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# Divorce Equality

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## CONTENTS

### ARTICLES

Working with Cancer: How the Law Can Help Survivors  
Maintain Employment

*Ann C. Hodges* 1039

Regulating Real-World Surveillance

*Margot E. Kaminski* 1113

The Law of Intimate Work

*Naomi Schoenbaum* 1167

Divorce Equality

*Allison Anna Tait* 1245

### NOTES & COMMENTS

Nothing Less than the Dignity of Man: The Eighth Amendment  
and State Efforts to Reinstitute Traditional Methods of Execution

*James C. Feldman* 1313

Towards an Institutional Challenge of Imprisonment for Legal  
Financial Obligation Nonpayment in Washington State

*Devon King* 1349

*State v. Crumpton*: How the Washington State Supreme Court  
Improved Access to Justice in Post-Conviction DNA Testing

*Jordan McCrite* 1395

Ridesharing's House of Cards: *O'Connor v. Uber Technologies, Inc.* and the Viability of Uber's Labor Model in Washington

*Henry Ross* 1431

An Ethical Dilemma: Attorneys' Duties Not to Reveal Elder Abuse in Washington State

*Margaret Sholian* 1471

## DIVORCE EQUALITY

Allison Anna Tait\*

*Abstract:* The battle for marriage equality has been spectacularly successful, producing great optimism about the transformation of marriage. The struggle to revolutionize the institution of marriage is, however, far from over. Next is the battle for divorce equality. With the initial wave of same-sex divorces starting to appear on court dockets, this Article addresses the distinctive property division problems that have begun to arise with same-sex divorce and that threaten, in the absence of rule reform, to both amplify and reinscribe problems with the conventional marital framework. Courts have failed to realize the cornerstone concept of equitable distribution—marriage as an economic partnership—in the context of different-sex marriage. Because same-sex divorce highlights this failing, this Article uses same-sex divorce as a lens through which to reexamine the untapped potential of equitable distribution statutes.

Two questions drive the analysis. One question is how to decide *which* assets count as marital property and how to value one spouse's contributions to the other spouse's career success. I propose that courts characterize enhanced earning capacity as marital property and count indirect spousal contributions toward the growth in value of business assets. Without these changes, courts fail to capture the nature of marital partnership and properly compensate contributions made by non-earning spouses. Another question, made salient by same-sex "hybrid" cases in which the spouses have been long-term cohabiting partners but short-term marital partners, is how to determine *when* an economic partnership begins. I propose that courts use the category of "pre-marital" property in order to count assets and income acquired outside of the marriage itself.

Addressing these questions is critical to the reformation of marriage because property rules impact how spouses bargain with one another, how diverse roles get valued in marital bargains, and how we assign and perform gender within marriage. Moreover, proper compensation for spousal contributions rewards individuals for making choices that benefit the couple rather than the individual, which is normatively positive behavior. These proposals for rule reform provide guidance for courts, both those encountering an increasing number of same-sex divorces as well those deliberating over how best to assess spousal contributions in different-sex marriages. Furthermore, the proposals in this Article provide a blueprint for advocates who seek to continue the work of marriage equality in the hopes of further unwinding the power of gender within marriage.

INTRODUCTION.....	1246
I. UNDERSTANDING THE MARITAL BARGAIN .....	1253
A. Establishing Economic Partnership.....	1254
1. Equitable Distribution and the Divorce Revolution .	1255
2. The Mixed Results of Equitable Distribution.....	1260
B. Specialized Labor and Spousal Contributions.....	1262
1. The Original Marital Bargain: Different-Sex Couples.....	1263
2. Updating the Marital Bargain: Same-Sex Couples...	1267
II. LEARNING TO DIVIDE THE DOMESTIC DOLLAR.....	1272
A. Questioning the Career Asset Carve-Outs .....	1273
1. The Last Citadel: Professional Degrees and Family Businesses .....	1274
2. Distribution and Support as Compensatory Mechanisms.....	1281
B. Why and How to Reward Spousal Contributions .....	1285
1. A Proposal to Value Enhanced Earnings.....	1288
2. A Case Study: Home Management and Dragon Slaying.....	1290
III. ENLARGING THE MARITAL GRID.....	1293
A. Transforming Non-Marital into Pre-Marital Property.....	1295
1. Recognizing Relationships on the Marital Fringe ....	1295
2. Equitable Distribution Instead of Equitable Remedy.....	1299
B. Measuring Duration and Modified Formalism.....	1302
1. Timing Relationships Through Legal Markers .....	1302
2. Enabling Judicial Efficiency and Personal Autonomy.....	1308
CONCLUSION .....	1311

## INTRODUCTION

First comes marriage; then comes divorce. Different-sex couples have experienced this truism for centuries. Now, following close on the successes of the marriage equality movement, the first wave of same-sex couples is seeking to get divorced.<sup>1</sup> The current revolutionary moment in

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the progress of marriage law promises to shift conventional gendered understandings of the institution. Yet, in order to make good on this promise, it is necessary to reexamine the rules governing marital property and equitable distribution. Much of the work that gender performs in a marriage is not revealed until the moment of divorce, when couples and courts are asked to value the contributions of individual spouses to the marriage.<sup>2</sup> If same-sex marriage is to transform the institution of marriage,<sup>3</sup> law must reflect equality not only at entry

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participants in the New York area family law workshop, participants in the 2015 LSA panel “New Forms of Intimate Ordering,” participants in the 2015 Family Law Scholars and Teachers Conference, participants in the 2015 Association of American Law Schools mid-year meeting panel on “The Impact of Same-Sex Marriage,” and members of the Associates and Fellows workshop at Columbia Law School.

