The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community

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INTRODUCTION

Imagine a couple madly in love waiting in line to obtain their marriage license at the local state authority.¹ A myriad of thoughts and feelings fill their minds. Despite the sobering statistics that one in two marriages end in divorce, they believe they will beat the odds: hope and optimism for their future together predominate.² Whatever life’s challenges and joys, they envision their lives united: a partnership forged of love and commitment that will provide solace and nourishment in the years to come.

Although this may be a romanticized description of marriage that certainly does not reflect the way the relationship operates on many occasions, it does express a vision of marriage in which many couples see themselves.³ As a result, in many marriages, the notion of a partnership is the background against which spouses plan and carry out their married lives. During marriage, the decision making process is changed; it is no longer a simple question of whether the contemplated choice will be good (or bad) for the individual, but,

¹ The idea for this narrative is borrowed from an empirical study conducted by Professors Lynn Baker and Robert Emery. Baker and Emery surveyed marriage license applicants, as well as law students, about their knowledge of divorce statistics, the content of divorce law and their expectations for their own marriages. See Lynn Baker & Robert Emery, When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage, 17 LAW & HUM. BEHAV. 439, 439 (1993).

² See id. at 443 (“Respondents’ predictions for the permanence of their own marriages and the consequences should they be divorced were much more optimistic than their perceptions of the likelihood and effects of divorce for others.”). Couples in the Baker & Emery survey accurately estimated the divorce rate at 50%, but when the same marital license applicants were asked to estimate the likelihood that they personally would divorce, the median response was zero. See id.

³ See, e.g., ROBERT N. BELLAH, ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 91 (1985) [hereinafter BELLAH ET AL., HABITS OF THE HEART] (“[Couples] speak of sharing—thoughts, feelings, tasks, values, or life goals—as the greatest virtue in a relationship.”). One married woman (previously divorced) explained how she fell in love: “I think it was the sharing, the real sharing of feelings, . . . I let all my barriers down. I really was able to be myself with him—very, very comfortable . . . I didn’t . . . have to worry . . . about what his reaction was going to be. I was just me. I was free to be me.” Id.
rather, whether the decision will result in a benefit (or harm) for the two of them together.¹ No longer solitary individuals, spouses are partners who have joined forces to work together toward common goals.

Naturally, each couple has its own unique vision of marriage,⁵ and, so, a consensus on the ideal marriage will likely never be reached. However, the scene just depicted—albeit with some poetic license—is the story that legal decision makers most often tell when they describe marriage and rationalize outcomes upon its dissolution. The view of marriage as a partnership, both economic and emotional, pervades and dominates the law of marriage and divorce.⁶

Despite continued and repeated adherence to the rhetoric of a marital community, it appears that in important ways legal decision makers do not actually believe the tale they so often tell. Instead, another view of marriage—almost always obscured by other rationales, but unmistakably present—often drives outcomes upon divorce. As cases where a career asset is in contention reveal,⁷ another model has risen to challenge that of partnership. Marital

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¹ Some commentators have argued marital theory too often focuses only on the husband and wife, rather than the larger family unit which so often—and importantly—includes children. See, e.g., MARTHA A. FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 176-77 (1991) [hereinafter FINEMAN, ILLUSION OF EQUALITY] (arguing that because equal treatment of parents at divorce ignores the fact that provisions for children come largely from the mother’s share, this relationship to children’s support should be made visible and should play a central role in allocation of financial resources at divorce); VICTOR R. FUCHS, WOMEN’S QUEST FOR ECONOMIC EQUALITY 146-47 (1988) (making recommendations for child-centered policies); June Carbone & Margaret Brinig, Rethinking Marriage: Feminist Ideology, Economic Change and Divorce Reform, 65 TUL. L. REV. 953, 1005-10 (1991) [hereinafter Carbone & Brinig, Rethinking Marriage] (arguing for a child-centered approach in divorce); Mary Ann Glendon, Family Law Reform in the 1980s, 44 L.A. L. REV. 1553, 1558-59 (1984) [hereinafter Glendon, Family Law Reform] (proposing a “children-first principle” in marital property law); Jane Rutheford, Duty in Divorce: Shared Income as a Path to Equality, 58 FORDHAM L. REV. 539, 579-83 (1990) (advocating that income should be shared on a per capita basis to better protect children’s interests). While I agree that the presence of children should play a central role in divorce law, I will focus on the husband and wife as the “marital unit” for purposes of this Article. I do so because this article examines the partnership theory of marriage which itself, in its current form, is oriented toward husbands and wives, not a family defined by children. If partnership theory was accepted rather than rejected in the context of career assets (and this Article argues that it has been rejected), then a spouse who has accepted primary responsibility for children’s care will be entitled to a share of the resource—and so the children who are in such a parent’s care will also have access to the resource.

⁵ See generally, e.g., Kathryn Abrams, Choice, Dependence, and the Reinvigoration of the Traditional Family, 73 IND. L.J. 517, 517 (1998) (“The salient fact about marriage, and divorce, is that one size does not fit all . . . . [T]he American social landscape is in fact populated by couples with a range of different tastes, patterns, and aspirations . . . .”).

⁶ See infra Parts I, II.

⁷ Career assets and the now popularized synonym “human capital” refer to human skills,
partnership is the pretense, but in many cases, the ascendant value is solitary individualism. On this view, although there may be a specific exchange of resources that needs to be accounted for upon divorce, both spouses enter and depart marriage as separate individuals who have had relatively minimal influence on one another. Sovereign identity is treated as fundamental and untransformed by marriage.

The primacy of individualism over the competing partnership ideal is manifest in both the results and the reasoning of many judicial opinions that address whether and how to allocate the economic advantages of a spouse's career that were enhanced during marriage. Partnership theory views marriage as a sharing enterprise: both spouses labor, although perhaps in different ways, and so each contributes meaningfully to the collective benefits the marital labor yields. Non-financial contributions by a spouse who performs unpaid domestic labor are, in theory, recognized as a valuable contribution to the marriage partnership. Accordingly, assets acquired from labor during marriage are jointly, not individually, owned. Based on this theory, each spouse laboring in a marriage should have an entitlement to share in a career asset (a property interest), like any other wealth accumulated by labor during marriage. Overwhelmingly however, courts have rejected the notion that a career asset can be jointly acquired and jointly owned. Instead, the spouse who possesses the enhanced career (referred to in this Article as the "enhanced spouse" or "titled spouse") is treated as the separate owner of the asset. The conclusion is that the career asset was achieved independently by the diligence, hard work and intellectual capacity of the enhanced spouse. The other spouse (referred to in this Article as the "supporting spouse") is not recognized as having an earned right to share the asset—in part because courts determine that she has not made a meaningful contribution to the asset through her labor.

This rejection of partnership ideology has important consequences. The conclusion that a supporting spouse's contribution is unworthy of financial recognition is deeply troubling. It quite clearly suggests that domestic labor, typically performed by women, is—apparently by its very nature—less

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8 I am not suggesting that these two contrasting views of marriage exhaust the possible models for conceptualizing marriage. Marriage is extremely complex and the myriad of potential views on marriage are as diverse as those who contemplate the subject.

9 See infra note 291 and accompanying text.

10 See infra notes 64-66 and accompanying text.

11 See id.

12 See infra Part II.

13 See id.

14 See id.
valuable than the labor of the enhanced spouse. Under a contemporary egalitarian perspective, this determination is untenable. It risks perpetuating discrimination against women and devaluation of traditional “women’s work.” Perhaps more importantly, the economic devastation that many women and children experience following divorce, partly as a result of women accepting traditional homemaking and child-rearing roles,\(^{15}\) will inevitably continue as long as such roles are maintained, and yet devalued in this way.

Additionally, repudiation of the sharing principles embraced in the partnership model evokes a portrait of marriage that many would find unsatisfying. Although individualism is surely a valuable component of marriage, alone, it is an incomplete account. Sharing principles reflect values that are widely held in American society\(^{16}\)—and, indeed, are already reflected in the law by partnership theory itself. The current approach to career asset cases is inconsistent with the way many spouses perceive and conduct their relationships with one another, including the economic decisions that inevitably arise in the course of marriage—as a partnership.

These two depictions, one of community, and one of individualism, are extreme. Real life and marital law, of course, reflect aspects of each. The challenge in marital law is to reconcile these competing visions.\(^{17}\) As Professor Milton Regan suggests, the controversy is over “the relative weight that we should attach to each vision in a particular context.”\(^{18}\) The current legal treatment of marriage reflected in career asset cases fails to accommodate—or even to recognize—this tension. Instead, courts focus

\(^{15}\) It is estimated that women and the minor children in their household experience at least a 30% decline in their standard of living following divorce. See, e.g., Greg J. Duncan & Saul D. Hoffman, What are the Economic Consequences of Divorce?, 25 DEMOGRAPHY 641 (1988) (citing with approval to Stephen D. Sugarman, Dividing Financial Interests on Divorce, in DIVORCE REFORM AT THE CROSSROADS 130, 149 (Stephen D. Sugarman & Herma Hill Kay eds., 1990)).

\(^{16}\) For example, as Bellah and his colleagues observed in a 1980 study, 96% of all Americans held to “the ideal of two people sharing a life together.” BELLAH ET AL., HABITS OF THE HEART, supra note 3, at 90. For further discussion, see supra note 3. Of course, relationship goals and functions are never so simple as to embrace a single value. In the legal context, Carl Schneider suggests that family members tend to think of themselves as “a collection of individuals united temporarily for their mutual convenience and armed with rights against each another.” Carl E. Schneider, Moral Discourse and the Transformation of American Family Law, 83 MICH. L. REV. 1803, 1859 (1985). The study done by Bellah and his colleagues on American thought regarding “habits of the heart” revealed a deeply entrenched individualism coexisting (in considerable tension) with the values of enduring commitment. See generally BELLAH ET AL., HABITS OF THE HEART, supra note 3, at 155-62.

\(^{17}\) The same tension and the challenge it presents exists in many areas other than marital law. As family law scholar Milton Regan observes, “[M]arriage is but a particularly stark example of a setting in which we seek both preservation of individuality and commitment to a shared purpose that transcends the self.” MILTON C. REGAN, JR., ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE 12 (1999) [hereinafter REGAN, ALONE TOGETHER].

\(^{18}\) Id. at 5.
exclusively on one individual—the enhanced spouse. In so doing, the individual interests of the supporting spouse are ignored. And, another important value, that of community in marriage, is thus being overshadowed in a way that undermines a prominent ideal of marriage at its best—marriage as a sharing experience that brings with it the "possibility of bridging the distance between separate selves."\(^{19}\)

This Article examines the level of commitment to the partnership theory of marriage in modern marital law governing career assets. To provide a foundation for understanding the analysis, Part I traces the emergence of the modern partnership model and describes its basic contours. Because this Article argues that current approaches risk perpetuating discrimination against women, there is a particular emphasis in Part I on the law's historic treatment of women's property rights upon divorce. Part II highlights judicial opinions that exemplify the acceptance or rejection of partnership theory. Next, it examines rationales offered by decision makers to justify exclusion of career assets from the marital estate. Finally, the Article explores the implications of the modern approach to career asset cases.

I. THE EMERGENCE OF THE MARITAL PARTNERSHIP THEORY

Over the last several decades, a predominant theory of marriage has emerged: that of marriage as a partnership.\(^{20}\) This model treats each spouse as making meaningful, although perhaps different, contributions to the marital estate. The following section briefly sketches the origins and basic contours of marital partnership theory and provides a broader context for understanding how the partnership ideal corresponds to the larger ongoing debate over whether and how to divide economic resources upon divorce. As Professor Milton Regan reminds us, the debate over what resources to include as marital assets, at its core, is driven by the more basic question of how to conceptualize ex-spouses.\(^{21}\) As the now familiar account reveals, partnership ideology

\(^{19}\) Id. at 11.


\(^{21}\) See Milton C. Regan Jr., Spouses and Strangers: Divorce Obligations and Property
evolved in the midst of dramatic cultural and legal transformations, ultimately reflecting changing perceptions about the institution of marriage and its place in American society. Readers already familiar with this history and the modern theory of partnership may wish to proceed directly to Part II.

A. The Shift to No-Fault Divorce

A notorious characteristic of early American marital law was the merger of the husband and wife into a single legal identity:

By marriage, the husband and wife are one person in law: that is the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover, she performs everything . . . . Upon this principle of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either one of them acquire by the marriage.

This early common law framework regarded marriage as a life-long status—a hierarchical relationship governed by the state in which the husband was the married woman’s “head and representative.” In exchange for a wife’s


This section provides only an abbreviated historical backdrop. Many rich accounts of divorce history are available. See generally, e.g., Carbone & Brinig, Rethinking Marriage, supra note 4, at 965; Lawrence Friedman, Rights of Passage: Divorce Law in Historical Perspective, 63 Or. L. Rev. 649 (1984); Mary E. O’Connell, Alimony After No-Fault: A Practice in Search of a Theory, 23 New Eng. L. Rev. 437 (1988); Judith T. Younger, Marital Regimes: A Story of Compromise and Demoralization, Together With Criticism and Suggestions for Reform, 67 Cornell L. Rev. 45 (1981). For a persuasive challenge to a historic view that the old fault regime was in some ways more advantageous to the plight of women post-divorce than the current no-fault regime, see Singer, Gender Justice, supra note 20, at 1103 (arguing that most women were not better off under the fault-based system).


Bradwell v. Illinois, 83 U.S. 130, 141 (1872). A married woman could not enter into contracts, initiate a lawsuit, or make a will. Her personal property became her husband’s property, and any interest she had in real property by way of estates of inheritance belonged to her husband during marriage. See 1 Homer Clark, Jr., The Law of Domestic
property and her duty to obey her husband, a husband was obligated to provide support for the family.

Gradually, societal views about the marital relationship—and women in particular—began to change. In the last half of the nineteenth century, state legislatures began enacting Married Women’s Property Acts to remove married women’s legal disabilities. These laws recognized a married woman’s right to a separate legal identity and, most importantly, her right to acquire, own, and transfer property without the “guardianship” of her husband. The older order was slowly being eroded. No longer equating women with infants and idiots, women’s “nobler” virtues—particularly those of motherhood and altruism—were celebrated. Of course, this meant assignment to separate spheres based on gender. The “family” sphere was occupied by (middle class) women, whereas the sphere of “the market” was reserved for men.

The modern women’s movement also significantly impacted conceptions of gender roles and marriage. Drawing on principles from the civil rights movement, “liberal” feminists rejected the notion that women were “separate

RELATIONS IN THE UNITED STATES 499-500 (2d ed. 1987) [hereinafter CLARK, DOMESTIC RELATIONS].

Interestingly, notwithstanding this patriarchal legal structure that concentrated ownership and power over property solely in the husband’s hands, it is possible to view some aspects of marital relations in the colonial period as a kind of partnership—although certainly not of equals. In this period, an agrarian lifestyle demanded that married couples work side by side, along with their children. Each family member contributed to the family economy in important ways. See Carbone & Brinig, Rethinking Marriage, supra note 4, at 965 (discussing the responsibilities of husbands and wives in colonial America).

25 See CLARK, DOMESTIC RELATIONS, supra note 24, at 503-04.

26 See id.


28 See Carbone & Brinig, Rethinking Marriage, supra note 4, at 967-68 & n.63 (women’s “nobler virtues” were reputed to be “piety, purity, submissiveness, and domesticity”). Parts of this section significantly rely on Carbone and Brinig’s work.

29 This ideology focused on activities of “proper white middle class women” and excluded black, poor, and immigrant woman who regularly provided “cheap and marginal labor.” Carbone & Brinig, Rethinking Marriage, supra note 4, at 970 n.70 (quoting W. CHAFE, WOMEN AND EQUALITY: CHANGING PATTERNS IN AMERICAN CULTURE 23 (1977)).

30 This dichotomy “tended to exclude women from the world of the marketplace while promising them a central role in the supposedly equally important domestic sphere.” Frances Olsen, The Family and The Market: A Study of Ideology and Legal Reform, 96 HARV. L. REV. 1497, 1500 (1983).

31 See, e.g., Carbone & Brinig, Rethinking Marriage, supra note 4, at 967-68 (discussing the redefinition of gender roles); Martha L. Fineman, Implementing Equality: Ideology, Contradiction and Social Change; A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce, 1983 WIS. L. REV. 789, 821 n.111 [hereinafter Fineman, Implementing Equality] (tracing the partnership ideal to nineteenth century feminist theory and to John Stewart Mill’s observation of the parallels between partnership and marriage).
but equal,” and instead emphasized the equality of the sexes as a means to facilitate women’s entry into the labor market. “The new ideal of equality replaced the older ideal of complementarity, tearing down distinctions between commercial and domestic, between male and female spheres of influence.”\(^{32}\) Women were encouraged to participate in the marketplace, and, increasingly, they did.

Prior to World War II, female employment was limited to primarily young, single women or poor, married women. Few middle class women had jobs. By 1975, in contrast, the two income family was the norm; 49% of all wives worked . . . . Although the employment changes did not signify progress toward equality, they ensured that social norms about a woman’s “place” no longer had a basis in reality.\(^{33}\)

During this time, another important shift more directly reflected changes in the very idea of what marriage might mean. In contrast to the older view of marriage that was predominantly concerned with social and economic status, the “companionate marriage” movement, as described by Professor Mary Ann Glendon, had arrived at the forefront of contemporary views of marriage. With features very familiar to modern conceptions, marriage was seen as part of a “quest for personal happiness” and was “prompted by mutual attraction and interests [and the desire for] close parent-child relationships.”\(^{34}\) The concept of marriage as an institution of the state and a determinant of status was being converted to one predominantly governed by individual choices and agreements—the view of marriage as a contract.\(^{35}\)

This reconstruction of marriage was shaped by and also contributed to the movement to eliminate the fault requirement in divorce, which culminated in the 1970s.\(^{36}\) In 1969, California initiated sweeping divorce reform with its adoption of a no-fault divorce statute.\(^{37}\) Within five years, forty-five states followed suit.\(^{38}\) Today, all states provide a unilateral no-fault option for divorce, which, in all but two states, can be obtained even over the objection of

\(^{32}\) Carbone & Brinig, Rethinking Marriage, supra note 4, at 974-75.

\(^{33}\) Id. at 975 n.89 (quoting W. CHAFE, WOMEN AND EQUALITY: CHANGING PATTERNS IN AMERICAN CULTURE 119-20 (1977)).

\(^{34}\) GLENDON, NEW FAMILY, supra note 21, at 14-15.

\(^{35}\) For a discussion of the movement from status to contract, see id. at 101-18; MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 35-42 (1993).

\(^{36}\) Another important factor pushing toward abandonment of the fault system was the problem of “collusive divorce.” The fault system had not effectively discouraged divorce as had been hoped, and instead invited spouses desiring divorce to perjure themselves to establish fault grounds. See, e.g., O’Connell, supra note 22, at 475-83.

