to destroy.<sup>125</sup> Each of these management and control rights, if exercised, could and would allow the title holder, acting alone, to determine shelter issues for the other spouse and any children.

A couple in State N may opt out of the forced separate property system, but only on an asset-by-asset basis. Making decisions in such a piecemeal way takes time; and, as Massey pointed out, it also takes professional legal knowledge, especially for the couple who migrates to New Hampshire from a community property state.<sup>126</sup> Therefore, from Massey's point of view, when State N coerces married residents and new domiciliaries to adopt a default separate property rule for their marriage, State N simultaneously infringes on each spouse's individual liberty "to create an equal economic partnership without making specific title decisions each time property is acquired."<sup>127</sup>

Here, then, is the premise of Massey's argument: there are individuals who seek equal romantic partnership. They want to be self-reliant, together. They want to practice thrift, together. They want marital property laws that make it easier and less expensive for them to co-create equality in their marriage over time. Populating Massey's proposal, refreshingly, are couples who want the state to enable a default marital property system that will allow them to choose sharing as the ethic of their marriage, regardless of who earns the wage. Today we accept that making automatic contributions to a tax-deferred account encourages saving.<sup>128</sup> So, why the skepticism over whether marital property laws can encourage the same? Law can encourage property

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<sup>122</sup> See *supra* text accompanying note 106.

<sup>123</sup> See *supra* text accompanying notes 104–113.

<sup>124</sup> *Id.*

<sup>125</sup> See CARRILLO, CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY LAW, *supra* note 10, at 427–524.

<sup>126</sup> See Massey, *supra* note 1, at 41–43.

<sup>127</sup> *Id.* at 36.

<sup>128</sup> AKERLOF & SHILLER, *supra* note 18, at 121–22.

equality between married couples; it does in nine U.S. states. As John Stuart Mill wrote: “having had only one experience of gender does not negate the possibility of other experiences, it only proves that we live under an experience we somehow have come to tolerate.”<sup>129</sup>

But, as I argue above, we have two categorical experiences of marital property systems in the U.S. With the two experiences in mind, here is my elaboration of Massey’s community property option proposal. Nine states promote property equality in marriage with community property.<sup>130</sup> Two states allow spouses to choose default property equality in marriage; they do this by enabling a community property option. Thirty-nine U.S. states continue to deprive married individuals, no matter their gender, of the right to own the acquisitions of their marriage equally by operation of law: there, spouses are coerced into orienting toward a market-based system that makes one of them richer than the other over time.

The separate property title rule seems consistent with general property law, and it is. It measures success or failure by the yardstick of the fair market presumption. In the context of interpersonal relationships, however, the title rule materially disadvantages both married persons. The title rule, says Massey, is particularly disadvantageous to longtime spouses who demonstrate over the course of their lifetimes that they value and have valued each other as property equals.<sup>131</sup> (The wage earner is disadvantaged by (a) the inability to choose a default concurrent title rule for acquisitions made during marriage and (b) the financial uncertainty that separate title creates under federal tax and state intestacy laws; whereas the non or lower wage-earning spouse is disadvantaged by higher income tax on capital gains of the marriage in the event that she or he outlives the earning spouse). I find this aspect of Massey’s proposal poignant, especially since it was one of the last law review articles he published. I break my analysis to speak briefly from my personal experience as Massey’s colleague of a quarter century. I recognize in Massey’s proposal the love, respect, and commitment he so often expressed for his spouse Martha. I also recognize the hope that Massey expressed for their daughter Ellen.

Massey’s brief article invokes the mountain of academic literature that highlights and re-highlights the feminization of poverty, as well as the role that marriage and childcare play in that process. Specifically, it indicates that “the economic gains of marriage can be disproportionately vested in the high earning spouse.”<sup>132</sup> But while the law review literature on the feminization

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<sup>129</sup> Mill, *supra* note 9, at 143.

<sup>130</sup> The nine U.S. community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Wisconsin (by passage of the Uniform Marital Property Act). The two option states are Alaska and Tennessee. See *supra* text accompanying notes 20–22, 120.

<sup>131</sup> See Massey, *supra* note 1, at 36–41.