1. See, e.g., Joe Coscarelli, *Gay-Marriage Pioneers Recall ‘Huge Journey,’* NYMAG.COM (June 26, 2013, 11:37 AM), <http://nymag.com/daily/intelligencer/2013/06/julie-hillary-goodridge-on-gay-marriage-supreme-court.html> (“Julie and Hillary Goodridge are no longer married, but the important thing is that they were . . . Part of the importance of marriage includes divorce and the laws that then govern a breakup.” (internal quotation marks omitted)). Julie and Hillary Goodridge were the plaintiffs in the landmark case *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003) (holding limitation of civil marriage to male-female unions under Massachusetts marriage licensing statutes unconstitutional under Massachusetts constitution). See also Tracy Connor, *Lesbian Couple Who Got Hitched Shortly After Gay Marriage Became Legal in New York State Set to Become One of First Gay Divorces*, N.Y. DAILY NEWS (June 25, 2012, 11:44 PM), <http://www.nydailynews.com/new-york/gay-divorces-finalized-state-article-1.1102288> (“It was inevitable. The legalization of gay marriage in New York is yielding the first wave of gay divorces.”); Clyde Haberman, *After Same-Sex Marriage, Same-Sex Divorce*, N.Y. TIMES CITY ROOM (June 27, 2011, 8:34 AM), <http://cityroom.blogs.nytimes.com/2011/06/27/after-same-sex-marriage-same-sex-divorce/> (noting possible “complications” attending impending wave of same-sex divorces).

2. See FREDERICK HERTZ & EMILY DOSKOW, *MAKING IT LEGAL: A GUIDE TO SAME-SEX MARRIAGE, DOMESTIC PARTNERSHIPS & CIVIL UNIONS* 61 (2014) (“The legal implications of marriage take on their real meaning when couples separate.”).

3. Some commentators and scholars argue that same-sex marriage will transform marriage by making it a more gender-equitable institution. See, e.g., Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, in *LESBIAN AND GAY MARRIAGE* 13, 14–16 (Suzanne Sherman ed., 1992); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1487–88 (1993); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 9, 18–19 (1991). Others are more skeptical and have argued that “[m]arriage runs counter to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture; and the validation of many forms of relationships.” Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *OUT/LOOK NAT’L GAY & LESBIAN Q.* (1989), reprinted in WILLIAM RUBENSTEIN, *CASES ON SEXUAL ORIENTATION AND THE LAW* (West. Pub. Co. 1997), at 14; see also Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*, 79 VA. L. REV. 1535, 1546 (1993) (“[A]n effort to legalize lesbian and gay marriage would make a public critique of the institution of marriage impossible.”). For a good overview of the debates as well as interviews with same-sex couples regarding their perspective on marriage, see KATHLEEN E. HULL, *SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND THE LAW* 78–

but also upon exit.

Over forty years ago, as part of another “divorce revolution,” legislatures enacted equitable distribution statutes to make divorce less acrimonious and more gender equitable. Equitable distribution statutes modernized divorce law by removing fault as a dispositive factor and making economic partnership the cornerstone concept of property division. Lawmakers sought to compensate housewives and mothers, who were typically hurt financially by divorce, and to reflect the idea that both partners in a marriage—the wage earner and the homemaker—contributed to its economic success. Equitable distribution statutes gave courts a directive and the means to properly remunerate the unpaid contributions of one spouse to the other’s career and to acknowledge that couples acted in partnership as they acquired assets, developed skills, and allocated marital roles. The promise of these statutes, however, was never fully realized for different-sex couples and, as an increasing number of same-sex divorces appear on matrimonial court dockets, courts will be forced to grapple with unanswered questions about how to make equitable distribution truly equitable.

Imagine this scenario: Two men living in New York have been in a marriage-like relationship for over fifteen years. One is a partner at a large law firm, and the other is a lawyer for a small non-profit organization making considerably less money. They live together in an apartment to which the law firm partner holds the title; he has furnished their apartment, bought significant artwork for them to enjoy, and has acquired several other types of collections, including a wine collection. The non-profit lawyer pays for the majority of their monthly living expenses as well as vacations. Moreover, the non-profit lawyer has made himself available to travel with his partner for work, and has passed up work opportunities in his own job to do so. When New York passed the law enabling same-sex marriage, the couple availed themselves of this legal right.<sup>4</sup> After being married for a year, however, the couple decided to divorce.<sup>5</sup>

With significant resources at stake at the dissolution of this long-term relationship, a judge will likely limit the marital property to assets acquired and earnings generated during the brief period of legal marriage, as prescribed by state divorce law. Despite the couple’s legal

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117 (2006).

4. See N.Y. DOM. REL. LAW § 10-a (McKinney 2011) (“A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.”).

5. Jesse Green, *From “I Do” to “I’m Done,”* NYMAG.COM (Feb. 24, 2013), <http://nymag.com/news/features/gay-divorce-2013-3/> (noting “gay couples are at the start of a divorce boom”).

inability to marry in the first fifteen years of the relationship, those years will not likely count for the purposes of the characterization and distribution of marital property. Titled property will go to the titleholder, and each party will have only the most limited rights to the other's non-liquid assets, like pensions or patents. Furthermore, in cases of income or earnings asymmetry, any likely award of maintenance or rehabilitative alimony will be decreased because of the artificially short length of the marital relationship. Finally, any career sacrifices that one partner made in order to benefit the other will be un- or under-compensated.

Same-sex divorce in cases such as this raises two major questions. One question—a question that has plagued different-sex divorce and will continue to produce inequality in same-sex divorce—is *which* assets count as marital property and how courts should handle unresolved questions about “career assets”—including enhanced earning capacity and indirect spousal contributions to business ventures. These career assets bring up the twin questions of individual accomplishment as well as individual contribution to the relationship. The manner in which courts have treated these particular career assets persistently belies the ideal of economic partnership, and reinforces the idea that “he who earns it, owns it.”<sup>6</sup> Addressing career assets is critical. In high-wealth divorces, they are worth significant amounts of money; in lower-wealth divorces, they are often the only assets of value a couple possesses. On a theoretical level, the question is important because conventional courts engaging in equitable distribution have persistently undervalued the non-earning spouse's contributions to the economic success of the marriage. Taking economic partnership seriously requires broadening what counts as marital property with respect to career assets and considering enhanced earning capacity as marital property.