\(^{37}\) Family Law Act of 1969, codified at CAL. CIV. CODE § 4359 (West 1983); see O’Connell, supra note 22, at 492 n.308 (“In 1969, the State of California adopted the nation’s first no-fault divorce statute.”).

\(^{38}\) See HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 80 (1988).
The old fault regime had been a holdover from earlier times. Until the 1970s, the law regarded marriage as a life-long relationship that could be ended only by an innocent spouse who could prove that the other party was at fault for having betrayed marital obligations. Provided the wife had not engaged in misconduct, the support obligation continued after divorce in the form of alimony as the major financial adjustment post-divorce. The most coherent theory offered in support of this result was that alimony was the damage payment for breach of the marital contract designed "to place the injured wife in the position that she would have enjoyed if her husband had not wrongfully ended the marriage." However, if the wife was determined "at fault," the husband was relieved of any duty of support, regardless of the parties' contributions to the marriage and their relative economic positions following divorce. Moreover, as Jana Singer persuasively argues, a husband's continuing duty of support under the fault regime appears to be more myth than reality. The figures show that in 1968,
less than 19% of divorcing women in California received alimony awards. Nonetheless, the fault model did provide legal decision makers a theoretical basis for distribution of financial resources at divorce.

B. The Partnership Approach: A Replacement for Fault

Once the fault system was abandoned, there was no clear rationale for determining how to distribute financial resources upon divorce. Divorce could no longer be thought of as a remedy for the innocent and punishment for the guilty. “The theoretical roots of the concept had been lost.” Although there was no uniform response to fill this void, a new conceptual model emerged—that of marriage as a partnership. The Uniform Marriage and Divorce Act (“UMDA”) explicitly adopted this approach: “The distribution of property upon termination of marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership.” The theory provides that spouses are partners who each make a set of meaningful, although perhaps different, contributions to the marital enterprise. Non-financial contributions are said to be fully credited, so that a spouse who stays at home to manage the household or, who furnishes child care provides as valuable resources to the family as has the spouse who provides income from employment. Therefore, each spouse is entitled to share in the marital estate


46 O’Connell, supra note 22, at 495. O’Connell was actually referring to the rationale used to justify the early equitable distribution statutes that existed as part of the fault system. However, her comments broadly recognize the theoretical void left after the fault system was abandoned.

47 In fact, Professor O’Connell suggests that some courts actually embraced the “theoretical void,” approving the absence of a theory as wholly appropriate because the unique nature of families requires great flexibility and individualized decision making. See id. at 495.


49 See infra notes 64-66 and accompanying text for further discussion of the partnership concept.

50 Many statutes explicitly recognize a homemaker’s contribution as a factor in distribution of marital property. See UNIF. MARRIAGE & DIVORCE ACT § 307 (amended 1973), 9A U.L.A. 288 (1998); COLO. REV. STAT. ANN. § 14-10-113 (1)(a) (West 1999) (“[T]he court shall . . . divide the marital property . . . in such propositions as the court deems just after considering all relevant factors including . . . [t]he contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker . . . ”); 23 PA. CONS. STAT. ANN. § 3502 (West 1991) (“[T]he court shall . . . equitably divide . . . the marital property between the parties . . . in such a manner the court deems just after considering all relevant factors, including . . . [t]he contribution or dissipation of each party in the acquisition . . . of the marital property, including the
because each participated in its acquisition. Under this view, the economic resource is apportioned, not based on need or status, but because it has been earned.

1. Community Property Origins

Partnership ideology draws on community property principles which first recognized that each spouse was entitled to share in all assets acquired by labor during marriage, regardless of legal title. This principle is not of common law origin; when several of the states were carved from former Spanish territories, the principle was imported from the early Spanish civil codes and integrated into American law. Of the varying forms of community property regimes, American law adopted the ganancial system, or “community of acquests,” system. Unlike the Roman-Dutch version of community property that includes in the community estate all property owned by each spouse whenever and however acquired, the acquests system recognizes two separate kinds of property; separate property, which is property acquired before or after marriage or property gifted to or inherited by one spouse during the marriage; and community property, which is property jointly acquired by the spousal partners during the marriage by labor. This system presumes that property

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51 Courts recognize this connection. See Boggs v. Boggs, 520 U.S. 833, 848 (1997) (declaring ERISA preempts even the long-standing partnership aspect of community property regimes); De La Rama v. De La Rama, 201 U.S. 303, 310-11 (1906) (referring to marriage under the Phillipine community property regime as a “conjugal partnership”).

52 See 1 WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 1 (2d ed. 1943) (listing these states as: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Oklahoma, Oregon, Texas, and Washington). Of these states, all but Oklahoma and Oregon are generally still classified as community property states. See CLARK, DOMESTIC RELATIONS, supra note 24, at 177 n.10. Wisconsin, too, has essentially converted to a version of a community property system. See Howard S. Erlanger & June M. Weisberger, From Common Law Property to Community Property: Wisconsin’s Marital Property Act Four Years Later, 1990 Wis. L. Rev. 769, 770 (1990) (citing Wisconsin as the first state with a history of common law property jurisdiction to convert to a community property system for married persons).

53 DE FUNIAK & VAUGHN, supra note 52, § 1 at 1 n.2 and accompanying text (citing Spanish law in which bienes gananciales means “property held in community by husband and wife, having been acquired or gained by them during the marriage”).

54 See id. § 1 (“All property which they possess is presumed to be held and owned by them in common unless or until it is proved to be the separate property of one of them. In respect to separate property each spouse is equally capable of owning separate property, and separate property owned by either before marriage continues to constitute separate property of that spouse during marriage. Likewise, property given to one spouse alone, during marriage, is the separate property of that spouse.”).
belongs to the community and that each spouse owns an equal share, regardless of whose labor produced the resource (or who has formal title). 55

This system has been praised—and, indeed, reformers embraced the approach—because it formally recognizes the equality of spouses in marriage and acknowledges that both spouses are partners who contribute to the marriage in important ways. 56 It also recognized a woman's independent legal identity, in contrast to the English common law system of "merger," where the wife disappeared into the husband and became a mere chattel. 57

However, the roots of the acquests system belie these egalitarian ideals. Perhaps not surprisingly, the early impetus for adopting the approach can be explained by economics. Marital property law developed at a time when real property was the primary source of wealth and was regularly passed down within families by inheritance. 58 The community property system that sheltered "separate" property acquired through inheritance, thus protected transmissions of wealth to lineal descendants and excluded such wealth from the marital community. Apparently by design, the most valuable assets of the era never became a part of the marital estate.

Professor Bea Smith argues that the historical notion of equality for women under the system was also largely illusory. 59 She characterizes marriage in nineteenth-century Texas, a community property state, as a limited partnership at best, with the husband as the general partner and the wife as a limited partner with few rights. 60 Spanish law and its American successors classified women as disabled, in the same group as children and the insane—"imbecilitas sexus"—imbeciles by nature. 61 "A married woman could own property, but not manage it. Her husband had exclusive control of her separate property and community property; he could sell either without her consent." 62 Smith concludes that the objective of early community property law was not to recognize a partnership of equals within a marriage, but rather to serve as the functional equivalent of Married Women's Property Acts. 63 Arguably, the

55 See id. (noting that an essential characteristic of the acquests system is that the wife has equal ownership and rights as her husband in the community property).

56 See Smith, Partnership Theory, supra note 20, at 698-99 ("Many commentators have praised community-property states for recognizing husbands and wives as equal partners in marriage.").

57 See supra note 23 and accompanying discussion.


59 See Smith, Partnership Theory, supra note 20, at 699.

60 See id.

61 Id. at 699 n.57 (citing K. LAZAROU, CONCEALED UNDER PETTICOATS: MARRIED WOMAN'S PROPERTY AND THE LAW OF TEXAS 1840 – 1913 49 (1986)).

62 Id. at 700 (citing K. LAZAROU, CONCEALED UNDER PETTICOATS: MARRIED WOMAN'S PROPERTY AND THE LAW OF TEXAS 1840 – 1913 49 (1986)).

63 See id. at 702 ("The context of nineteenth-century marital-property laws reveals that they do not reflect a unique attempt to treat husband and wife as equal partners but are quite
system was adopted to create women's separate property, not to create or protect marital property.

2. The Modern Partnership Concept

Although these inauspicious beginnings suggest that community property partnership theory has unattractive historical roots, contemporary views have shaped the concept such that it has considerable potential and appeal as an effective and egalitarian theory of marriage. Modern partnership theory views marriage as a shared venture in which both spouses make vital financial and non-financial contributions. As a result, the assets produced by the efforts of either spouse belong to the partnership, giving each partner a right to share in the marital estate. Professor Sally Sharp aptly captures the core of the modern concept in its broad sense:

[T]he partnership ideal does stand for the proposition that property acquired by the single enterprise of the marital unit, to which both spouses often are presumed to contribute equally, should be equally shared when the unit is dissolved by divorce. Partnership principles seek to compensate, and thus implicitly to promote, the kind of sharing, and at times altruistic behavior in spouses that is deemed essential for the preservation of marriage. In particular, the concept creates a means for recognition of the contribution of the dependent spouse, who may have sacrificed his or her own career potential for the sake of the other or for the marriage itself. At one level then, the partnership ideal enunciates a public policy of promoting sharing behavior . . . . It also seeks to ensure that each estate is compensated fairly for its investment in the marriage.

literally the functional equivalent of common-law states' similar attempts to remove, through piecemeal legislation, some of the legal disabilities of married women.

See CLARK, DOMESTIC RELATIONS, supra note 24, at 194 (recognizing that partnership theory, upon which modern marital property statutes are founded, implies consideration of economic and non-economic contributions when marital property is divided on divorce).

See id. at 185. As the previously—discussed history of divorce law reform emphasizes, the ideal of equality between the sexes powerfully influenced modern law's adoption of partnership theory. See supra notes 31-33 and accompanying text. Martha Fineman describes equality as the basis for the partnership metaphor. See FINEMAN, ILLUSION OF EQUALITY, supra note 4, at 4 ("The symbolic aspects of equality rhetoric have dominated the reforms [focusing on the economic allocations made at divorce] . . . ."). However, some state law variants do not assume equal contribution or equal division as the norm. Instead, many courts are granted wide discretion to consider each spouse's contribution on a case-by-case basis, including those of the homemaker. See infra notes 75-78 and accompanying text (discussing different approaches taken by states). Regardless, equality norms still play a crucial role in our thinking about desirable marital property systems.

Sally Burnett Sharp, The Partnership Ideal: The Development of Equitable Distribution in North Carolina, 65 N.C. L. REV. 195, 199 (1987). This concept is borrowed from one type of commercial partnership law that assumes equal contribution and an equal
Consistent with this theory, no-fault divorce reform in both community property and common law states were deeply influenced by partnership ideology and thus adopted systems of marital property that integrate this concept. The incorporation of partnership theory is most strongly evidenced in the structure of modern marital property systems themselves. Primarily in the 1960s and 1970s, common law jurisdictions abandoned the previous system that distributed assets according to formal legal title and viewed spouses as economically separate individuals. This now-abandoned title approach vested ownership in the spouse who “earned” the money, meaning the spouse who was paid in the labor market. Accordingly, the bulk of the assets were regularly awarded to the husband. As a part of the sweeping reforms that accompanied the advent of no-fault divorce, community property principles of joint ownership were adopted nationwide (although frequently “vesting” only upon divorce), and common law states created “equitable distribution” systems that, regardless of title, recognize “marital” property as the product of joint spousal efforts, to which each spouse has a claim upon divorce.

Beyond this, there are varying approaches among the states. Again mirroring community property states, a majority of states have adopted a “dual property” equitable distribution scheme. Under this scheme, judges must distinguish between marital property generated by partnership efforts (generally presumed if acquired during marriage), and separate property not share of partnership assets upon the partnership’s demise. See Kornhauser, supra note 20, at 1416-17 (noting that partnership model of marriage is an idealized version of the equivalent two-person commercial partnership model).
attributable to shared labor (generally that which is acquired before the date of marriage, after divorce, or by gift or inheritance at any time or property acquired in exchange for separate property and kept separate). Only marital property, and not separate property, may be apportioned. However, a significant minority of states, often called “kitchen sink” or “hoch pot” states, divide all property owned by either spouse, regardless of when or how acquired. Accordingly, courts have discretion to award what would otherwise be classified as one spouse’s “separate” property. This regime is also based on partnership principles, but apparently takes a broader view of how the partnership operates and of its result.

In terms of the shares awarded to each spouse, only three states accept the traditional community property principle of a mandatory equal division. The remaining states, including five community property jurisdictions, grant courts discretion to allocate property upon divorce based on what is “equitable” (not necessarily equal) according to a list of statutory factors. These factors take into account specific facts of the marriage, commonly including each party’s contribution to the acquisition of the asset (financial and non-financial), and the parties’ relative financial circumstances, prospects, and needs after divorce. Although many states simply leave this judgment in the hands of individual judges, some states have adopted a rebuttable presumption of equal division, and other states provide that an equal division is the “starting point”

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73 See id. (listing states that use the “hochpot” method); Clark, Domestic Relations, supra note 24, at 178 (“In other common law states the statutes permit the courts in divorce cases to divide all the property owned by either spouse, regardless of when or how acquired.”).

74 There is some evidence that this “merger” of separate into marital property more accurately reflects some married couples’ own perspectives regarding their assets. This has been referred to as the “universal partnership” theory. See Gary, supra note 58, at 572-73 (“In contrast with marital partnership theory, research indicates that a couple in an ongoing first marriage are likely to view their marriage as a sharing not just of property earned during the marriage but of all their property.”). Another commentator suggests that the reverse is true. Professor Robert Levy argues that separate property exceptions reflect common sense expectations and perceptions among spouses that property acquired before marriage or by gift or inheritance belong to the titled spouse alone. See Robert Levy, An Introduction to Divorce-Property Issues, 23 Fam. L.Q 147, 152 (1989) (“It may not be universal, but it is certainly not uncommon for couples to view income that either of them produced during the marriage as ‘of the marriage’ and different from funds or assets brought by one of the spouses to the marriage or acquired by one of the spouses during the marriage by gift or inheritance.”).

75 These states are California, Louisiana and New Mexico. See Swisher, Miller and Singer, Family Law, supra note 72, at 873.

76 See id. at 873-75; Clark, Domestic Relations, supra note 24, at 181.
for applying the factors. The recent trend appears to prefer an equal division.

Equitable distribution systems have made their reliance on partnership principles explicit:

The function of equitable distribution is to recognize that when the marriage ends, each of the spouses, based on the totality of the contribution made to it, has a stake in and a right to a share of the family assets accumulated while it endured, not because that share is needed but because those assets represent the capital product of what was essentially a partnership entity.

Non-economic contributions, traditionally made by wives, make up a critical component of partnership ideology:

[Equitable distribution] gives recognition to the essential supportive role played by the wife in the home, acknowledging that as homemaker, wife and mother, she should clearly be entitled to a share of family assets accumulated during the marriage. Thus the division of property upon divorce is responsive to the concept that marriage is a shared enterprise, a joint undertaking, that in many ways is akin to a partnership.

No-fault divorce itself also reflects partnership theory. Similar to a commercial partnership, which is a voluntary association, under no-fault divorce, spousal partners can terminate their relationship at will. The ostensible purpose of divorce law then is to provide care and support for any children of the marriage and to segregate the parties’ financial affairs, with a view to permitting each spouse to move on with his or her now separate lives. This model prefers property division over alimony and envisions a “clean break” between spouses after divorce. As discussed in some detail in the

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See Swisher, Miller and Singer, Family Law, supra note 72, at 933-35 (cataloging states’ varying approaches).

For further discussion, see Suzanne Reynolds, The Relationship of Property Division and Alimony: The Division of Property to Address Need, 56 Fordham L. Rev. 827, 866-71 (1988) (summarizing the findings of various studies that confirm that trial courts commonly divide property equally).


Id. at 1177-78 (quoting Rothman v. Rothman, 320 A.2d 496, 496 (N.J. 1974)).

By 1985, no-fault divorce was uniformly permitted. Today, all states provide a unilateral divorce option. See Elrod & Spector, A Review, supra note 39, at tbl.4 (establishing that every state either provides for no-fault divorce either as the sole grounds or in addition to traditional grounds for divorce).

The UMDA reflects this preference. See Unif. Marriage & Divorce Act, Prefatory Note (amended 1973), 9A U.L.A. 161 (1998) (providing that maintenance may be awarded only if property division fails to provide for a spouse’s reasonable needs).

See Regan, Spouses and Strangers, supra note 21, at 2314 (“[F]inancial adjustments at divorce...[are] strongly influenced by the idea that divorce should effect a ‘clean break’
next section, the property preference and the notion of a clean break have been widely and, in my view, justifiably, criticized.

However, these facets of the no-fault divorce model do not change the core partnership concept now embodied in marital property law: spousal partners who joined their lives and futures and worked together in their respective capacities jointly acquired the economic assets of the marriage; thus, each has a right to share in the rewards of the shared enterprise.

III. CAREER ASSETS AND THE PARTNERSHIP PRETENSE

One apt criticism of the partnership model is that it can be an amorphous concept beyond its general principles. Additionally, the partnership model’s distinction between separate and marital property preserves individual rather than joint ownership of separate assets. Accordingly, the theory does not focus wholly on the marital community and exclude any consideration of spouses as individuals. Nonetheless, for identification and division of marital property, the general parameters of partnership theory quite clearly and unequivocally embrace the acquisition of marital assets as a community, rather than individual, effort: spouses should share in any assets produced during the marriage because these assets are the product of united, cooperative efforts. This basic notion of partnership has been rhetorically embraced by states nationwide and it is the dominant rationale offered to justify modern marital property law.

Legal decision makers have generally implemented the partnership theory when identifying and dividing traditional (concrete) property interests. So if there is a house, furniture, financial instruments, cash or retirement accounts and the like, the accumulation of such assets during marriage are regularly attributed to the efforts of both spouses, regardless of who actually earned the dollars that were used to purchase them. Again based on the notion of marriage as a joint enterprise, courts in recent years have increasingly awarded property status to intangible interests. Although such resources often cannot be sold or transferred and have no exchange value, marital law now recognizes


85 See CLARK, DOMESTIC RELATIONS, supra note 24, at 185.


87 See Kelly, Professional Goodwill, supra note 40, at 571 (recounting that the “classic sort of things that can be divided upon divorce” were easy to determine and distribute under the no-fault system of divorce).
unvested pensions, stock options, intellectual property, professional goodwill, and even celebrity status as property.\(^{88}\) However, despite this tendency for expansion of property concepts and, in apparent disregard for partnership principles, courts have overwhelmingly rejected one critically important and highly controversial economic resource: intangible career assets.

