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# In Good Times and in Debt: The Evolution of Marital Agency and the Meaning of Marriage

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## I. INTRODUCTION

A person's liability for the debts his or her spouse was once an invariable attribute of marital status. Two individual persons merged into one legal persona. The husband managed the legal persona and acted as the exclusive agent for both spouses.<sup>1</sup> Today, marriage is

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1. 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 433–45 (William Carey Jones ed., 1915). In his commentaries, Blackstone noted that:

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; and is therefore called in our law-French a *feme-covert*, *foemina viro coperta* [married woman]; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or *lord*; and her condition during her marriage is called her *coverture*.

*Id.* at 442.

more like partnership than merger.<sup>2</sup> Married persons hold property and incur liability together but also remain distinct individuals. A spouse may incur liability on her own behalf or as an agent for the other.

In many situations, whether a married person is financially responsible for her spouse's debt is a simple question of personal liability under contract or other law. Suppose one spouse wants to buy a motorcycle on credit. If the other spouse co-signs the loan, both spouses are directly liable to the creditor, even though only one of them rides the motorcycle and even though they think of the loan as solely his responsibility. In some situations, one spouse becomes liable for the other not by consent but rather by imputation. Suppose a married person defrauds a business associate and becomes liable in tort. If the tortfeasor acted as agent for the other spouse or on behalf of their marital partnership, then the other spouse is liable by imputation.

Consider what is at stake in imputed marital liability cases. Imputation spreads liability from one spouse to both. The pool of assets available to satisfy the creditor's claim also expands to include the other spouse's property.<sup>3</sup> This expansion is important when the directly liable person is insolvent.<sup>4</sup> The other spouse and the creditor both have a powerful argument against the debtor that they should not be responsible for his conduct. But his insolvency inescapably requires one of them to bear it.<sup>5</sup> If the other spouse loses her property to

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2. See 1 ALAN R. BROMBERG & LARRY E. RIBSTEIN, *BROMBERG AND RIBSTEIN ON PARTNERSHIP* § 1.03 (Aspen Publishers 1998 & Supp. 2007); MILTON C. REGAN, JR., *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* 12 (Oxford Univ. Press 1999) ("[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."). The analogy between marriage and partnership is imperfect in many respects. A marriage is not an entity distinct from the individuals. Under modern law, whether a partnership is a distinct legal entity or an 'aggregate' of individual partners is an open question. See BROMBERG & RIBSTEIN, *supra*, § 1.03(a) (noting that "the courts have been unable to agree on the appropriate characterization of partnership").
  3. See generally Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 393 (2000) (noting that establishing the legal distinction between individual and group is the principal role of organizational law).
  4. The task of allocating loss from one actor's default and insolvency among relative innocents is the bulwark of organizational and commercial law. See generally JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 839-83 (5th ed. 2000) (describing UCC Article 9 rules regarding priority conflicts among creditors). Cf. Marie T. Reilly, *Making Sense of Successor Liability*, 31 HOFSTRA L. REV. 745 (2003) (successor liability law); Marie T. Reilly, *The Latent Efficiency of Fraudulent Transfer Law*, 57 LA. L. REV. 1213, 1234-45 (1997) [hereinafter *Latent Efficiency*] (fraudulent transfer law).
  5. The risk that the primarily liable party may default while insolvent and externalize loss illustrates the economic problem of moral hazard. See, e.g., Mark V.

the creditor, she acquires a right of reimbursement against the insolvent spouse and his insolvency becomes her problem. On the other hand, a finding that a directly liable spouse acted solely as an individual protects the other spouse and her assets from risk of loss to his creditor. His creditor ends up with all the loss while the other spouse bears none.

Under what circumstances should one spouse's liability be the other spouse's problem? Today, married people can to some extent set the scope of their shared marital enterprise and their financial responsibility for each other by agreement.<sup>6</sup> Imputed liability, however, is a legal construct imposed on the couple without their consent, at a creditor's request. It is generally beyond the couple's power to control by private agreement.<sup>7</sup>

This Article explores the historical and modern role of marital agency law in defining a critical aspect of what it means to be married—the scope of spouses' imputed liability for each other to third parties. Part II explains how the emergence in the nineteenth century of married women's legal capacity was driven in part by demand for a reliable legal mechanism to shield assets invested in marriage from the claims of husbands' creditors. Part III considers the scope of marital agency and shared liability under the modern view of marriage as a voluntary partnership among equals, terminable at the will of either. Spouses' financial responsibility for each other to third parties varies widely among jurisdictions. The variety reflects differences in spousal property rights among marital community and non-community property regimes. It also reveals the absence of a consistent theory of the scope of shared risk and reward relative to spouses' individuality within marriage. Part IV offers an explanation for the persistent complexity of the law governing creditors' rights against married people. Even in the context of divorce, in which the partnership metaphor is most robust, we lack consensus on the legal effect of

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Pauly, *The Economics of Moral Hazard: Comment*, 58 AM. ECON. REV. 531, 535 (1968).

6. See generally Brian H. Bix, *The ALI Principles and Agreements: Seeking a Balance Between Status and Contract*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 372–91 (Robin Fretwell Wilson ed., 2006) (contrasting the ALI Principles' treatment of premarital, marital and separation agreements with current law); Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 148–58 (1998) (summarizing history of enforceability of pre-marital agreements).
7. E.g., *Jansen v. U.S.*, No. CV-S-90-253-RDF(RJJ), 1992 WL 121368, at \*2 (D. Nev. Feb. 4, 1992) (agreement couple executed after marriage excluding husband's earnings from community property was effective only between the spouses and not against the IRS as wife's creditor). But see *Calmes v. U.S.*, 926 F. Supp. 582, 588 (N.D. Tex. 1996) (prenuptial agreement recharacterizing spouses' income from community to separate property was effective against IRS).

marriage on a couple's legal relationship with each other. This void complicates not only divorce but also the related question of the scope of spouses' shared responsibility to third party creditors during their marriage. Despite the daunting complexity of marital agency law, it is a mirror of judicial and legislative attitudes about the balance between public and private regulation of intimate relationships. And, it is an undeniably powerful instrument of social policy.

## II. THE EFFECT OF MARRIED WOMEN'S PROPERTY REFORM ON CREDITORS' RIGHTS AGAINST MARRIED PEOPLE

Until reform in the nineteenth century, marriage created an aggregate of two individuals dominated by one of them. Under this theory of marital unity, the husband owned and controlled nearly all the couple's wealth.<sup>8</sup> As a legal and practical matter, married women were isolated from market activity. Without legal capacity or property of their own, married women were hardly worth creditors' attention. Only husbands could become liable to a creditor. Creditors enjoyed recourse to the full extent of his property, which included interests he acquired from his wife by virtue of marriage.

Although, in theory, a married woman lacked legal capacity as an individual,<sup>9</sup> she existed as a legal person for some purposes. She could act as an agent for herself and her husband in emergencies, such as "when her husband [was] imprisoned for life or for years, or [had] fled the country or been exiled."<sup>10</sup> Moreover, married women enjoyed derivative legal capacity as retail consumers. A married woman could bind her husband and the wealth he controlled by a contract for "necessaries" as if he had incurred the obligation directly.<sup>11</sup> To reconcile the legal construct of marital unity of person with the doctrine of necessities, courts commonly explained a husband's indirect liability for necessities as a corollary of a husband's common law duty to sup-

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8. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 129 (2d ed. 1832); e.g., *Griswold v. Penniman*, 2 Conn. 564, 564 (1818) ("It is a general rule, that all personal property, which accrues to the wife during coverture, vests absolutely in the husband. The reason is, that the legal existence of the wife is merged in that of her husband."). See generally MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA, chs. 5-6 (1986).

9. E.g., 5 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 11:2 (Richard Lord ed., 4th ed. 1993).

10. *Bank v. Partee*, 99 U.S. 325, 330 (1878).

11. See generally Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 517 (2d Cir. 1973) (discussing doctrine of necessities under common law); WILLISTON, *supra* note 9, § 11:9; Robert C. Brown, *The Duty of the Husband to Support the Wife*, 18 VA. L. REV. 823, 823-26 (1932) (discussing the duty of the husband to the wife under the principles of the law of agency).

port his wife.<sup>12</sup> A wife's legal *agency* for her husband lurked unmistakably. Whether a particular debt was for "necessaries" depended on the economic circumstances and expectations of the particular couple, rather than an inflexible standard based on wives' minimal expectation of support.<sup>13</sup>

During the early nineteenth century, social and economic change became a dominant theme in Americans' lives.<sup>14</sup> Families increasingly encountered entrepreneurial and tort liability, presenting a range and magnitude of risk far greater than consumer debt for necessities.<sup>15</sup> The wage labor force grew and families grew increasingly dependent on income without the safety net of a real property portfolio. Change in the type and level of risk facing families affected their

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12. *E.g.*, *Gessler v. Gessler*, 124 A.2d 502, 505 (Pa. Super. Ct. 1956) (indicating that a husband's duty to support his family justified implication of obligation to creditor who extended necessities to wife).
  13. *E.g.*, *Raynes v. Bennett*, 114 Mass. 424, 429 (1874) ("[T]he term 'necessaries' . . . is not confined to food or clothing required to sustain life . . . but includes such articles of utility as are suitable to maintain [the wife] according to the estate and degree of her husband.").
  14. See generally LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 148 (3d ed. 2005) (By the mid-nineteenth century, "[t]he number of women with a stake in the economy had increased dramatically."); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 6 (1985) (describing factors that "marked the crucial transition of the family from a public to private institution" including a shift in family economics from production to consumption, decline of generational influences, new fertility patterns and declining family size, emerging domestic egalitarianism as a challenge to patrimony, and "a more clearly defined use of private property as the major source of domestic autonomy"); DAVID J. RUSSO, *FAMILIES AND COMMUNITIES: A NEW VIEW OF AMERICAN HISTORY* 4 (1974) (noting that changes occurred economically, socially, politically, and culturally); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 186-88* (Cambridge Univ. Press 1998) (describing postbellum intersection of marital reform movement and free labor economy); John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 722-24 (1988). For a discussion of the impact of this economic change on contract law, see Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415 (1988).
  15. See, e.g., NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* 39 (1982) ("The world of husbands and wives in antebellum New York was far removed from the agricultural world of baron and feme in medieval England. New Yorkers lived amidst an intricate network of speculation, credit, insurance, stocks, and wages which was subject to cycles of boom and bust."); see STUART BRUCHEY, *GROWTH OF THE MODERN AMERICAN ECONOMY* 102-03 (1975); see also Claire Priest, *Creating an American Property Law: Alienability and its Limits in American History*, 120 HARV. L. REV. 385 (2006) (analyzing laws protecting real property from the claims of creditors in colonial America).

economic organization in a way that made change in marital law inevitable.<sup>16</sup>

At the time, however, marital law was highly inflexible. Under the Blackstonian theory of marriage as merger, a husband could incur debt *only* as an agent for his marriage and not as an individual.<sup>17</sup> Nor could he easily segregate "marital" wealth into a distinct asset pool shielded from risk of loss from his creditors. Married couples needed a low cost, accessible, and reliable way for one of them to take risk without exposing *all* their wealth to creditors.

The first response was judicial. Courts recognized limited, equitable property rights for married women as a means of segregating family wealth from the husband's creditors. By the beginning of the nineteenth century, a couple with legal advice could opt-out of a prospective husband's marital prerogative over a wife's property rights by conveyance of property (typically by her father or her husband) to her "separate estate" established via an express or implied trust for her benefit.<sup>18</sup> Even without agreement between the spouses, in response to foreclosure, some courts reserved a priority equitable interest for a married woman in personal property she owned prior to, or inherited during, marriage.<sup>19</sup> The sole purpose of recognizing priority for a

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16. See Isidor Loeb, *The Legal Property Relations of Married Parties: A Study In Comparative Legislation* in 13 STUDIES IN HISTORY, ECONOMICS, AND PUBLIC LAW 11, 12 (Faculty of Pol. Sci. of Columbia Univ. ed., 1900) ("The changes in the industrial system had affected the economic organization of the family, and it was inevitable that the legal relations [of husband and wife] should accommodate themselves to the new conditions."). Historian Lawrence Friedman noted that in England, the common law was geared to the landed gentry but in mid-nineteenth century United States, "the middle-class family was at the core of the law" and English land-based legal regimes were "too cumbersome, technical, and expensive for this class to use or tolerate." FRIEDMAN, *supra* note 14, at 148.
  17. See 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE §§ 2-19 (Little, Brown, & Co. 1873) (observing that executed contract of marriage is in part contract and in part status; parties could contract to order their property interests within their marriage as the requisite consideration, but could not alter the status conferred on them by marriage).
  18. *E.g.*, *Butler v. Merchants Ins. Co.*, 8 Ala. 146, 152 (1845); *Ancker v. Levy*, 22 S.C. Eq. 197 (3 Strob. Eq. 1849). See generally JOHN F. KELLY, A TREATISE ON THE LAW OF CONTRACTS OF MARRIED WOMEN 2-25 (1882) (describing ante-nuptial contracts and trusts).
  19. Unlike interests in real property, her husband did not automatically acquire title to such personal property by marriage. Rather, he took title only upon "reducing it to his possession." No husband could physically possess intangible property rights (such as a contract right to rent or interest income). So, courts adopted a requirement that a husband could reduce such property to his control only via a judicial proceeding in which courts typically imposed equitable trust for the wife. *E.g.*, *Shaw v. Mitchell*, 21 F. Cas. 1195, 1197 (D. Me. 1843) (No. 12,722); *Tevis's Representatives v. Richardson's Heirs*, 23 Ky. (7 T.B. Mon.) 654 (1828). See Leonard J. Long, *Emerging from the Shadow: The Bankrupt's Wife in Nineteenth-Century America*, 21 QUINNIPIAC L. REV. 489, 517-22 (2002) (describing equitable doctrine that elevated a married woman's property interests over those of her

wife's equitable interest in property was to protect it from seizure by the husband's creditors. A married woman continued to have no legal right to manage any property, including property attributed to a trust for her benefit, except as provided expressly in the trust.<sup>20</sup>

The manipulation of property rights to protect some of a married couple's property interests from market risk was not a new idea.<sup>21</sup> In the colonial period, some American jurisdictions had adopted the English common law joint marital estate, tenancy by the entirety, as a device for segregating family wealth from the claims of creditors.<sup>22</sup> Blackstone explained that because husband and wife were one person under the law, they could not hold property jointly in a true concurrent estate, but only "by the entireties."<sup>23</sup> The wealth-shielding effect of estate by the entirety is analogous to that of an equitable separate estate. A husband cannot alienate or encumber it unilaterally. Nor could a creditor of only one spouse partition property held by the entirety by foreclosure during the other spouse's life without her consent.<sup>24</sup> Later, during the nineteenth century, political opposition to

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husband and his creditors). Courts explained the priority of the wife's equitable interest as an expression of the moral imperative of the husband's *marital* duty to support his wife. "For he holds [marital property], not in his personal, but in his representative character, and, like every other administrator, is bound to account for it to those who are legally or equitably entitled to it." *Shaw*, 21 F. Cas. at 1197.

20. *E.g.*, *Trs. of the Methodist Episcopal Church v. Jaques*, 3 Johns Ch. 77, 88 (N.Y. Ch. 1817), in which the court stated that:

These marriage settlements are made to secure to the wife, and her offspring, a certain support in every event, and to guard her against being overwhelmed by the misfortunes, or unkindness, or vices, of the husband. They usually proceed from the prudence and foresight of friends, or the warm and anxious affection of parents. If fairly made, they ought to be supported, according to the true intent and spirit of the instrument by which they are created . . . .