Another question—made salient during this exceptional time of transitional rights for same-sex couples—is *when* an economic partnership begins. Equitable distribution statutes posit the partnership beginning at the moment of marriage. However, taking seriously the idea of economic partnership—and, in this exceptional moment, recognizing that some couples have been legally barred from marriage—how do courts evaluate when a partnership begins? At what point are the individuals in a romantic couple sufficiently committed to one another that they should be allowed claims to one another's property? The tide of

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6. Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2250 (1994).



same-sex divorces that will inevitably rise—bringing with it new “hybrid” cases that involve long-term cohabiting partners and short-term marital partners—will push these legal questions into the foreground.<sup>7</sup> State courts have taken on the question in the context of different-sex marriages, providing examples of how marital property can be measured from points other than marriage. Following these models, I propose that courts use the category of “pre-marital” property in order to equitably distribute property in hybrid cases. Enlarging the marital grid by including pre-marital property in a marital estate instantiates the idea of economic partnership and also helps equalize economic injustices that may result from financial asymmetries and specialized household labor.

Answering questions about the practical goals and theoretical grounding of equitable distribution at this moment in the evolution of marriage law has great consequences. Which property counts and when it gets counted impacts the ways in which spouses bargain with one another, how diverse roles are valued in these bargains, and how we assign and perform gender within marriage. Including career assets and pre-marital property in marital estates will help courts actualize the stated goals of equitable distribution by identifying marital property according to economic partnership values rather than individual earning or purchasing power. Genuine equitable distribution will benefit all spouses who take on a non- or low-earning role in their partnerships—whether to raise children, change careers, or pursue meaningful but unremunerated work.

Achieving divorce equality is also important because longstanding social policy and cultural norms promote the ideal of sharing in marriage. The sharing norm has historically been evident in marital property rules that discourage spouses from keeping an accounting of debts and credits within marriage and that disallow most claims based on this type of domestic accounting. The New Jersey Supreme Court has stated: “Marriage is not a business arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce. Rather, as we have said, ‘marriage is a shared enterprise, a joint undertaking . . .’”<sup>8</sup> The goal from this perspective is to “devise a legal framework for divorce that will safeguard those who do not maximize their separate interests, but instead engage in unselfish, sharing

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7. The Maine Supreme Judicial Court is currently considering this question in the case of *Kinney v. Busch*. See Brief of Appellee, *Kinney v. Busch*, No. KEN-14-456, available at <http://www.glad.org/uploads/docs/cases/kinney-v-busch/kinney-v-busch-appellee-brief.pdf>.

8. *Mahoney v. Mahoney*, 453 A.2d 527, 533 (N.J. 1982) (citations omitted).

behavior.<sup>9</sup> Proper compensation through equitable distribution rewards individuals for sharing and making choices that benefit the unit rather than the individual, normatively positive behavior.

In previous scholarship, family law and feminist scholars demonstrated great interest in the topic of equitable distribution as statutes were enacted around the country. In the 1980s, scholars produced a number of articles detailing the shifts in property regimes, ordinarily focusing on divorce reform in a particular state.<sup>10</sup> As courts began to construe the statutes and award divorce settlement using the new rubrics, scholars tracked the outcomes in order to gauge the efficacy of the statutes.<sup>11</sup> Since these first two waves of literature about equitable distribution—the first primarily descriptive and the second evaluative—there has been minimal discussion of the equitable distribution in legal scholarship.<sup>12</sup> This Article builds on the body of evaluative literature concerning equitable distribution, and adds to it by drawing on robust literatures about marital bargaining<sup>13</sup> and the specialization of household labor in both different- and same-sex marriage.<sup>14</sup>

This Article uses same-sex divorce as a lens through which to reexamine the aims and the actualities of equitable distribution as well as the notion of economic partnership within intimate relationships. One immediate goal is to provide a roadmap for thinking about the new marital property claims that will arise during this transitional moment. Same-sex couples currently going through property disputes at the

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9. Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in *DIVORCE REFORM AT THE CROSSROADS* 6, 31 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

10. See, e.g., Carmen Valle Patel, *Treating Professional Goodwill as Marital Property in Equitable Distribution States*, 58 N.Y.U. L. REV. 554 (1983); Sally Burnett Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C. L. REV. 247 (1983).

11. See generally *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 9; Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621 (1991); Symposium, *Divorce and Feminist Legal Theory*, 82 GEO. L.J. 2119 (1994).

12. There are some scholars who have taken up the question more recently. See, e.g., Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN'S L.J. 141, 167–76 (2004).

13. Social science literature about marital bargaining and the problem of career development for women who are primary caretakers is extensive. See, e.g., ARLIE HOCHSCHILD, *THE SECOND SHIFT* (1989); RHONA MAHONY, *KIDDING OURSELVES: BREADWINNING, BABIES, AND BARGAINING POWER* (1995); Williams, *supra* note 6.

14. See, e.g., Susan Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 98 (2005); Franke, *supra* note 3; Polikoff, *supra* note 3.

dissolution of marriage provide a situationally unique and analytically rich object of inquiry. The problems confronting these couples underscore the limits of conventional marital property distribution and revivify long-standing debates about the pitfalls and failures of equitable distribution. A second goal is to understand how reshaping equitable distribution rules to address same-sex divorce will ultimately benefit both same- and different-sex couples by recalibrating the valuation of unpaid or indirect spousal contributions and collapsing the gendered framework that has supported marriage to date.

This Article proceeds in three Parts. In Part I, I discuss how states adopted equitable distribution rules starting in the 1970s and how these rules became the primary system of marital property division. I describe how these new marital property rules formed part of more sweeping divorce reform efforts, and were intended to implement a theory of marriage as economic partnership. I analyze why equitable distribution statutes have failed to create meaningful equality between partners at the dissolution of relationships and what factors have obstructed the full realization of the economic partnership ideal. Subsequently, I analyze the problem that equitable distribution statutes were meant to solve: specialization of household labor. I discuss this specialization of labor—the marital bargain—in the traditional context of different-sex couples. I also draw on recent sociological literature to examine how same-sex couples organize household labor and whether they engage in similarly gendered forms of specialized labor.

In Part II, I discuss how courts have resisted characterizing certain career assets as marital property, just as they have resisted equal division of business assets even when one spouse has made significant indirect contributions to the business. I discuss how professional degrees, enhanced earning capacity, and the valuation of spousal contributions to corporate enterprises remain carve-outs from the more general policy of using property to compensate non- or low-earning spouses. I also analyze how courts resist characterizing these assets as marital property and discuss why distribution and spousal-maintenance awards are inadequate solutions to the problems of asset characterization. Finally, I argue that courts should define enhanced earning capacity broadly and characterize it as marital property, and I provide models from New York case law that demonstrate how courts can realize the values of economic partnership.