A. An Overview of the Human Capital/Career Asset Concept

Identified by Lenore Weitzman over twenty-five years ago as the major source of wealth for divorcing families,\(^{89}\) the term “career asset” and the now-popularized synonym “human capital,” refer to human skills, knowledge, and experience acquired or increased through investments of time, energy and money in an individual, as a form of wealth enhancing future income.\(^{90}\) This collection of economic advantages possessed by an individual is generally categorized in marital law in one of several ways, all of which are analogous at their core: professional licenses or degrees, (enhanced) earning capacity, and personal (professional) goodwill.

A professional license or degree is valuable, not because you can sell the license or degree itself, but because it represents the enhanced earning power possessed by the holder of the achievement.\(^{91}\) Of course, more broadly, earning capacity is possessed by and can be enhanced by individuals employed in a spectrum of jobs. For example, a computer consultant has a much greater potential for higher earnings once he or she has made an investment in education (either formal or informal), in on-the-job training and has accumulated significant experience in the field. Thus, enhanced earning capacity refers to both “professionals” and other workers.

Personal goodwill similarly refers to an individual’s enhanced earning power. Personal goodwill differs from enterprise (or “classic”) goodwill. To understand personal goodwill, a basic understanding of enterprise goodwill is necessary. Although differing definitions abound, very generally, classic goodwill is an intangible asset consisting of a collection of advantages that a

\(^{88}\) See id. at 571 nn.6-12 (providing examples and citations for each of these assets).


\(^{90}\) See Joan M. Krauskopf, Recompense for Financing Spouse’s Education: Legal Protection for the Marital Investor in Human Capital, 28 Kan. L. Rev. 379, 381 (1980) (attributing the rebirth of the concept of human capital in general to Theodore W. Schultz, the 1979 Nobel Prize winner). Gary Becker, in his book Human Capital (3d ed. 1993), has been credited with pioneering the concept in the context of family law, albeit in the context of the parent-child relationship. See id. at 21; Brinig, Talisman, supra note 21, at 95 n.10. I will refer to career assets, human capital and enhanced earnings interchangeably. I use the terms in the narrower sense to mean those assets that have not yet been transformed into concrete interests.

\(^{91}\) See Simmons v. Simmons, 708 A.2d 949, 952-54 (Conn. 1998) (concluding that while a medical degree may not fit a statutory definition of property, it nonetheless represents an opportunity for the degree holder to earn income in the future).
business entity possesses and may use to enhance the value of the business. 92 So for instance, one business may have an excellent reputation for producing high quality goods, and this reputation will attract more customers who purchase the product. As a result, the business that has the benefit of an excellent reputation will generate more profits than a similar business who may sell the very same product, with the same quality, but does not have the excellent reputation. 93 Similarly, a business may benefit from a great location or a particularly skilled set of employees. These advantages may also generate greater earnings for the business than one without these benefits.

Professional businesses such as law firms, accounting firms, or medical practices may also enjoy enhanced earnings as a result of goodwill. 94 For instance, a doctor’s office may have a good reputation as a whole; a good location; and a well-trained, friendly staff, all of which induce patients to seek treatment there instead of another doctor’s office. 95 It is appropriate to recognize these benefits as enterprise goodwill, because they attach to the business entity itself. 96 If the doctor sold his or her practice, the advantages of a superior locale and employment force presumably could be sold with the business and the purchase price predictably would include an added value for those advantages. 97

However, in the divorce context, courts have struggled with professional goodwill, because very often a professional practice has enhanced earnings attributable to the reputation and expertise of an individual professional rather

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92 See In re Marriage of Nichols, 606 P.2d 1314, 1315 (Colo. App. 1979) (“Goodwill has traditionally been defined as an intangible property right incident to an on-going business with a locality or name); Kelly, Professional Goodwill, supra note 40, at 582 (detailing the concept of goodwill and including a description and examples of both enterprise and personal goodwill, as well as the methods for valuing goodwill).

93 See Kelly, Professional Goodwill, supra note 40, at 582.

94 See id. at 580-81 n.56 (citing cases and secondary sources that have treated professional goodwill the same as commercial goodwill).

95 See Nehorayoff v. Nehorayoff, 437 N.Y.S.2d 584, 591 (1981) (distinguishing between the circumstance in which goodwill attaches to the business itself because the doctor does not have personal relationships with the patients from the situation in which the goodwill is contingent on the doctor’s personal relationships).

96 See Kelly, Professional Goodwill, supra note 40, at 580 n.53 (providing sources describing enterprise goodwill).

97 The value of the future stream of income generated by goodwill can be capitalized to produce a purchase price. The purchase price of a business with goodwill ordinarily takes into account and measures the value of a business in terms of its potential to produce income, including the future earnings attributable to goodwill. See Kelly, Professional Goodwill, supra note 40, at 607-08 (noting that the core of valuation methods is that “the worth of a business is directly related to its future profitability”); Alan S. Zipp, Divorce Valuation of Business Interests: A Capitalization of Earnings Approach, 23 Fam. L.Q. 89, 91-93 (1989) (describing the relationship between the value of a business and the future profits expected from the business).
than (or, in addition to) the business entity itself. Imagine now that a patient is attracted to a doctor’s office not because of the location or reputation of the medical practice itself, but because the patient understands that a particular doctor has extensive expertise in a specialized field and a good bedside manner. The medical practice likely generates more earnings than a comparable practice that does not have the benefit of the reputed physician. However, the ability to generate additional earnings attaches to the doctor himself and not to the organizational entity. If the doctor leaves the practice, the doctor’s good reputation, the loyal patients, and the increased earnings attributable to the doctor’s presence goes with him or her. This intangible asset departs from the classic goodwill concept which, by definition, attaches to the business entity, not to an individual. The doctor’s reputation and expertise possessed by the individual doctor fits within the category of “personal” goodwill.

Personal goodwill typically is built up over a period of years while the individual gains expertise and experience in the chosen field. Over time, due to investments of time, labor and, often, additional education, an individual enjoys an increased earning capacity. When the concept of personal goodwill is examined closely, it represents just another form of enhanced earnings. At its core, personal goodwill is almost indistinguishable from the potential enhanced earnings that give value to a professional license or degree or a developed “non-professional” career. All three concepts—personal goodwill, professional degrees and enhanced earning capacity—represent a set of intangible advantages that enable the holder to experience increased earning power.

Most courts exclude enhanced earning capacity and educational degrees from the marital estate. Although a distinct line of cases has treated personal goodwill as a marital asset, the emerging nationwide trend excludes it from the

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98 The treatment of professional goodwill nationwide has been confused and often contradictory, in large part because courts fail to fully understand the complexities of the concepts of goodwill, particularly the difference between enterprise and personal goodwill. However, some courts have begun to differentiate the concepts. See Kelly, Professional Goodwill, supra note 40, at 586-90 nn.90-114 (citing and discussing cases that address the difficulties surrounding division of professional goodwill).

99 See id. at 585-86 (citing In re Marriage of Lukens, 558 P.2d 279 (Wash. Ct. App. 1976) for the proposition that, in the case of this physician, the “personal” goodwill—his skills, abilities and reputation—was inextricably part of the individual).

100 See Dugan v. Dugan, 457 A.2d 1, 6 (N.J. 1983) (finding that goodwill does not exist at the time professional qualifications or licensing are obtained, but develops with accomplishment and performance).

101 Occasionally, courts have recognized these similarities. See, e.g., Sorenson v. Sorenson, 839 P.2d 774, 776 (Utah 1992) (“We believe, however, that unless the professional retires and his practice is sold, his reputation should not be treated differently from a professional or advanced degree: both simply enhance the earning ability of the holder.”).
Similarly, with rare exceptions (most notably New York), most jurisdictions have steadfastly rejected the classification of a professional degree or enhanced earning capacity as marital property. Nor have courts recognized a protected claim vested in each spouse to share in the resource in the form of alimony, or otherwise.

However, as the next section argues, despite courts' protestations to the contrary, career assets readily fit modern conceptions of property. Moreover, the very same partnership principles that justify sharing more traditional assets apply with equal force in the context of career assets. Why, then, have courts and legislatures overwhelmingly excluded them from division? A likely and deeply troubling explanation is revealed in the case law.

Although courts rhetorically embrace partnership theory, at least in the context of career assets, which is often the most important resource developed during the marriage, most courts simply do not accept the notion that united, cooperative spousal efforts produced the asset. Instead, human capital of this kind is judged, in the end, to be the individual accomplishment of the enhanced spouse. Courts' commitment to the partnership ideal then is limited at best. The result is that the supporting spouse, now and historically almost always the wife, is left without an equitable share of the most important asset of modern times. In the discussion that follows, I have chosen to highlight only selected cases that most clearly represent the level of commitment to, or disregard for, partnership ideology and the various rationales for accepting or rejecting career assets as marital property. The primary focus is on the treatment of professional degrees at divorce, because this subject has been the focus of

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102 See Kelly, Professional Goodwill, supra note 40, at 586-87 (citing and discussing cases which recognize personal goodwill as having developed from notions of classic (enterprise) goodwill). One explanation for some courts' willingness to include personal goodwill as a marital asset, while excluding other forms of enhanced earnings is that courts including personal goodwill have a ready-made opportunity to do so with goodwill. Goodwill is regularly included as marital property in a majority of states. See id. at 584 n.76 (citing cases). In contrast, an overwhelming majority of states refuse to classify enhanced earning capacity as a form of property to which both spouses have an earned right. See infra note 103. So for personal goodwill, unlike other forms of enhanced earning capacity, courts have a forum for treating the asset as property. As one writer suggests, "Perhaps these courts, faced by the gross social and economic disparities confronted by men and women, have tried to smuggle in some measure of equality" by misapplying the classic concept of goodwill. Michael G. Heyman, Goodwill and the Ideal of Equality: Marital Property at the Crossroads, 31 U. LOUISVILLE J. FAM. L. 1, 16 (1992). If courts perceive the current law to be inequitable and are tempted (consciously or not) to manipulate the law in order to achieve better economic justice between spouses, the law must be changed. As this article suggests, the current application of partnership theory in career asset cases similarly demands law reform.

103 See Kelly, Professional Goodwill, supra note 40, at 572 n.15. See infra note 107 for further discussion.

104 See infra Part II.B.4.b.iii.
discourse nationwide. Additionally, courts that exclude professional degrees from equitable division use reasoning that is virtually identical to the rationales for excluding personal goodwill from the division of marital assets.\textsuperscript{105}

\section*{B. The Exception: Inclusion of Career Assets Based on the Partnership Ideal}

Some jurisdictions stand out as exceptions to the general rule that excludes career assets from the marital estate. As the discussion below demonstrates, these exceptional states explicitly base their decisions on partnership theory. Awards made to the supporting spouse recognize marriage as a community of persons who unite their lives and their labor and thus are entitled to share in whatever fruits their union bears.

In the now renowned case, \textit{O'Brien v. O'Brien},\textsuperscript{106} New York became the only state to unequivocally classify a professional degree, in this case a medical license, as marital property subject to equitable distribution.\textsuperscript{107} The facts of the case, like so many of the cases in jurisdictions that have rejected the \textit{O'Brien} Court's conclusion, were highly sympathetic to the wife's claim to a share of the resource.

The parties were married almost ten years and, during that period, had focused their joint efforts exclusively on the husband's medical career.\textsuperscript{108} The wife relinquished her opportunity to complete her permanent teaching certification. Instead, both spouses kept their teaching jobs (Mrs. O'Brien had a temporary certificate) while Mr. O'Brien completed his undergraduate program and premedical requirements attending school at night.\textsuperscript{109} Thereafter, the parties moved to Guadalajara, Mexico, where Mr. O'Brien became a full-time medical student while Mrs. O'Brien provided her earnings from teaching and tutoring for their joint support.\textsuperscript{110} The O'Briens subsequently returned to New York so that the husband could complete his program and internship and the wife returned to her former teaching position.\textsuperscript{111} Two months after Mr.
O'Brien received his license to practice medicine, he filed for divorce.\textsuperscript{112} He was a resident in general surgery at the time of trial,\textsuperscript{113} and his medical degree was the only asset of the marriage.\textsuperscript{114} The court found that, in addition to maintaining the household and managing the family finances, Mrs. O'Brien contributed 76\% of the parties' income during the marriage.\textsuperscript{115}

Relying on a strategy that had been successful in other jurisdictions, Mr. O'Brien argued that the degree was not property, but was instead a "personal attainment in acquiring knowledge."\textsuperscript{116} The court disagreed, explaining that marital property is purely a statutory creature, the definition of which is left to the courts who are not constrained by traditional common law property doctrine.\textsuperscript{117} New York statutory law, which broadly defined marital property as all property acquired by either or both spouses during marriage, regardless of formal title, easily accommodated inclusion of a medical degree.\textsuperscript{118}

Although the opinion suggests that this definition is distinguishable from other jurisdictions, in fact, the language relied on is exactly parallel to the prevailing definition of marital property nationwide today.\textsuperscript{119} Further illuminating its reasoning, the court explained why the degree is property to which each spouse has a claim: "The Legislature replaced the existing [title] system with equitable distribution of marital property, an entirely new theory . . . based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker."\textsuperscript{120} Language of partnership and unity pervade the opinion:

As this case demonstrates, few undertakings better qualify as the type of joint effort that the statute's economic partnership theory is intended to address than contributions toward one spouse's acquisition of a professional license. Working spouses are often required to contribute substantial income as wage earners, sacrifice their own educational or career goals and opportunities for child rearing, perform the bulk of household duties and responsibilities and forego the acquisition of marital

\textsuperscript{112} See id.

\textsuperscript{113} See id.

\textsuperscript{114} See O'Brien, 489 N.E.2d at 713.

\textsuperscript{115} This was exclusive of a $10,000 loan. See id. at 714.

\textsuperscript{116} Id. at 715.

\textsuperscript{117} See id.

\textsuperscript{118} See id. The court held that the New York statute was properly read as regarding "things of value" acquired during the marriage as "marital property."

\textsuperscript{119} See, e.g., COLO. REV. STAT. ANN. § 14-10-113 (3) (West 1999) ("All property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership . . . ."); 750 ILL. COMP. STAT. ANN. 5/503 (b)(1) (West Supp. 2000). Perhaps the court was referring to the old title system still in existence in some jurisdictions at the time.

\textsuperscript{120} O'Brien, 489 N.E.2d at 716 (citations omitted).
assets that could have been accumulated if the professional spouse had been employed rather than occupied with the study and training necessary to acquire a professional license.\textsuperscript{121}

Thus, this court concluded that fidelity to partnership theory required classification of career assets as marital property subject to equitable division. A similar description of the nature of marriage and partnership is provided in \textit{Woodworth v. Woodworth},\textsuperscript{122} a Michigan case that held that a law degree was marital property:

[The] plaintiff’s law degree was the end product of a concerted family effort. Both parties planned their family life around the effort to attain plaintiff’s degree. Toward this end, the family divided the daily tasks encountered in living. While the law degree did not preempt all other facets of their lives, it did become the main focus and goal of their activities. Plaintiff left his job in Jonesville and the family relocated to Detroit so that plaintiff could attend law school. In Detroit, defendant sought and obtained full time employment to support the family.

We conclude, therefore, that plaintiff’s law degree was the result of mutual sacrifice and effort by both plaintiff and defendant. While plaintiff studied and attended classes, defendant carried her share of the burden as well as sharing vicariously in the stress of the experience known as the “paper chase.”

We believe that fairness dictates that the spouse who did not earn an advanced degree be compensated whenever the advanced degree is the product of such concerted family investment. The degree holder has expended great effort to obtain the degree not only for him—or herself, but also to benefit the family as a whole. The other spouse has shared in this effort and contributed in other ways as well, not merely as a gift to the student spouse nor merely to share individually in the benefits but to help the marital unit as a whole.\textsuperscript{123}

The \textit{Woodworth} and \textit{O’Brien} courts demonstrate an unusual willingness to follow partnership theory in the context of marriage to its logical end—the inclusion of an advanced degree as “marital property.” As will be discussed below, however, in many of the cases rejecting career assets as property, the notions of partnership and joint achievement are starkly absent.

As Professor Susan Keller’s examination of the rhetoric judges’ invoke in professional degree cases suggests, one way to understand this extensive reliance on partnership theory is that judges use available rhetoric to tell the story of their choice: “a story of how one might come to understand the[ir]

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{121} \textit{Id.} at 716.
\item \textsuperscript{122} 337 N.W.2d 332 (Mich. Ct. App. 1983).
\item \textsuperscript{123} \textit{Id.} at 334.
\end{enumerate}
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choice."  

Decision makers both influence rhetoric and are influenced by it. More importantly, however, judges play an important role in reflecting and developing our cultural understanding of what marriage means. Thus, the courts’ acceptance or rejection of partnership ideology has powerful normative implications. This is why the acceptance or rejection of partnership ideology matters; it influences us and how we conceptualize marriage and divorce, and, ultimately, what rights and responsibilities accrue upon divorce. The rejection of career assets as divisible property is a rejection of the partnership model of marriage and provides a sharply different view of marriage than that of community. This competing model is one where, despite facts that suggest costly sacrifice and dedicated labor by the supporting spouse, career achievements are deemed the product of the separate, individual efforts of the enhanced spouse.

C. The Rule: Exclusion of Career Assets; An Accomplishment of The Solitary Individual

Based on a variety of rationales, states across the country have overwhelmingly concluded that professional degrees and increased earning capacity generally are not marital property. Commentator Joyce Davis describes three primary rationales courts offer when excluding human capital in the form of enhanced earning capacity from the marital estate: (1) it does not fit traditional legal conceptions of property; (2) valuation is too difficult; and (3) contrary to the goal of a clean break, inclusion would require on-going financial entanglement between the parties:

In other words, it’s not property because it’s not property; it’s not property because if it were, it would be too difficult to assess its value; it’s not property because if it were, requiring the husband to pay over a long period of time would keep the parties financially entangled and prohibit their establishing a new life.

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124 Keller, supra note 40, at 411-13. Mary Ann Glendon makes a similar, although more pointed, observation that partnership rhetoric “merely serves to rationalize the imposition of a result.” GLENDON, NEW FAMILY, supra note 21, at 66.

125 See Keller, supra note 40, at 421-23 (describing four themes of marriage that emerge from case law rhetoric: marriage as sharing, independent achiever, marriage as joint enterprise, and hostility to economics). Many others also describe this reflection and reinforcement of societal norms in law. See generally, e.g., Martha A. Fineman, Our Sacred Institution: The Ideal of the Family in American Law and Society, 1993 UTAH L. REV. 387, 387-88 (1993) (stating that the law represents a choice among competing interpretations of the concept of family and has special force in the creation of norms).