21. *See generally* Priest, *supra* note 15 (analyzing economic and political development of colonial American law governing non-family creditors' rights in debtors' real property).
22. *See generally* John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. REV. 35.
23. *Id.* at 38–39. "Both husband and wife were seised of the entirety . . ." *Id.* at 39. England abolished tenancy by the entireties in 1925. *See* Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 39(6) (Eng.) in LAW OF PROPERTY ACT, 1925, 25 (W.H. Aggs & H.W. Law eds., 1925) (converting tenancies by the entirety into joint tenancies).
24. 4 THOMPSON ON REAL PROPERTY, THOMPSON EDITION § 33.02 (partition), § 33.07(e) (creditors' rights) (David A. Thomas, ed., 1994); 41 AM. JUR. 2d *Husband and Wife* § 32 (partition), § 36 (liability for debt) (2005 & Supp. 2008). A creditor technically can seize the debtor/spouse's interest but only subject to the other spouse's indestructible right of survivorship. This encumbrance practically eliminates, or at least greatly diminishes, the market value of the debtor's interest. For a modern critique, see Steve R. Johnson, *The Good, the Bad, and the Ugly in Post-Drye Tax Lien Analysis*, 5 FLA. TAX REV. 415, 441–42 (2002) (describing how tenancy by the entirety jurisdictions treat creditors' claims against one spouse).



commodification of real property rights led to homestead legislation to protect real property from the claims of non-family creditors.<sup>25</sup>

As nineteenth century economy exposed families to unprecedented risk of liability, marital law made married women entirely dependent on their husbands. At the same time, their social and legal status rendered them impotent to monitor or control their husbands' disposition of family resources.<sup>26</sup> Courts openly protected married women's right to financial support as morally superior to husbands' creditors' claims as an appropriate intervention into market relationships over which wives had no control.<sup>27</sup> To creditors, however, courts' solicitude for wives' financial security appeared as a populist maneuver that suborned fraud, undermined commerce, and preserved a bygone social order.

By the middle of the nineteenth century, judge-made law governing creditors' rights against married people and their property was a labyrinth.<sup>28</sup> Calls for clarity fueled political support for marital property reform legislation.<sup>29</sup> One historian notes that although the

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25. *E.g.*, *Doyle v. Coburn*, 88 Mass. (6 Allen) 71 (1863) (homestead is a limited estate that cannot be conveyed by the sole deed of a husband). Richard Chused has observed that the appearance of homestead statutes was roughly contemporaneous with married women's property reform legislation. Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1398-1404 (1983). See generally Alison D. Morantz, *There's No Place Like Home: Homestead Exemption and Judicial Construction of Family in Nineteenth-Century America*, 24 LAW & HIST. REV. 245 (2006); Priest, *supra* note 15, at 421-27 (describing the Debt Recovery Act as a means of protecting creditors' investment in the American colonies from the effect of British law that made real property exempt from creditors' recourse).

26. Joan C. Williams, *Married Women and Property*, 1 VA. J. SOC. POL'Y & L. 383, 386-87 (1994) (noting plight of abandoned wives in industrial economy under coverture).

27. See, *e.g.*, *Elliott v. Waring*, 21 Ky. (5 T.B. Mon.) 338, 340 (1827), in which the court noted that:

While it is necessary for family government, and also to the relation to the rest of society, in which the husband and wife may stand, that there should be but one will to govern, and one owner of property, yet there are great abuses as well as hardships growing out of that rule, which courts of law can not correct, or relieve, and equity therefore will interpose, and give redress. One of these hardships is the suffering of the wife and children, from the imprudence of the husband, and equity will often relieve it, by providing for the maintenance of the wife, especially out of an estate originally belonging to her in her own right.

28. A court noted with understatement that the validity of implied or expressed trusts for the benefit of married women against husbands' creditors was a matter of "considerable nicety." *In re Grant*, 10 F. Cas. 973, 975 (D. Mass. 1842) (No. 5,693); see also Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings 1860-1930*, 82 GEO. L.J. 2127, 2142 (1994) ("Courts vacillating between protection of family assets and protection of creditor interests developed a conflict-riddled law of capacity destined for collapse.").

29. See BASCH, *supra* note 15, at 115 (lobbyist for married women's property reform in New York in the 1830's noted that reform would enable couples to shield some

reform movement appeared to advance the legal capacity and property rights of married women, "the main point . . . [was] to rationalize more mundane, even cold-blooded matters, such as the rights of a creditor to collect debts out of land owned by husbands, wives, or both."<sup>30</sup> Another historian explains the reform movement as a "complex interplay of factors."<sup>31</sup> Hope of reducing uncertainty regarding marital wealth-shielding techniques on the developing credit market "assured its passage."<sup>32</sup> Married women's property legislation in the first half of the nineteenth century coincided with periods of economic depression, which also suggests a political connection between reform and the economic prospects of middle class families.<sup>33</sup> By the end of the Civil War, twenty-nine states had enacted legislation recognizing the capacity of a married woman to hold legal title to property separately from her husband and his creditors.<sup>34</sup> The immediate effect was to make it easier for a married couple to segregate property from foreclosure by creditors, and to reduce uncertainty in credit markets about the state of title to property.

Married women's separate estate became an effective wealth shield against creditors who could not (or did not) bargain with the couple in

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of their assets from their creditors); Joseph A. Ranney, *Anglicans, Merchants, and Feminists: A Comparative Study of the Evolution of Married Women's Rights in Virginia, New York and Wisconsin*, 6 WM. & MARY J. WOMEN & L. 493, 554 (2000) (concluding that in all three states, reform was enacted principally as a means of protecting assets from husband's creditors).

30. FRIEDMAN, *supra* note 14, at 148. During constitutional debates in 1850 on a California community property provision, delegates argued that a wife's separate estate violated the laws of nature and would injure creditors by allowing husbands to hide their assets in their wives separate estates. See J. BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION IN SEPTEMBER AND OCTOBER, 1849, at 262 (remarks of Del. Lippitt) and, at 268-69 (remarks of Del. Botts) (1850), discussed in Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 54 (1981).
31. Linda E. Speth, *The Married Women's Property Acts, 1839-1865: Reform, Reaction, or Revolution?* in 2 WOMEN AND THE LAW 69, 75 (D. Kelly Weisberg ed., 1982); see *id.* at 73-75 for a discussion of the factors.
32. *Id.*; see also Siegel, *supra* note 28, at 2136 (describing historical accounts of the "competing preoccupations driving reform" as "matters of land law, debtor-creditor relations, family welfare, codification and capital accumulation" and concluding that "considerations of gender equity play[ed] a conspicuously minor role").
33. BASCH, *supra* note 15, at 113-35; Speth, *supra* note 31, at 73.
34. See Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, 5 FEMINIST STUD. 346 (1979); Speth, *supra* note 31, at 73-74. Mississippi law was the first to pass married women's property legislation. It protected slaves a wife held before or inherited during marriage from attachment by her husband's creditors. 1839 Miss. Laws ch. 46. See generally Chused, *supra* note 25, 1409-10 (describing two forms of married women's property statutes, the first recognizing a separate estate for married women at law, and the second merely insulating certain property designated as married women's separate estate from a husband's creditors).

advance for the personal liability of both. Note that creditors who can bargain can contract with both spouses and eliminate the risk of a loss from a subsequent inter-marital property transfer from the debtor spouse to the other spouse. For example, a home mortgage lender can insist on the personal liability of both spouses and recourse to their respective interests in the real property collateral as a condition to the credit. Or, a creditor can set interest rates to take the risk of *ex post* marital wealth-shielding into account. Married women's property reform changed the playing field for tax and tort creditors and certain holders of entrepreneurial debt who did not bargain for shared liability in advance. These creditors previously enjoyed automatic access to all of a married couple's wealth simply by asserting personal liability of the husband. Reform made it easier for married couples to shield some wealth from creditors by private allocation to the wife's separate estate.

Creditors affected by reform responded by challenging inter-marital property transfers as fraudulent. Fraudulent transfer law quickly became as complicated and uncertain of outcome as the equitable property doctrines that reform had laid to rest. For example, some jurisdictions treated a gift of property from a husband to wife as though it were made "in consideration of marriage." The legal effect was to turn a wife from a donee transferee into a purchaser for value, and to blunt the husband's creditors from avoiding the transfer on fraudulent transfer grounds.<sup>35</sup> Some states recognized inter-marital gift transfers as presumptively non-fraudulent so long as the transferor/husband was not insolvent at the time of the transfer.<sup>36</sup> Others,

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35. See, e.g., *Prewit v. Wilson*, 103 U.S. 22, 23 (1880) (grantor's creditors cannot set aside post-nuptial conveyance from husband to wife where wife knew husband was indebted but not to what extent, and without knowledge of his fraudulent intent); *Otis v. Spencer*, 102 Ill. 622, 630 (1882), in which the court indicated that:

While the law is vigilant in protecting creditors against the fraud of their debtors, it never despoils or confiscates the property of innocent purchasers for their benefit. Such purchasers have the same right of protection in their rights as have creditors, and it must be remembered that Mrs. Spencer is entitled to the same protection as had she been a cash purchaser, and had paid every dollar the property was worth.

But see *Dent v. Pickens*, 33 S.E. 303, 308 (W. Va. 1899) (evidence established that grantee knew of grantor's fraudulent intent where man conveyed all his property to his intended wife while a third party's suit against him for breach of promise to marry was pending).

36. E.g., *Cameron v. Peoples' Bank of Maytown*, 147 A. 657 (Pa. 1929). The key fact became the husband's insolvency at the time of the transfer. See *Rundle v. Murgatroyd's Assignees*, 4 U.S. (1 Dall.) 304 (1804) (invalidating mortgage executed to wife, which was ostensibly to secure his antecedent obligation to her, as husband was insolvent at the time of the conveyance); *Kipp v. Hanna*, 2 Bland 26, 34-35 (Md. 1820) (invalidating transfer of couple's home from husband to trust for benefit of wife while insolvent).

including New York, followed the contrary English rule, which held that any gift transfer by a person who was *indebted* at the time of the transfer was fraudulent as to existing and subsequent creditors, even though he did not become insolvent until later.<sup>37</sup>

Meanwhile, lawyers, courts and legislatures were mired in the unintended consequences of married women's property reform.<sup>38</sup> In a second wave of reform in the post-Civil War period, legislatures clarified an aspect of married women's legal individuality by recognizing a married woman's right to control wages she earned for work outside the home.<sup>39</sup> Proponents of married women's wage legislation argued that it extended to working class married women the financial security separate estate legislation afforded women in wealthy marriages. Income a married woman earned outside the home could afford her economic security against her husband's creditors.<sup>40</sup> One commentator has noted that courts interpreting wage legislation excluded the value of services a married woman provided for her family from the scope of 'wages' subject to her control. A woman's work in her home was her marital duty and the value of such work continued to be her husband's property as an incident of marital status.<sup>41</sup> For wives who did not own property before marriage, acquire it by gift or inheritance during marriage, or work outside the home, this second wave of reform legislation provided a victory in principle but little protection against husbands' improvidence or indifference.

Legal recognition of married women's property rights focused creditors' attention on the boundary between individuality and marital partnership that the unity model of marriage had long obscured. A profound hypocrisy appeared between property and marital law. Title to property was a matter of individuality, whereas *control* of property was a matter of marital status. Some early reform legislation did not address at all a married woman's legal capacity to *control* her separate property or incur obligation on the strength of it, perhaps supporting the inference that legislatures expected reform to have no effect on marriage. For example, New York passed legislation in 1848 that at-

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37. *Bibb v. Freeman*, 59 Ala. 612, 615-16 (1877) (voluntary conveyances by debtor are void); *Reade v. Livingston*, 3 Johns. Ch. 481, 492 (N.Y. 1818) (a gift transfer by a person who is indebted although not insolvent is presumptively fraudulent). See generally Annotation, *Conveyance Pursuant to Antenuptial Agreement as Fraud on Creditors*, 41 A.L.R. 1163 (1926).

38. See Siegel, *supra* note 28, at 2142 (describing the aftermath of early married women's property reform as "commercial havoc").

39. See generally *id.* at 2145. *E.g.*, IDAHO CODE ANN. § 32-912 (1948); WASH. REV. CODE ANN. § 26.16.130 (West 1961).

40. Siegel, *supra* note 28, at 2145.

41. *Id.* at 2129-30. "In this way, courts reformulated a putatively feudal body of status law so that the doctrine of marital service imposed upon the wife the duty to perform such work as is necessary to reproduce the labor force in a modern industrial economy." *Id.* at 2130.

tributed legal title to separate property to a wife but failed to recognize her legal agency to transfer such property. Until correction of the legal glitch, neither spouse could sell the property.<sup>42</sup>

Even after reform, marriage not only stripped a woman of her right to control property, it obscured her control of and responsibility for herself. Under pre-reform common law, a married woman could commit a tort, but her husband was liable for it. His liability followed logically from the construct of marriage as a unity of persons and the husband's marital dominion over her person and her property.<sup>43</sup> His personal liability for her tort was ordained by marital status, not agency law. His personal liability and wealth provided the sole source of the tort victim's compensation for injury she caused.<sup>44</sup>

Reform recognized married women's capacity to hold title to property and opened the corollary possibility that married women might also incur liability as individuals. The possibility became a thorny practical and theoretical problem in tort cases involving married women defendants. To the extent that reform legislation addressed spouses' liability for each other's torts at all, it relieved husbands' from their *marital* liability for wives' torts.<sup>45</sup> Some statutes omitted from the husband's newfound freedom from marital tort liability "case[s] where [the husband] would be jointly responsible with [the wife] if the marriage did not exist."<sup>46</sup> Other statutes defined the scope of a husband's post-reform liability by implicitly rejecting the prevail-

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42. Speth, *supra* note 31, at 78.

43. *E.g.*, Lane v. Bryant, 37 S.W. 584, 585 (Ky. 1896) (At common law, his marital right of control "vest[ed] in him the right to use such forcible means as would bridle her tongue or make her of good behavior.").

44. *E.g.*, Prentiss v. Paisley, 7 So. 56 (Fla. 1889) (indicating that a "[husband's] liability for her torts is a result of the mere fact that by the common-law rules a suit cannot be maintained against the wife alone during coverture"). California, a community property jurisdiction, adopted this view as to spousal tort liability. *See, e.g.*, Henley v. Wilson, 70 P. 21 (Cal. 1902). *See generally* Annotation, *Liability of Husband for Independent Tort of Wife*, 20 A.L.R. 528 (1922) (describing statutory developments rejecting the common law rule of spousal liability). *Cf.* Adams v. Golson, 174 So. 876, 879 (La. 1937) (rejecting common law liability of husband for wife's torts except upon proof that "she was expressly or impliedly authorized to and was, at the time of the commission of the act, actually attending to the affairs or business of the community").

45. *E.g.*, McCabe v. Berge, 89 Ind. 225, 228 (1882); Hill v. Duncan, 110 Mass. 238 (1872); Bretzfelder v. Demaree, 130 N.E. 505, 506 (Ohio 1921) ("Neither husband nor wife . . . is answerable for the acts of the other."); Bebout v. Pense, 150 N.W. 289, 290 (S.D. 1914) (stating that while the language of the statute relieves the husband and wife "of liability for the acts of each other, it does not purport to relieve them as individuals . . .").

46. *E.g.*, McElroy v. Capron, 54 A. 44, 45 (R.I. 1902) (under Rhode Island law, a husband is not liable for torts of his wife "unless he participated therein or coerces her thereto."); Killingsworth v. Keen, 154 P. 1096, 1096 (Wash. 1916) (Under Washington law, a husband is not liable "except where he would be jointly responsible with her if the marriage did not exist.").

ing legal fiction that husbands controlled their wives' behavior. A husband became liable for his wife's tort only if the tort victim could establish that she acted under his "actual coercion and instigation."<sup>47</sup>

Even after legislative reform that expressly emancipated married women, some courts continued to perceive a husband's liability for his wife's torts as the natural consequence of his *marital* right and responsibility to dominate and protect her. For example, California courts retained a husband's liability for his wife's torts until 1913 when the legislature expressly made married women liable for their own torts.<sup>48</sup> Texas courts took a similar position. Because the husband dominated the marital relationship, "it would be difficult, if not impossible, for the courts to determine when she had acted at her own instance, and when she was guided by his dictation."<sup>49</sup> A wife's tort creditor could attach a husband's separate property solely by asserting the fact of marriage until an amendment to Texas law in 1921 expressly protected his separate property from her creditors' recourse.<sup>50</sup>

Recall that some married women's property legislation expressly abrogated a husband's common law liability for his wife's torts "except in cases where he would be jointly liable with her if the marriage did not exist," or where his wife acted under his "actual coercion and instigation."<sup>51</sup> Creditors seized on this statutory language as a launching pad for marital agency arguments. A wife, as a legal individual, could commit a tort as agent for her husband. If so, he should be vicariously liable as her principal and correspondingly, his property subject to her creditor's recourse.