In Part III, I analyze the question of when an economic partnership begins. I examine how courts have addressed questions surrounding property division in different-sex “hybrid” relationships and propose that courts adopt the category of pre-marital property to address the

particular difficulties of hybrid relationships. I also propose a modified formalist framework for assessing when the counting of pre-marital property begins, one that recognizes autonomous decisions to remain off the marital grid and relies on myriad legal markers to indicate intent to form both a legal relationship and an economic partnership. For example, in the case of same-sex partners, some couples will have entered into domestic partnerships, or civil unions. Moreover, many same-sex couples have purposefully engaged in private contracting and estate planning, such that courts will have other evidence relating to a couple's wishes about property distribution and their level of financial commitment to one another. These types of indicators, I argue, are legal markers that may indicate an economic partnership.

Ultimately, same-sex divorce underscores the need for a reexamination of and recommitment to our guiding theories of marital property. If we are to take seriously the notion that marriage is an economic partnership we must look beyond the strict confines of the marriage license and consider the probability that economic partnerships begin before marriage licensing. Similarly, we must reconsider what counts as marital property. The solutions I propose are more responsive to the marital bargains that both same- and different-sex couples make because they take into account household specialization of labor and recognize spousal contributions that are currently going un- or undervalued. These solutions will help equalize the gendered effects of marriage and advance the goals of divorce equality.

## I. UNDERSTANDING THE MARITAL BARGAIN

Most systems of property ownership are based on explicit understandings of resource use, allocation, and sharing. Property ownership within marriage is distinct because it involves agreements about how to pool resources, including human capital, that are largely tacit. Because of these norms of shared assets and shared work, disputes about resources and household work are common. It is not until divorce, however, that the ownership of household assets becomes truly contested. Moreover, as Lawrence Waggoner has observed, divorce might be considered unusual in the context of property ownership because the law, rather than the legal owner of the property, "makes the crucial allocative decision [at divorce]."<sup>15</sup>

Traditionally, at the dissolution of a marriage, assets went to the

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15. Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 23 (1994). This is presuming the absence of an antenuptial agreement.

individual who held title to the asset, usually the husband. This common law approach to marital property derived from the English coverture framework, which gave the husband all property rights both during and after marriage, and disallowed most property ownership for women within marriage. This long-standing method of property division remained in place, mitigated by alimony awards, until the divorce reforms of the 1970s and 1980s. In this Part, I discuss the problems with the title-based theories of property division that led to the divorce reforms and the creation of the equitable distribution statutes. Legislatures and courts aspired, as I demonstrate, to install a new conception of marriage—marriage as economic partnership—through the enactment of these statutes. I evaluate the limited success that the statutes had as safeguards against economic unfairness, and subsequently analyze the problem that equitable distribution statutes were meant to solve—the perceived need to compensate wives for fulfilling their unpaid role as prescribed by the marital bargain. The conventional bargain, as it has existed between different-sex couples, is rooted in specialization of labor, economic dependency, and gender difference. I evaluate how this bargain works for different-sex couples and how same-sex couples may or may not be updating this marital bargain by de-gendering marriage.

#### *A. Establishing Economic Partnership*

In the 1970s and 1980s, along with no-fault divorce, states enacted equitable distribution statutes (or adopted community property rules)<sup>16</sup> that ushered in a new regime of marital property division. Equitable distribution statutes required courts to look beyond title—as well as marital fault—and created the statutory categories of marital and separate property. Once a court determined the extent of a couple's marital property—their marital estate—it then divided the marital property either equally or equitably, pursuant to the state statutory system. These statutes were seen as necessary to safeguard housewives against what were, for them, the detrimental consequences of divorce. These statutes and the judicial gloss that courts supplied framed the marital relationship as an economic partnership, thereby trying to

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16. I am bracketing the discussion of community property rules and focus, in this Article, solely on equitable distribution states. Currently there are nine community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. See generally William A. Reppy, Jr., *Major Events in the Evolution of American Community Property Law and Their Import to Equitable Distribution States*, 23 FAM. L.Q. 163 (1989).

capture the contributions of both wage earners and homemakers. The focus of marital property division shifted, accordingly, away from fault inquiries to inquiries about spousal contributions to the marriage. In this section, I describe these changes in the marital property rules and their mixed success.

### 1. *Equitable Distribution and the Divorce Revolution*

Prior to the divorce reforms in the 1970s and 1980s, states uniformly awarded property based on title holding at the dissolution of a marriage. This system derived from English common law heritage. Under rules of coverture, a married woman was unable to own property while married, with limited exceptions, and her husband controlled all of her non-trust property.<sup>17</sup> Upon separation or divorce (which was rare and difficult to obtain), a husband was entitled to everything except for a wife's real property and assets placed in separate trust.<sup>18</sup> After the statutory enactments that granted married women the right to own and control property, the "reformed" common law approach identified "two distinct interests, the husband's separate property and the wife's separate property. Common ownership [was] brought into being only when one or both spouses elect[ed] to hold property in both names."<sup>19</sup> At divorce, all property remained with the title-holder, and the emphasis was placed squarely on individual earning, ownership, and investment.<sup>20</sup>

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17. All "moveables" or "chattels"—which included money, clothing, jewelry, furniture, and other personal goods—became the property of the husband, as did any leasehold land. A wife's dowry, or portion, also came under the control of her husband. A married woman retained title to her freehold, and in theory the husband could not dispose of it without her consent. However, a wife had no right to any income the property produced. AMY LOUISE ERICKSON, *WOMEN AND PROPERTY IN EARLY MODERN ENGLAND* 103–13 (1993). Women could, however, have assets placed in trust for their benefit. See Allison Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 *YALE J.L. & FEMINISM* 165, 167 (2014). For a good overview of the complexity of coverture, see generally MARRIED WOMEN AND THE LAW: COVERTURE IN ENGLAND AND THE COMMON LAW WORLD (Tim Stretton & Krista Kesselring eds., 2013) [hereinafter MARRIED WOMEN AND THE LAW].