126 See sources cited supra notes 102-03. As stated earlier, personal goodwill has received mixed treatment, but there appears to be an emerging trend excluding it.


128 Id. at 112-13. Parts of this section rely significantly on Davis’ work.
Although each of these rationales have been the subject of scholarly examination elsewhere, it is worth spending some time reviewing them, as well as other rationales for exclusion of human capital, in light of what they reveal about the acceptance—and rejection—of partnership theory. As scholars such as Joyce Davis and Margaret Brinig persuasively establish, none of the offered rationales for exclusion are convincing. In fact, these rationales are so easily refuted that courts’ continued adherence to them reflects a reluctance to rigorously and honestly face the real interests at stake and raises a critical question: why are legal decision makers so resistant to the inclusion of career assets as property?

The leading case for excluding professional degrees from the marital estate is *In re Marriage of Graham* from Colorado. The facts are strikingly similar to those of the *O’Brien* case. The wife worked full-time throughout the parties’ six-year marriage as a flight attendant while the husband worked part-time so that he could focus most of his energies on his education. During the marriage, the husband acquired both a bachelor of science degree in engineering physics and a masters degree in business administration. As in *O’Brien*, no other marital assets were accumulated. Similarly, the trial court determined that Mrs. Graham provided 70% of the financial support throughout the marriage, including her husband’s tuition, and also did the majority of the household work.

Realizing, no doubt, that given her full-time employment throughout the marriage and at divorce, Mrs. Graham would be ineligible for post-divorce spousal support (maintenance), she did not request it.

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129 See id. at 117 (refuting difficulties in valuation rationale); id. at 130 (refuting involuntary servitude rationale); id. at 134 (refuting clean break rationale); Brinig, *Talisman*, supra note 21 at 105-07 (analogizing marriage to a business partnership in which the supporting spouse would have a residual claim to the “capital gains” (the promise of future income) of the enhanced spouse at divorce).

130 Indeed, Joyce Davis recounts that when she undertook her examination of the rationales for excluding career assets (which she refers to as human capital/enhanced earning capacity), her discussions with colleagues, including Martha Fineman, easily led to a consensus that not only was human capital/enhanced earning capacity property, but that the conclusion was “entirely obvious.” See Davis, supra note 127, at 113 n.47. For a similar observation about the ease of refuting traditionally offered rationales for exclusion, see Jana B. Singer, *Husbands, Wives, and Human Capital: Why the Shoe Won’t Fit*, 31 FAM. L.Q. 119, 123-24 (1997).

131 574 P.2d 75 (Colo. 1978).

132 See supra notes 106-15 and accompanying text.

133 See *Graham*, 574 P.2d at 76.

134 Mr. Graham attended school for three and half years while married. See id.

135 See id.

136 See id.

137 Id. at 78. The Colorado statute, typical of many modern statutes, effectively precluded an award of maintenance in the Graham case because the court has jurisdiction to
Similar to the statute defining marital property in O'Brien, the Graham Court noted that the legislature’s use of the word “property” was intended to include “everything that has exchangeable value or which goes to make up wealth.” Despite this particularly expansive definition, the court chose to exclude the degree from the marital estate, explaining:

An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of “property.” It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It cannot be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.

1. It is Not Property Because it is Not Property

The above language in Graham has been cited extensively by most subsequent jurisdictions that have considered the issue, and is the dominant rationale offered for excluding intangible career assets. Essentially, courts conclude that an educational degree is not property because it has none of the attributes of property. The term “property,” however, is not self-defining. Such conclusory reasoning begs the question: what is property? Perhaps the most apt answer Davis (and others) provides is that “property is very much a social/legal construct . . . . ‘Property is, of all the basic rights, perhaps, most obviously the creation of the state.’” Thus, as the broad and unlimited statutory definitions of marital property suggest, it is clear that courts have the power to define property to include career assets. However, to do so, the courts would have to accept the validity of the supporting spouse’s ownership award maintenance only when the spouse seeking it is unable to support himself or herself. Id. at 78-79 (Carrigan, J., dissenting). Although the majority recounted its ability to account for a supporting spouse’s efforts in the calculation of any support award, the suggested remedy was wholly illusory because Mrs. Graham was ineligible for support.

138 See supra note 118 and accompanying text.
139 See Graham, 574 P.2d at 77 (citation omitted).
140 Id.


claim. As I suggest at various points in this article, courts reject the idea that the supporting spouse has an earned right to joint ownership of career assets—she does not qualify for ownership.

Regardless, Davis convincingly explains that enhanced earning capacity has most of the basic characteristics of traditional property. She examines the property attributes of human capital by examining four categories that composite the elements of property, according to major property theorists such as Hohfeld, Honore, and Pound.

One element of property is a claim or right to use, possess or manage it. As Davis demonstrates, intangibles such as skills, knowledge and ability (acquired through education, training or experience) "are possessed by and can be used by the holder in much the same way that tangibles can be used." The possessor can exercise power over the resource in many ways. The owner of this intangible property may use it for personal benefit, the benefit of others, as a means of acquiring wealth, or, the owner can choose not to use it at all.

Next, Davis notes that the possessor of human capital has the privilege or power to exclude others from, waive, transfer, dispose of, abandon, or to alienate the resource. "Just as no one is free to use copyrighted material without permission or payment, no one can use the enhanced earning capacity of another without permission or payment." Although a degree itself may not be sold assigned or transferred, the earning capacity it represents can be, and routinely is sold in the marketplace. Physical and intellectual labor, skills, and abilities are products regularly purchased in the employment market, and earning capacity is frequently pledged in exchange for loans to finance education. Additionally, the possessor enjoys another traditional characteristic of property—the liberty to enjoy, injure, consume or destroy his or her human capital.

Finally, Davis concludes that the requirement that property be immune from appropriation by others or the government is consistent with the classification

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143 See generally Davis, supra note 127.
144 Davis relies in part on Stephen Munzer’s review of Hohfeld and Honore. See id. at 136-40 (citing STEPHEN R. MUNZER, A THEORY OF PROPERTY (1990)) (reviewing Munzer’s discussion of Hohfeld (the four elements of property are claim-right, privilege, power, and immunity) and Honore’s expansion and clarification of these elements).
145 See id. at 136-37 (citations omitted).
146 Id. at 136.
147 See id. at 137-38.
148 See id. (finding that “just as one can alienate the manual labor of one’s body, one can also alienate . . . the intellectual labor of one’s mind”).
149 Davis, supra note 127, at 137.
150 See id. at 137-38.
151 See id. at 137 (observing the frequency with which loans are collateralized by future earning capacity).
152 See id. at 138.
of human capital as property.153 Specifically, "appropriation" would not occur when a supporting spouse is awarded a share of and advanced degree; the asset retains the characteristics of property just described. Rather, the supporting spouse is regarded as a co-owner who is entitled to share in the asset's payout. Thus, the finding of joint entitlement to a revenue stream does not affect the original determination that human capital is property.154

In addition to satisfying traditional property concepts, human capital unquestionably is consonant with more contemporary conceptions of property.155 Over thirty years ago, Charles Reich observed that the American economy was undergoing a transformation in forms of wealth, which effected a changing vision of what constitutes property.156 In an agricultural or manufacturing society, most wealth is manifest in physical assets such as land. As Allan Parkman observes, however, in an economy such as the United States, where most income is derived from service and knowledge activities, an individual's primary asset is his or her earning capacity.157 From an economist's perspective, Parkman explains, "an asset, which is another word for property, exists and has value if it produces a future stream of returns, regardless of whether it is exchangeable or not."158 In modern times then, wealth may increasingly consist of intangibles such as jobs, income and benefits; licenses; and contracts.159

Charles Reich recently directly addressed the issue of career assets in the context of divorce and highlighted the equitable concerns which he felt compelled inclusion as property:

Consider an action for divorce where, as is increasingly common today, the husband and wife possess virtually no property in the traditional sense . . . . But suppose there is one major asset: the husband has a professional license—perhaps he is a physician. And suppose the wife worked for years to put the husband through medical school, sacrificing her own interests . . . . In this case, unless the medical license is accorded the

153 See id. at 138-39.
154 See id. (stating that the requirement of payment from future income in no way negates individual ownership of a career asset).
155 See Kelly, supra note 40, at 598-600. For others who make this same point, see id. n.163.
156 See Charles A. Reich, The New Property, 73 YALE L.J. 733, 738 (1964) [hereinafter Reich, New Property] (observing that an increasing amount of wealth in American culture is in the form of intangible rights or status).
157 See Allen M. Parkman, Human Capital as Property in Celebrity Divorces, 29 FAM. L.Q. 141, 142 (1995) [hereinafter Parkman, Celebrity Divorces] ("The wealth of individuals, i.e. their property, is the value of the income stream that they can anticipate from [their] assets . . . . their human capital.").
159 See Reich, New Property, supra note 156, at 734-36.
status of property, a substantial injustice to the wife may result . . . the medical license is actually a substitute for property in its traditional form.\textsuperscript{160}

Thus, contrary to courts' often conclusory holdings otherwise, career assets quite easily fit modern notions of property and also possess many critical elements of more traditional property conceptions.

2. It is Not Property Because it is Too Difficult to Value

Another frequently cited reason for excluding career assets from marital property is that its value is very difficult to determine. Its calculation has been described as “uncertain” and “unquantifiable,” “little more than guesswork,” and “entirely speculative.”\textsuperscript{161} Although it is true that the valuation process can present significant challenges, such difficulties simply do not justify the asset’s exclusion from the marital pot. Even more disturbing is that courts’ refusal to grapple with the valuation issues reveals that ultimately, very little value is attributed to the supporting spouse’s contribution to the resource. As one writer suggests: “Because money is the measure of value in a market economy the refusal to compensate an injury is a direct message about the worth of the injury; compensation legitimizes the interest and emotions it rewards.”\textsuperscript{162} A refusal to “bother” with a valuation challenge reflects a conclusion that the person denied compensation is not really viewed as having a valuable interest to begin with.

In his dissenting opinion in \textit{Washburn v. Washburn},\textsuperscript{163} Justice Rosellini provides a persuasive response to the valuation challenges posed by career assets.\textsuperscript{164} Rosellini emphasizes that professional goodwill,\textsuperscript{165} like a professional degree, is intangible, often unmarketable, and difficult to value, and yet courts include goodwill as a divisible asset upon divorce.\textsuperscript{166} Because the supporting spouse has made an important contribution (through financial and domestic services or otherwise) to the development of the goodwill of the professional practice—or, similarly, to the achievement of a professional degree or development of a career—that spouse has a valuable interest in the asset.\textsuperscript{167} “The mere fact that goodwill is an amorphous asset and a value

\textsuperscript{161} Mahoney v. Mahoney, 453 A.2d 527, 531-32 (N.J. 1982).
\textsuperscript{162} Nancy Levit, \textit{Ethereal Torts}, 61 GEO. WASH. L. Rev. 136, 188-89 (1992); \textit{see also} Davis, \textit{supra} note 127, at 120 n.120 (citing to Levit’s article).
\textsuperscript{163} 677 P.2d 152 (Wash. 1984).
\textsuperscript{164} \textit{See id.} at 161 (Rosellini, J., dissenting); \textit{see also} Davis, \textit{supra} note 127, at 117-18 (summarizing Justice Rosellini’s arguments in \textit{Washburn}).
\textsuperscript{165} The \textit{Washburn} court defined goodwill “as the expectation of continued public patronage.” \textit{Washburn}, 677 P.2d at 162.
\textsuperscript{166} \textit{See id.}
\textsuperscript{167} \textit{See id.}
cannot be precisely determined is an improper basis . . . [for its exclusion as property].” 168 In addition, courts regularly recognize and divide pension and retirement benefits, which are also unrealized future interests and are often subject to contingencies and valuation difficulties. 169 Thus, valuation challenges cannot properly be the basis for excluding career assets such as an educational degree.

Moreover, in tort cases, career assets are ascribed value on a regular basis. As Rosellini observed, courts consistently recognize the need to determine the value of a professional education to compensate a plaintiff for a loss of future income in wrongful death or personal injury actions. 170 In such cases, there are no fixed mathematical formulas for valuation, but rather each case must be determined based on its own facts, considerations and probabilities. 171 Courts rarely deny relief because of the difficulties in valuing the asset and “should be equally hesitant to deny relief to a nonstudent spouse who has lost the economic potential of the partial value of the education that she helped to provide.” 172

Besides, courts have another viable option available to them for the division of career assets. Valuation challenges stem from attempts to predict how much the enhanced spouse will actually earn in the future from the enhancements. A simple solution would be to award the supporting spouse a share of the career asset for a specified duration as it is realized over time in the form of an income stream; the supporting spouse could share in the actual payout as does the enhanced spouse. 173 This “pay as it comes in” approach has been adopted in the great majority of cases dividing unvested pension benefits. 174 Like

168 Id.
169 See id.
170 See id. at 162 (analogizing the difficulty in assessing certain tort damages to the difficulty in assessing the value of intangible marital assets); see also Graham, 574 P.2d at 79 (Carrigan, J., dissenting). For a list of considerations relevant to the damage calculation in a personal injury case, see Washington v. American Community Stores Corp., 244 N.W.2d 286 (Neb. 1976) (finding that a wrestler with hopes for the Olympics who was employed at the time of the injury as a parole officer should be awarded damages for a personal injury based on his projected future income assuming that he was successful at the Olympics and would have parlayed that success into employment as a professional or college wrestling coach).
171 See Washburn, 677 P.2d at 163.
172 Id. (citation omitted). Rosellini suggests one valuation approach similar to that utilized in tort actions: to compare the student spouse’s earning capacity at the time of marriage with that at the time of dissolution to ascertain the value of the enhancement. Id. at 165.
173 See, e.g., Brinig, Talisman, supra note 21, at 106-07 (proposing a share of earning capacity that will be paid in the future, similar to the way pensions are now shared in some states); Kelly, supra note 40, at 626 (proposing an award to the supporting spouse of a percentage share in the income stream goodwill produces post-divorce).
174 See J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY...
career assets, unvested pensions are problematic to value and are subject to various future contingencies. In particular, the benefits may never be received if, for example, the pensioned spouse leaves that employment or dies before retirement. Although the parallels to career assets are evident, courts have not accepted this “pay as it comes in” approach as a solution to their valuation challenges. The primary objection to this kind of post-divorce sharing (with regard to career assets, but apparently not to unvested pensions) is that it would prevent ex-spouses from experiencing a clean break at divorce. However, as discussed in the next part, divorce cases rarely result in a clean break.

3. It is Not Property Because if it were, there Could be no Clean Break Upon Divorce

Another reason courts provide for rejecting human capital as property is that sharing the asset requires ongoing financial entanglement between the parties, contrary to the goal of providing a “clean break” upon divorce. Because a distinguished body of scholarship examines and critiques the clean break ideal, the discussion here only highlights a few of the main points.

One response to the clean break objection is that sharing the value of career assets has almost the same effect on the goal of a clean break as other forms of resource allocation have upon divorce. That is to say, with regard to some assets, such as cash accounts, the parties’ joint ownership can be effectively separated out. As a practical matter, however, in the dissolution of most marriages there is not, and cannot be, a complete and immediate severance of spouses’ financial interdependence.

As many commentators note, since approximately 60% of divorces involve

§ 7.10 [5], at 7-51 to 7-53 and cases cited therein (1994).

175 See, e.g., In re Marriage of Brown, 544 P.2d 561, 563 n.2 (Cal. 1976) (recognizing that even vested rights may be subject to divestiture in case of death or court martial (citations omitted)).

176 See, e.g., id. at 563.

177 See generally Davis, supra note 127, at 112, 130-35 (“[C]ourts have . . . relied on the idea that it is important to have a clean break between the parties at the time of divorce.”).

178 See generally, e.g., Fineman, ILLUSION OF EQUALITY, supra note 4 (arguing that equal treatment of parents at divorce ignores the fact that mothers most often raise and support children after divorce); Weitzman, DIVORCE REVOLUTION, supra note 89 (discussing the ramifications of the no-fault doctrine on existing divorce law); Brinig, Talisman, supra note 21 (asserting that a clean break is not a possibility where children are involved); Carbone, Income Sharing, supra note 21 (discussing the concept of “income sharing”—treating post-divorce income as jointly owned rather than individually owned for a period of time following a divorce); Glendon, Family Law Reform, supra note 4 (proposing a “children-first” principle in marital property law); Regan, Spouses and Strangers, supra note 21 (asserting that the clean break ideal is unrealistic); Starnes, supra note 83 (suggesting a partnership model for marriages and an associated partnership approach to dissolution that includes a “buy out” provision for the untitled spouse).
minor children, it is neither possible nor desirable to effect a clean break with
regard to a parent’s relationship to a child nor between ex-spouses who must
find a way to co-parent their children.\textsuperscript{179} After a divorce, spouses with
children necessarily must have an ongoing economic relationship and some
form of emotional relationship for the duration of their shared parenting
responsibilities. Certainly the law does not promote the idea that parents can
“move on” with their separate lives by walking away from their children. At
least one parent will continue to sacrifice time at home and, very likely, time at
work, to provide care for children.\textsuperscript{180} These obligations and losses obviously
continue well beyond the time of divorce.

In addition to shared child support and care for children, under existing law
spousal support and property obligations may continue for years post-divorce.
Although it has been estimated that alimony is in fact awarded in only 16.8%
of divorces,\textsuperscript{181} spousal support law clearly contemplates a form of income
sharing for at least a period of time following divorce. In fact, even in some
career asset cases, courts that have refused to classify the interest as property
have nevertheless been willing to provide a remedy to supporting spouses
through an alimony award.\textsuperscript{182} Accordingly, there is already a mechanism that
anticipates some level of financial interdependence between ex-spouses.
Additionally, commonly divided marital property such as a house, a retirement
account or a business often cannot be liquidated at divorce. Because in many
such cases no other assets exist to offset the value of such property,\textsuperscript{183} one
spouse must “buy the other out” by making monthly payments that go on for
years. As a practical matter then, a clean break does not occur and is not
possible in many divorce cases.

Even if a clean break were possible, many scholars make compelling

\textsuperscript{179} Some scholars have particularly emphasized concern regarding the notion of a clean
break in families with children. See sources cited supra note 4. Elizabeth Scott has aptly
described this tension:
The value of children in a life plan is both basic and complex; it derives from a desire
to pass on a cultural and personal heritage, to instill values, skills and interests and to
enjoy the companionship of persons sharing a unique and insoluble bond. These
intentions for the role of family would appear to conflict with the legal and social
norms that facilitate minimal commitment and ready dissolution of marriage.
Elizabeth Scott, Rational Decisionmaking About Marriage and Divorce, 76 VA. L. REV. 9,

\textsuperscript{180} See Brinig, Talisman, supra note 21, at 108-09 (“Children imply (in nearly all cases)
that at least one caretaker must sacrifice leisure time and employment time for them.”).