<sup>132</sup> *Id.* at 40.

of poverty is concerned primarily with the sociology of how economic options become over or underdetermined during marriage, very little of it explores whether or how state marital property laws (which can be technical in the extreme) create or perpetuate such a property/poverty problem.<sup>133</sup>

Scholarly accounts of marital property laws are too often de-linked from the issue of property division at divorce.<sup>134</sup> Some underscore that “marriage rarely is a means to economic and social security [for spouses who do not earn a wage] and often puts these goals at risk.”<sup>135</sup> But does such a declaration implicitly condemn marriage and divorce to one painful experience in which a spouse must subordinate or else be subordinated by their counterpart? I do not accept that to marry is to necessarily brace oneself for a forced-march into a Meow Wolf experience of durable hierarchies.<sup>136</sup> I remain hopeful that we are capable of creating and co-creating fairer experiences of intimate partnering. Just because “the economic gains of the marriage can be disproportionately vested in the high earning spouse” does not mean that spouses should be forced into that outcome by operation of law.<sup>137</sup>

Massey’s proposal answers the question of how a separate property state can support those who (a) want to marry (or are married) and (b) want to strive for property equality in their marriage. It places less stress on the autonomous individual and more stress on community. It makes room for the qualitative values of community by arguing that two individuals should have the right to maximize their liberty by the exercise of a state enabled

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<sup>133</sup> Silbaugh, *Commodification and Women’s Household Labor*, *supra* note 23, outlines the debate. See also Williams, *supra* note 27, at 249, 253 (promoting a “new vision of morality” in which, at divorce, historic wrongs to women are corrected by judicial orders that transmute assets titled in husbands names alone into the joint title of husbands and wives (or alternatively the sole title of wives); explaining that such a transmutation combats the “he who earns it, owns it rule,” which leads to the domesticity of women, and the new morality does so in the interest of furthering a legal recognition of the value of home labor nation-wide).

<sup>134</sup> Silbaugh, *Commodification and Women’s Household Labor*, *supra* note 23, at 90–95.

<sup>135</sup> Shrage, *supra* note 26, at 640.

<sup>136</sup> Meow Wolf, <https://meowwolf.com/> [<https://perma.cc/2WUS-EC4A>] (last visited Jan. 23, 2017) (Meow Wolf is a permanent art experience in Santa Fe, New Mexico that was built, in part, with the support of Santa Fe resident George R.R. Martin, author of *A SONG OF ICE AND FIRE*, the first volume of which is *A GAME OF THRONES* (1996); the installation encourages visitors to explore concepts commonly understood as unchangeable—space, time, and linearity—by how it moves visitors forward in space even as they discover that forward—consistent with the two plus two problem developed in BERTRAND RUSSELL, *THE PROBLEMS OF PHILOSOPHY* (1912)—is not always a movement in time).

<sup>137</sup> Massey, *supra* note 1, at 40.

choice “to create an equal economic partnership without making specific title decisions each time property is acquired.”<sup>138</sup>

Obviously mapping the sociology of economic (in)security in marriage would help scholars understand the institution. So too would identifying how legal proposals intersect with social values like equality and fairness. Massey’s proposal is helpful in the latter regard. It compares separate property and community property outcomes for recurring fact patterns. For example, it explains the ever eye-opening step-up in basis to show how a surviving spouse in a community property state is not liable for federal income tax on the appreciation of (community property) assets that were (a) acquired during the marriage, (b) retained until the decedent spouse’s death, and (c) sold thereafter; residents in separate property states are.<sup>139</sup> It explains under what circumstances the spousal share election does not guarantee the “economic fruits” of a marriage to the surviving spouse.<sup>140</sup> It urges New Hampshire to add a quasi-community property rule to any community property option statute it might adopt.<sup>141</sup> It explains how the New Hampshire legislature, bench, and bar can keep “abreast of current developments” in community property law.<sup>142</sup>

Finally, Massey’s article makes its case in ways that are lacking in the other proposals I’ve analyzed in this essay. First, Massey accurately contextualizes his proposal in the law.<sup>143</sup> Second, he signals an awareness that the defining legal details of marriage and dissolution are questions of state law.<sup>144</sup> California and New Hampshire have different laws when it comes to marriage; so do California and Connecticut.<sup>145</sup> Doctrinal differences matter, even to scholars who look down from lofty altitudes,

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<sup>138</sup> *Id.* at 36.

<sup>139</sup> *Id.* at 37–38.

<sup>140</sup> *Id.* at 39; *see also id.* at 42–43, 42 n.38 (urging New Hampshire to adopt the UNIFORM DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH ACT, UNIFORM LAW COMMISSION (1971) so that “couples migrating from community property states can realize their expectations concerning the community property acquired before migration”; and identifying the sixteen separate property states that have adopted this uniform disposition law: Alaska, Arkansas, Colorado, Connecticut, Florida, Hawaii, Kentucky, Michigan, Minnesota, Montana, New York, North Carolina, Oregon, Utah, Virginia, and Wyoming).

<sup>141</sup> Massey, *supra* note 1, at 45–46.

<sup>142</sup> *Id.* at 46 (explaining that “the details of community property are readily absorbed by reference to treatises and practice aids that exist in the nation’s community property jurisdictions”).