Under what circumstances does a wife act as an agent for her husband? The answer depends on the legal effect courts assign to the marriage. A pair of cases is illustrative. In *Radke v. Schlundt*,<sup>52</sup> a wife negligently injured the plaintiff while driving a horse cart loaded

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47. *Tanzer v. Read*, 145 N.Y.S. 708, 709 (App. Div. 1914) (New York law); *see also* *Blakeslee v. Tyler*, 55 Conn. 397 (1887) (interpreting a Connecticut statute that authorized legal action against a married woman "for any tort committed by her without the actual coercion of her husband"); *McElroy*, 54 A. at 45 (stating that the general rule in Rhode Island is that when a husband and wife commit a tort together the presumption is that he has coerced her, but this presumption can be rebutted by proof that she acted of her own volition); *Fadden v. McKinney*, 89 A. 351, 354 (Vt. 1914) (indicating that Vermont law holds that a husband is not liable for the torts of his wife unless "committed by his authority and direction"); *Story v. Downey*, 20 A. 321, 321 (Vt. 1890) (same).

48. *E.g.*, *Henley v. Wilson*, 70 P. 21 (Cal. 1902); CAL. CIV. CODE § 171a (1913).

49. *McQueen v. Fulgham*, 27 Tex. 464, 467 (1864).

50. *E.g.*, *Whitney Hardware Co. v. McMahan*, 231 S.W. 694, 695 (Tex. 1921) (stating that Texas statutes leave the wife and the husband liable for the torts of the wife); 1921 Tex. Gen. Laws, ch. 130 § 1.

51. *See supra* text accompanying notes 47-49.

52. 65 N.E. 770 (Ind. App. 1902).

with produce grown on the family farm on her way to market.<sup>53</sup> Under Indiana's married women's property law, she was liable for her own torts as if she were unmarried, except for torts "committed under her husband's direction or in his presence with his consent," in which case, the spouses were jointly liable.<sup>54</sup> The plaintiff argued that the wife was her husband's servant and that the tort occurred within the scope of their master/servant relationship. The court expressly rejected the plaintiff's characterization of the defendant's marriage as a master/servant relationship. It noted that while she acts "within her proper domestic sphere," a wife is not a servant to her husband.<sup>55</sup> The court offered no alternative characterization of their relationship.

Similarly, in, *McNemar v. Cohn*,<sup>56</sup> the plaintiff sued both husband and wife for damage to buildings caused by a trash fire the wife set behind the couple's store. Illinois law had abrogated common law liability of a husband for the torts of his wife, "except in cases where he would be jointly responsible with her if the marriage did not exist."<sup>57</sup> The court dismissed the agency-based claim against the husband noting that although the wife helped her husband by maintaining the family home and working in the store, she was not his agent for fire starting purposes.<sup>58</sup>

Creditors' assertion that the husband was vicariously liable for his wife's tort based on agency between them required courts to interpret the effect on third parties of the 'new' marital relationship. In *Radke*, the court found the wife's discretion in household matters to be "within her proper domestic sphere" as a wife, and legally distinct from that of the typical servant, for whom the master is vicariously liable. In *McNemar*, the court cleverly dodged the issue. Even if the wife was the husband's servant for house and store keeping, her negligent fire starting was outside the scope their *marital* master/servant relationship and thus outside the range of the husband's vicarious liability. Both courts may have viewed creditors' agency arguments as an affront to husbands' newfound freedom from liability for their

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53. *Id.* at 771.

54. *Id.* at 773 (citing 1881 Ind. Acts §§ 6965, 6966); see also *Strouse v. Leipf*, 14 So. 667 (Ala. 1893) (Alabama law); *Christensen v. Johnston* 207 Ill. App. 209 (1917) (Illinois law); *Weber v. Weber*, 11 N.W. 389 (Mich. 1882) (under Michigan law, wife solely liable for her torts); *Moore v. Doerr*, 203 S.W. 672 (Mo. 1918) (Missouri law); *Killingsworth v. Keen*, 154 P. 1096 (Wash. 1916) (Washington law).

55. *Radke*, 65 N.E. at 774. The court noted that "the occasion of her trip to town being the marketing of such farm products as are usually under the supervision and control of the farmer's wife, and the purchasing of articles for family use; the business of her trip relating to domestic matters." *Id.* at 771.

56. 115 Ill. App. 31 (1904).

57. *Id.* at 35. The court noted that by 1874, previous legislation in 1861 and 1869 had so modified the common law relationship between husband and wife "that scarcely a vestige of it remained." *Id.* at 35.

58. *Id.*

wives' torts. For creditors, though, husbands' new freedom was a radical setback but for the possibility of agency.<sup>59</sup> Without a way to spread a wife's liability to her husband, a wife's tort creditor typically faced an insolvent defendant, no claim against her husband, and no recourse to his property.

A recurring question in all jurisdictions was whether a married woman's legal capacity to hold legal title to property separate from her husband included the power to act as a surety for her husband. (Her liability as surety gave her husband's creditor recourse by foreclosure to her separate property.)<sup>60</sup> For example, in 1896, the Idaho Supreme Court held that a married woman could bind her separate property by contract, but her husband could not bind her personally or subject her separate property to his creditors' claims by his contract.<sup>61</sup> Because she had legal capacity and control over her separate property, however, she could by her own act become a *surety* for her husband's debt and thereby expose her separate property to his creditor.<sup>62</sup> Two years later, the Idaho Supreme Court reversed its position. It held that

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59. By the end of the nineteenth century, most courts relieved husbands of marital tort liability even in the absence of express statutory relief, often with great rhetorical flourish. For example, in *Martin v. Robson*, 65 Ill. 129, 139 (1872), the court stated that:

The chains of the past have been broken by the progression of the present, and she may now enter upon the stern conflicts of life untrammelled. She no longer clings to and depends upon man, but has the legal right and aspires to battle with him in the contests of the forum; to outvie him in the healing art; to climb with him the steps of fame, and to share with him in every occupation. Her brain and hands and tongue are her own, and she should alone be responsible for slanders uttered by herself.

See also *Lane v. Bryant*, 37 S.W. 584, 585 (Ky 1896) (quoting above language from *Martin v. Robson*, 65 Ill. 129, 139 (1872)). In *Goken v. Dallugge*, 72 Neb. 16, 18–19, 99 N.W. 818, 818–19 (1904), the Court stated:

The wife may now be "the head of the family" as respects homestead rights and exemptions. She is equally entitled with her husband to the guardianship of the offspring of the marriage in case of separation, and she may have an absolute divorce, with alimony, almost for the asking, because of "extreme cruelty"; which falls far short of personal chastisement or restraint of liberty. Even if not divorced, public sentiment will not tolerate that she be compelled to abide with him, although she be destitute of provocation or excuse for doing otherwise, and his criticism of her conduct must not exceed approval by the refined manners of "polite society." We think that so nearly a complete "emancipation" of the wife must in an equal degree emancipate the husband also, and free him from obligations that were incident to a state of law and society that has vanished before the progress of modern ideas.

60. See generally *Loeb*, *supra* note 16, at 34–36 (noting that some states imposed restrictions on married women's capacity to act as surety for husbands based on legislative perception of "feminine weakness . . . [A]nd the probability that her confidence, which she so freely accords, may be taken advantage of . . .").

61. *Dernham v. Rowley*, 44 P. 643, 645 (Idaho 1896).

62. See *id.*



where both spouses signed a promissory note for a community debt, the creditor had the personal liability of both spouses, but no recourse to the wife's separate property. While a married woman could bind herself personally for separate debt incurred *for her exclusive benefit*, she lacked capacity to become a consensual surety for her husband's debt or for the debt of the community.<sup>63</sup> In 1903, the Idaho legislature amended its community property law to afford a married woman control over separate property coextensive with that afforded to married men.<sup>64</sup> However, the Idaho Supreme Court continued to hold that a married woman lacked legal capacity to incur liability on the strength of her separate property when she acted as surety for her husband on his separate debt or on community debt.<sup>65</sup> In 1939, the court explained its narrow interpretation of married women's legal capacity as a means of protecting married women given the non-egalitarian reality of marriage.<sup>66</sup> Oddly, the protection extended only to preclude unsecured creditors from foreclosing on her separate estate. Idaho law did not protect a married woman from the consequences of a pledge of her separate property by mortgage or security interest to enhance her husband's credit.<sup>67</sup> In 1977, the Idaho Supreme Court reversed a long line of decisions and recognized that a married woman's capacity to incur personal liability by contract extends to contracts of suretyship for her husband.<sup>68</sup>

In community property jurisdictions, married women could hold title to property either as a member of the marital community or individually, separate from the marital community.<sup>69</sup> Married women's

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63. *Jaekel v. Pease*, 53 P. 399, 400 (Idaho 1898).

64. *Williams v. Paxton*, 559 P.2d 1123, 1127 (Idaho 1976) (describing amendment).

65. *Bank of Commerce, Ltd. v. Baldwin*, 85 P. 497 (Idaho 1906).

66. In *Loomis v. Gray*, 90 P.2d 529, 536 (Idaho 1939), the court noted the following:

[I]t is common knowledge that wives are not usually experienced in business, do not know what they may sign without making their separate property liable . . . [T]o require a wife to openly repudiate the acts of her husband in order to protect her property from liability for his unauthorized acts [using her separate funds and separate credit to further community business] would make it necessary for the wife whenever her husband requested her to sign a paper . . . to closely interrogate him about the matter, and if still in doubt, to obtain legal advice. Such constant questioning would, no doubt, lead to misunderstandings, suspicion and turmoil, and thus largely destroy the peace and tranquility of the home which sound public policy would preserve.

67. *Williams*, 599 P.2d at 1133 (Donaldson, J., dissenting) (citing *Bank of Commerce*, 85 P. 497 at 499).

68. *Id.* at 1132.

69. The law governing the characteristic of property as community or separate is complex and varies among community property jurisdictions. In general, property one of the spouses owned prior to marriage continues to be his or her separate property during marriage. Gifts and bequests of property one spouse receives during marriage are separate property. All other property is community property, including all earnings of either spouse. Commingling of separate prop-

legal emancipation increased the possibility that either spouse could incur liability individually or as an agent for the marital community. The new permutations exponentially increased the complexity of the effect of an individual's marital status on his credit relationships. An important challenge for creditors of community spouses was obtaining the right to foreclose on *community property* to satisfy one spouse's tort liability. As in non-community property jurisdictions, communal ownership of property did not correspond with the shared right to control it. With some exceptions, community property jurisdictions recognized the husband as having the exclusive right to manage and transfer nearly all the couple's community personal property.<sup>70</sup> By the early twentieth century, however, most community property states had enacted significant limitations on husbands' unilateral property control rights. For example, in New Mexico, California, Arizona and Texas, the husband's "head and master" control right excluded community *real* property as to which joinder of both spouses was required.<sup>71</sup>

During the same period, other community property jurisdictions made creditors' recourse to community property depend on whether the debtor had the right to manage it, not whether he held exclusive title to it. The effect of this "right to manage" approach was to afford creditors of husbands with broad access to community property coextensive with the husbands' broad statutory rights to manage it. For example, under California law, each spouse held a "present, equal and existing" interest in community property.<sup>72</sup> Until the mid-twentieth century, the husband held the exclusive right to manage community personal property other than the wife's earnings or property she ac-

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erty with community property changes separate to community property and all property obtained by either spouse during marriage is presumptively community property. See W. S. McCLANAHAN, *COMMUNITY PROPERTY LAW IN THE UNITED STATES* § 10:4, at 483-84 (Lawyers Co-op. Publ'g Co. 1982).

70. See McCLANAHAN, *supra* note 69, § 4:21, at 216 (noting that under Spanish community property system, the husband had "practically complete management and control of the community property").

71. *E.g.*, *In re Risse*, 319 P.2d 789, 793 (Cal. Dist. Ct. App. 1957) (describing California statutory provision requiring wife's consent to transfer of community real property interest as "wife's veto power"); *Frkovich v. Petranovich*, 151 P.2d 337, 342 (N.M. 1944) (describing 1915 amendment to New Mexico's community property law that made either spouse's unilateral conveyance of community real property void, thereby eliminating the husband's unilateral right to control community real property); ARIZ. REV. STAT. §§ 33-451, 33-452 (LexisNexis 1956); WASH. REV. CODE ANN. § 26.16.040 (West 1961). In the early twentieth century, some community property states enacted married women's wage legislation which granted management powers to community wives in certain forms of property, notably a married woman's wages. McCLANAHAN, *supra* note 69, at § 4:21.

72. CAL. CIV. CODE § 161a (West 1954).

quired by testamentary disposition or gift.<sup>73</sup> In 1941, the California Supreme Court held that a husband's tort creditor had recourse to both spouses' interests in community personal property as a corollary of the husband's statutory right to control it.<sup>74</sup> Conversely, when a wife incurred an obligation as an individual (other than for necessities for which her husband was also personally liable), her tort creditor had no recourse to community personal property because she had no right to control it.<sup>75</sup> This interpretation left observers wondering what the California legislature could have meant by declaring both spouses' interests in community property as "present, equal . . ." and "existing."<sup>76</sup>

An alternative response to resolve the problem of creditor recourse to community property was to afford one spouse's creditor recourse to it only to the extent of the debtor spouse's one-half interest.<sup>77</sup> This response brought into focus the role of marriage as a buffer for the economic welfare of family members against the claims of outsider creditors. If a creditor of one community spouse could foreclose on that spouse's one-half interest in community property, then logically community property held by an intact marital family would be subject to partition and forced sale. Courts were accustomed to dividing community property as a final accounting between spouses at death or

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73. *Id.* § 168 (exclusion of wife's earnings from husband's control); *id.* § 172a (West 1966); see also ARIZ. REV. STAT. § 25-211 (LexisNexis 1956); N.M. STAT. § 57-4-3 (1953); WASH. REV. CODE ANN. § 26.16.030 (1961). See generally, *LaTourette v. LaTourette*, 137 P. 426, 428 (Ariz. 1915) (noting that the husband's exclusive right to manage community personalty was not "in recognition of any higher or superior right that he has therein" but rather because of the expedience of recognizing a single agent for the community); WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 113, at 276 (Univ. Ariz. Press, 2d ed. 1971) (Recognition of the husband as the exclusive agent for the community justified by both gender supremacy and administrative expediency). If a husband did dispose of community personalty in fraud of his wife, the transfer to the third party would be valid. The defrauded wife would have a claim against the husband for fraud. DE FUNIAK & VAUGHN, *supra*, § 113, at 276.

74. *Grolemund v. Cafferata*, 111 P.2d 641, 644 (Cal. 1941) ("To hold that the husband could not subject the community property to liability for his tort would be to hold that he could not manage and control the same.").

75. *E.g.*, *McClain v. Tufts*, 187 P.2d 818 (Cal. Dist. Ct. App. 1947). To afford her creditor recourse to the community property "would be not only an unwarranted interference with, and infringement upon, the husband's right to management and control, but it would also permit his property to be taken for what is, as to him, a nonexistent liability." *Id.* at 819.