\textsuperscript{181} See Scott & Scott, Relational Contract, supra note 21, at 1231 n.13 (citing a 1988
survey of divorced women: Bureau of Census, U.S. Dep’t of Commerce, Current Population

\textsuperscript{182} See infra notes 244-45 and accompanying text.

\textsuperscript{183} Lenore Weitzman prominently exposed how frequently it is the case that divorcing
spouses have very little, if any tangible property to divide. See WEITZMAN, DIVORCE
REVOLUTION, supra note 89, at 53.
arguments that a clean break is not an appropriate goal in the first place. As Milton Regan advises, "[c]ommon experience belies the notion that lives so intertwined are easily disentangled." A clean break is a particularly inappropriate goal in light of the way career assets are often developed in a marriage.

Members in a marital partnership, Regan explains, make a myriad of subtle contributions and sacrifices with the expectation of a shared future in which the entire family will reap the rewards of such efforts. Decisions throughout the marriage are made for the purpose of benefiting the partnership as a whole. However, when spouses divorce, each party individually possesses the advantages or disadvantages of joint marital choices, and the repercussions of these choices continue for many years after divorce. Importantly, however, unless reallocated upon dissolution, only one spouse will live with the benefit—or the burden—of partnership decisions.

The acquisition of career assets exemplifies this process—and its results. The recurring fact pattern is: one spouse (typically the husband) focuses on marketplace career development; he gains experience, skills and knowledge, perhaps through formal education. As a result, his earning capacity increases over the span of the marriage. The other spouse (usually the wife), focuses her efforts on managing the home and providing care for children. Even if both spouses work, a scenario that is becoming more prevalent today, typically one spouse (again usually the wife), will nonetheless dedicate more time and energy to caring for the parties’ children and personal lives, and less time toward career development. This provides the other spouse with more time for work or leisure. The homemaker spouse suffers a loss in earning capacity, diminished marketplace skills, and leaves the marriage without the advantages of career investments. Even if she was employed, but was primarily focused on family matters, she suffers the same losses but to a lesser degree. These burdens will be likely be exacerbated as women “overwhelmingly tend to be the custodians of children following divorce,” which further limits their ability to achieve success in the marketplace.

For these women, divorce does not change the allocation of work from the pre-divorce assignments; rather,

184 See sources cited supra note 178.
185 Regan, Spouses and Strangers, supra note 21, at 2400.
186 See id. at 2387-88 (advocating that the ethic of family responsibility, rather than market entitlement, should be the governing principle in property distribution upon dissolution).
187 See Kelly, Professional Goodwill, supra note 40, at 591.
188 See Swisher, Miller & Singer, Family Law, supra note 72, at 771 (noting that nearly 54% of American mothers with children under 3 years old work outside the home).
190 Regan, Spouses and Strangers, supra note 21, at 2318 (citation omitted) (stating that sole custody is awarded to mothers in an estimated two-thirds of California cases).
divorce primarily changes their access to the likely greater income to which their work contributed—their husband’s.

Any attempt to impose a “clean break” without adjusting the economic advantages and disadvantages just described would wrongly disregard the long-term effects that the marital enterprise generated. Without reallocation, for whom would it be a clean break? Ignoring these effects certainly would not provide a clean break for supporting spouses or the children so often in their custody.191 In short, the notion of clean break does not comport with the reality of marriage and divorce.

Although the clean break principle has been associated with partnership ideology, it must be understood in connection with the related partnership principles essential to its fair application.192 As Joyce Davis aptly concludes: “even if one accepts that a clean break is the preferable result at divorce, it would seem that the concrete goal of providing for the financial well being of each party to the extent consistent with their joint assets would take precedence over this illusive and abstract ideal.”193

Once these traditionally offered bases are deconstructed, one conclusion can easily be drawn: there must be another explanation for courts refusal to award the supporting spouse an entitlement to share career assets. The next section is an exposition of what that explanation might be.

4. The Ascendant Rationale: Career Assets as Individual Achievement

a. The Language of Solitary Individualism

An examination of the leading cases that deny property status to human capital reveals another rationale for exclusion often obscured by other rationales—but unmistakably present. Notwithstanding the rhetoric of partnership that has been espoused nationwide, the advantages accruing to a spouse who emerges from marriage with an enhanced career are deemed attributable to the independent efforts of the spouse who possesses the career (the “titled” spouse).194 Unlike decisions such as O’Brien that treat career assets as property in which language of partnership, mutual contribution, and sacrifice surround the explanation for inclusion of the asset, the justifications for excluding career assets from property status predominantly omit any such

191 See Brinig, Talisman, supra note 21, at 107-13 (“[A]rguably there can be no clean break when children are involved.”).

192 See Starnes, supra note 83, at 108.

193 Davis, supra note 127, at 134-35.

194 My colleague Professor Susan Keller has thoughtfully examined the rhetoric courts use in professional degree cases, and has graciously shared her insights with me in her article on the subject and in our discussions. See generally Keller, Rhetoric of Marriage, supra note 40. I am grateful for the valuable resource, that, as evidenced in parts of this section, surely has influenced my perspective.
In its place, courts offer the rationales highlighted earlier (the nature of property, valuation difficulties, and the lack of a clean break). However, entrenched throughout these opinions is yet another explanation—even in the community paradigm of marriage—individual accomplishment is treated as the dominant value.

The *Graham* case discussed earlier is typical of this reasoning. There, amidst the usual explanations that career assets are not property, is what has become a recurring theme: “An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property.” Similarly, a degree has been described as “a personal achievement of the holder” which, if valued in divorce based on cost would “fail to consider the scholastic efforts and acumen of the degree holder.” These comments reveal a conclusion that the degree was achieved independently by the diligence, hard work and intellectual capacity of the titled spouse. While this is certainly part of how the degree was accomplished, that effort was not a solitary one, since the degree was acquired during marriage. Similar to the accrual of a house and a pension, the supporting spouse worked alongside the enhanced spouse contributing her own “diligence,” “hard work” and “intellect” to the asset’s acquisition. When faced with the challenge that the supporting spouse has also made an important contribution, the response has, at times, been even more explicit in emphasizing individual accomplishment: “the contribution made by one spouse to another spouse’s advanced degree plays only a small part in the overall achievement.”

195 It is not that entire opinions necessarily omit reference to partnership theory. Indeed, many of the opinions describe a stated commitment in the law to the partnership nature of marriage. Partnership language is often included in the part of the opinion where the court believes it is granting some form of compensation to the supporting spouse. See, e.g., Simmons v. Simmons, 708 A.2d 949, 952 (Conn. 1998) (describing mutual contribution, sacrifice and expectations regarding a professional degree); Mahoney v. Mahoney, 453 A.2d 527, 534 (N.J. 1982). However, as discussed infra, courts overwhelmingly refuse to grant the supporting spouse an earned right to share enhanced earning capacity. Because there is no right to share the asset, whatever non-property remedy may be available is often wholly illusory. The focus here is on the specific parts of these opinions that rationalize denying the supporting spouse an earned right—in other words—a property interest. These portions typically ignore partnership notions of joint contribution and effort. See, e.g., Simmons, 708 A.2d at 953-56 (“[T]he future income sought cannot be ‘marital property’ because it has not been earned.”); *Mahoney*, 453 A.2d at 531-34 (recognizing a marriage as a partnership, but “[o]nly monetary contributions . . . should be a basis for [an alimony award]”).

196 See *supra* notes 133-40 and accompanying text.

197 *Graham*, 574 P.2d at 77.

198 *Mahoney*, 453 A.2d at 531.


More recent thinking by legal decision makers ultimately reflects the same hyper-individualistic orientation. Recently, in 1998, the Connecticut Supreme Court faced for the first time the question of whether a career asset (again a medical degree) should be classified as marital property. The opinion, Simmons v. Simmons,\(^{201}\) specifically incorporated the analysis of earlier leading decisions and reflects the current majority reasoning on the subject. Once again, after acknowledging the Connecticut legislature’s broad definition of marital property,\(^{202}\) the court marshaled the argument that an enhanced career is not property because it does not fit the definition of property.\(^{203}\) Next, even in the face of an accusation by the supporting spouse that the court maintained “a paleolithic view of marriage” inconsistent with partnership theory, the court prominently announced the primacy of solitary individualism: “[o]n the whole, a degree of any kind results primarily from the efforts of the student who earns it. Financial and emotional support are important, as are homemaker services, but they bear no logical relation to the value of the resulting degree.”\(^{204}\) Of course, none of this has to do with whether the resource is property, but rather, whose property it is.

b. The Non- Contribution Conclusion

This reasoning seems most concerned with the notion of contribution. Who contributed to the resource, how much did they contribute and what are those contributions worth? Overwhelmingly, these questions have been answered by courts in the same way: the supporting spouse did not really contribute much of anything at all. This conclusion is evident in the current legal treatment of human capital: the supporting spouse has no entitlement to share in the asset. Although courts sometimes state that the supporting spouse’s contributions

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\(^{201}\) See id. at 953-55.

\(^{202}\) The Connecticut legislature used the definition of “property” provided in BLACK’S LAW DICTIONARY 1095 (6th ed. 1990): “everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. It extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditament.” Simmons, 708 A.2d at 953 (citations omitted).

\(^{203}\) Simmons, 708 A.2d at 956 (citing Hoak v. Hoak, 370 S.E.2d 473, 477 (W. Va. 1988)).
have value, in the end, her contributions are deemed unworthy of financial recognition in many cases and viewed as worthless.\footnote{As discussed \textit{infra}, many courts have recognized that the standard factual pattern experienced in career asset cases presents disturbing inequities that may require some remedy. However, the remedies provided in the vast majority of cases do not conceive of nor treat the supporting spouse as an equal partner in the marriage. Although some courts imagine that they recognize the supporting spouse's contribution by way of dividing other property or through the possibility of granting alimony, unless a career asset is included as a resource to which the supporting spouse has definitively earned a claim, she will continue to be denied her partnership share in many cases. \textit{See infra} subsection (b)(iii).} This conclusion calls into question the extent to which legal decision makers accept a core concept of partnership theory—that each spouse makes crucial, although perhaps different, contributions to the marital estate. If the perception is that spouses do not provide meaningful contributions to one another when in the process of acquiring this critically important form of wealth, then such a view inescapably rejects the notion of marriage as a sharing relationship.

The non-contribution conclusion generally flows from two separate sources. The first is the argument that a career asset is separate property rather than marital property. Second, some argue that even if there is some value acquired during marriage, the marital value itself is overwhelmingly attributable to the efforts of the enhanced spouse and not to those of the other spouse. Together, the two sources suggest that whatever the supporting spouse may have contributed, it was not much and was of no real value.

i. The Separate Property Claim

The separate property claim arises by looking at property both before marriage and after divorce. Typically, the timing of the acquisition of the asset determines its character as either separate (property acquired before or after marriage) or marital property (property acquired during marriage).\footnote{\textit{See, e.g., Md. Code. Ann., Fam. Law § 8-201 (1991) (excluding from the definition of “family home” and “marital property” property acquired before the marriage); N.Y. Dom. Rel. Law § 236 (B)(1)(c) (McKinney 1986) (defining the term “separate property” in part as property acquired before marriage).} This division is easy to determine for some assets. For example, a cash account or a house that is fully paid for before marriage is classified as separate property. From there, the process becomes increasingly complex. If the house was not completely paid for before marriage, for example, and equity had accumulated by mortgage payments over the marriage, the portion of the equity acquired before marriage is separate and the portion acquired during marriage is marital property. As described below, the acquisition of human capital is arguably even more complex.

a. Premarital Property

Allen Parkman, a prominent human capital theorist, suggests that human
capital is the product of many investments made over an extensive period of time, such as investments in a formal education or those made on the job. Accordingly, a spouse entering marriage already has significant human capital (earning potential) built up as separate property. "At any moment, an individual has a stream of expected future earnings based on investments that have already taken place in him or her. These earnings are net of any future investments and the value of this net earnings stream is the individual's human capital." A major portion of the asset, Parkman suggests, is typically acquired before marriage, and simply is paid out over time (including during the marriage). Thus, he concludes that "[u]nder normal circumstances, the investment in human capital before marriage will be so large and essential, compared with the investments after marriage, that an individual's human capital should be treated as separate property."

It is difficult to reconcile this description of the acquisition of human capital with the fact patterns in career asset cases, because such cases usually involve quite significant and arguably "essential" investments made during the marriage. Though Parkman does acknowledge the possibility that in "exceptional cases when the investment after the marriage is substantial, it is appropriate to treat human capital as marital property," he maintains that such cases are rare. He provides an example of such a "rare" case where the wife supported her husband from the eleventh grade through medical school.

Although the time frame for support of the student spouse in cases such as Graham and O'Brien are not as lengthy as in Parkman's example, it does not appear that cases with "substantial" investments are unusual. In fact, courts and commentators have referred to the factual scenario as a situation "so common as to be a cliche" and have labeled the pattern as the "working spouse/student spouse syndrome" or "enhanced spouse/other spouse divorces." In these cases, a supporting spouse regularly makes extensive contributions to the other spouse's career development and, more generally, to

207 See Parkman, Human Capital, supra note 158, at 446.
209 Parkman, Celebrity Divorces, supra note 157, at 150-51.
210 Id. at 150.
211 Parkman, Human Capital, supra note 158, at 448.
212 Id. at 448 n.38 (citing Diment v. Diment, 531 P.2d 1071 (Okla. 1974)).
213 Washburn v. Washburn, 677 P.2d 152, 155 (Wash. 1984); see also Keller, supra note 40, at 417-18.
214 See, e.g., Simmons, 708 A.2d at 952 (holding that husband's medical degree is not property subject to distribution under Connecticut law, but recognizing this case as typical of "an unfortunate circumstance that too often arises in family courts").
the marital unit. Indeed, an entire package of investments is often evident, including: direct support for formal education (tuition, books, etc.); financial support for everyday life (housing and food); emotional support; sacrifice of the student spouse’s earnings (and potential property accumulation) during the investment period, or, sacrifice of the supporting spouse’s own income altogether if the decision is that she work only or primarily at home and not in the paid labor market; management of the household (shopping, personal finances, cleaning, etc); and, finally, if there are children, the supporting spouse likely takes more or most of the responsibilities for child care to allow the enhanced spouse to experience the benefits of being a parent, a family member and an “ideal” worker at the same time. This investment package can certainly be characterized as substantial.

Parkman’s estimation of these investments as “insubstantial,” however, can perhaps be understood by recognition that his analysis is based on a view of human capital’s acquisition over much of a lifetime. From his perspective, additions to human capital made during a marriage that endures for ten or fifteen years may appear insubstantial when compared to the investments made over the span of an individual’s life. As Parkman acknowledges, however, all additions are surely property from an economist’s perspective, and have real value. As these investments in human capital are made jointly by spousal partners and do indeed occur during marriage, then they should be treated as marital property and divided like any other asset.

216 See generally, e.g., Simmons, 708 A.2d at 951-52 (describing how the wife moved with her husband to Connecticut and “provided financial and emotional support” while her husband attended medical school); Woodworth, 337 N.W.2d at 332 (describing family’s move to Detroit so the husband could go to law school and the wife’s support of the family including sharing in the stresses of law school); O’Brien, 489 N.E.2d at 712 (finding that the wife contributed 76% of income used to support the marital unit while her husband attended medical school).

217 Several family law scholars describe the supporting spouse’s contributions as much more comprehensive than simply adding value to a particular asset. Support from a spouse may enable the enhanced spouse to simultaneously advance a career and be a parent, an opportunity that critically depends on the supporting spouse taking on greater child care and domestic responsibilities. See Jana Singer, Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony, 82 Geo. L.J. 2423, 2445-46 (1994) [hereinafter Singer, Alimony and Efficiency] (pointing out that a husband’s opportunity to enjoy the benefits of both parenthood and career advancement “depends critically on his wife’s assumption of primary child care responsibilities.”); Williams, Coverture, supra note 189, at 2255-56 (asserting that only the responsibilities accepted by the supporting spouse allows the other spouse to be both an ideal worker and a parent).

218 See Parkman, Human Capital, supra note 158, at 446-48 (asserting that “human capital is accumulated over an extensive period of time” and that the “critical investments” occur before the future anticipated income stream increases with entrance into medical school).

219 See id. at 440, 465 (recognizing human capital as a valuable asset).
b. Property Acquired After Marriage

Although courts generally do not address the "premarital" separate property argument offered by Parkman, some courts have determined that sharing enhanced earnings would wrongly divide income acquired after divorce. Employing yet another rationale for denying a degree the status of property, the Simmons decision again offers the rationale characteristic of this approach:

[T]he real value being sought is not the diploma but the future earned income of the former spouse which will be attained as a result of the advanced degree. The property being sought is actually acquired subsequent to the parties' separation. Thus, the future income sought cannot be marital property because it has not been earned. If it has not been earned, it has not been acquired during the marriage.

Similarly, the Mahoney court concluded that "any assets resulting from income from professional services would be property acquired after marriage . . . ." Courts often focus on the fact that the income stream from enhanced earning capacity is received after divorce and thus appears to be generated by the post-divorce efforts of the enhanced spouse, and property acquired after divorce is considered separate property to which an ex-spouse has no claim.

This reasoning reflects a misunderstanding of the nature of human capital. Recall Parkman's description of human capital—it is the product of many investments made over an extensive period of time. As such, at any given moment, there is human capital already built up that will produce income after the date of divorce. Although the income will be paid out after divorce, the labor and investments that produced the asset—the earning potential—occurred, at least in part, during the marriage.

This phenomenon also exists in the analogous context of professional goodwill, an asset whose nature has been more fully considered and developed by the judiciary. Although the division of goodwill presents the identical problem of "after acquired earnings," legal decision makers generally include a business's goodwill as divisible marital property. As described earlier, goodwill refers to a set of intangible advantages possessed by a business, particularly its reputation, that generates additional earnings for the business

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220 See Keller, Rhetoric of Marriage, supra note 40, at 430-32 (discussing a now "depublised" California case, In re the Marriage of Sullivan, 184 Cal. Rptr. 796, 798 (Cal. Ct. App. 1982), that held before rehearing that a degree was the separate property of the husband).

221 Simmons, 708 A.2d at 956 (quoting Hodge v. Hodge, 520 A.2d 15 (Pa. 1986) (emphasis in original omitted)).


223 See, e.g., sources cited supra notes 221-22.

224 See supra note 207 and accompanying text.

225 See supra note 102.
when compared to a business without these advantages. For example, an established law firm known for providing quality legal services will attract more and higher-paying clients, and thereby generate more income than will a new law firm that lacks a recognized good name in the community. The value of goodwill, then, depends on the projected future earnings of the business attributable to its reputation.