<sup>143</sup> *Id.* at 36–43.

<sup>144</sup> *Id.*

<sup>145</sup> *See, e.g.,* CARRILLO, CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY LAW, *supra* note 10, at 4–19; Williams, *supra* note 27, at 267 (discussing *Wendt v. Wendt*, No. FA96 0149562 S, 1998 WL 161165 (Conn. Super. Ct. Mar. 31, 1998) with case citations from multiple jurisdictions).

because such differences affect legal and policy outcomes not only in the state, but in the marriage itself—that micro-community with which each proposal is ultimately concerned.

In California (Massey's former domicile), for instance, the duty to support a spouse is statutory; therefore contract provisions between spouses to waive spousal support during marriage are unenforceable due to a dual state interest to protect the economically weaker spouse relative to the economically stronger spouse and to protect the public.<sup>146</sup> Consequently, an argument in favor of enforcing contract provisions that waive spousal support rights and obligations during marriage is not persuasive, at least not in court. Neither is it adjudged good public policy.

To wrap up, marriage is more than (merely) right or obligation. It is personal, political, social co-creation. I see the possibility for such an idea in

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<sup>146</sup> See, e.g., CAL. FAM. CODE § 720 (2015) (providing that “[s]pouses contract toward each other obligations of mutual respect, fidelity, and support”). CAL. FAM. CODE § 720 was part of the California community property law system before the enactment of California's comprehensive Family Code in 1992, which went into effect in 1994. The current statute has been long interpreted to imply that contract provisions between spouses that waive mutual obligations of support during marriage are unenforceable as against public policy.

See also Williams, *supra* note 27, at 256–58 (incorrectly) including California in the “he who earns it, owns it” group of states, and arguing that *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993), which enforces the rule that a contract waiving spousal support during marriage is unenforceable, is evidence of gender unfairness in California law).

There were many issues with the contract in *Borelli v. Brusseau* that implicated traditional legal concerns: the contract was between a terminally ill spouse and a healthy spouse, it was oral, 16 Cal. Rptr. 2d at 20, and in violation of the state public policy as expressed in its community property laws. *Id.* at 19. Williams discusses only the public policy aspect of *Borelli v. Brusseau*, perhaps because in that case the majority opined, “thus, even if few things are left that cannot command a price, marital support remains one of them.” *Id.* at 20. Williams's citation of *Borelli v. Brusseau* (a contract to devise case) as support for her claim that courts undervalue acts of caring is so overbroad as to be incorrect, especially if one considers that the California community property system rejected what Williams dubs the “he who earns it, owns it rule” at statehood, as it was bound by the Treaty of Guadalupe Hidalgo to do. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922 (“In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected.”). Practically speaking, this means that when a marriage is dissolved in a California court, whether by divorce or death, title does not determine the ownership interest of any asset acquired during marriage by either spouse. I do not mean to suggest that a title document is irrelevant in the California community property system, only that such a document does not conclusively determine ownership to the titled asset for the reason that community property vests in equal shares on the date of acquisition.

Massey's proposal, especially because it is premised on the idea that marriage involves qualitative values that are as, if not more, important than anything quantitatively market-based. It is from this vantage point that Massey's article urges the state of New Hampshire to enable a community property option and to adopt the Uniform Community Property Rights at Death Act to protect the rights of couples who migrate there from a community property state.<sup>147</sup> These changes to the law are practical ways that New Hampshire can benefit "industrious, thrifty people who invest their savings," together, during marriage.<sup>148</sup>

#### CONCLUSION

Massey's community property enablement proposal does not require doing away with the institution of marriage. It does not ignore the end point of marriage. It does not claim the right of marriage but then ignore the reality of divorce. It does not call for the state to categorically flip the presumption in equitable division statutes so that the interests of a formerly benefited class of spouses (the gainfully employed) become subordinated to those of a formerly disadvantaged class of spouses (the unpaid).

What makes Massey's proposal worthy of implementation is that it analyzes market phenomena without measuring individual success by market-metrics. By reconciling two concepts that are not often even linked in marriage reform proposals—individual liberty and marriage (relational community)—Massey's proposal carves out a meaningful way in which a state can enable the use of contract and trust to facilitate a choice for property equality in marriage.

Choosing property equality as a default option envisions the use of contract. Contract not as a tool to guarantee self-enrichment, but rather as a way to process, negotiate, and co-create a common discourse based on consent, dialogue, disclosure, fairness, and voluntariness. In my view these are qualitative ideals that animate the community property sharing principle; and they may become the values that inspire the quest for a community property option in separate property states.

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<sup>147</sup> Massey, *supra* note 1, at 37–41, 43, 45–46.

<sup>148</sup> *Id.* at 37.