76. See Norvie L. Lay, *Tort Liability of Community Property*, 13 WAYNE L. REV. 706, 709 (1967).

77. New Mexico took this approach. *E.g.*, *McDonald v. Senn*, 204 P.2d 990, 1000 (N.M. 1949); N.M. STAT. § 40-3-10 (West 1978) (creditor of community wife entitled to recourse to her one half interest in community property). New Mexico's statute barred a married woman from incurring contract liability on the strength of community property. N.M. STAT. ANN. § 57-4-2 (West 1953). But it was silent as to her tort creditors' recourse to community property.

dissolution of marriage. They balked at the prospect of partitioning community property for a *creditor's* benefit, in many cases, subjecting the non-debtor community spouse to the loss of her financial security. Community property should be "left intact for the support and maintenance of the family" and should not be depleted during the marriage "for obligations not incurred for the benefit of the family."<sup>78</sup>

This theme, that a spouse's inchoate interest in community property was morally superior to the creditor's foreclosure interest, reflected a glaring flaw in the theory of marital community. Husband and wife were not in fact one, but rather two. Despite the utopian metaphor of the marital community, either spouse was and is legally entitled to incur liability benevolently for the betterment of the community or recklessly and selfishly to its detriment.<sup>79</sup> Some jurisdictions took on the task of differentiating between fact and theory in creditors' foreclosure actions. One resolution was to permit a creditor of only one spouse to foreclose on *community* property only if the debtor spouse incurred the obligation *for the benefit of* the marital community. Under this approach, creditor recourse to community property turned on an assessment of the nexus between the liability and the marriage. A creditor holding "community debt" could reach community property; a creditor holding a spouse's "separate" debt could not. In the latter case, the creditor would have the debtor's personal liability and recourse by judicial process to the debtor's separate property but not to either spouse's interest in community property.<sup>80</sup>

Most jurisdictions adopting this approach afforded creditors with a presumption that *contract* liability incurred by either spouse during the marriage was community debt.<sup>81</sup> When the debt was contractual,

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78. DE FUNIAK & VAUGHAN, *supra* note 73, § 162, at 385. Some courts expressed disapproval of the deleterious effect of splitting community property for the creditors of one spouse. *E.g.*, *Columbia Nat'l Bank of Dayton v. Embree*, 26 P. 257, 257 (Wash. 1891) (noting with disapproval that under Washington law, each spouse can devise one-half of community property, and that "persons interested in the community may be entirely excluded, and the property given at will to a stranger").

79. For a modern critique of the utopian metaphor or marital community, see Andrea B. Carroll, *The Superior Position of the Creditor in the Community Property Regime: Has the Community Become a Mere Creditor Collection Device?*, 47 SANTA CLARA L. REV. 1, 17-18 (2007).

80. Courts faced conflicts between the laws of the jurisdictions where the debt was incurred and property acquired. *E.g.*, *La Selle v. Woolery*, 44 P. 115, 115 (Wash. 1896). Some debtors took advantage of the differences in law between jurisdictions. *E.g.*, *Snyder v. Stringer*, 198 P. 733 (Wash. 1921) (husband purchased automobile on credit in a neighboring non-community property state (separate debt); the automobile was community property once brought into Washington, where the couple lived).

81. *E.g.*, *Cosper v. Valley Bank*, 237 P. 175, 178 (Ariz. 1925); *Strong v. Eakin*, 66 P. 539, 542 (N.M. 1901). See generally DE FUNIAK & VAUGHN, *supra* note 73, § 161, at 382 (noting that the issue of creditor recourse to community property is "ex-

the couple bore the burden of showing that it did not benefit the community.<sup>82</sup> As for *tort* liability incurred by only one spouse, however, jurisdictions varied widely in their approaches to characterization of the debt as "separate" or "community."<sup>83</sup> The *benefit* of tort liability to a couple was considerably more difficult to assess than that of contract liability, for which the couple usually received capital, property, or services. Courts approached the characterization of tort liability as "community" or "separate" based on a fact-driven balance of equity between the tort victim and the non-debtor spouse. For example, a plaintiff injured by the negligence of a husband driving a cab for hire could reach the couple's community property on the theory that the husband operated the cab for a financial return for the benefit of the marital community.<sup>84</sup> A husband who lied in a corporate real estate transaction acted for the benefit of the community so that the plaintiff could foreclose on corporate stock the couple held as community property.<sup>85</sup> On the other hand, a court found that a husband's liability for alienation of the plaintiff's wife's affections was not of benefit to the community, and protected his wife's interest in community property from the plaintiff's foreclosure action.<sup>86</sup> Also, a husband's liability for burning down a community-owned business in an attempt to collect insurance money and liability was his separate obligation.<sup>87</sup> Over time, jurisdictions adopting the debt-characterization approach relaxed the required nexus between a tort obligation and the community

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ceedingly difficult, for the statutes of the different states are all at sixes and sevens").

82. DE FUNIAK & VAUGHN, *supra* note 73, § 161, at 383.

83. *See generally* 15A AM. JUR. 2D *Community Property* § 98 (2000).

84. "It is clear, we think, that if the community . . . had employed a man to drive the automobile, and the negligence of this employee had caused the injury, the community would be liable. . . . [B]ecause the employee would be the agent of the community. . . ." *Milne v. Kane*, 116 P. 659, 659 (Wash. 1911); *see also* *Kangley v. Rogers*, 147 P. 898, 898 (Wash. 1915) (husband/notary public falsely certifies in capacity as an agent for a marital community).

85. *Wimmer v. Nicholson*, 275 P. 699, 700 (Wash. 1929) (court noted that the only source of income to the community was the husband's salary from the corporation and the return on their investment in corporate stock).

86. *Schramm v. Steele*, 166 P. 634, 637 (Wash. 1917). The court indicated that:

In not a single case has this court held or intimated that community property, whether real or personal, can be subjected to levy to satisfy a judgment against the husband alone for a tort committed by him alone, and not in connection with the community business nor for the benefit of the community.

*Id.* at 636; *cf.* *McFadden v. Watson*, 74 P.2d 1181, 1183 (Ariz. 1938) (husband's libel and slander held to be a community debt since husband acted to protect the financial interest of the community in a partnership).

87. *Bergman v. State*, 60 P.2d 699, 701 (Wash. 1936).

and effectively expanded one spouse's tort creditor's recourse to all community property.<sup>88</sup>

The strategic implications of rules governing creditor recourse to community spouses' property are apparent. If marital property law limits a creditor's recourse by foreclosure to his or her debtor's separate property, a person can use marriage as a wealth shield. For the price of a marriage license, a person can transform his interest in property that would have been available to his creditors into community property safe from his creditors, but happily within his control.<sup>89</sup> On the other hand, if one spouse's creditor has a right to foreclose on community property regardless of the circumstances in which the obligation was incurred (as in jurisdictions that afford creditors recourse to all community property the debtor had a right to manage), then the debtor's marital status would appear to some observers as a boon for creditors at the expense of the debtor's spouse. To the extent the debtor spouse can expose all community property to his or her creditors' recourse unilaterally, the other spouse's legal individuality and his or her "present and equal" interest in community property effectively disappears. This result is clearly at odds with the premise of marriage as a community of equal and legally distinct individuals.<sup>90</sup>

All approaches to creditor recourse to community property addressed the latent question of the scope of marital agency. In community property jurisdictions, creditors enjoy a special "back door" to the non-debtor spouse's interest in community property. A creditor of a community spouse can foreclose on community property the debtor has a right to manage, or whenever the liability benefits the community, without showing that the debtor spouse incurred the liability as an *agent* for the other spouse. It is important to note that this "back door" to community property does not make the non-debtor spouse *personally* liable for the other spouse's debt. Nor does it expose the

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88. See *Werker v. Knox*, 85 P.2d 1041, 1042 (Wash. 1938) (noting a trend "quite definitely in the direction of finding ways and means of imposing such liabilities upon the community"). In *Werker*, the court held that liability from the wife's negligent operation of the family car was a community debt. *Id.* at 1044. Three years earlier, the same court held that liability from an assault in the course of driving the family car was a separate debt. *Newbury v. Remington*, 52 P.2d 312, 313 (Wash. 1935). See generally DE FUNIAK & VAUGHN, *supra* note 73, § 161, at 382 (noting that the issue of creditor recourse to community property is "exceedingly difficult, for the statutes of the different states are all at sixes and sevens").

89. The effect became known as "marital bankruptcy." See, e.g., *Hines v. Hines*, 707 P.2d 969, 971 (Ariz. Ct. App. 1985); *Schilling v. Embree*, 575 P.2d 1262, 1264 (Ariz. Ct. App. 1977). See generally Carroll, *supra* note 79, at 8-9.

90. DE FUNIAK & VAUGHN, *supra* note 73, § 179, at 420-21 ("There is no reason in justice why the property of one who has not joined in undertakings with another, who stands to share in no profits from such undertakings, should share the burdens of such undertakings or be liable therefor in any way, just because of the marital relationship.").

non-debtor spouse's separate property to risk of loss to the debtor spouse's creditors. A creditor who cannot satisfy its claim via back door access to community property can still proceed against community property and the non-debtor spouse's separate property, but only by establishing the other spouse's personal liability. To do that, creditors in community property jurisdictions must use the front door to establish that the debtor spouse acted as agent for the other spouse.<sup>91</sup>

Creditors used married women's individuality to challenge the theoretical foundation of the marital estate of tenancy by the entirety. Tenancy by the entirety reflects a uniquely marital unity of title premised on the unity of person model of marriage. Both spouses hold an undivided one half interest in tenancy by the entirety property. And a creditor of only one spouse cannot partition it to foreclose on the debtor spouse's interest while the couple remains married without the consent of the other spouse.<sup>92</sup> In 1900, the Nebraska Supreme Court found tenancy by the entirety out of step with the post-reform marital relationship: "The old common-law idea of the oneness in the relation of husband and wife is fast disappearing. The identity of the woman is not lost in her husband. She is no longer under his dominion or control . . . [but they] are now considered as equals; and the relation as a dual equality . . . ."<sup>93</sup> The post-reform individuality of married women and the legal independence of spouses shook the theoretical foundation of tenancy by the entirety all to the advantage of creditors.

The chasm between married women's individuality for purposes of title to property and their legal right to control it persisted for more than a century after reform. Husbands typically held title to the couple's wealth and enjoyed nearly unilateral power to control it, except for limitations such as statutes that recognized wives' rights in

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91. *E.g.*, *Munger v. Boardman*, 88 P.2d 536 (Ariz. 1939) (wife deemed agent of husband by estoppel in favor of mortgagee of couple's real property); *Hulsman v. Ireland*, 270 P. 948 (Cal. 1928) (in a case of first impression, wife who incurred debt in restaurant business was agent by estoppel for her husband personally, and for their marital community; husband knew of, and benefited from, restaurant business); *Travers v. Barrett*, 97 P. 126 (Nev. 1900) (husband and community property not liable for wife's contract to sell property, husband had authorized wife to lease, but not sell).

92. *See supra* notes 22–24. The not-so-latent justification for tenancy by the entirety estate today is as a wealth-shielding device for married couples. *See, e.g.*, *Sawada v. Endo*, 561 P.2d 1291, 1297 (Haw. 1977) ("If we were to select between a public policy favoring the creditors of one of the spouses and one favoring the interests of the family unit, we would not hesitate to choose the latter." ).

93. *Kerner v. McDonald*, 60 Neb. 663, 84 N.W. 92 (1900). *See generally* 7 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 52.01 at 52-11 (Michael Allan Wolf, ed., LexisNexis Matthew Bender 2007) ("[T]enancy by the entirety remains a viable alternative in a majority of states in spite of periodic predictions of its demise."); *see generally* Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 445–46 (2001).

their own wages, or required joinder for real property transactions, or the common law doctrine of necessities.<sup>94</sup> In a 1967 law review article, a scholar noted that "the community property system vests the control and management of the common property in the hands of the husband, as the partner who due to economic and biological factors is more practiced and experienced in the acquisition and management of property."<sup>95</sup>

During this period, married women experienced a scissor effect from married women's property reform. They gained individuality for purposes of property rights, liability, and agency. They enjoyed no corresponding expansion of their legal or practical rights to control property or their husbands' conduct. Even so, by the end of the first half of the twentieth century, judicial solicitude for wives' economic plight in creditors' rights cases became muted. During the late nineteenth and early twentieth century, middle class couples were clearly using wives' separate estates as an asset protection strategy to shield wealth from husbands' creditors.<sup>96</sup> The new rhetoric in these cases became legal, not equitable. It focused on the legal independence of spouses and the corresponding possibility of an agency or partnership between them as a means by which she and her separate property might be liable for his debt. Ironically, a married woman's legal (but not practical) independence from her husband and his risky behavior became a weapon in creditors' hands to undermine her efforts to protect herself by accumulating a nest egg in her own name.

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94. In jurisdictions recognizing tenancy by the entirety, until reform in the last quarter of the twentieth century, husbands enjoyed exclusive control over tenancy by the entirety property. See George L. Haskins, *Estates Arising from the Marriage Relationship and Their Characteristics* in 1 AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES 615-758 (A. James Casner, ed., Little, Brown & Co. 1952); 2 ROBERT E. LEE, NORTH CAROLINA FAMILY LAW § 107 (4th ed. 1980). As an example of reform, see N.C. GEN. STAT. § 39-13-6 (1983) (husband and wife have equal right to the control real property held by them in tenancy by the entirety and neither spouse may alienate it without the written joinder of the other spouse).
  95. Michael J. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 45 (1967). See generally Scott Greene, *Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women*, 13 CREIGHTON L. REV. 71 (1979).
  96. E.g., *Pinkston v. Cedar Hill Nursery & Orchard Co.*, 51 S.E. 387 (Ga. 1905) (wife who owned orchard held liable for husband's debt to plant nursery as his undisclosed principal where he falsely represented he owned the orchard to nursery vendor); *Smith v. Miller*, 280 N.W. 493 (Iowa 1938) (wife liable for husband's fraud in connection with sale of her property); *Atherton v. Barber*, 128 N.W. 827 (Minn. 1910) (same); *Watring v. Gibson*, 100 S.E. 68 (W. Va. 1919) (same). But see *Etheridge v. Price*, 11 S.W. 1039 (Tex. 1889) (wife not liable for husband's oral misrepresentation in sale of her land where deed did not contain misrepresentation and she had no knowledge of it); *Lewis v. Hoeldtke*, 76 S.W. 309 (Tex. Civ. App. 1903) (same).



The possibility of an egalitarian partnership between husband and wife captured public attention in 1930 when the U.S. Supreme Court considered the effect of asserted marital partnerships in two income attribution tax cases. In both cases, married couples asserted that they were partners as justification for attributing salary earned by the husband to both. In *Lucas v. Earl*,<sup>97</sup> the Court rejected such an agreement as a sham.<sup>98</sup> The income was the husband's and was taxable entirely to him notwithstanding their private agreement otherwise. In contrast, in *Poe v. Seaborn*,<sup>99</sup> the Court validated a Washington couple's agreement to share income as a valid partnership. Despite the husband's exclusive power to control community property in the form of his income,<sup>100</sup> the Court held that Washington law gave the wife a present property interest in it, which she could contribute to their marital partnership.<sup>101</sup> The cases reveal a gap between the *legal* property rights of married women *vis-à-vis* their husbands and the prevailing view of marriage, under which wives typically depended on their husbands for support and deferred to their management and control of property. In the first case, the Court held that the husband's income was his and no agreement between the spouses could change that for income tax purposes. In the second, the Court deferred to state community property law on the income tax issue, even though by all other accounts, the husband's earned income was "his" and not really "theirs."

In 1946, the U.S. Supreme Court held that the key attributes of a marital partnership for the purpose of income attribution were shared contribution to, and control over, a business enterprise or investment

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97. 281 U.S. 111 (1930).

98. "There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it." *Id.* at 114-15.

99. 282 U.S. 101 (1930).

100. The *Poe* court stated that:

The reasons for conferring such sweeping powers of management on the husband are not far to seek. Public policy demands that in all ordinary circumstances, litigation between wife and husband during the life of the community should be discouraged. Law-suits between them would tend to subvert the marital relation. The same policy dictates that third parties who deal with the husband respecting community property shall be assured that the wife shall not be permitted to nullify his transactions.

*Id.* at 112.