Like the enhanced earning capacity gained from a professional degree, the projected future income that comprises the value of goodwill was built up during the marriage, through the joint efforts of both spouses, with the income merely paid out after the date of divorce. Accordingly, as economist Alan Zipp has explained, “income received by the business after the divorce which [is] attributable to the goodwill in existence at the date of divorce” does not result from post-divorce efforts, but, rather, “is merely the fruit of a marital asset existing at divorce.” The labor that created the goodwill was expended during the marriage, although the reward is paid out after its dissolution.

Two different constructs may be of assistance in thinking this issue through. The first is that human capital is like a field that is constantly being reseeded and harvested. Accordingly, there is a valuable crop in existence at divorce, that need only be harvested after divorce. Zipp seems to assume this kind of image; one where the labor producing each crop can be discretely identified. However, Parkman would seemingly embrace a different model where human capital is more like a tree that grows over time and bears fruit. It strikes me that human capital may best be understood by combining aspects of both models. Like the field, the acquisition of some portions of human capital can be traced to particular investments, such as an educational degree or the maintenance and improvement of skills and experience through a career developed over years of marriage. However, similar to the tree, human capital appears to be the product of many investments which are interrelated and impossible to definitively segregate.

Both images are useful in conceptualizing the nature of an asset that accumulates value during marriage, but is often collected after divorce. The two images, however, also raise two related problems. First, whether the human capital is conceived of as a field or a tree, some amount of post-divorce labor is required to actually harvest the product. Second, since it seems that,

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226 See supra notes 92-97 and accompanying text.
227 Zipp, supra note 97, at 103.
228 See id. at 103-04 (providing an analogy of goodwill as a half-exhausted gold mine “where the present value of the remaining gold can be determined today even though [it] . . . will not be received until the future”).
229 I am grateful to my colleague Professor Rick Greenstein who first suggested this point to me.
230 See Parkman, Human Capital, supra note 158, at 442-43, 454 (noting that particularly because human capital investments are often interconnected, it may well be impossible to clearly separate the value of the investment during the marriage from earlier investments).
like the tree, the asset was accumulated over time due to efforts both before and during marriage, it may be very difficult, if not impossible, to distinguish which labors are responsible for which fruit.

As these constructs suggest, human capital theory presents difficult and complex challenges. However, as courts have widely recognized (at least in theory) intuitively, we know human capital is a valuable thing. Why else would spouses sacrifice time, money and effort to obtain it? The challenges posed stem not from disagreement about whether there is something of value there, but rather from efforts to precisely identify and measure the value of the asset and the contributions that created it. Although it may be difficult to segregate the separate and marital components, marital efforts did create real value. Thus, these challenges call for a rational methodology of recognizing and sharing the asset, and not for human capital’s exclusion as an asset. Once again, then, the question is: what is the basis for courts’ exclusion?

ii. The Non-Essential Contribution Claim.

Another dimension of Parkman’s theory leads back to an examination of the second source of argumentation for the non-contribution conclusion—the view that even if human capital has a marital component, the enhanced spouse makes much more important contributions to its acquisition than does the supporting spouse, so much so that the supporting spouse has not earned a definitive right to share in the resource’s return. In addition to his “separate property” argument, Parkman argues that under normal circumstances, investments made in one spouse’s human capital are “non-essential” and are therefore more in the nature of debt financing (borrowed funds) than equity financing (an investor’s own resources, or those of a “close associate”).231 An equity claim, he explains, “provides the investor with a share of the profits, if any, from a venture;” in contrast, a debt claim provides “the lender . . . with a guaranteed return on its investment, regardless of whether the venture is profitable or not.”232

Parkman describes equity funds as essential and scarce resources, whereas sources of debt financing can be much more plentiful.233 The key to determining whether the supporting spouse has a debt or an equity claim, Parkman argues, is to examine other potentially available sources of funds for investment. The question is whether the investment resources were “essential” in the sense that the investment would not have been made without the support of the spouse, or, if instead, “the education would have occurred without her support” because the spouse would likely have been able to obtain resources from another source—perhaps a lending institution.234 In the common case, Parkman concludes, because alternative fund sources, such as educational

231 Id. at 444-45.
232 Parkman, Celebrity Divorces, supra note 157, at 149.
233 See Parkman, Human Capital, supra note 158, at 444.
234 Id. at 460, 465.
loans, are readily available to the enhanced spouse, the supporting spouse’s contribution is “non-essential.”235 Although he concedes that the supporting spouse made recognizable contributions to the human capital of the enhanced spouse, he nonetheless concludes that in the so-called “normal” case, her contributions merely make her a lender, and do not entitle her to an equity interest that would be shared with a partner.236 Ultimately, Parkman characterizes the typical supporting spouse’s contributions as both “insubstantial” and “non-essential.”237

This view looks too narrowly at the investment resources provided by the supporting spouse. The supporting spouse provides much more than a substitute for otherwise available loans. She makes an entire set of investments, the quality and quantity of which are specifically tailored to the needs of the partnership; this package of contributions is just not available from other sources. As outlined earlier, this package often includes extensive financial, emotional, and logistical support.238

The myriad resources contributed during the marriage corresponds exactly with Parkman’s description of “essential” funding from an equity partner.239 A rational “investor” would not likely furnish these highly personal, extensive resources in exchange for a lesser interest. Indeed, as courts have sometimes recognized—even those that deny human capital property status—the parties’ “expectation [is] that the future benefit of increased earning capacity would be the reward shared by both . . .”240

Nonetheless, as revealed by the view that the supporting spouse “plays only a small part in the overall achievement” of the enhanced spouse, it is clear that many courts have implicitly adopted Parkman’s “non-essential” contribution conclusion.241 Modern remedial approaches to career asset cases reveal the same conclusion.

iii. Modern Remedies—The Result: Illusory Compensation

As previously discussed, only New York clearly and consistently classifies career assets as property.242 Nonetheless, many states that refuse to award career assets property status have nominally recognized the inequity of

235 See id. at 460, 465.
236 See id. at 454 (asserting that reimbursement for sacrifice is an appropriate remedy).
237 See id. at 448 (commenting that only in exceptional cases is the investment during marriage substantial); supra notes 210-11 and accompanying text.
238 See supra notes 216-17 and accompanying text.
239 See supra notes 231, 234 and accompanying text.
240 Simmons, 708 A.2d at 952. See also, e.g., Mahoney, 453 A.2d at 533 (“[A] partner to a marriage takes the benefits of his spouse’s support in obtaining a professional degree or license with the understanding that future benefits will accrue and inure to both of them . . .”).
241 See supra Part II.C.4.a.
242 See supra notes 103, 107 and accompanying text.
denying a supporting spouse a share in the earnings stream that she worked to enhance during marriage, and do provide a remedy in some circumstances. Overwhelmingly, however, courts do not deem the supporting spouse a partner deserving her earned interest in the asset. At best, courts may treat her as a lender of narrowly described resources. Alternatively, she can hope for some form of a remedy in a distribution of other marital property or in the possibility of alimony. Very often, contrary to the core partnership principles of contribution and sharing, the supporting spouse receives no compensation at all for her labor and investment—she has no real remedy.

Of those states that attempt to provide a remedy, the majority simply incorporate consideration of the supporting spouse’s labor and sacrifice as a factor in dividing other marital property or in calculating any maintenance award. Often, this provides little, if any, recompense. In theory, a supporting spouse might receive a greater share of other marital property. However, in the typical situation where a couple has forgone current income and invested in one spouse’s education, few other assets may exist, so that there is little tangible property to divide. The supporting spouse must also overcome the hurdle of convincing a judge that she deserves a greater share of the property on the basis of her contribution. This may pose an insurmountable challenge, given courts’ emphasis on the labor and dedication of the enhanced spouse and the overall preference many courts have for an equal division.

See Batts, Remedy Refocus, supra note 215, at 754-76 (detailing her analysis of judicial approaches). Batts analyzed courts’ treatment of the interest of the “other spouse” in career asset cases, which she refers to as “enhanced earning capacity” cases. She identified four approaches generally used by courts in 1988. Essentially, as my discussion here demonstrates, courts today use those same approaches, with a few variations emerging more recently.


The Simmons case provides a good illustration. At divorce, there were two cars, a few collectibles, $5,800 in cash and a $40,000 loan for the husband’s education to be allocated between the parties. The husband was assigned the loan and, implicitly, his degree. The wife was awarded the cash. See Simmons, 708 A.2d at 959.

A survey of judicial opinions by Professor Suzanne Reynolds strongly supports this conclusion. She found that even in states that appeared to pay in depth attention to resolving spouses’ economic needs post-divorce and where judges had clear authority and direction from the legislature to make an unequal division in favor of the needy spouse, courts are reluctant to impose an unequal division, and rarely do. See Reynolds, supra note 78, at 844-914 (1988).
Compensating the supporting spouse through traditional alimony awards is similarly problematic. As was the situation in Graham, where the supporting spouse is the one who worked to provide financial support for the family, she is perceived as able to support herself.\textsuperscript{248} The supporting spouse in this situation is often precluded from an alimony award because she is unable to demonstrate "need" for support, a threshold requirement in many jurisdictions.\textsuperscript{249} Additionally, because the enhanced spouse often has not yet established an earnings record, courts have little basis on which to make an award.\textsuperscript{250} Even if the supporting spouse could demonstrate eligibility for alimony, it is doubtful that a court would actually award her more based on her contribution than she would otherwise have been awarded based on need. She faces the same problem that she faced in the property division context; courts focus on the enhanced spouse as deserving "his" income. Lastly, an alimony award is at risk of being decreased or terminated, since alimony is modifiable with a showing of changed circumstances, and terminates upon remarriage or death.\textsuperscript{251}

Other approaches include either rehabilitative or reimbursement alimony. Rehabilitative alimony ostensibly provides the supporting spouse an opportunity to become self-sufficient through retraining or education funded in part by an alimony payment from the enhanced spouse.\textsuperscript{252} By definition, this award is short, limited in amount and terminates at a specific date by which the spouse should have become self-supporting.\textsuperscript{253} For eligible spouses, rehabilitative alimony is likely to provide very limited compensation as

\textsuperscript{248} See Graham, 574 P.2d at 78-79 (Carrigan, J., dissenting) (noting that alimony award cannot compensate wife because Colorado limits maintenance awards to cases where the supporting spouse is unable to financially support herself).

\textsuperscript{249} The UMDA is representative of approaches nationwide. Maintenance may be awarded only if the court finds that the spouse seeking support: "(1) lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment." Unif. Marriage and Divorce Act § 308(a) (amended 1973), 9a U.l.A. 446 (1998) (emphasis added).

\textsuperscript{250} See, e.g., Martinez v. Martinez, 754 P.2d 69, 76-77 (Utah Ct. App. 1988) (recognizing that the proper approach in such cases requires "creativity to achieve fairness").

\textsuperscript{251} See Batts, Remedy Refocus, supra note 215, at 766 (arguing that flexible maintenance awards provide limited remedy for the supporting spouse because the enhanced spouse can apply for adjustments at any time and does not have to continue payment if the supporting spouse remarries).

\textsuperscript{252} See, e.g., Severs v. Severs, 426 So.2d 992 (Fla. Dist. Ct. App. 1983) (affirming award of rehabilitative alimony in amount of $300 per month for three years); Krause v. Krause, 441 N.W.2d 66, 72 (Mich. Ct. App. 1989) (finding it reasonable and equitable that the enhanced spouse assist the supporting spouse in "improvement of her employability or income earning potential" upon divorce); Lehmicke v. Lehmicke, 489 A.2d 782, 786 (Pa. Super. Ct. 1985) (denying alimony because supporting spouse was registered nurse).

\textsuperscript{253} See Batts, Remedy Refocus, supra note 215, at 768 (citation omitted) (stating court's definition of rehabilitative alimony).
compared to the years of labor and sacrifice that the supporting spouse may have dedicated to the enhanced spouse’s career.\textsuperscript{254} Furthermore, this limited remedy is frequently unavailable because like traditional alimony, rehabilitative alimony may only be available upon a showing of “need.”

A court might instead attempt to return the supporting spouse’s direct contributions in the form of reimbursement alimony.\textsuperscript{255} One variation of this remedy is strictly limited to direct financial contributions toward tuition, books and fees.\textsuperscript{256} Another variation expands the reimbursable financial contributions to include the enhanced spouse’s living expenses.\textsuperscript{257} Sometimes called the “cost approach,” these definitions exclude other critical financial contributions such as the loss of forgone income and assets that would have been available if both spouses worked throughout the marriage, as well as the supporting spouse’s possible losses from not fully developing her own career. The array of non-financial contributions such as domestic work and child care are also left out of the equation. There are a few states that more expansively define the supporting spouse’s contribution. Wisconsin, for example, permits recompense for “opportunity costs” like those just described and purports to take into account social as well as economic contributions “insofar as this is possible.”\textsuperscript{258}

“Reimbursement” approaches like these are designed to pay back the initial investment in the enhanced spouse’s career since the supporting spouse does not receive a share of the asset’s actual return. As the name suggests, this approach treats the supporting spouse as a lender, not as an investor in the asset. It is as if a person worked to acquire stock in a business, and rather than receiving the actual value of the stock, the initial investment is simply returned. As scholar Stewart Sterk observes:

Limiting the contributing spouse’s interest to restitution for contributions made advantages the spouse who has received an education that

\textsuperscript{254} See id.
\textsuperscript{255} See, e.g., DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 759 (Minn. 1981) (subtracting one half of couple’s living expenses from supporting spouse’s contribution to arrive at sum due); Mahoney, 453 A.2d at 534 (defining reimbursement alimony to include “financial contributions toward the former spouse’s education, including household expenses, educational costs, school travel expenses, and any other contributions”); Hubbard v. Hubbard, 603 P.2d 747, 751 (Okla. 1979) (holding that reimbursement alimony is an equitable remedy to compensate the supporting spouse for investment and prevent unjust enrichment of the enhanced spouse).
\textsuperscript{256} See Roberts v. Roberts, 670 N.E.2d 72, 76 (Ind. Ct. App. 1996) (citing Indiana’s statutory restriction on reimbursement above assets of the marital estate).
\textsuperscript{257} See, e.g., Pyatte v. Pyatte, 661 P.2d 196, 207 (Ariz. Ct. App. 1982) (“The award . . . should be limited to the financial contribution by [the supporting spouse] for [the enhanced spouse’s] living expenses and direct educational expenses.”).
\textsuperscript{258} Haugen v. Haugen, 343 N.W.2d 796, 800-03 (Wis. 1984) (interpreting Wisconsin’s Divorce Reform Act of 1977 to include flexible consideration of all factors to arrive at an equitable remedy).
considerably expands earning capacity. If the investment in education has produced a particularly large return, the spouse in whose education the investment was made reaps the full benefit of the good investment; the contributing spouse receives compensation only for the contributions made. This result contrasts sharply with the contributing spouse’s rights to investments in traditional property, where each spouse shares in the ultimate value of the asset.259

In reality, the supporting spouse may not even get the original investment back; many of the remedies would only partially return the contributed resources.

Worse, the supporting spouse may well receive nothing at all. Even if a spouse qualifies for alimony or reimbursement, or there is property to divide, all of these possible remedies are left to the court’s discretion. The supporting spouse does not have a legally recognized entitlement to any of these remedies. She is simply not viewed as a partner who has an earned interest in the asset she worked to develop.

In summary, denying the supporting spouse an entitlement to share in the benefits of a career asset is not a result required by current law. A conclusion that one person has made a lesser contribution than another, of course, has no relevance to whether a resource is classified as property, but rather, whose property it is. Second, even if the conclusion that the supporting spouse has made only a small, insubstantial contribution were accepted, that determination argues not for precluding her share in the asset all together, but rather, that she be awarded a diminished share. Nor would such a conclusion suggest that she was merely a lender; the nature of the resources contributed and both parties’ expectations from the outset establish an equity claim vested in both partners—albeit perhaps a lesser share of the reward for the partner who ostensibly contributed less. But most importantly, what does such a conclusion mean about our concept of marriage and of gender relations?

c. Implications of the Individual Achievement Perception

The conclusion that a career asset is overwhelmingly attributable to the individual efforts and achievement of the enhanced spouse ultimately reflects a rejection of the core partnership principles that each spouse provides a set of different, but meaningful, contributions to the marital estate, and therefore has a claim to share in its rewards.260 This rejection has very disturbing and wholly undesirable implications. First, it systematically devalues contributions to the marital unit made by supporting spouses, who are typically women. Additionally, this conclusion is inconsistent with prevalent American societal norms that view marriage as a sharing relationship. These losses come with an

260 See supra notes 64-66 and accompanying text for discussion of the modern concept of marital partnership and its origins.
unacceptably high social cost.

i. Devaluation of Non-Market Contributions ("Women’s Work")

A closer examination is revealing. We are faced with a conclusion in career asset cases that the supporting spouse has made, at best, only “small” or “non-essential” contributions. The facts of many of these cases, however, suggest quite the opposite.261 Case after case describes the supporting spouse as having sacrificed much, including forgone income of the enhanced spouse, development of her own career, and as having contributed extensive resources for the good of the family unit, including direct economic support for education, food and shelter, homemaking services and primary care for children.262 Yet, when courts compare the supporting spouse’s sacrifices and provision of seemingly valuable and scarce resources to the enhanced spouse’s efforts, in many cases the supporting spouse's efforts are deemed unworthy of financial recognition.263 This result must flow from the unfortunate determination that the sacrifices made and resources contributed by the supporting spouse are judged to be less valuable—apparently by their very nature—than those of a “professional” spouse. We are left with the harsh conclusion that work done by the supporting spouse, particularly classic homemaker services, has less value than labor expended to develop a career traditionally recognized in the labor market. While it is not surprising that the marketplace does not value these marital investments, it is appalling that modern marital law, which purports to do otherwise by embracing partnership theory, adopts this same view.

Under a contemporary egalitarian perspective and, in light of the fundamentals of partnership theory, this determination is untenable. It offers a view of marriage that directly opposes modern social ideals of equality in marriage and between the sexes. Quite obviously, it devalues traditional “women’s work” and thereby risks perpetuating discrimination against women. Whether consciously or unintentionally, as Martha Fineman observes, these distribution decisions send a message because it “may psychologically represent to spouses the final accounting of their contributions to the marriage—a concrete measure of their relative worth.”264 Thus, the content of the message conveyed in the majority of career asset cases is that the

261 See, e.g., Graham, 574 P.2d at 77 (finding that an educational degree is not property and, therefore, not subject to distribution at divorce). For a discussion of the facts of this case indicating the substantial contribution made by the supporting spouse while the enhanced spouse obtained two educational degrees, see supra notes 132-37 and accompanying text.
262 See, e.g., Woodworth, 337 N.W.2d at 334 (noting sacrifices made by supporting spouse while enhanced spouse obtained law degree).
263 See supra notes 131-41 and accompanying text (discussing the leading cases excluding career assets from marital property).
264 FINEMAN, ILLUSION OF EQUALITY, supra note 4, at 40.
supporting spouse’s contributions, the bulk of which are made predominantly by women, are worth very little, if anything, relative to those of the enhanced spouse.