18. See EILEEN SPRING, *LAW, LAND, AND FAMILY: ARISTOCRATIC INHERITANCE IN ENGLAND 1300 TO 1800* 8–66 (1993); SUSAN STAVES, *MARRIED WOMEN'S SEPARATE PROPERTY IN ENGLAND 1660–1833* (1990); MARRIED WOMEN AND THE LAW, *supra* note 17; Tait, *supra* note 17 (discussing traditional rules of coverture).

19. Susan Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849–1975*, 24 *UCLA L. REV.* 1, 5 (1976); see also Waggoner, *supra* note 15, at 24.

20. If the husband held all the property and assets in his name, courts mitigated the inequity through alimony awards, which were often indexed to fault. Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 *MISS. L.J.* 115, 117–20 (1997).

By the mid-twentieth century, as divorce rates began to rise<sup>21</sup> and the problems with fault-based divorce became clear, a range of groups—including some feminist organizations<sup>22</sup>—began to push for divorce reform. Reformers focused their efforts on the adoption of no-fault divorce rules, which allowed couples to divorce without proving fault and being forced to manufacture evidence of adultery.<sup>23</sup> Equitable distribution statutes were related to this reform because they generally barred marital fault from being a consideration in property distribution.<sup>24</sup> Equitable distribution statutes were also, however, designed to address the problems inherent in the position of a homemaker upon divorce: “By the middle of the twentieth century, critics attacked the title system as unfair to traditional homemakers. They argued that the homemaker’s valuable contribution to the marital unit was completely ignored by a system that awarded all property to the wage-earner.”<sup>25</sup> Those fighting to recognize the labor of homemakers included both feminist groups, such as the National Organization for Women, as well as more conservative constituencies, including the family law bar in many states.<sup>26</sup>

The idea of equitable distribution arose in policy papers and reports as early as 1963. In that year’s Report of the Committee on Civil and Political Rights to the President’s Commission on the Status of Women, the report authors observed that:

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21. See Garrison, *supra* note 11.

22. See *id.* (arguing feminist groups focused primarily on ERA efforts but also, contrary to conventional story, did advocate for divorce reform).

23. See *id.*; HERBERT JACOB, *THE SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1983); Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 9, at 130, 130 (“Rather, no-fault divorce primarily sought to rid domestic relations law of the bad features of the old system—bitter recriminations, private detectives, cooperative lying about adultery, the stigma of being divorced, and so on.”).

24. Martha L. Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, 23 *FAM. L.Q.* 279, 286 (1989). There has been much discussion around the data in Weitzman’s book and, according to even Weitzman’s admission, some of the data is incorrect. However, all data confirms the general trends and outcomes that Weitzman identified in her book. Very few states, like North Carolina, still include fault as a factor. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985).

25. See Bell, *supra* note 20, at 122–23 (citations omitted).

26. Mary Zeigler, *An Incomplete Revolution: Feminists and the Legacy of Marital-Property Reform*, 19 *MICH. J. GENDER & L.* 259, 261 (2013) (“By the late 1970s, NOW responded by campaigning for ‘pro-homemaker’ divorce reforms: measures such as those calling for equal or equitable distribution of marital property and laws recognizing the contributions of homemakers in the division of marital property.”); see also Suzanne Kahn, Chapter I: Alimony Drones, Breeding Cows, and Displaced Homemakers: Women Find Their Way Through the Divorce Law Revolution (May 2015) (unpublished Ph.D. dissertation, Columbia University) (on file with author).

Marriage as a partnership in which each spouse makes a different but equally important contribution is increasingly recognized . . . . During marriage, each spouse should have a legally defined substantial right in the earnings of the other, in the real and personal property acquired through those earnings, and in their management. Such a right should be legally recognized as surviving the marriage in the event of its termination.<sup>27</sup>

The Committee recommended changes to laws concerning alimony, support, and property settlements.<sup>28</sup>

California was the first state to act on these recommendations, thanks in large part to the efforts of Herma Hill Kay and her associates. California enacted no-fault divorce in 1969, simultaneously establishing a community property system.<sup>29</sup> California's new divorce rules subsequently served as a model for the drafting of the Uniform Marriage and Divorce Act (UMDA), which introduced the idea of equitable distribution. Aligned with the idea that fault was not to be a factor in either granting the divorce or awarding property, the prefatory note to the UMDA stated that property distribution at divorce was to be treated, as nearly as possible, "like the distribution of assets incident to the dissolution of a partnership."<sup>30</sup> Courts were charged with distributing marital property "without regard to marital misconduct, in just proportions after considering all relevant factors."<sup>31</sup> The first factor was the "contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker."<sup>32</sup>

The UMDA was thereafter promulgated by the Uniform Law Commission in 1971 and approved by the American Bar Association, after much debate, in 1974.<sup>33</sup> The majority of states followed

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27. PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON CIVIL AND POLITICAL RIGHTS TO THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN 47 (1963).

28. *Id.* at 48.

29. *See Kay, supra* note 9, at 6-9 (noting California was the first state to abolish traditional fault-based grounds for divorce and to substitute factual finding of marriage breakdown in their place, and California no-fault divorce law became effective in 1970 in context of community-property marital regime).

30. UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. 177, at 4 (1973).

31. *Id.* § 307.

32. *Id.* Other factors included (2) value of the property set apart to each spouse; (3) duration of the marriage; and (4) economic circumstances of each spouse when the division of property was to become effective, including the desirability of awarding the family home or the right to live therein for a reasonable period to the spouse having custody of any children. *Id.*

33. *See generally Kahn, supra* note 26.



California's lead and changed their divorce laws. The journey to full national acceptance of equitable distribution rules was, however, protracted; it took several decades for the majority of states to enact equitable distribution statutes. State by state, legislatures and family law bars debated the wisdom of the proposed UMDA and mostly adopted pieces of the model legislation without fully adopting it. By 1983, twenty-two states had adopted some kind of equitable distribution statute,<sup>34</sup> and by 2014 there were forty-one equitable distribution states.<sup>35</sup> At present, all states have adopted either equitable distribution or community property principles, and state legislatures have entirely eliminated title-based systems.