101. The U.S. Attorney General had issued several opinions treating a California wife's interest in community property as a "mere expectancy contingent on her husband's death" but treating a wife's interest in community property in Washington, Arizona, Texas and other community property states as a "present vested" interest. *Id.* at 113-14.

other than the financial integration normally incident to marriage.<sup>102</sup> "If [the wife] either invests capital originating with her or substantially contributes to the control and management of the business, or otherwise performs vital additional services, or does all of these things, she may be a partner . . ."<sup>103</sup> Two years later, Congress ended the crisis that the prospect of marital partnership had posed to the income tax system. It permitted all married couples to attribute income earned by either to both on a joint tax return with joint tax liability, regardless of who actually owned or controlled the income.<sup>104</sup> Joint return legislation solved the marital partnership problem for income taxes. It left undisturbed, however, the Court's view that a couple's shared investment in *their marriage* could not invoke partnership consequences absent an arm's length relationship between the spouses in which both agreed to share ownership and control of property in an enterprise that was distinct from the ordinary shared financial enterprise of marriage. "Real" partnership required an *agreement* based on legal and financial equality between the participants, a circumstance mid-twentieth century observers thought was usually missing between spouses.<sup>105</sup>

### III. SPOUSES' RESPONSIBILITY FOR EACH OTHER UNDER MODERN MARRIAGE

In the last half of the twentieth century, the American labor market changed. Educational and employment opportunities for women expanded.<sup>106</sup> And women advanced toward political and legal equal-

102. *Comm'r of Internal Revenue v. Tower*, 327 U.S. 280, 290 (1946). "[T]he wife drew on income which the partnership books attributed to her only for purposes of buying and paying for the type of things she had bought for herself, home and family before the partnership was formed." *Id.* at 291-92. The husband controlled the income generated by the alleged partnership exactly as he had prior to its formation; the wife took no part in management of the business. *Id.* at 291; *see also Helvering v. Horst*, 311 U.S. 112 (1940).

103. *Tower*, 327 U.S. at 290.

104. 26 U.S.C. § 6015 (2006).

105. For example, in *Cooper v. Knox*, 90 S.E.2d 844 (Va. 1956), the court protected a wife from imputed liability for her husband's business debt although she participated in management of the business. Mrs. Knox had no "voice" in the operation of the business even though she described it to third parties as "our" business, kept the business books, and used business revenue to pay the couple's household expenses. *Id.* at 846-47. Rather, "her statements and conduct merely indicate a devoted and faithful wife's interest in the successful operation of her husband's business," not the existence of a business partnership between them. *Id.* at 847.

106. *See* PAULA ENGLAND & GEORGE FARKAS, *HOUSEHOLDS, EMPLOYMENT AND GENDER: A SOCIAL, ECONOMIC, AND DEMOGRAPHIC VIEW* 11-15 (Aldine Pub. Co. 1986). Before World War II, female employment was limited primarily to young, single women or poor, married women. Few middle-class wives held jobs. WILLIAM HENRY CHAFE, *WOMEN AND EQUALITY: CHANGING PATTERNS IN AMERICAN CULTURE* 92-93 (Oxford Univ. Press 1977). After the war, despite political efforts to

ity as legislatures and courts dismantled legal regimes that had been based on the premise of women's economic inferiority to men.<sup>107</sup> Married women earned an increasing portion of family income.<sup>108</sup> One commentator explains that for most married middle class women who chose to work outside the home, "the decision to get up early, drop the children off at daycare, and head to the office or factory was [at least in part] . . . a calculated attempt to give their families an economic edge."<sup>109</sup> Social attitudes about the role of women as mothers and caregivers within marriage also changed. In 1970, 78% of younger married women thought that "it was better for wives to be homemakers and husbands to do the breadwinning."<sup>110</sup> By the end of the twentieth century, only 38% of American women described a lone full-time parental care-giver for children as "ideal"; nearly 70% of adults believed that the gender of the stay at home parent was irrelevant.<sup>111</sup>

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lure working women out of the labor force, the percentage of women working outside the home continued to grow. *Id.* at 94. Chafe notes that in the 1950's women in the labor force were increasing at a rate four times faster than men. *Id.* By 1960, 40% of all women over sixteen were in the labor force compared with 25% in 1940. *Id.* at 94-95. "The very fact of massive increases in female employment destroyed the reality of traditional notions of women's 'place' in the home." *Id.* at 95-96.

107. *E.g.*, *Orr v. Orr*, 440 U.S. 268 (1979) (state law allowing women, but not men, to seek alimony upon divorce violates Equal Protection Clause); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (striking a presumption entitling wives and widows, but not husbands and widowers, to full spousal benefits without proof of financial dependency); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 n.11 (1975) ("[T]he presumption of complete dependency of wives upon husbands has little relationship to present reality."); *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (striking requirement that spouses of female, but not male, members of the uniformed services prove dependency for purposes of obtaining benefits as a violation of the due process clause).
108. Sharon M. Danes & Mary Winter, *The Impact of the Employment of the Wife on the Achievement of Home Ownership*, 24 J. CONSUMER AFF. 148, 165-66 (1990); Mark Evan Edwards, *Home Ownership, Affordability, and Mothers' Changing Work and Family Roles*, 82 SOC. SCI. Q. 369, 373-74 (2001). Before the last quarter of the twentieth century, women in the workforce were predominantly older, lower-income or childless: middle class women tended to become full time homemakers. Elizabeth Warren, *Families Alone: The Changing Economics of Rearing Children*, 58 OKLA. L. REV. 551, 566 (2005); see STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 162 (Basic Books 1992). In the last twenty five years, middle class mothers joined the workforce at rates exceeding women in other socioeconomic classes. Warren, *supra*, at 566, LAWRENCE MISHLE ET AL., *THE STATE OF WORKING AMERICA 2002/2003*, at 103 (Cornell Univ. Press 2003) (fig. 1S shows the contribution of wives' earnings to family incomes between 1970 and 2000).
109. Warren, *supra* note 108, at 565-66.
110. COONTZ, *supra* note 108, at 168.
111. See ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* 30, 201 n.59 (Basic Books 2003) (citing Chris McComb, *Few Say It's Ideal for Both Parents to Work Full Time Outside of Home*, GALLUP NEWS SERVICE, May 4, 2001, at 2-3, availa-

Public opinion about the social role of marriage also changed dramatically. Reform in the late twentieth century abandoned fault as prerequisite for divorce and diminished it as a factor in parties' post-divorce financial relationship.<sup>112</sup> Today, most commentators assert that the function of divorce law is not to punish transgressing spouses for their antisocial behavior, but rather to make a "clean break" for the couple financially.<sup>113</sup> Divorce law prescribes the process of reconciling spouses' claims against each other. The process and principles of divorce allow the couple to disentangle their individual interests from their marriage, dissolve their joint investments, and go their separate ways.<sup>114</sup> While a couple is married, however, the scope of one spouse's responsibility for the other to a third party is not purely a private matter between the spouses. Divorce law reform did not change the effect of a marital relationship on creditors—at least not directly.

### A. Status-Based Shared Liability

Even though divorce law reconstructs marriage as a contract at the will of the parties, marital *status*—the fact that two people are married—triggers shared financial responsibility to third parties without regard to the parties' private agreement. In other words, in some circumstances, an insolvent spouse's liability is the other spouse's problem simply because the couple is married. Today, perhaps the most economically significant source of status-based shared liability is for debt either spouse incurs for "necessaries." Two-thirds of the states retain the common law doctrine of necessities, including five of the nine community property jurisdictions.<sup>115</sup> Some jurisdictions have

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ble at <http://poll.gallup.com/content/default.aspx?ci=1558> (available by subscription only).

112. California passed the first no-fault divorce legislation in 1970. See CAL. CIV. CODE §§ 4503–09 (West 1970). By 1985, all states recognized a basis for no-fault divorce. See Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 25 FAM. L.Q. 417, 439–40 (1992).
113. E.g., Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 313 (1987) (California's no-fault divorce statute achieves a "clean break" between spouses); Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2314 (1994) (discussing how the new model of marriage and divorce replaced state-imposed status and duty with a transitory relationship between individuals who voluntarily yield some autonomy over their property and person until they end the marriage and regain the full measure of their individual autonomy).
114. E.g., UNIF. MARRIAGE & DIVORCE ACT, Prefatory Note, 9A U.L.A. 149 (1987) ("The distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership.").
115. See, e.g., 23 PA. CONS. STAT. ANN. § 4102 (West 2001) (creditor for necessities of one spouse may sue both spouses, execute against property of contracting spouse, and if insufficient property is found, recover from property of non-contracting

adopted “family expense” statutes that impose liability on both husband and wife for designated family expenses incurred by either of them.<sup>116</sup> These laws impose a range of shared financial responsibility on spouses, regardless of their private agreement as to who between them will bear the risk. Driver insolvency in automobile accidents prompted the emergence of the “family purpose doctrine” by which courts imposed one family member’s tort liability on other solvent family members based on family activities as joint enterprise. Under this doctrine, family members were *de facto* agents of one another for operation of the family automobile, and also shared financial responsibility for tort victims of the joint enterprise.<sup>117</sup> Today, permissive use and mandatory automobile insurance legislation address the problem of driver insolvency, and many jurisdictions have abrogated the common law family purpose doctrine.<sup>118</sup>

Community property jurisdictions impose an important source of shared liability on married people by way of the doctrine that governs creditors’ foreclosure rights in community property. Statutes vary,

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spouse); see Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 838 n.34 (2006) (listing selected jurisdictions); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 517 (2d Cir. 1973) (discussing doctrine of necessities under common law). Some jurisdictions have found the common law doctrine of necessities, which imposed liability for necessities on husband but not wife, a violation of the equal Protection Clause and have abrogated it entirely. *E.g.*, Emanuel v. McGriff, 596 So. 2d 578 (Ala. 1992); N. Ottawa Cmty. Hosp. v. Kieft, 578 N.W.2d 267 (Mich. 1998).

116. *E.g.*, CAL. FAM. CODE § 914 (West 2004); COLO. REV. STAT. § 14-6-110 (2005); 750 ILL. COMP. STAT. 65/15 (1990); IOWA CODE ANN. § 597.14 (West 2001); MONT. CODE ANN. § 40-2-210 (2005); NEV. REV. STAT. ANN. § 123.090 (West 2005); TEX. FAM. CODE ANN. § 3.201(a)(2) (Vernon 2006); WASH. REV. CODE ANN. § 26.16.205 (West 2007) (expenses of the family and the education of the children, including stepchildren); WIS. STAT. ANN. § 766.55(2) (West 2001). See, e.g., *In re Olexa*, 317 B.R. 290, 295–97 (Bankr. W.D. Penn. 2004) (debtor’s husband secondarily liable for debtor’s credit card debt under state “necessaries” statute); N. Shore Cmty. Bank & Trust Co. v. Kollar, 710 N.E.2d 106, 109–10 (Ill. App. Ct. 1999) (describing “family expenses” as including debts for hospital, medical and funeral services, utilities, wearing apparel, including furs and jewelry, rent, wages for domestic servant, but excluding business expenses, or obligation to repay loan for cash); Nelson v. First Nat’l Bank Omaha, No. C8-02-11233, 2004 WL 2711032 (Minn. Ct. App. 2004) (not reported) (court denies bank’s motion for summary judgment against husband on absence of proof that wife used credit card for household articles used by the family).

117. See generally 8 AM. JUR. 2D *Automobiles and Highway Traffic* § 714 (2007).

118. See, e.g., *McMartin v. Saemisch*, 116 N.W.2d 491, 494 (Iowa 1962) (holding that “[l]iability may now rest upon the firm foundation of the statute, or a true agency, etc., and not on an ox bow appendage tenuously attached to the law of agency”); *Jacobsen v. Dailey*, 36 N.W.2d 711, 715–16 (Minn. 1949) (holding that statute making the owner liable when the car is driven by another person with the consent of the owner has in effect replaced the family purpose doctrine, such doctrine is no longer in operation). See generally 7 AM. JUR. 2D *Automobile Insurance* § 22 (2007).

but generally recognize a “separate but equal” right for each spouse to control some forms of community property.<sup>119</sup> Note that unlike tenants in common who cannot alienate or encumber the other tenant’s interest without his or her consent, in jurisdictions that match creditor recourse to community property to a community debtor’s right to control it, either spouse’s creditor has recourse to all community property that spouse has a right to control.<sup>120</sup> Some jurisdictions go even further in favor of creditors. California and Louisiana expressly afford a spouse’s creditor with recourse to community property the *other* spouse manages exclusively.<sup>121</sup> Texas allows a tort, but not contract, creditor to have recourse to community property under the other spouse’s exclusive management.<sup>122</sup>

Other community property jurisdictions handle creditor recourse to community property based on whether the debt benefits the com-

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119. *E.g.*, ARIZ. REV. STAT. ANN. § 25-214(C) (2007) (“Either spouse separately may acquire, manage, control or dispose of community property or bind the community” subject to enumerated exceptions.); WASH. REV. CODE ANN. § 26.16.030 (West 2005) (“Either spouse, acting alone, may manage and control community property, with a like power of disposition as the acting spouse has over his or her separate property” subject to enumerated exceptions); see W. S. McCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES §§ 9:11–9:12 (1982) (discussing transfers of property and “equal management” statutes); Elizabeth De Armond, *It Takes Two: Remodeling the Management and Control Provisions of Community Property Law*, 30 GONZ. L. REV. 235, 247 n.57 (1994). All community property states require joinder of both spouses for certain transactions, such as those involving real estate, suretyship, or household goods. Some states permit the couple to designate certain property, such as businesses and partnership and stock interests, as “exclusive management” property over which one spouse has the exclusive right to manage. *E.g.*, CAL. FAM. CODE § 1100(d) (West 2004); LA. CIV. CODE ANN. art. 2350 (1985); NEV. REV. STAT. § 123.230(6) (2007); WASH. REV. CODE ANN. § 26.16.030 (West 2005). Under some statutes, a spouse who is named in the title for certain types of community property has sole power to manage it. N.M. STAT. ANN. § 40-3-14(B) (LexisNexis 1978) (any community property); LA. CIV. CODE ANN. art. 2351 (1985) (movables issued or registered in the spouse’s name); LA. CIV. CODE ANN. art. 2352 (1985 & Supp. 2008) (a partnership interest held by a spouse). Under Texas law, each spouse retains the exclusive right to manage property he or she brings into the marriage, and enjoys an equal unilateral right to manage community property acquired during marriage. TEX. FAM. CODE ANN. § 3.102 (Vernon 2006).

120. See generally De Armond *supra* note 119, at 247.

121. CAL. FAM. CODE § 910(a) (West 2004) (“Except as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt.”); *id.* § 911 (exception providing for non-liability of segregated earnings of non-debtor spouse); LA. CIV. CODE ANN. art. 2345 (1985) (“A separate or community obligation may be satisfied during the community property regime from community property and from the separate property of the spouse who incurred the obligation.”).

122. TEX. FAM. CODE ANN. § 3.202 (Vernon 2006).

munity.<sup>123</sup> A recurring problem arises when the debt is tort liability which does not appear to “benefit” the community. If the tort liability is not a community debt, the tort claimant cannot recover against a married tortfeasor who holds only community property.

For example, Washington common law generally protects community property from creditor recourse to satisfy the separate debts of either spouse.<sup>124</sup> In *deElche v. Jacobsen*,<sup>125</sup> a spouse incurred separate tort liability, but his separate property was insufficient to satisfy the victim’s claim. Under the general rule, the court faced a Hobson’s choice: allow recourse to community property to satisfy separate liability incurred by one spouse absent “benefit to the community,” or protect all community property at the expense of the tort victim even though the tortfeasor is solvent, albeit with wealth “tied up” in community property.<sup>126</sup> The court gave the tort victim recourse to community property for the separate debt. At the same time, it gave the tortfeasor’s spouse a right to reimbursement against the tortfeasor for any loss to her interest in community property. Her right against the debtor spouse would be secured by an equitable lien enforceable upon termination of the community.<sup>127</sup>

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123. *E.g.*, ARIZ. REV. STAT. ANN. § 25-215 (2007) (debt incurred for benefit of community shall be satisfied first from community property and second from the debtor’s separate property); N.M. STAT. ANN. §§ 40-3-10, 40-3-11 (LexisNexis 1978) (a creditor on separate debt must exhaust his debtor’s separate property before seizure of the debtor spouse’s one-half interest in the community property). Under Wisconsin law, for tort obligations incurred by one spouse, only the tortfeasor’s share of community property is liable. WIS. STAT. ANN. § 766.55 (West 2001). *E.g.*, *Max L. Wells Trust v. Grand Cent. Sauna & Hot Tub Co.*, 815 P.2d 284 (Wash. Ct. App. 1991) (obligation incurred or enterprise undertaken by either spouse during marriage is presumptively for benefit of community). *But see* *Colorado Nat’l Bank v. Merlino*, 668 P.2d 1304 (Wash. Ct. App. 1983) (given broad community management powers of both spouses in Washington, debt for purchase of real property is presumptively separate debt where other spouse does not execute transaction).