Perhaps even more damaging than the message is the result. The economic devastation that many women suffer after divorce, in part as a result from their acceptance of traditional homemaking and child-rearing roles, will inevitably continue as long as such roles are maintained and yet devalued in this way. Perhaps this result suggests an important lesson for women. As family law scholar Ira Ellman cautions, unless the traditionally female supportive role is recognized as valuable and is compensated, there is no (economic) incentive for women to maintain these roles. If family law continues to deem women’s work as inherently less valuable than labor expended to enhance an individual’s value in the marketplace, it would be foolish, from an economic perspective, for anyone to keep doing this kind of work.

In determining how to divide property, marital law generally does allow consideration of each spouse’s relative contribution to the acquisition of marital property. It seems, therefore, that courts have authority to measure the relative worth of each spouse’s contribution according to the fact finder’s inclinations and discretion. That discretion, however, must be constrained by the law’s commitment to partnership theory which underlies marital property systems, and that at its core, presumptively recognizes both spouses’ contributions as valuable, such that each has earned a right to share in the assets of the marriage. A court has authority to evaluate each spouse’s relative contribution for the purpose of dividing resources, but not for the initial determination of whether a resource should be included in the marital estate to begin with. Accordingly, a court cannot deny a spouse’s claim to the

265 See supra notes 15, 189-90 and accompanying text (noting decline in standard of living for women and children in their household and pattern of decreased marketability of skills and earning capacity for women after divorce).

266 Ira M. Ellman, The Theory of Alimony, 77 CAL. L. REV. 1, 65 (1989) (discussing how alimony may free spousal decisions about the conduct of marriage from distorting market pressures). I am not suggesting that most women accept these traditional roles today or that they should. Although in modern times many women participate in the labor force, many working women still perform a disproportionate share of child care and domestic responsibilities. See Williams, Coverture, supra note 189, at 2245 (stating that the idea that women are now full participants in two-career marriages is illusory). When I refer to the supporting spouse’s contributions, I mean to include the wide array of contributions made by supporting spouses.

267 See, e.g., PA. CONS. STAT. ANN. § 3502(a)(7) (requiring courts to consider (in the property division decision) “[t]he contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party a homemaker.”). This statute adopts most of the language of the UMDA. See UNIF. MARRIAGE AND DIVORCE ACT § 307(a-b) (amended 1973), 9A U.L.A. 238-39 (1998).

resource based on a conclusion of "non-contribution," but can only choose to have a lesser contribution affect her share in the asset. There is an increasing trend, however, to take even this level of discretion out of judges' hands, and to require or presume an equal division of assets.269 Consistent with partnership theory, therefore, the supporting spouse's contributions cannot be ignored. Particularly because partnership theory recognizes non-economic contributions, namely the "contribution of a spouse as a homemaker."270

Indeed, contrary to the result manifest in career asset cases, "partnership [theory] was intended to challenge the implicit devaluation of household labor."271 Explicit inclusion of the "homemaker contribution" was designed to "make clear that non-financial contribution was just as important to the marriage as financial contribution."272 As Milton Regan observes, the result was that "[w]omen's financial claims were no longer dependent on the conscience of judges and ex-husbands, but rested on the solid footing of their own labor."273 Unfortunately, it appears that this goal of divorce reform, formulated more than two decades ago, has yet to be accomplished with regard to career assets.

Martha Fineman's account of Wisconsin's development of no-fault divorce reform traces the history of allocation standards, which are based on partnership ideology.274 This history demonstrates how strongly the demand for recognition of the value of domestic labor influenced those standards. The contribution concept itself, Fineman observes, was adopted to enable courts to avoid the common law approach that recognized a property interest only on the basis of title or on monetary contributions.275 Specifically, as Bea Ann Smith suggests, partnership theory was adopted "to increase the distribution of property to women upon divorce and thus to offset the economic losses caused by divorce."276 Even with a broader basis for women's entitlement to property, reformers were concerned that the law gave courts too much discretion, which could be used to disadvantage women. Accordingly, mandatory recognition of a homemaker's economic contribution was advocated and, ultimately,

1977) (holding that a spouse's contribution to the acquisition of property is not a factor to be considered in determining whether the property is part of the marital estate).

269 See supra notes 75-76 and accompanying text (discussing the trend preferring equal division); see also A.L.I. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.15 p. 194 (proposed final draft Part 1 1997) (proposing a presumption of equal division of marital property).


271 Regan, Spouses and Strangers, supra note 21, at 2316.

272 Reynolds, supra note 78, at 836.

273 Regan, Spouses and Strangers, supra note 21, at 2316.

274 Fineman, Implementing Equality, supra note 31, at 803.

275 See id. at 803-04.

276 Smith, Partnership Theory, supra note 20, at 697 (citation omitted).
Thus, the contribution concept was implemented for the very purpose of acknowledging a supporting spouse’s valuable contributions, even if non-financial, to afford greater economic protection for women upon divorce. Instead, lawmakers have defeated this goal of partnership theory and systematically have chosen to devalue homemaker’s contributions.

Perhaps some dimension of this result can be attributed to misguided judicial inquiries into each spouse’s contribution to the acquisition of a particular asset, rather than espousing a more global perspective of spousal contributions to the marriage enterprise as a whole. Because partnership theory recognizes that each partner may take on different responsibilities and roles, the contribution inquiry should not focus on labor for, or investment in, a particular singular asset. Rather, the inquiry must be based on a totality of contributions over the course of the marriage, with some contributions producing financial value and others producing non-financial value. Based on this “totality of contributions” intuition, some courts (ironically, those that do measure contribution in career asset cases) have cautioned against efforts to arrive at a precise calculation of marital contributions and sacrifices, because such an “accounting” would be inconsistent with the ethic and function of marriage. For instance, the Mahoney court chastised: “Marriage is not a business arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce.”

One method of preventing attempts at a strict accounting for marital contributions, and, the devaluation of the supporting spouse’s efforts that such an inquiry permits, would be to require, or at least to presume, a fifty-fifty division of the marital assets based on an explicit assumption that each party contributed equally to the marriage. While this view is gaining ground and many states have adopted an equal division presumption, many states have

277 See Fineman, Implementing Equality, supra note 31, at 802-03 (discussing legislation passed in 1977 in Wisconsin requiring judges to consider homemaking and child care contributions).

278 See id. at 852 (citing Wisconsin Governor’s Commission on the Status of Women, Divorce Reform Legislation (1978) for the proposition that divorce reform in Wisconsin had a gender-specific goal).

279 See Woodworth, 337 N.W.2d at 334 (holding that fairness dictates that the supporting spouse be compensated by the fruits of the advanced degree because she contributed to the marital unit as a whole).

280 Mahoney, 453 A.2d at 533.

281 See, e.g., N.C. Gen. Stat. § 50-20(c) (1999) (“There shall be an equal division by using net value of marital property [and] divisible property.”); Or. Rev. Stat. § 107.105(1)(f) (1999) (adopting a presumption that both spouses have contributed equally to the acquisition of property); Hayes v. Hayes, 756 P.2d 298, 300 (Alaska 1988) (adopting a presumption of equal division). See also supra notes 75-78, 269 and accompanying text (discussing the trend preferring equal division). For an observation of this trend through the mid-1980s, see Grace G. Blumberg, Marital Property Treatment of Pensions, Disability Pay, Workers Compensation, and Other Wage Substitutes: An Insurance, or Replacement,
chosen instead to entrust the allocation decision entirely to the discretion of the judiciary.\(^{282}\) Such unfettered discretion has been widely criticized. For example, Mary Ann Glendon characterizes “equitable distribution” more appropriately as “discretionary distribution,” “since what consistently distinguishes them from their predecessors is not that they are more equitable, but that they are more unpredictable.”\(^{283}\) Nonetheless, a significant segment of states remain hesitant to remove the discretion and flexibility that remains in the current system. This may be because the very concept of contribution itself seems to require “individualized, case-by-case decision making.”\(^{284}\) Some lawmakers continue to believe that a balancing approach, rather than a definitive rule such as equal division, is necessary if justice is to be achieved in a particular case.\(^{285}\)

This hesitance to accept an equal division rule can also be explained, in part, as a lingering effect of the common law systems that viewed property as “belonging” to the spouse who earned the dollars that produced the asset.\(^{286}\) This suggests that some jurisdictions have not fully accepted the “joint acquisition” norm of community property regimes.\(^{287}\) But that is what this Article argues is so troubling. The judiciary is not committed to a fundamental principle of partnership theory that each spouse makes vital contributions to the marriage. Allowing courts broad discretion apparently in an effort to achieve “equity” as the circumstances of a particular case warrant, has empowered courts to devalue the contribution of the supporting spouse in a way that not only betrays modern law’s commitment to partnership theory, but also seriously disadvantages women by perpetuating bias against them and

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\(^{283}\) Glendon, Family Law Reform, supra note 4, at 1556.

\(^{284}\) See Fineman, Implementing Equality, supra note 31, at 805.

\(^{285}\) About the time that equitable distribution schemes were first becoming widely adopted, Professor Henry Foster explained:

In view of the surrounding circumstances, varying weight will be accorded each [statutory] factor and a balancing approach is contemplated. Such was intended because of the myriad of fact situations presented in matrimonial litigation and the need for equitable discretion and flexibility, if justice is to be achieved ... The policy decision by the Legislature was that flexibility is most desirable and that “rules of thumb” should be avoided.


\(^{286}\) See IRA ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS, 274 (3d. ed. 1998) (discussing the continuing influence of the common law heritage in family law cases).

\(^{287}\) See supra notes 51-55 and accompanying text (discussing the origin of community property systems in America and partnership ideology).
contributing to their economic inequality at divorce. If variants of current law continue to undermine, or even defeat, this critical goal of partnership theory, which is what occurs in jurisdictions that permit courts to deviate from egalitarian principles that form the basis of partnership theory, then the current formulation of the law must be changed. As I noted earlier, many states have already recognized this problem and there is a nationwide movement toward specific recognition of each party’s presumptive equal claim to share in the marital estate. A mandatory, or at least presumptive, equal division of marital assets must be adopted in order to avoid systematic devaluation of the supporting spouse’s contribution.

ii. Marriage as a Solitary Journey

The conclusion that a career asset is overwhelmingly attributable to the individual efforts of the enhanced spouse also portrays the structure of the marital relationship in a way that many would find undesirable. Such a conclusion specifically depicts the marital relationship as one where a spouse is an independent property holder whose achievements are ultimately attributed to his own autonomous effort; the supporting spouse is seen as “non-essential” to this process—treated at best as a lender who merely provides fungible resources and who can ostensibly be made whole by mere repayment. Thus, although there may have been a specific exchange of resources that need to be accounted for upon divorce, both spouses enter and depart marriage as separate individuals who have had relatively minimal influence on one another. This view appears to be “based on the assumption that [one’s] sovereign identity is fundamental and untransformed by marriage.”

There is, of course, another possible view of marriage quite different from this, one that seems to reflect contemporary societal norms and that certainly corresponds more closely with the concept of marriage as a partnership. Milton Regan eloquently describes a model of marital partnership that emphasizes the sharing nature of marriage, a “distinctive open-ended relationship of mutuality, interdependence, and care.” As Regan suggests:

Most people regard marriage as a relationship in which two persons lives are significantly intertwined psychologically, emotionally, and economically. Contemporary culture emphasizes the ideal of companionate marriage, in which the spouses strive for intense intimacy and shared experience as part of a process of mutual personal growth. In this way, marriage serves to construct a “nomos,” an arrangement “that creates for the individual the sort of order in which he can experience his

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288 See supra notes 263-66 and accompanying text.
289 See supra notes 75-78, 269 and accompanying text.
290 See supra note 16 (discussing the near unanimity of Americans’ sharing view of marriage).
291 Regan, Spouses and Strangers, supra note 21, at 2384.
292 Id. at 2382.
life as making sense.” The result is that marriage generally is a critical constituent of a spouse’s identity. . . . Marriage therefore tends to involve a relationship whose influence permeates virtually every aspect of a spouse’s daily life . . . .

Ex-spouses are not simply individuals who revert to their former identities as sovereign individuals. They have shared an experience that has affected them deeply, to the point where, in a sense, they are not the same person as they were when they entered the marriage.293

I am not suggesting that these two contrasting views of marriage exhaust the possible models for conceptualizing marriage. Marriage is extremely complex and the myriad potential views on marriage are as diverse as those who contemplate the subject. However, these two models seem to accurately reflect what Milton Regan characterizes as the “double identity” of marriage: “[m]odern American attitudes toward marriage reflect two competing commitments: that spouses are separate individuals with their own distinct interests, and that they are members of a community who have special obligations to promote its welfare.”294 And so it is true that any model of marriage necessarily must accommodate the individuals who associate in marriage as well as the community that is created by their union. One cannot be chosen to the exclusion of the other. Indeed, as Milton Regan suggests, it is likely that spousal partners constantly mediate between these dual identities, seeking a satisfying balance between their individual selves and their identity as members of their marital community.295

Although these dual identities can and do co-exist, it matters very much which aspect of the marital relationship is emphasized in formulating our thinking on marriage, and ultimately, divorce. Quite naturally, as other family law scholars observe, our marriage model shapes the rights and responsibilities family members have toward one another during marriage and at divorce.296

293 Id. at 2384-86 (citation omitted).

294 REGAN, ALONE TOGETHER, supra note 17, at 3. Similarly, Duncan Kennedy also describes a tension present more generally in American culture, which he characterizes as a “fundamental contradiction.” Kennedy observes that “[m]ost participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it.” Duncan Kennedy, The Structure of Blackstone’s Commentaries, 28 BUFF. L. REV. 205, 211 (1979). In other words, there is a dichotomy in goals: individual freedom is dependent on societal relationships.

295 REGAN, ALONE TOGETHER, supra note 17, at 5.

296 See, e.g., id. at 140-41 (“[U]nderstanding what it means to be a member of a community helps shape our sense of the terms on which individuals may leave it. At the same time, our view of divorce influences our conception of marriage. This is because the terms on which individuals may leave a community help constitute the meaning of membership in it.”); Martha L. Fineman, Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce, 23 FAM. L. Q. 279, 279 (1989) (“The way
Building on this concept in the next section, I suggest that the marital community is an important way in which we create and express our identities and that it is also an experience that profoundly influences both ourselves and those around us. American culture has a long history of recognizing solitary individualism and autonomy as a defining concept; therefore it is not surprising that individuality plays such an important role in shaping marital law. It is the primary reason, I believe, that the notion of solitary contribution has become dominant in career asset cases. This focus, however, is much too narrow. Although individualism is a valuable component of marriage, alone, it is an incomplete account. It seems, therefore, that another critically important value, that of community in marriage, is being overshadowed in a way that undermines a prominent ideal and aspiration for marriage at its best—marriage as a sharing experience that brings with it the "possibility of bridging the distance between separate selves."  

5. Individual Autonomy and Slavery Concerns

Flowing from the independent achievement theory then, and inextricably related, is seemingly the heart of the rationale for excluding career assets from the marital estate: promotion of the individual autonomy of the enhanced spouse. From this perspective, the conclusion that a career asset is overwhelmingly attributable to the individual efforts of the enhanced spouse is almost a natural, because the spouse is seen primarily as a separate, autonomous individual and not as a member of a marital community.

a. Case Law Emphasis on Individualism

This emphasis is evident in two different sets of concerns raised by courts, both found in the DeWitt opinion from the Wisconsin Court of Appeals:

Whether a professional education is and will be of future value to its recipient is a matter resting on factors which are at best difficult to anticipate or measure. A person qualified by education for a given profession may choose not to practice it, may fail at it, or may practice in a specialty, location or manner which generates less than the average income enjoyed by fellow professionals. The potential worth of the education may never be realized for these or many other reasons. An award based upon the prediction of the degree holder's success at the chosen field may bear no relationship to the reality he or she faces after the divorce. Unlike an award of alimony, which can be adjusted after that we as a society perceive marriage and the relationship between husband and wife profoundly affects the way that we select, develop, and apply rules governing property distribution at divorce.

297 See REGAN, ALONE TOGETHER, supra note 17, at 11-12 (viewing marriage as a relationship "comprised of separate individuals with their own unique interests" is an incomplete and unsatisfying account of marriage).