In the space of little more than two decades, then, the common law theory of marital property had been transformed through statutory reform to such a degree that equitable distribution statutes were the new normal. As the New Jersey Supreme Court stated in *Painter v. Painter*<sup>36</sup>: "Today in the laws of many other states, in words very similar to those found in our statute, provision is made for the fair and equitable distribution of marital assets in the event of divorce."<sup>37</sup> State courts charged with interpreting the parameters of equitable distribution results also understood the legislative charge of putting into practice the principle of marriage as an economic partnership. In 1974, in a leading early case concerning New Jersey's equitable distribution statute, *Rothman v. Rothman*,<sup>38</sup> the State Supreme Court observed:

[The statute] gives recognition to the essential supportive role played by the wife in the home, acknowledging that as homemaker, wife and mother she should clearly be entitled to a share of family assets accumulated during the marriage. Thus the division of property upon divorce is responsive to the concept that marriage is a shared enterprise, a joint undertaking, that in many ways it is akin to a partnership.<sup>39</sup>

As state courts increasingly evaluated cases using equitable distribution

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34. See Zeigler, *supra* note 26, at 261 ("Equitable property division, rare in 1970, became the norm in all but ten states by the mid-1980s. Whereas no states had property-division rules recognizing the contributions of homemakers in 1968, 22 states had adopted such a policy by 1983." (citations omitted)).

35. These states comprise all of the states that are not community property states. See Kay, *supra* note 9, at 6.

36. 320 A.2d 484 (N.J. 1974).

37. *Id.* at 491.

38. 320 A.2d 496 (N.J. 1974).

39. *Id.* at 501.

statutes, they repeated the mantra of marriage as economic partnership.<sup>40</sup> Just over ten years after *Rothman*, the North Carolina Supreme Court remarked:

[T]he General Assembly sought to alleviate the unfairness of the common law rule by enacting our Equitable Distribution Act . . . [which] reflects the idea that marriage is a partnership enterprise to which both spouses make vital contributions and which entitles the homemaker spouse to a share of the property acquired during the relationship.<sup>41</sup>

Another decade later, in Mississippi, the State Supreme Court reiterated that marriage was a partnership enterprise in justifying the equitable distribution of marital assets:

Most parties enter into marriage with no estate and proceed to build an estate together. Therefore, in the event of a divorce, there is more often than not one estate. If the breadwinner happens to be the husband and has all property in his name, this serves to relegate the non-breadwinner wife to the equivalent of a maid—and upon division of the marital estate entitled to a minimum wage credit for her homemaking service. We abandon such an approach. We, today, recognize that marital partners can be equal contributors whether or not they both are at work in the marketplace.<sup>42</sup>

Modern marriage was an economic partnership, and modern divorce was the dissolution of this economic partnership. By the 1990s, these notions had become entrenched in legal language and culture.<sup>43</sup>

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40. See, e.g., *Cassiday v. Cassiday*, 716 P.2d 1133, 1136 (Haw. 1986) (“These decisions are consistent with the time honored proposition that marriage is a partnership to which both partners bring their financial resources as well as their individual energies and efforts.”); *Williams v. Williams*, 354 S.E.2d 64, 66 (Va. 1987) (“The ‘equitable distribution’ statute, however, is intended to recognize a marriage as a partnership and to provide a means to divide equitably the wealth accumulated during and by that partnership based on the monetary and non-monetary contributions of each spouse.”); *Lacey v. Lacey*, 173 N.W.2d 142, 144–45 (Wis. 1970) (“The division of the property of the divorced parties rests upon the concept of marriage as a shared enterprise or joint undertaking. It is literally a partnership, although a partnership in which contributions and equities of the partners may and do differ from individual case to individual case.”).

41. *White v. White*, 324 S.E.2d 829, 831–32 (N.C. 1985).

42. *Hemsley v. Hemsley*, 639 So. 2d 909, 915 (Miss. 1994).

43. The concept of marriage as an economic partnership has given rise to a body of literature comparing the marital partnership to other, corporate forms of partnership. See, e.g., Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689 (1990).

## 2. *The Mixed Results of Equitable Distribution*

Despite grandiose statements from courts and legislatures about marriage as a partnership, equitable distribution statutes did not always alleviate economic inequality between spouses post-divorce. Rather, there was a growing consensus in the years following the adoption of equitable distribution rules that the new laws had not “lived up to their promise of providing a fair apportionment of assets between the parties.”<sup>44</sup> Marsha Garrison’s leading 1991 study of how courts in three New York counties treated property and alimony found that new property distributions “failed to provide major benefits to divorced wives”<sup>45</sup> and that, simultaneously, the “alimony prospects” of long-term homemakers were significantly reduced.<sup>46</sup> Deborah Rhode and Martha Minow likewise observed that equitable distribution statutes actually produced a “[s]harp decline in single women’s standards of living following divorce”<sup>47</sup> and exacerbated the “feminization of poverty.”<sup>48</sup>

One of the major problems in implementation was the scope and characterization of the marital estate—in other words, what counted as marital property.<sup>49</sup> Rhode and Minow noted: “Part of the problem lies in the restrictive definition of property belonging to the community . . .”<sup>50</sup> Garrison found, from the outset, that husbands in her sample group were more likely to possess separate property than their wives and consequently left the marriage with a higher level of assets. But the fact that courts characterized key non-liquid assets, such as professional degrees and other “career assets,”<sup>51</sup> as separate from the marital estate

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44. Kay, *supra* note 9, at 12.

45. Garrison, *supra* note 11, at 739.

46. *Id.*

47. Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 9, at 191, 197; see also Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2318 (1994) (“[T]he years since the enactment of the initial no-fault divorce reforms have made it clear that women tend to fare far worse financially as a result of divorce than men.”).

48. Rhode & Minow, *supra* note 47, at 197; see also MARTHA FINEMAN, *THE ILLUSION OF EQUALITY* 38 (1991) (arguing that single-parent families headed by women are the “new poor”).

49. Before a court values and distributes marital property, it first characterizes the property as either separate or marital. Property acquired before the marriage, as well as gifts or bequests received by one member of the couple during marriage, remain separate property. Everything else, generally, is marital property.