124. *Nichols Hills Bank v. McCool*, 701 P.2d 1114 (Wash. 1985). *But see* *Fisch v. Marler*, 97 P.2d 147 (Wash. 1939) (husband’s former wife could seize his community property to satisfy his support obligation to her based on statutory exception to rule in favor of a creditor who reduces liability to judgment within three years before the debtor’s marriage for separate debts for child support and to the debtor’s former spouse as to the debtor’s “earnings and accumulations”); WASH. REV. CODE ANN. § 26.16.200 (West 2005) (exceptions to immunity of community property for separate debt for child support and as to debtor spouse’s “earnings and accumulations” in favor of a creditor who reduces liability to judgment within three years before marriage).

125. 622 P.2d 835 (Wash. 1980).

126. *Id.* at 838.

127. *Id.* at 840. *See also id.* at 842 (Horowitz, J., dissenting) (“Community property, enjoying such a protected position in our scheme of marital community ownership, cannot be subjected to the individual spouse’s separate debt simply because it in some sense “belongs” to him . . .”). In *Keene v. Edie*, 935 P.2d 588, 595 (Wash. 1997), the Court expanded the holding in *deElche* to afford a tort creditor

## B. Imputed Liability

As we have seen, spouses' prerogative to hold wealth *either* as individuals or jointly within marriage makes it possible for spouses to adopt a private allocation of wealth for the purpose of shielding some assets from risk of loss to creditors. To respond to this strategy, creditors of an insolvent spouse argue that the other spouse who is not directly liable (and her separately-held property interests) should be liable by imputation. Where the liability at issue is not one for which spouses share liability by virtue of marital or family status, creditors must show a partnership or other agency relationship between spouses to impute one spouse's liability to the other.

Partnership and agency law tend to allocate loss an insolvent debtor cannot absorb to the party whose relationship with the debtor affords him a relative advantage in insuring against or preventing the loss in the first place.<sup>128</sup> For example, the term "partnership" refers to a mutual agency relationship in which participants act as agents for each other to carry on a shared business enterprise.<sup>129</sup> Persons who intend to be partners are agents for the partnership and are vicariously liable for each other's conduct within the scope of the partnership.<sup>130</sup> The fact that two persons co-own property and share the profits and losses it generates is not enough to establish a partnership with corresponding shared liability.<sup>131</sup> The two people must share

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recourse to community *real* property. In *Haley v. Highland*, 12 P.3d 119 (Wash. 2000), a tort creditor could reach the debtor's one half interest in community property even though the tort occurred prior to the marriage. Under Arizona law, a creditor of one spouse on pre-marital separate debt can foreclose on community property "but only to the extent of the value of that spouse's contribution to the community property which would have been such spouse's separate property if single." ARIZONA REV. STAT. ANN. § 25-215(b) (2007); e.g., *Schilling v. Embree*, 575 P.2d 1262, 1264 (Ariz. Ct. App. 1977).

128. Although the purpose of vicarious liability is debatable, the dominant explanation is efficiency. See BROMBERG & RIBSTEIN, *supra* note 2, § 4.07(a) (partnership tort and contractual liability is justified by the principle that the partnership should bear the loss if it could efficiently reduce the probability of the harms occurring by controlling its partners). See generally *Latent Efficiency*, *supra* note 4, at 1227-34 (explaining how equity holders, creditors, and transferees of the debtor can avoid or insure against the debtor's default and insolvency).
129. E.g., REVISED UNIF. P'SHIP. ACT § 306(a), 6 U.L.A. 117 (1997) (all partners are jointly and severally liable for all obligations of the partnership). If a third party can establish that the persons are partners then the debtor's agency for the partnership is presumed under partnership law for any act that is carrying on the partnership in the usual way, unless the third party knows the person's authority is restricted. *Id.* § 301(1), 6 U.L.A. at 101. See generally BROMBERG & RIBSTEIN, *supra* note 2, §§ 4.07-4.08 (describing a partner's presumptive power to bind the partnership as to "usual or ordinary course" acts as "partnership power").
130. REVISED UNIF. P'SHIP ACT § 3.08, 6 U.L.A. at 128.
131. *Id.* § 202(c) cmt. 1, 6 U.L.A. at 93 ("[P]assive co-ownership of property by itself, as distinguished from the carrying on of a business, does not establish a partnership.").



both ownership *and control* of an enterprise.<sup>132</sup> The legal right to control an enterprise gives a participant who does not incur direct liability an opportunity to monitor, control, and insure against loss from the other partner's conduct within the scope of their shared enterprise. This opportunity gives the other participant an advantage in preventing or insuring against risk of loss from the debtor's conduct over a creditor who has only a credit relationship with the debtor. Shared ownership creates an incentive for one participant to control the behavior of the other. Shared right of control makes it possible for her to do so relatively cheaply. Whenever the combination of incentive and right to control the debtor makes the other participant the cheaper bearer of risk of loss (relative to the creditor), imputed liability tends to be the efficient allocation.<sup>133</sup>

A creditor can argue that even though two people are not partners in a common enterprise, one of them authorized the other to act as her agent with respect to a particular risky activity. Absent evidence of an express agreement as to actual authority between principal and agent,<sup>134</sup> a court can find authority by implication (apparent authority) based on the perspective of the creditor who deals with the directly liable person (the actor).<sup>135</sup> The principal is vicariously liable for the actor's conduct if the creditor reasonably believed the actor had authority to act on her behalf and the creditor's belief is "traceable to a

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132. An association is a partnership if the participants are carrying on a for profit business as co-owners. *Id.* §§ 101(6), 202, at 61, 92–93. Bromberg & Ribstein observe that the shared ownership and control test is more subtle than it appears. Profit sharing is "probably the most important element" whereas shared right to control is "also important" but "somewhat more elusive because of the many gradations of control and because partners often delegate decision-making power." BROMBERG & RIBSTEIN, *supra* note 2, § 2.07.

133. *E.g.*, BROMBERG & RIBSTEIN, *supra* note 2, § 4.07(a) n.1; R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937), reprinted in READINGS IN PRICE THEORY 331 (George J. Stigler & Kenneth E. Boulding eds., 1952) (explaining the relative efficiency of a firm in which agent/managers allocate resources by allocation of discretion among collaborators rather than through discrete market transactions with third parties); see also RESTATEMENT (THIRD) OF AGENCY § 5.04 cmt. b (2006) ("A principal's opportunity to monitor an agent and create incentives for the proper handling of information warrant[s] imputing an agent's knowledge to the principal even when the agent has breached duties of disclosure to the principal.").

134. A principal grants actual authority to an agent by a "manifestation . . . that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf." RESTATEMENT (THIRD) OF AGENCY § 3.01 (2006).

135. *Id.* § 2.03. Apparent authority arises by inference from a person's "manifestation that another has authority to act with legal consequences [for him], when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation." *Id.* § 3.03.

manifestation of the principal.”<sup>136</sup> The drafters of the *Restatement (Third) of Agency* note that apparent authority aligns the private relationship between the principal and agent with the impression they give reasonable observers. “A principal may not choose to act through agents whom it has clothed with the trappings of authority and then determine at a later time whether the consequences of their acts offer an advantage.”<sup>137</sup>

An alternative argument for imputed agency by implication is agency by estoppel or ratification.<sup>138</sup> One party cannot deny that the other acted as her agent if she: 1) failed to use ordinary care to control the other party; 2) that failure enabled the other party to create a reasonable misperception of agency in a third party; and 3) the third party changed its position in reliance on that misperception.<sup>139</sup> Shared liability by ratification implements restitutionary principles. One person may be liable for another if she knows about, and accepts, the benefits of the other person’s act with knowledge after the fact.<sup>140</sup>

136. *Id.* § 2.03 cmt. c. A “manifestation” includes written or spoken words and other conduct that expresses meaning. *Id.* § 1.03 cmt. b. If a principal voluntarily manifests intention to create an agency or assent to another’s agency for him, the manifestation is effective to support an inference of apparent authority even if the principal made the manifestation negligently or mistakenly. *Id.* § 1.03 cmt. d. “The relevant state of mind is that of the person who observes or otherwise learns of the manifestation.” *Id.* § 1.03 cmt. b.

137. *Id.* § 2.03 cmt. c. *Restatement (Third) of Agency* § 3.03 cmt. c (2006) states:

Apparent authority is an essential adjunct to actual authority in enabling third parties to deal effectively with organizations. . . . [It] enables persons who interact with the organization to treat the agent’s act or statement as dispositive, without further inquiry directed elsewhere within the organization, in the absence of circumstances suggestive of self-dealing or other irregularity.

One person’s silence and inaction with knowledge that another person purports to act for his benefit may constitute a manifestation sufficient to justify imposition of vicarious liability on him whenever the third party reasonably believed the principal acquiesced in the directly liable person’s actions. *See id.* § 3.03 cmt. b.

138. The difference between liability based on authority by implication and liability based on ratification or estoppel is that the latter does not require a manifestation of authority on the part of the vicariously liable person to the third party.

139. *Id.* § 2.05. Vicarious liability based on estoppel, also known as ostensible authority, recognizes that one person (the principal) can become liable for the acts of another based on the principal’s failure to exercise ordinary care. The principal’s own failure to use ordinary care “enables the agent, or an actor who purports to be an agent, to misrepresent the agent’s authority . . . .” *Id.* § 2.05 cmt. d.

140. *See id.* § 4.01 (defining ratification). A person ratifies the act of another by “manifesting assent” or by “conduct that justifies a reasonable assumption that the person so consents.” *Id.* § 4.01(2). A principal must have knowledge (not just notice) of the facts of the act he ratifies. A person may lose his right to raise his lack of knowledge of the facts as a defense to ratification, if after learning of the facts, he retains the benefits of the transaction with knowledge of the facts. *See id.* § 4.06; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981) (a party

Such a person will be treated as though she authorized both the reward and the risk of his action before the fact.<sup>141</sup>

The easiest statement to make about the existence and scope of marital partnership or agency is also the most general. Marital status alone does not establish that spouses intend to share ownership, control, and risk of all property interests held by either of them as partners. It does not establish a mutual agency such that the act of one is always the act of both.<sup>142</sup> Yet, like any two legally distinct individuals, one spouse can act as agent for the other. Although the couple's marital status is not dispositive, a couple's financial integration and behavior *within the context of their marriage* is relevant to determining the existence and scope of an implied partnership or agency between them.<sup>143</sup>

Some common themes appear in marital agency cases. First, it is clear that marriage matters. Some courts continue to recognize the distinction between "simply married" and "also partners" that the Supreme Court raised in the income tax cases. They differentiate between the ordinary financial integration typical between *entrepreneurial* partners (which supports imputation of liability) and *marital* integration (which does not). For these courts, sharing of ownership and control of assets is consistent with the couple's intention to be *married*. It does not support an inference of their shared intention to manage an investment or business together as a partnership.<sup>144</sup>

For example in *Barmes v. I.R.S.*,<sup>145</sup> the court considered an employee withholding tax dispute arising from the operation of a gift

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may avoid a contract based on material misrepresentation if the party is justified in relying on the misrepresentation).

141. See RESTATEMENT (THIRD) OF AGENCY § 4.01 cmt. b. ("[R]atification is both an act and a set of effects."). Under some circumstances, a person may be estopped to deny ratification of the acts of another as against a third party who has relied on the ratification to his detriment. *Id.* § 4.08.
142. *E.g.*, *Ryan v. Rademacher*, 142 S.W.3d 846 (Mo. Ct. App. 2004); *Ellsworth v. Am. Arbitration Ass'n*, 148 P.3d 983 (Utah 2006).
143. *State Farm Fire & Cas. Co. v. Garrett*, 783 N.E.2d 329 (Ind. Ct. App. 2003) (indicating that marriage does not in itself create an agency relationship between spouses; however, the marital relationship is one of facts and circumstances to be considered in determining the existence of an agency relationship); *Nwannunu v. Weichman & Associates, P.C.*, 770 N.E.2d 871 (Ind. Ct. App. 2002) (same); *Nationwide Mut. Ins. Co. v. Prioleau*, 597 S.E.2d 165 (S.C. Ct. App. 2004).
144. *See, e.g.*, *Bayes v. Isenberg*, 429 N.E.2d 654, 659 (Ind. Ct. App. 1981) (indicating that to establish an agency relationship, "the evidence must be clear and satisfactory and sufficiently strong to explain and remove the equivocal character . . . of the marital relation[ship]"); *Ogallala Fertilizer Co. v. Salsbery*, 186 Neb. 537, 184 N.W.2d 729, 730 (1971) (partnership between husband and wife was disputed question of fact where wife's participation in farming business was consistent with spouses' mutual marital duties of support and service).
145. 116 F. Supp. 2d 1007 (S.D. Ind. 2000).

shop business.<sup>146</sup> “[W]ith respect to a husband and wife, co-ownership of property and the sharing of business profits do not demonstrate a partnership because those arrangements are common in marriages.”<sup>147</sup> Because Mrs. Barmes was not Mr. Barmes’ partner, but was merely his wife, she was not personally liable for the business’s withholding tax debt.<sup>148</sup> Absent evidence that Mrs. Barmes “helped to run the business,” the court treated the tax liability as exclusively Mr. Barmes’s and protected Mrs. Barmes and property titled in her name from IRS recourse.<sup>149</sup>

The unexplored issue in cases like *Barmes v. I.R.S.* is *how* a court is to determine whether a couple is “simply married” or “also partners” for purposes of imputed liability. What kind of interaction between spouses divides ordinary marital sharing from a partnership? Marital agency cases reveal no clear line. Instead, courts evaluate each couple’s behavior against an unspoken norm of socially desirable marital behavior. At some point, a couple’s relationship stops looking like “just marriage,” and begins to look like strategic wealth-shielding only incidentally accomplished within a marriage.

For example, in *In re Tsurukawa*,<sup>150</sup> the debtor’s husband set up a corporation in her name and used it to defraud his employer of more than \$2 million. She executed corporate and bank documents in which she identified herself as the sole owner of the corporation. She wrote checks on the corporate bank account and used the corporate credit card for family expenses.<sup>151</sup> The couple used the fraud proceeds to buy two additional houses and new cars.<sup>152</sup> After the fraud victim

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146. *Id.* at 1009. The IRS asserted liens against both spouses individually on the theory that Barbara’s Gift Shop was a partnership between the spouses and that both spouses were individually as its general partners. The Barmes challenged the IRS liens against Mrs. Barmes on grounds that Mr. Barmes was the sole owner of Barbara’s Gift Shop. *Id.* at 1013.

147. *Id.* at 1013.

148. “[T]hat she is her husband’s wife is not enough.” *Id.* at 1014. In an earlier case, an Indiana court gave some indication of the kind of involvement that might support an inference of partnership between spouses. *Soley v. VanKeppel*, 656 N.E.2d 508 (Ind. Ct. App. 1995) (holding that plaintiff in dram shop liability case raised material issue of fact as to whether husband and wife operated saloon as partners; wife was co-owner of saloon property, worked at the bar and held herself out as a co-owner to vendors, but liquor license, operating permit, food service license, retail merchant certificate and tax returns were in husband’s name as sole proprietor).

149. *Barmes*, 116 F. Supp. 2d at 1012. In *Johnson v. Wiley*, 613 N.E.2d 446, 451 (Ind. Ct. App. 1993), a husband and wife were partners in a real estate business. The court applied what it called a “duck test” to determine the legal nature of the Johnsons’ relationship: “[T]he Johnsons acted like partners, worked like partners, and shared profits/losses as partners.” *Id.*

150. 287 B.R. 515 (B.A.P. 9th Cir. 2002).

151. *Id.* at 518–19.