298 Id. at 11.
divorce to reflect unanticipated changes in the parties' circumstances, a property division may not. The potential for inequity to the failed professional or one who changes careers is at once apparent; his or her spouse will have been awarded a share of something which never existed in any real sense.299

First, the court is troubled because the future is "difficult to anticipate" and the actual payout of the asset, the enhanced income stream, may not be as predicted at the time of distribution. Of course, this same concern arises anytime an asset is assigned a fixed value at divorce, such as the valuation of a home that will not actually be sold upon divorce. This reasoning is another version of the argument, discussed earlier,300 that career assets are not property because they are too difficult to value. Again, valuation difficulties do not justify the exclusion of career assets from the marital estate.301

Worries about the future, then, rest largely on another issue. The second, more critical concern, is for the effect on the enhanced spouse's ability to follow or not to follow a career path according to his own free choice, a choice that is free from any constraints flowing from divorce.302 What if the professional wanted to change careers, to accept a job for lesser compensation, or to quit all together, and to become say, a poet? The divorce award could seriously impair his freedom to do so. As one court explains, a "professional in training who is not finally committed to a career choice when the distributive award is made may be locked into a particular kind of practice simply because the monetary obligations imposed by the distributive award... leaves him or her no alternative... [E]quitable distribution was not intended to permit a judge to make a career decision for a... spouse... ."303

One court has even suggested that sharing the benefits of a professional degree amounts to slavery. In Severs v. Severs,304 the sum total of the court's response to the wife's argument that her husband's medical degree should be shared to some degree as marital property was:

"The wife's claim to a vested interest in the husband's education and professional productivity, past and future, is unsupported by any statutory or case law. Indeed, such an award by the trial court would transmute the bonds of marriage into the bonds of involuntary servitude contrary to

300 See supra Part II.C.2.
301 See supra Part II.C.2.
302 The court explained that in the context of a claim for support, a divorced spouse "should be allowed a fair choice of a means of livelihood and to pursue what he honestly feels are his best opportunities even though he might for the present, at least, be working for a lesser financial return." DeWitt, 296 N.W.2d at 768 (citation omitted).
304 496 So.2d 992 (Fla. 1983).
Amendment XIII of the United States Constitution.\textsuperscript{305}

Joyce Davis’ response to this serious accusation is well taken. “Considering the history and purpose of the Thirteenth Amendment,” Davis finds the slavery argument “disturbing, even offensive.”\textsuperscript{306} Experiencing economic pressure to continue working in a career that is no longer your preference, she concludes, cannot seriously be equated with slavery—“what it meant to be owned as human property.”\textsuperscript{307} “[T]he system of American slavery is best understood as the absolute control by white slaveholders over all aspects of the lives of their slaves . . . . Understood in this way the concept of servitude contemplated by slavery as being just like that exchanged by the free worker for wages becomes absurd.”\textsuperscript{308} Similarly, Stewart Sterk observes that “economic constraints are a fact of life for nearly everybody within this and every other society. The financial constraints that result from the alienation of human capital can only be enslaving if they are somehow more coercive than the other financial constraints under which we all operate.”\textsuperscript{309} As Davis asks, “[w]hy is requiring the husband to compensate the wife for her contribution more onerous than requiring him to repay loans?”\textsuperscript{310}

Additionally, it appears that judicial forecasts that an enhanced spouse may change careers are unfounded in most cases. There is a lack of empirical data regarding the frequency with which professionals change careers, so courts’ perceptions about a possible career change are speculative, not factual. Compiling data from various sources, Davis estimates that fewer than 6% of lawyers actually leave the profession annually, despite significant job dissatisfaction.\textsuperscript{311} Likewise, it is “exceedingly rare” for medical doctors to leave the practice of medicine; the ratio of medical doctors actually changing careers is estimated to be approximately the same as that of lawyers.\textsuperscript{312} Moreover, as both Sterk and Davis point out, concerns about job satisfaction are disproportionately concerns of the upper-middle-class.\textsuperscript{313} While job

\textsuperscript{305} Severs, 426 So.2d at 994.
\textsuperscript{306} Davis, supra note 127, at 128.
\textsuperscript{307} See id. (“Slavery wasn’t about being unhappy with your work . . . . Slavery was brutal, dehumanizing, and agonizingly inhumane.”).
\textsuperscript{308} Id. (quoting Joyce E. McConnell, Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment, 4 YALE J.L. & FEMINISM 207, 219 (1992)).
\textsuperscript{309} Sterk, Restraints on Alienation, supra note 259, at 445.
\textsuperscript{310} Davis, supra note 127, at 127.
\textsuperscript{311} A 1990 survey by the ABA Young Lawyer’s Division showed career dissatisfaction among 41% of female attorneys and 28% of male attorneys. See id. at 126-27.
\textsuperscript{312} See id. at 126-27 & n.169 (referring to the author’s conversation with Jim Cultis of the Bureau of Health Professionals, Public Health Services).
\textsuperscript{313} See id. at 127-28 & n.182 (“Job satisfaction is predominantly an upper-middle-class concern.”); Sterk, Restraints on Alienation, supra note 259, at 446 (“[F]reedom to change careers . . . is largely an upper-middle-class freedom not enjoyed even by debt-free members of the working class”).
satisfaction is important to people of all income levels, economic realities often require working class people to accept the highest income they can garner just to make ends meet. "For them, the notion that a person might be 'forced' by obligations to take a higher paying job would be simply laughable." 314 Nonetheless, while the slavery concern is extreme and overstates the case, the courts’ interest in the future career mobility of the enhanced spouse does express legitimate concern for one spouse’s autonomy following divorce. As Sterk suggests, “images of trapped people, forced by circumstances beyond their control to work in jobs they despise,” has real emotional force. 315 These images lurk behind many career asset cases, instilling within the courts a desire to protect the individual liberty of the enhanced spouse.

b. The Tradition of Individualism

This focus on individual autonomy and independence is no surprise, for American society has a long-standing and rigorous commitment to individualism. 316 The origins and influence of individualism in American culture (and beyond) are complex, lengthy, and have been fully developed elsewhere. 317 Accordingly, this subsection sketches only a few very basic

314 Sterk, Restraints on Alienation, supra note 259, at 446.
315 Id. at 444.
316 It is no accident that this pervasive concern for autonomy has arisen within the context of a debate over how to conceptualize property. Individual freedom, and its preservation, has long been associated with property rights. Milton Regan, among others, has explored the association of property with independence: "The right to control and exclude others from the use of property . . . establishes a boundary between oneself and others that demarcates a zone of ostensibly absolute autonomy." Regan, Spouses and Strangers, supra note 21, at 2341. For further discussion of property as a source of autonomy, see generally, e.g., id.; Jennifer Nedelsky, Law Boundaries and the Bounded Self, in Law and the Order of Culture 162 (Robert Post ed., 1991) (exploring a boundary-defined understanding of individual liberty); Joseph Singer, The Reliance Interest in Property, 40 Stan. L. Rev. 611 (1988) (discussing personal relationships and property rights).
317 There is a vast literature on the subject, too numerous and rich to do them justice in a citation set forth here. Just a few examples will have to suffice. See generally, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) (discussing liberalism and rights); LAWRENCE FRIEDMAN, THE REPUBLIC OF CHOICE: LAW AUTHORITY, AND CULTURE (1990) [hereinafter FRIEDMAN, REPUBLIC OF CHOICE] (exploring individualism and its place in modern law); MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987) (focusing on family law); MARY ANN GLENDON, RIGHTS TALK (1991) (discussing how rights talk "reflects and distorts" American culture); JOHN RAWLS, A THEORY OF JUSTICE (1971) (a general discussion of social contract theory); Bruce C. Hafen, Individualism and Autonomy in Family Law: The Waning of Belonging, 1991 B.Y.U. L. Rev. 1 (1991) [hereinafter Hafen, The Waning of Belonging] (describing the ascendancy of individual autonomy in family related interests in constitutional law); Schneider, supra note 16 (identifying recent trends in family law). For an examination of the influence of American’s "first language" of individualism on our capacity for commitment, see generally, BELLAH ET AL., HABITS OF THE
elements of the theory of liberal individualism and its deeply entrenched concept of personal autonomy.

Commentator Carl Schneider traces family law’s relationship to the American tradition of individualism to a celebrated principle from John Stewart Mill’s essay On Liberty: “that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.” Family law, along with American society at large, he explains, has “incorporated this moral preference against social intervention in personal affairs as long as they ‘do no harm’ to others.”

A foundational principle is that individuals have the right to make autonomous choices and pursue their own path to “the good life” as they define it. Lawrence Friedman describes the liberal state as “a republic of choice” whose citizens have “the right to develop oneself, to build a life suited to oneself uniquely, to realize and aggrandize the self, through free, open selection among forms, models and ways of living.” The role of the state, liberals argue, is to remain neutral regarding the ends that individuals choose, and to provide the freedom necessary to enable the formulation and pursuit of those goals. Additionally, because the constitution of the self in liberal society occurs as a reflective process based on a cumulation of life experiences in which we are always reformulating our sense of self, individuals must be free to revise goals and choices devised in the past.

In career asset cases, the judiciary quite clearly have in mind those particular principles of liberal individualism. As discussed earlier, courts seek to protect the enhanced spouse’s freedom to pursue his desired career goals, unimpeded by the now dissolved marital relationship. Essentially, courts permit the enhanced spouse to reinvent himself. Unhindered by earlier career goals, the lawyer is free to become a poet.

There are, of course, other values to which family law could—and does—

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319 Id.
322 See, e.g., Elizabeth Scott, Rehabilitating Liberalism in Modern Divorce Law, 1994 UTAH L. REV. 687, 690-91 (1994) [hereinafter Scott, Rehabilitating Liberalism] (“The role of the state is to provide the individual with conditions of freedom in which to make choices and acquire ends.”).
323 See, e.g., id. at 691-92 (“[B]ecause her ends may change, she must be free to revise . . . her means based on information gained through experience.”).
subscribe. As many critics of "atomistic" individualism suggest, the primacy of individual freedom discounts the importance of community, the connection among humans, as a defining component of human identity, experience and values, particularly in the context of marriage. Even within the framework of liberal theory, however, the courts' emphasis on individualism is too narrow, presenting an incomplete account of the theory. Courts' exclusive focus on one spouse's autonomy is a distortion of liberal society, a distortion scholars such as Elizabeth Scott suggest is prevalent in family law as well as in a variety of other fields. Liberals have argued that such a narrow depiction "presents a caricature of liberalism as a blueprint for a society of individuals pursing selfish ends and transitory attachments."

Although liberalism certainly includes the principles of free choice and reflective self-determination that family law courts traditionally emphasize, liberalism is not limited to only these values. Indeed, as Scott points out, while the state may be constrained from imposing a moral vision, individual choices can and often do reflect a moral content. That content often specifically embraces community values—a perception that the good life is one of commitments and relationships. Individuals who choose to commit to marriage have demonstrated that, at least in some important respects, their concept of self is defined through their relationship to one another. Additionally, although at times seemingly forgotten in the caricaturized depiction of liberalism, the relationship between self and others is also an important element of liberal theory. The "do no harm" principle of Mill's theory establishes a boundary for individual freedom. To the extent that the exercise of individual liberty causes harm to another, individual freedom can justifiably be constrained. Relations and interdependence among individuals must be taken into account.

Schneider points out, however, that applying Mill's principle to family law

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324 This challenge is grounded in principles often associated with a communitarian framework. Professor Elizabeth Scott provides a very informative description of the basic components of liberal theory, communitarian theory and the liberal-communitarian debate. See generally Scott, Rehabilitating Liberalism, supra note 322 (defending liberalism as a framework for shaping family law and policy). Professor Jennifer Nedelsky also summarizes a core critique of liberalism: "The now familiar critique by feminists and communitarians is that liberalism takes atomistic individuals as the basic units of political and legal theory and thus fails to recognize the inherently social nature of human beings." Jennifer Nedelsky, Reconceiving Autonomy: Sources, Thoughts and Possibilities, 1 YALE J.L. & FEMINISM 7 (1989) [hereinafter Nedelsky, Reconceiving Autonomy].

325 See infra Part II.C.5.c.

326 See Scott, Rehabilitating Liberalism, supra note 322, at 705 ("The law's concern with protecting the individual's interest in pursuing his own ends after divorce, free of state interference, has acquired constitutional stature.").

327 Id. at 698.

328 See id. at 698-99 (noting that communitarians erroneously ignore the possibility that liberal selves will seek to form meaningful and long-lasting relationships).
can be difficult. First, "the uncertain meaning of 'harm to others' is particularly acute in family law, which, by definition, deals with one person’s relationship with another person and, therefore, with a situation in which harm is always possible." Second, and of greater significance, due to the complex and interdependent nature of familial relationships, family members are especially vulnerable to one another. The opportunities for harming other members are plentiful and often reciprocal. Any legal protection granted to one family member's "liberty of action" will inevitably harm the other members.

The law is faced with the difficult task of striking an acceptable balance between individual liberty and protection from harm—protecting the liberty of the "other." Overlaying this challenge is the added complexity of recognizing that individual identities are partially formed through participation in interdependent relationships, such as marriage. The law must acknowledge and accommodate the value of community as a component of individual identity together with "solitary" individualism, which itself can raise competing claims.

c. Implications of Emphasis on One Spouse's Narrowly Defined Autonomy Interests

The results in career asset cases present a particularly stark example of the failure to achieve a desirable balance between competing claims of individual autonomy and community values. They evince a far too limited understanding of the elements that make up individual autonomy, and ignore the notion of community encompassed by partnership ideology.

i. Devaluation of Autonomy Interests of a Supporting Spouse

Lawmakers have focused solely on the enhanced spouse’s autonomy following divorce. Quite obviously, the supporting spouse’s autonomy following divorce is also implicated—and just as strongly. Alongside the enhanced spouse, the supporting spouse has worked and sacrificed to achieve the shared goals of a more comfortable lifestyle and a better quality of life for the family. Concerns for her human dignity, personhood and autonomy demand that her contributions and expectations be acknowledged and valued—that she be awarded an ownership interest in the asset that is the product of her

329 Schneider, supra note 16, at 1840.
330 See id. ("Not only are there many opportunities within families to harm others, there are many incentives.").
331 This dilemma is hardly unique to family law; it arises in many contexts. Examples from my property course come easily to mind. For example, nuisance law attempts to balance the extent to which one landowner can exercise her freedom to use her property, when such use interferes with the use and enjoyment of a neighbor’s property. See, e.g., Joseph Singer, Property Law, Rules Policies and Practices 323-74 (2nd ed. Aspen Law & Business 1997) (discussing nuisance law).
efforts.

However, career asset case decisions conclude that the supporting spouse’s labor and sacrifice are undeserving of financial recognition. Her expectations have been appropriated, and are declared to have little, if any value. In contrast, the enhanced spouse’s efforts are highly valued and he is awarded full credit for the career achievement. His autonomy is emphasized while hers is left out of the equation.332

Obviously the supporting spouse’s autonomy is also impacted by the judge’s decision. Her individual liberty following divorce may be diminished (based on joint decisions during the marriage) if career opportunities were forfeited and/or personal development was sacrificed.333 The supporting spouse’s ability to transform herself following divorce—to change or build a career may be severely limited by the economic allocation decisions at divorce. Having lost access to the enhanced spouse’s increased income stream, she is unlikely to have the economic resources necessary for such a career change. This is simply the converse of the argument that the enhanced spouse should not have his freedom to change jobs (or quit altogether) impaired by a duty to share his increased income. Courts apparently have not considered—or, worse yet, have disregarded—the correlative impact that their allocation decisions have on the autonomy interests of the supporting spouse.

Like the assumption that a supporting spouse’s contributions are less valuable than those of the enhanced spouse, a result that diminishes the supporting spouse’s autonomy cannot survive scrutiny from a modern perspective of equality and gender justice. The outcome is all too familiar and must be rewritten: women are typically the persons devalued in this way and who continue to suffer economic devastation that accompanies unequal treatment upon divorce. A more equitable balance between the competing claims to autonomy must be achieved, one that takes into account the community values that comprise the marital relationship as many understand it. The search for a resolution must include the possibility that a dimension of the community relationship survives divorce for a period of time.

ii. Devaluation of the Role of Community in Marriage

As Bruce Hafen puts it, “American law’s extreme preoccupation with individual liberties virtually has captured the field of family law.”334 Much good has come of the American focus on individualism, and it seems most

332 See Davis, supra note 127, at 130 (“When courts refuse to appropriately credit the wife’s efforts and compensate her accordingly, only the husband’s hopes and expectations are realized. Hers are ignored and essentially discounted as insignificant.”).

333 Joyce Davis has also examined this issue and reaches similar conclusions. See id. at 129-30 (“Failing to recognize that [the supporting spouse] has earned a right to share in the increased earnings attributable to the husband’s enhanced capacity denies her efforts, her personhood, her will, and her autonomy.”).

Americans would agree that continued diligence for protection of individual autonomy is a critical value in our culture. As Elizabeth Scott reminds us, a vital characteristic of liberal society is the protection it affords individuals to choose their own values and, importantly, to avoid domination, oppression and imposition of values by a larger group.\(^{335}\) In a society that aspires to value the diversity of its citizens, and yet “is marred by a history of oppression of some of its people,”\(^{336}\) courts and legislatures may well be reluctant “to impose values other than tolerance, equality, and individual liberty.”\(^{337}\)

However, as Jennifer Nedelsky observes, it is because the “[t]he tradition of American political thought sets individual autonomy in opposition to collective power” that our conception of autonomy has been distorted.\(^{338}\) This conception neglects the critical dimension of autonomy that our sense of individual identity is formed, in part, through our interactions with others. “The task is to render autonomy compatible with the interdependence which collective power (properly used) expresses.”\(^{339}\)

While I wish it were otherwise, I cannot offer a detailed vision that accomplishes such harmony. The point of this article necessarily is much less ambitious: it is simply to describe the extent to which courts have embraced a one-dimensional view of individualism and to explore some of the losses family law discourse experiences as a result of such a narrow perspective. It is the challenge of family law, already taken on by many in the legal community and elsewhere, to develop a conception of marriage that is more inclusive of other values, such as community.

I certainly am not suggesting that community values, which include “[a]ltruism, commitment, cooperation, connections to others, and responsibility,”\(^{340}\) are the exclusive values that form the marital relationship, or even that they should be made dominant in marital law. They should not be effectively ignored, however, as they are in so many career asset cases. Sharing principles must be a vital part of the marital law. Not because I, or even a large a group of persons hold these values dear, but because they are an important part of how many married persons envision their own relationship. Many individuals have themselves chosen community ideals as an important component of their aspirations for, and behavior in, marriage.\(^{341}\) “[F]amily norms of responsiveness to need, sacrifice, caring and disregard for strict cost-

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335 See Scott, *Rehabilitating Liberalism*, supra note 322, at 699-700 (“Liberal society safeguards against repression . . . by devising a scheme of individual rights to protect the individual from overreaching by the community.”).

336 Id. at 700.


339 Id.


benefit accounting" are already present in the minds and hearts of many who marry and, although eroded to some degree, still exert a powerful influence. Particularly, where there are children involved, the need for caretaking and sacrifice are at the forefront of parents' daily experience.

An important goal of marital law should be to reflect the commonly held view of marriage as a relationship of sharing, cooperation and interdependence. Partnership theory, at least to some degree, accomplishes this goal because sharing principles are its very foundation. A rejection of partnership norms fails to account for the way many couples perceive and conduct their relationships.

Even setting aside the manner in which numerous individual spouses make decisions within their relationship, how we conceptualize marriage often has profound normative implications. As Katharine Bartlett suggests:

Marriage in this society is still an important ideal. Marriage rates remain high and most unmarried adults want, or expect, to marry. People in the United States also continue to believe in traditional marriage values, even though they do not always act on these values. The appeal of marriage makes it an important resource for transmitting and reinforcing the values of commitment and responsibility thought to be important to families and children. It makes no sense to give up this valuable resource when the needs of individuals for family belonging and nurture are so great.

If marital discourse treats individualism as the prime value, then we have lost something as a society. Rejection of the sharing principles that partnership theory embraces offers a distinct vision of how we ought to behave. Self-interested choices are rewarded and cooperation and support are not. This narrative about human behavior matters. There is the potential that such a model will influence what we do, for "when we speak our languages we cannot help believing them; we cannot help participating, emotionally and ethically and politically, in the worlds they create and in the structures of perception and feeling they offer us."

To say that we are individuals is only a part of who we really are. Relationship and association with spouses, parents, children, family, friends, teachers and larger communities are also critical components of human identity.

342 Regan, Spouses and Strangers, supra note 21, at 2383.
343 See id.
344 See generally, e.g., BELLAH ET AL., HABITS OF THE HEART, supra note 3 (suggesting that American’s fierce individualism may undermine our capacity to make commitments to one another, but also finding great importance placed on the values of commitment and love).
and happiness. The rejection of partnership principles of sharing and relationship reflected in career asset cases undermines and discounts an important part of who we are, and who we might like to be.