50. Rhode & Minow, *supra* note 47, at 200.

51. Lenore Weitzman defined career assets as “a large array of specific assets such as pension and retirement benefits, a license to practice a profession or trade, medical and hospital insurance,

was even more detrimental to the goals of equitable distribution. For example, many states did not initially count pensions as part of the marital estate. New York did not do so until 1984, following *Majauskas v. Majauskas*.<sup>52</sup> The Retirement Equity Act of 1984,<sup>53</sup> which required private pension plans to comply with court orders in the context of divorce decrees, facilitated a nationwide shift toward including pensions in the marital estate.<sup>54</sup> Pension assets are now uniformly included in the marital estate and are one of the most common forms of wealth within marriage. Likewise, courts that were originally vexed by how to characterize and value both patents and professional goodwill, other assets that often represent a future rather than present income stream, now routinely include these assets in the marital estate.

Contrarily, almost all state courts, with the exception of New York, have ruled that professional degrees cannot count as marital property.<sup>55</sup> Indeed, courts almost uniformly refuse to characterize either professional degrees or any form of enhanced earning capacity as marital property. This leaves one spouse's contributions to the other spouse's education and career un- or under-valued. This undervaluation is problematic in both low-asset marriages, because enhanced earning capacity is one of the only significant assets, and in long-term marriages, because wives often emerge with no experience in the labor market and little earning potential.<sup>56</sup> In addition, courts have uniformly resisted awarding equal percentages of family businesses or other closely held corporate shares to divorcing wives, even when the marriage is a long-term one in which the wife acted as homemaker and caretaker for a significant period of time.<sup>57</sup>

Problems characterizing the marital estate have subsequently resulted

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the goodwill of a business, and entitlements to company goods and services," and labeled them "The New Property." See WEITZMAN, *supra* note 24, at 110.

52. 463 N.E.2d 15, 17 (N.Y. 1984) ("Vested rights in a noncontributory pension plan are marital property to the extent that they were acquired between the date of the marriage and the commencement of a matrimonial action, even though the rights are unmatured at the time the action is begun."). The case involved a police officer who argued that his pension was not marital property during the divorce proceedings. The couple owned no other property and the court awarded the wife "maintenance of \$43 per week, to be reduced if defendant obtained employment by \$1 per week for every \$3 of her gross earnings." *Id.* at 18.

53. Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (codified in scattered sections of 26 U.S.C. and 29 U.S.C.).

54. WEITZMAN, *supra* note 24, at 115.

55. See *infra* Part II.A.1 (discussing professional degrees as marital property).

56. See *infra* Part II.A (discussing career assets as marital property).

57. See *infra* Part II (for a more in-depth discussion of the problem of career assets).

in economic inequalities at divorce. Exacerbating these problems is the fact that the adoption of equitable distribution rules has rendered courts less likely to make substantial alimony awards. Once courts adopted the “equal partnership” model, the theory held that property division would adequately provide for both parties. “To the extent that the marriage left one spouse financially dependent on the other, property division, rather than alimony, would be used to address that dependency since property could be divided at the time of divorce.”<sup>58</sup> Relatedly, alimony also contravened the desire of reformers to establish divorce rules that would facilitate a clean break between the parties.<sup>59</sup> Consequently, one of Garrison’s major findings was a significant decrease in the frequency and amount of alimony awards, even in long-term marriages.<sup>60</sup> Rejecting permanent alimony and large alimony awards, state courts focused primarily on rehabilitative alimony, giving the wife time-limited payments that allowed her to obtain additional job training or education in order to enter the paid labor market. Because, as Garrison also found, most couples had little property to divide, the decrease in alimony awards was an obstacle to adequately provisioning an economic dependent post-divorce. “[R]eformers realized that women were not equals in the marketplace,”<sup>61</sup> nevertheless equitable distribution statutes did not always meet the challenge of equalizing parties post-divorce.

### B. *Specialized Labor and Spousal Contributions*

The primary reason that reformers sought to change the marital property division rules was that the old rules did not compensate wives who stayed at home and specialized their labor according to cultural norms and gender stereotypes. The original marital bargain—hammered out in both legal rules and the social imagination—posited the husband and wife existing in two distinct but complementary roles. The husband

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58. Jana Singer, *Husbands, Wives, and Human Capital: Why the Shoe Won't Fit*, 31 FAM. L.Q. 119, 120 (1997); see also Regan, *supra* note 47, at 2315 (“[M]ost states treat property division as the primary vehicle for financial adjustments, creating a presumption against alimony or maintenance that can only be rebutted by demonstrating that an equitable property division still leaves a spouse in dire financial condition.”).

59. Singer, *supra* note 58, at 121 (“[T]he no-fault divorce philosophy appeared to absolve divorcing spouses of responsibility for each other’s financial well-being. As a result, facilitating a clean financial break replaced punishing a guilty spouse (or protecting an innocent one) as the overriding objective of divorce-related financial adjustments.”); see also Regan, *supra* note 47, at 2316 (“Divorce law therefore now regards divorce primarily as transforming spouses into strangers.”).

60. See Garrison, *supra* note 11, at 634.

61. *Id.* at 630.

earned income and acted as head of household. The wife provided domestic services and childcare. Equitable distribution rules were designed to better account for this particular householding pattern. In this section, I discuss the specialization of household labor—the marital bargain—and how it has both persisted and evolved in the wake of social change for women and the advent of same-sex marriage.

1. *The Original Marital Bargain: Different-Sex Couples*

The conventional marital bargain is encapsulated in the ubiquitous narrative of the separate spheres. In this story, women “live in a distinct ‘world,’ engaged in nurturant activities, focused on children, husbands, and family dependents.”<sup>62</sup> Men, on the other hand, participate in the world of the marketplace, earning income and representing the household in the economic and political worlds. The bargain, originally written into English coverture rules and domestic relations law, was that the husband had a duty to support his wife since social norms prevented her from earning income.<sup>63</sup> Husbands owed their wives alimony or “separate maintenance” when the couple lived apart, and couples rarely divorced.<sup>64</sup> In the modern context, specialization of labor continues to occur and modern economists, most famously Gary Becker, have explained and justified this gendered labor specialization on efficiency grounds.<sup>65</sup> Becker has argued that “[i]ncreasing returns from specialized human capital is a powerful force creating a division of labor in the allocation of time and investments in human capital between married men and married women.”<sup>66</sup>

Moreover, despite the fact that patterns of work and caretaking have shifted in the last decades “[a]mong heterosexual couples, within-couple inequalities have persisted in terms of earnings and time spent on household labor, even as women have been more fully integrated into the paid labor market.”<sup>67</sup> And even when participating in the paid labor market, wives take on a larger share of housework and childcare than

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62. Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9, 10 (1988).