152. *Id.* at 519.

obtained a judgment against the couple,<sup>153</sup> the wife filed for bankruptcy. The victim objected to her discharge.<sup>154</sup> The debtor argued that her husband's fraud should not be imputed to her because she and her husband were not business partners.<sup>155</sup> She claimed her husband ran the business; she was merely a "figurehead."<sup>156</sup>

The Ninth Circuit Bankruptcy Appellate Panel held that she was her husband's partner, not just his wife.<sup>157</sup> It noted that evidence of sharing of ownership and control between married people can be ambiguous.<sup>158</sup> Finding partnership between spouses too easily would inhibit socially valuable marital sharing. In this case, however, an inference of partnership (and imputed liability) would not "unfairly affect the marital community."<sup>159</sup> The debtor spouse held herself out to the fraud victim as the owner of the corporation through which the husband worked his fraud. She performed "substantial activities" for the business, and "assumed an active role . . . that [went] beyond merely holding a community property interest in her husband's business . . . ."<sup>160</sup>

The court could have reached the same result by reasoning backward. The Tsurukawas were partners because their behavior was naked wealth-shielding and beyond the scope of socially valuable marital

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153. *Id.* Under California law, the judgment was community debt. *Id.* at 519 n.4.

154. Under Bankruptcy Code § 523(a)(2), a claim for certain kinds of financial fraud is nondischargeable. 11 U.S.C. § 523(a)(2) (2006). See generally Bernice B. Donald, *Fraud Imputation Under Section 523(a)(2)(A): Is a Partner Always Liable for Wrongdoing by the Partnership?*, 24 MEM. ST. U. L. REV. 651 (1994).

155. *In re Tsuruskawa*, 287 B.R. at 521.

156. *Id.* In support of being having no control:

Debtor maintained that she could not question or direct her husband's business affairs because she was "simply a homemaker and mother; it was not her station in life to delve into [the husband's] job or his business," and she "was *never* in any position to dictate what he could or could not do."

*Id.*

157. The bankruptcy court held Mrs. Tsurukawa's debt to be nondischargeable. The Ninth Circuit B.A.P. reversed on grounds that under California law, a marital relationship alone was insufficient to justify imputation of the husband's fraud to the wife. On remand, the bankruptcy court held the wife and husband were partners and imputed his fraud liability to her. The B.A.P. affirmed. *Id.* at 518.

158. The B.A.P. court noted that:

[I]t is not appropriate to find an agency relationship in every instance in which a spouse takes bare legal title to business property held for the benefit of the couple . . . where one spouse performs minor services for a business run by the other spouse . . . [or where] spouses share the profits of an enterprise, because under community property law a husband and wife generally share the profits of a business managed by either spouse.

*Id.* at 522.

159. *Id.* at 524.

160. *Id.* at 522-23.

cooperation.<sup>161</sup> Alternatively, the court could have decided the case based on agency between husband and wife, without finding a marital partnership. It could have held Mrs. Tsurukawa liable for her husband's fraud on grounds that she authorized his fraudulent conduct by ratification.<sup>162</sup> The legal question posed by this argument is whether she accepted the benefits of his fraudulent conduct with sufficient knowledge so that his liability should be imputed to her. The level of knowledge that is sufficient for this purpose varies among jurisdictions. Some courts impute one spouse's fraud liability to the other based on ratification only if the other retains the benefits with *actual* knowledge of the fraud.<sup>163</sup> Others presume the requisite knowledge of the fraud on proof of circumstances that would have put a reasonable person on inquiry as to the source of the benefit.<sup>164</sup>

In *Tsurukawa*, the wife charged hundreds of thousands of dollars on the corporate credit card and checking account and dramatically improved her family's standard of living.<sup>165</sup> The court noted that under California law, "persons who reap the benefits of a partnership must also be subject to its liabilities."<sup>166</sup> So too, a spouse who receives

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161. See, e.g., *Ins. Agents v. Zimmerman*, 381 N.W.2d 218, 220 (S.D. 1986) (finding partnership between husband and wife for purpose of their joint liability for insurance premiums in part because the couple had reorganized their business through a series of name changes in a way "not designed to help creditors trace assets").

162. See *supra* text accompanying notes 138–41. E.g., *Lusher v. Sparks*, 122 S.E.2d 609 (W. Va. 1961) (wife who shared in proceeds of sale of real property owned by the couple as joint tenants shared liability for husband's fraudulent misrepresentation to vendee).

163. E.g., *Lissau v. Smith*, 138 A.2d 381, 386 (Md. 1958) (indicating that the wife "not only did not authorize the option, but she did not know of it and her acceptance of the rent was entirely consistent with her belief that the tenancy was a monthly one"); *Schenectady Trust Co. v. Castelli*, 209 N.Y.S.2d 739, 742 (Schenectady City Ct. 1960) (holding that "[a]cceptance of the benefit of improvements . . . without knowledge of the execution of the instrument cannot by any inference indicate a ratification of this unknown act or any implication of authority to the defendant").

164. E.g., *Stegeman v. Vandeventer*, 135 P.2d 186 (Cal. Dist. Ct. App. 1943); *Smith v. Merrit Sav. & Loan, Inc.*, 295 A.2d 474 (Md. 1972) (husband liable for agent wife on mortgage document who forged his signature; husband used proceeds of mortgage to purchase a gun rack, pool table and other personal property specially adapted to his use); *Murphy v. Olds*, 508 S.W.2d 249 (Mo. Ct. App. 1974).

165. *In re Tsurukawa*, 287 B.R. at 524.

166. *Id.* In *In re Copeland*, 291 B.R. 740 (Bankr. E.D. Tenn. 2003), the court held that husband and wife were partners in a cheesecake business, *id.* at 771–79, but the wife could nonetheless discharge any vicarious liability in her bankruptcy case because the husband's fraud was not in the ordinary course of partnership business. *Id.* at 779 (citing to the test from *In re Ledford*, 970 F.2d 1556, 1561–62 (6th Cir. 1992), concerning imputation to the debtor in bankruptcy cases involving non-dischargeable vicarious liability for fraud between partners). The court did not consider that the husband and wife may have expressly or impliedly authorized her husband to act for their partnership in connection with the bakery

a financial benefit as extraordinary as the millions at issue in *Tsurukawa* has sufficient knowledge of a fraud so that if she shares the booty without objection, she ought to share liability as well.

Contrast *Zickgraf Hardwood Co. v. Seay*.<sup>167</sup> The plaintiff sued a husband and wife for building supplies the husband purchased on credit for use in a contracting business.<sup>168</sup> The wife knew the husband bought supplies on credit. She enjoyed a share of income from the building business. Yet, the court held she was not vicariously liable for the debt. In this setting, the couple's sharing of the risk and reward of the business was simply marriage and not partnership.<sup>169</sup> "The fact that money generated by the building business provided Mrs. Seay and the Seay children with their support and income . . . shows only that Mrs. Seay received the maintenance and support which she was entitled to receive from her husband under the law."<sup>170</sup> Her failure to disaffirm his debt did not constitute ratification.<sup>171</sup>

In a case involving a passive and trusting husband, *Schenectady Trust Co. v. Castelli*,<sup>172</sup> the court held that he did not knowingly accept the benefits of a home improvement contract on which his wife had forged his signature.<sup>173</sup> Although the husband was aware his wife had contracted for the improvements and stood by silently when

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sale transaction, or that the wife knowingly ratified the transaction even though it was outside the ordinary scope of partnership business. *In re Copeland*, 291 B.R. at 779.

167. *Seay*, 298 S.E.2d 208 (N.C. Ct. App. 1982).

168. The husband was a building contractor and the wife worked part time in the office. *Id.* at 210.

169. *See id.* The court also rejected the plaintiff's partnership argument because Mrs. Seay had no independent control over the affairs of the building business. "At most the evidence shows that Mrs. Seay was an employee of her husband who performed mainly secretarial and bookkeeping tasks at his direction." *Id.* at 211. *But see* *Wike v. Wike*, 445 S.E.2d 406, 407 (N.C. Ct. App. 1994) (former wife was partner of former husband in landscaping business where wife contributed capital, labor and management).

170. 298 S.E.2d at 211.

171. Similarly, in *Camp v. Leonard*, 515 S.E.2d 909 (N.C. Ct. App. 1999), new home buyers sued the builder and his wife for breach of contract. The wife signed the deed along with her husband to convey the real property, but she was neither actively involved in her husband's construction business nor his partner. *Id.* at 912. The court found that she was entitled to summary judgment because the buyers did not prove that she benefited from the lot sale or building contract other than in her capacity as wife. *Id.*; e.g., *Barnes v. I.R.S.*, 116 F. Supp. 2d 1007, 1013 (S.D. Ind. 2000) (under Indiana law, co-ownership of property and sharing of profits from a business do not justify finding partnership between husband and wife because "those arrangements are common in marriages").

172. 209 N.Y.S.2d 739 (Schenectady City Ct. 1960).

173. *Id.* at 742 (stating that the important point was not that he knew that certain home improvements were taking place, but that he lacked knowledge concerning the execution of the notes). *See generally* RESTATEMENT (THIRD) OF AGENCY § 4.06 cmt. d (2006) (knowledge requisite to ratification of agency and the risk of lack of knowledge).

the contractor worked, the court held that he did not know his spouse incurred liability on his behalf. When the couple discussed the improvements and the husband asked whether they could afford them, his wife told him "not to worry about the money."<sup>174</sup> Without explanation, the court voidated the husband's trust in his wife. The creditor was left with no right to foreclose on the husband's interest in their property.<sup>175</sup>

The conflict between social policy that protects marital collaborative behavior and that which enforces creditors' rights appears starkly in tenancy by the entirety cases. Recall that a creditor with the personal liability of only one spouse cannot force partition of tenancy by entirety property except by imputing liability to the other spouse.<sup>176</sup> If the other spouse has expressly or impliedly consented to the debt, however, both are personally liable and their tenancy by the entirety property is subject to the creditors' recourse.

Tests for marital agency between tenants by the entirety vary among jurisdictions. Under Pennsylvania law, if both spouses benefit from the debt, either spouse is presumptively the agent for the other. This treatment is similar to community property jurisdictions that afford creditor recourse to community property based on whether the debt was incurred for the benefit of the community.<sup>177</sup> In contrast, Missouri law does not presume agency between spouses. Rather, to establish agency, a creditor must prove the knowledge and active participation of the passive spouse in the liability producing transaction.<sup>178</sup> New York and Florida, also tenancy by the entirety states,

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174. *Castelli*, 209 N.Y.S.2d at 742.

175. *Id.* But see *Lyons v. Jones*, 121 S.W.2d 125 (Tenn. Ct. App. 1938) (holding wife responsible for husband's alteration of promissory note to pay for home improvements; although she had no knowledge of the alteration, she enjoyed the improvements).

176. See *supra* text accompanying notes 22–24.

177. *E.g.*, *Miller v. Benjamin Coal Co.*, 625 A.2d 66, 68 (Pa. Super. Ct. 1993) (when one spouse acts to affect title to entirety's property, no agency is implied or presumed, but in other cases, one spouse is presumed agent for both when act benefits both spouses and no evidence negates or limits spouse's authority); see also *Schmidt v. Matilsky*, 490 So. 2d 237, 238 (Fla. Dist. Ct. App. 1986) (finding that an estate by the entirety can be transferred only by the joint deed of both spouses, except if such a transfer "(1) does not adversely affect the interest of the other spouse and (2) is done with the full knowledge, assent and acquiescence of such other spouse").

178. See *McCarthy v. Wahby*, 717 S.W.2d 571, 572–73 (Mo. Ct. App. 1986) (wife is not vicariously liable unless her participation in the transaction respecting entirety property "rises to the level where she is in control . . . and she participates in decisions relative to construction"); *Turner v. Hoffmeier*, 690 S.W.2d 188, 189 (Mo. Ct. App. 1985) (stating that the creditor must show "joint participation" of the spouses in the transaction, demonstrated by knowledge and active involvement). Apparently disregarding the usual requirement of knowing participation by the non-debtor spouse, a bankruptcy court applying Missouri law found agency because of the *absence* of any knowledge of or participation by the passive



find implied consent or agency by ratification if the non-debtor spouse knows or should know about the liability producing transaction, but does not repudiate it.<sup>179</sup>

Whether one spouse incurs credit card debt with the implied consent of the other spouse similarly varies depending on the law of the jurisdiction whose law governs the contract. Only a few reported opinions consider the extent to which a court may impute one spouse's credit card debt to the other. One reason might be that credit card issuers can easily obtain the personal liability of both spouses by bargain. They do not present as compelling a case for imputed liability as tort and tax creditors who cannot bargain in advance for the liability of both spouses. For example, in *Provident National Bank v. Ebarb*,<sup>180</sup> the court found that evidence that the husband occasionally paid the wife's monthly credit card bill "did not establish his approval, full knowledge, or intent to assume personal liability for the debt [his wife] had incurred."<sup>181</sup> Note also that in some jurisdictions, credit card debt incurred for "necessary" or "family" expenses may fall under statutory or common law doctrine that make both spouses liable for such expenses incurred by either of them as an incident of marital status, without regard to agency.<sup>182</sup>

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spouse. *Kinney v. United Mo. Bank*, 16 B.R. 664 (Bankr. W.D. Mo. 1981). The court held that the couple's "long course of conduct" in which the husband managed the farm and the wife took care of the house justified a finding that she acquiesced in her husband's conduct as her agent for purposes of his authority to encumber farm equipment held by the entirety. *Id.* at 665 ("If this long course of conduct is not sufficient to change the character of the entirety property [to the husband's separate property] . . . it at least amounts to [the wife's] knowingly permitting [the husband] to act as her agent in encumbering [the tractor]."). *But see In re Davison*, 29 B.R. 987 (Bankr. W.D. Mo. 1983) (bankruptcy trustee avoids creditor's lien in debtors' retail inventory held as tenants by entirety where debtor wife did not sign financing statement).

179. See *Parrish v. Swearington*, 379 So. 2d 185, 185-86 (Fla. Dist. Ct. App. 1980) (consent of the other spouse to a conveyance of tenancy by entirety property may be inferred from the conduct of the other spouse such as being "a party to, participating in, or [knowing] of the conveyance of the property held in the entireties"); *Jill Real Estate, Inc. v. Smyles*, 541 N.Y.S.2d 515, 517 (App. Div. 1989) (New York law) ("Where a party who holds land as a tenant by the entirety, with knowledge or sufficient notice of her rights, freely does what amounts to recognition or adoption of a contract, or acts in any manner inconsistent with its repudiation, the party is thereafter equitably estopped from avoiding it.").

180. 180 S.W.3d 898 (Tex. App. 2005).

181. *Id.* at 901-02 (The trial judge may have concluded that the husband's subsequent awareness of the credit card account and payment of some of the monthly bills did not establish agency by ratification.).

182. See discussion *supra* text accompanying notes 115-16.

#### IV. THE EFFECT OF CHANGE IN MARRIAGE ON MARITAL AGENCY: SOME OBSERVATIONS

Legislative reform to marriage that recognized married women's separate estate could not be confined solely to *de jure* property rights for married women. It launched a long and continuing process by which courts reconcile the effect of spouses' marriage on their relationships with creditors.

In the last quarter of the twentieth century, marriage changed again to reflect a relatively abrupt change in the political and economic status of women.<sup>183</sup> Marriage no longer strips women of their legal capacity as individuals or subordinates their voice in the management of property. Yet, it has not become just another form of unincorporated association. As we have seen, a debtor's marital status affects his credit relationships. The doctrine of necessities and family expense statutes impose shared liability on spouses. And married people are subject to property regimes and rules regarding imputed liability that are distinct from those that apply to non-marital associations. From the perspective of some observers, recent developments in the evolution of marriage may appear to have made it indistinguishable from assent based partnership. From creditors' perspective, however, marriage remains notably different than non-marital collaboration.

It is easy to use the metaphor of marriage as a partnership to describe the relationship between the spouses. Applied to individual spouses' obligations to *third parties*, however, the label "partners" proves an uncomfortable fit for several reasons. First, two person partnerships present an inescapable governance problem—deadlock.<sup>184</sup> Absent contrary agreement, partnership law generally imposes majority rule for breaking deadlock.<sup>185</sup> Two person partnerships, however, cannot resolve disputes by a majority vote, as there is no majority. Once the partners agree on the ground rules for

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183. MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 14–15 (1981) (noting the ascendancy of "companionate marriage" to facilitate individual spouses' goals and the decline of marriage as a matter of social order, status and property).

184. See, e.g., *Seligson v. Russo*, 792 N.Y.S.2d 34, 35 (App. Div. 2005) ("In light of the 50–50 deadlock between the parties and the consequent inability of the partnership to make any decisions, it was equitable to dissolve this partnership . . ."); *Krulwich v. Posner*, 738 N.Y.S.2d 315, 316 (App. Div. 2002) (holding the partnership dissolved because of "the irreconcilable dissension between the two equal partners").

185. See BROMBERG & RIBSTEIN, *supra* note 2, § 6.03(b). See also UNIF. P'SHIP. ACT § 18, 6 U.L.A. 101 (1914) (equal management rights subject to agreement); REVISED UNIF. P'SHIP. ACT § 401, 6 U.L.A. 133 (1997) (equal management rights); see *id.* § 103 (effect of partnership agreement, terms may be varied including management rights).

partnership operations, one partner cannot unilaterally change them, short of dissolution of the partnership.<sup>186</sup> For example, suppose spouses agree on an ordinary course in which one partner can incur liability for a certain range of projects on behalf of both. The partner with authority can continue to incur liability on behalf of the partnership within that ordinary course, even though the other partner changes his or her mind and would prefer to retract the initial authorization.<sup>187</sup>

Until the last part of the twentieth century, the deadlock problem was not much of a problem in marital relationships. By both law and custom, one spouse—the wife (with some exceptions)—was excluded from the legal right to make decisions or take action on behalf of both spouses. Even after married women's property reform, courts were reluctant to find partnership or agency between spouses who did not legally or practically share control over risk.<sup>188</sup> Under modern marriage, however, husbands no longer legally dominate wives in management decisions. Yet, no "tie-breaking" rule has emerged to replace the old "man-wins" rule. Instead, courts employ agency doctrine to determine, on a case by case basis, whether one spouse acted individually or as agent for the other within the scope of their shared enterprise.

A marital relationship is also different from a non-marital partnership on the issue of scope. A non-marital partnership typically has an express or relatively discernable business purpose and an "ordinary course" that marks the boundary between partners' common enterprise and their individual pursuits. The action of a partner within the scope of this ordinary course is an act of the partnership for which both partners are individually liable. In contrast, the scope of a *marital* partnership is hard for a stranger to the marriage to see. Marriage encompasses the range of human activity we think of as "personal." It embraces a multitude of overlapping projects, including home maintenance, child-rearing and management of financial affairs. It is not limited to a discernable, finite, profit-oriented objective such as developing a shopping mall or operating a law practice. Indeed, when mar-

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186. The inability of one partner to unilaterally retract mutual authority distinguishes a two person *partnership* from an agency relationship between two people. See RESTATEMENT (SECOND) OF AGENCY §§ 118–119 (1958) (a principal may retract authority of an agent to act in a particular manner at any time). A person who is an agent for another person, but not a partner with him, acts for the exclusive benefit of the principal and is therefore subject to the principal's unilateral control. In contrast, a partner is an agent for the partnership in which he or she shares an interest, and only an act of the partnership can retract his agency.

187. BROMBERG & RIBSTEIN, *supra* note 2, §§ 4.02 nn.80–82, 6.03(c)(1). See generally Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules and Exclusivity of Remedies in Partnership and Marriage*, 58 LAW & CONTEMP. PROBS. 221, 225–26 (1995).

188. BROMBERG & RIBSTEIN, *supra* note 2, § 6.03(b); e.g., *Sweet v. Morrison*, 8 N.E. 396 (N.Y. 1886).

ried people coincidentally undertake such a discrete financial project together, we tend to isolate the project as their “business” as distinct from their “marriage.” Moreover, the ordinary course of *non-marital* partnerships is stable compared to the ordinary course of a marriage, which can change from moment to moment in ways that are difficult for a creditor to perceive. Detecting the presence of an agency relationship or the existence of a partnership (and shared liability) in non-marital cases is difficult enough. Cases are highly fact specific and difficult to reconcile within, or across, jurisdictions. Adding marriage to the mix only adds to the complexity.

In practical terms, the challenge for courts is to navigate the wide sea between two extremes. On the one hand, treating all marriages as partnerships and all conduct of either spouse as on behalf of the partnership would reinstate Blackstone’s merger model for marriage. It would also negate an important political and economic function of married women’s property reform—the ability of spouses to shield some of their joint investment in marriage from an individual spouse’s creditors’ reach. On the other hand, treating all conduct of either spouse as entirely individual, with no possibility of agency or imputed liability, both ignores the collaborative reality of marriage and encourages inefficient wealth-shielding conduct.

The course between the two extremes requires courts to interpret and draw inferences regarding the reasonableness of spouses’ conduct against an archetype of marriage. The archetype of reasonable marital behavior reflects the courts’ sense of prevailing social and legal expectations arising from marital status. Marital partnership is *sui generis* in part, perhaps, because collaboration within marriage has a long and persistent social function distinct from non-marital collaborative forms. In their treatise on partnership law, Alan Bromberg and Lawrence Ribstein note that the courts’ challenge in detecting a partnership between married people is that “aspects of the relationship that would otherwise resemble partnership take on a different coloration in the family setting.”<sup>189</sup> The marital relationship, and norms about what conduct is socially valuable and therefore reasonable between spouses, colors its legal characterization for purposes of imputed liability.

The persistent special treatment of marriage for purposes of imputed liability inescapably reveals much about the legal meaning and social value of marriage. This function of marital agency is disturbing for some observers who prefer to view marital status as no more than a sentimental label. For example, some observers see the doctrine of necessities and family expense statutes as serving no purpose other

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189. BROMBERG & RIBSTEIN, *supra* note 2, § 2.10. The same ambiguity appears when the basis of imputed liability is not partnership but agency.

than as "collection devices" for creditors.<sup>190</sup> This criticism rests on the unspoken premise that marriage has no external effect or social value other than as an expression of the individual spouses' private agreement. The persistence of a sphere of marital collaboration shielded from shared liability under modern legal and economic conditions strongly suggests that marriage, as a collaborative form, retains a unique social value.

Marital agency cases make it clear that courts continue to recognize the unique social value of the *stability* of marital relationships. Even after mid-nineteenth century reform, marriage remained distinct from non-marital partnership by its nearly mandatory term—till death do us part. In the last quarter of the twentieth century, divorce law reform afforded spouses a right to dissolve a marriage more closely akin to a non-marital partner's right to dissolve a partnership. As divorce becomes less costly for a financially dependent spouse, the threat of divorce during marriage logically becomes a more effective lever to control the other spouse's behavior.<sup>191</sup> Yet, even under a no-

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190. See Melissa B. Jacoby and Elizabeth Warren, *Beyond Hospital Misbehavior: An Alternative Account of Medical-Related Financial Distress*, 100 Nw. U. L. Rev. 535, 565 (2006) (noting that litigation involving the doctrine of necessities is dominated by medical services creditors); Shawn M. Willson, Comment, *Abrogating the Doctrine of Necessaries in Florida: The Future of Spousal Liability for Necessary Expenses After Connor v. Southwest Florida Regional Medical Center, Inc.*, 24 FLA. ST. U. L. REV. 1031, 1043 (1997) (application of the doctrine is unrelated to a spouse's failure to provide basic financial support for a spouse). As part of the movement toward legal equality for women, some jurisdictions abrogated the doctrine of necessities on equal protection or other grounds. See, e.g., N. Ottawa Cmty. Hosp. v. Kieft, 578 N.W.2d 267, 273 (Mich. 1998) (abrogating the necessities doctrine and holding that "neither a husband nor a wife is liable, absent express agreement, for necessities supplied to the other"); Schilling v. Bedford County Mem'l Hosp., Inc., 303 S.E.2d 905, 908 (Va. 1983) (holding that the necessities doctrine "creates a gender-based classification not substantially related to serving important governmental interests and is unconstitutional"); Med. Ctr. Hosp. v. Lorrain, 675 A.2d 1326, 1329 (Vt. 1996) (indicating that the necessities doctrine violates equal protection, and opting to abolish the doctrine rather than extending the doctrine to both husband and wife); Marcus L. Moxley, Survey, *North Carolina Baptist Hospitals, Inc. v. Harris: North Carolina Adopts a Gender-Neutral Approach to the Doctrine of Necessaries*, 66 N.C. L. Rev. 1241, 1246-48 (1988) (discussing the four approaches used to modify the doctrine of necessities and noting that North Carolina had opted to "extend the doctrine of necessities to apply equally to both spouses").

191. The possibility of divorce at the option of either spouse creates an incentive for spouses to act for the account of the other. If the spouse with control over shared assets acts inconsistently with his marital mutual agency, he risks an adjustment against his individual interests at divorce in the other spouse's favor based on "financial fraud," "dissipation," or "mismanagement." See, e.g., Lewis Becker, *Conduct of a Spouse that Dissipates Property Available for Equitable Property Distribution: A Suggested Analysis*, 52 OHIO ST. L.J. 95, 97-98, 111-16 (1991) (explaining how courts adjust equitable distributive shares to account for dissipation and observing how courts appear to identify dissipation on an *ad hoc* basis).

fault, equitable distribution divorce regime, marriage remains distinct from non-marital partnership for purposes of imputed liability. Put another way, courts do not find a spouse financially responsible for her choice of spouse under the same standards that would apply to a non-marital partner's choice of partner.

The reason for this may be that terminating a marriage is not analogous to termination of a non-marital partnership. In a case of deadlock, ending the marriage is the only legally effective mechanism to end risk of shared liability to third parties. Divorce yields negative effects, especially to children, that the dissolution of business partnerships does not.

Until the late twentieth century, marital status may have been a useful heuristic for socially valuable investment in child rearing. And investment in child-rearing activity (given women's alternatives) *required* economic specialization within marriage. Women tended to specialize in child care which rendered them and their children physically and economically dependent on men. Under these conditions, women had little choice but to trust and defer to husbands' financial decisions. Under this one-size-fits-all model for marriage, it was possible to identify "ordinary" marital behavior, and to hold up ordinary behavior in the face of ordinary vulnerability as justification for a protective imputed liability rule for trusting, deferential wives.<sup>192</sup>

Today, marriage is no longer the sole legal locus for child rearing. Nor are women as dependent on men to support and protect them and their children. Yet, the marital relationship remains *sui generis* for purposes of shared liability to third parties. Put simply, despite change in economic conditions and divorce law, courts continue to expect marriages to last beyond deadlock over asset management strategy. This view is evident in marital agency cases, even if it is fading or absent in legal discourse about divorce. For example, when a creditor seeks to impute liability to the other spouse based on agency by ratification, a court may discount the spouse's failure to prevent the risky behavior by threatening divorce because it views her threat of

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192. See WILLIAM J. DOHERTY ET AL., WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES 8–9 (Inst. for Am. Values 2002) (marriage across cultures is fundamentally a reproductive alliance); Maggie Gallagher, (How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman, 2 U. ST. THOMAS L. REV. 33, 46 (2004) ("Marriage intrinsically aims at an enduring, exclusive, sexual union between a man and a woman, because managing the procreative consequences of human sexual attraction is at the core of its reason for existence."); Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, BEPRESS LEGAL REPOSITORY (2004), available at [http://law.bepress.com/uvalwps/uva\\_publiclaw/art8](http://law.bepress.com/uvalwps/uva_publiclaw/art8).

divorce as a socially undesirable tool of control over the other spouse.<sup>193</sup>

When a spouse's behavior appears to the court as reasonable behavior within the context of marriage, the court will characterize her failure to monitor, control, or repudiate the conduct of the other spouse as appropriate and ordinary marital trust and deference. In other words, this type of deferential behavior is characteristic of what married people should do. However, when the court characterizes a spouse's behavior as *unreasonably deferential*, the couple's private allocation of assets and risk will appear as "judgment-proofing," or less pejoratively "asset protection."<sup>194</sup> Rather than determine the existence and scope of marital agency directly, courts appear to reason backward from the desired result. Thus, a spouse who trusts and defers to a fraudulent spouse is protected from shared liability to his creditor (no agency) whenever such behavior is "merely" marriage—that is—consistent with the archetypal, reasonable marital relationship. The effect of protection from shared liability in such a case encourages such behavior between spouses by subsidy at the expense of a creditor.<sup>195</sup> Under other circumstances, one spouse's trust of, and deference to, the other appears unnecessary and unrelated to the social value of marriage. Under these conditions, the court finds an agency relationship, and the trusting spouse shares the risk of loss the other spouse's conduct creates as a partner would.

The challenge for courts in imputed marital liability cases is to distinguish socially valuable conduct between spouses from opportunistic wealth-shielding behavior. This is a daunting task. Whose perception should govern? The spouses deny that one acted on behalf of the other. The creditor, who is a stranger to their marriage, must construct the inference to be drawn from their relationship notwithstanding

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193. A court might find that a spouse who chooses to remain married and silent rather than confront her spouse and provoke inevitable deadlock over his conduct has not impliedly authorized or ratified her husband's conduct by her silence. *E.g.*, *Zickgraf Hardwood Co. v. Seay*, 298 S.E.2d 208 (N.C. Ct. App. 1982).

194. Twenty first century families exploit wealth shielding options unknown to their nineteenth century counterparts. Indeed, marriage as a wealth-shielding strategy has notably declined in utility as marriage has become increasingly transitory. Modern asset protection strategies involve creation of limited liability partnerships or other entities to hold "family" wealth legally separate from the family members who control it and their creditors. *E.g.*, Mario A. Mata, *Asset Protection Planning for the Family Business Owner: Use of Domestic and Offshore Strategies and Entities to Legally Maximize the Preservation of Wealth for Family Business Owners and Family Members*, SM003 ALI-ABA 1359 (July 19–21, 2006) (discussing different asset protection strategies); [http://www.assetprotectionbook.com/family\\_limited\\_partnerships.htm](http://www.assetprotectionbook.com/family_limited_partnerships.htm) (providing information concerning Family Limited Partnerships); <http://www.rjmintz.com> (discussing a range of asset protection strategies).

195. The insolvent debtor's creditor will bear the loss from his default whenever the creditor cannot impute his liability to the other spouse.

ing the couple's self-serving testimony. The effectiveness of creditors' arguments depends upon the discretion of a court with no particular legal expertise in marriage or divorce. The result is a swamp of decisions, without consistent justification, in which no case offers useful guidance for the next. To make matters even worse, individuals' consumer debt and entrepreneurial risk levels continue to rise relative to income. As the legal significance of marriage becomes increasingly unpredictable, the stakes for creditors and their married debtors in imputed liability cases are higher than ever.

As states adopt domestic partnership laws that extend marital liability and property regimes to registrants, creditors will call upon courts to impute liability from one domestic partner to the other.<sup>196</sup> Just as imputed liability cases identify reasonable behavior within marriage, cases alleging imputed liability between domestic partners will define the scope of shared domestic partnership liability and a critical aspect of what it means to adopt the legal status of domestic partner. As domestic partnership evolves as a social phenomenon, courts will reveal the archetype of reasonable domestic partner behavior, and the level of trust and deference within domestic partnerships that is "just what domestic partners should do." Courts, not sweeping legislative initiatives, will define in each case the social value of investment in domestic partnerships relative to creditors' rights. At the same time, they will determine the social value of domestic partnerships relative to the tradition of marriage.

## V. CONCLUSION

Although marriage has changed from a legal status to a customized private relationship between spouses, change in marital agency has taken its own pace. Courts continue to differentiate between ordinary marital collaboration and partnership or agency between people who, coincidentally, happen to be married. While commentators debate who may marry and the optimal legal regulation of divorce, courts define, without fanfare, the legal effect of a person's marriage on his creditors and the relative social value of marriage as a collaborative form.

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196. See generally 2003 Cal. Stat. 421 § 15 (2003) (provisions of the Domestic Partnership Act "shall be construed liberally in order to secure to eligible couples the full range of legal rights, protections and benefits, as well as all of the responsibilities, obligations and duties to each other, to their children, to third parties and to the state, as the law of California extend to and impose upon spouses"); Robert F. Kidd & Frederick C. Hertz, *Partnered in Debt: The Impacts of California's New Registered Domestic Partner Law on Creditors' Remedies and Debtors' Rights Under California Law and Under Federal Bankruptcy Law*, 28 CAL. BANKR. J. 148 (2006).