63. Class, as historians have noted, has complicated this bargain, at all times. *See id.* at 12.

64. *See* Tait, *supra* note 17, at 13.

65. Gary S. Becker, *Human Capital, Effort, and the Sexual Division of Labor*, 3 J. LAB. & ECON. S33, S33 (1985).

66. *Id.*

67. Katherine Weishaar, *Earnings Equality and Relationship Stability for Same-Sex and Heterosexual Couples*, 93 SOC. FORCES 93, 96 (2014); *see also* Alicia Brokars Kelly, *Navigating Gender in Modern Intimate Partnership Law*, 14 J.L. & FAM. STUD. 1, 10–20 (2012).

their spouses.<sup>68</sup> Furthermore, wives have traditionally been more willing to engage in part-time labor or commit themselves to underemployment in order to be the primary caretaker for children and to allow their spouses to maximize their work productivity.<sup>69</sup> Even couples who strive to be egalitarian by dividing up earnings, chores, and carework end up with an unequal division of household labor in which the wife ends up taking on a larger share of the unseen work of household administration, “second shift” work.<sup>70</sup> And while a couple may jointly benefit from specializing labor, the problem for women is that “housework responsibilities lower the earnings and affect the jobs of married women by reducing their time in the labor force and discouraging their investment in market human capital.”<sup>71</sup> Upon divorce, wives are left underinvested in their human capital, and the unpaid contributions they have made to the success of the marital enterprise are undercompensated because these contributions cannot be characterized as property.<sup>72</sup>

Current divorce laws fail to capture the myriad sacrifices and unpaid contributions that spouses, usually wives, make. In a modern context, one in which women are strong participants in the labor market and men are doing an increasing amount of caretaking, these sacrifices and unpaid contributions take on many forms. For some couples, marriage may still mean that spouses take on highly gendered roles and divide labor between the home and the market. One partner might forgo paid employment entirely to help manage the home and raise children while

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68. See MARTHA ERTMAN, *LOVE'S PROMISES* 126 (2015) (“On an average day in 2012, only 20 percent of men did housework like cleaning or laundry, compared with 48 percent of women.”).

69. See Laura A. Rosenbury, *Work Wives*, 36 HARV. J.L. & GENDER 345, 381 (2013). Because of the persistence of the gendering of roles, many individuals—including working women—say they need “wives.” What this means is that:

[T]he speaker desires someone in her (or his) life who will pick up the dry cleaning, keep track of appointments, do the laundry, take the kids to soccer practice, get dinner on the table, manage the social calendar, and vacuum, dust, and scour the tub. In other words, the speaker wants someone to perform the caregiving tasks that legal wives previously were required to perform when marriage was a gendered hierarchy, with men at the top and women at the bottom.

*Id.*

70. See generally HOCHSCHILD, *supra* note 13 (examining division of housework and childcare duties among “dual-career,” opposite-sex couples); MAHONY, *supra* note 13.

71. Becker, *supra* note 65, at S55.

72. Deborah Widiss speculates that there is “a disconnect in a structure of marriage law that encourages specialization during marriage but that, upon divorce, treats such specialization as an individual choice for which the dependent spouse must bear the brunt of the consequences.” Deborah A. Widiss, *Reconfiguring Sex, Gender, and the Law of Marriage*, 50 FAM. CT. REV. 205, 211 (2012).

her partner earns the income and invests in his career.<sup>73</sup> On the opposite end of the spectrum, there are partnerships in which both parties are earners and have similar levels of education and income. These more egalitarian couples might share the burdens of housework and income generation just as they share other resources. Even in these relationships, however, partners bargain, make trade-offs, and distribute the work of running a household.<sup>74</sup> Even in equal partnerships, spouses must cooperate and negotiate as they “engage in a variety of collective projects, including child rearing, broader family relationships, friendships, and the common management of resources—a household, investments, and careers.”<sup>75</sup>

In addition, many marriages go through periods when one spouse takes a career break, makes a career transition or goes through any other prolonged period of nonearning.<sup>76</sup> In some marriages, one partner might take on the role of earner while the other obtains additional education, starts a new career venture, or looks for work in a bad economy. Alternatively, one partner may take a job with excellent compensation that allows the other to work in a personally meaningful but not highly paid job. Or, one partner may take a lower paying job or forgo career opportunities in order to allow the other partner to make critical career moves and relocate. These choices are sometimes reciprocal and, at various points in a partnership, individuals may switch roles, such that both partners have the chance to take risks and explore new career opportunities. As Milton Regan has observed: “Members of [a] partnership make a host of subtle contributions and sacrifices in reliance

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73. See Regan, *supra* note 47, at 2320 (“Seen as an economic partnership, marriage often reflects a joint effort to enhance the human capital of one spouse as part of a strategy to maximize total household income.”). Therefore, despite the need and desire of some women to participate fully in the paid labor force, the fact that they have lower paying jobs sometimes enables couples to rationalize devoting the marital resources to supporting the husband in his career rather than the wife. See GARY S. BECKER, A TREATISE ON THE FAMILY 41, 44 (2d ed. 1993); Margaret Brining, *Property Distribution Physics: The Talisman of Time and Middle Class Law*, 31 FAM. L.Q. 93, 103–04 (1997).

74. Even couples without children must allocate “admin.” See Elizabeth F. Emens, *Admin*, 104 GEO. L.J. (forthcoming 2015). See generally MAHONY, *supra* note 13, for more on the ways couples bargain.

75. Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 82 (2004).

76. In a modern context, it is also less likely that families can afford to have one partner out of the paid workforce. See June Carbone & Naomi Cahn, *Whither/Whither Alimony?*, 93 TEX. L. REV. 925, 927 (2015) (“We believe that it is entirely plausible that most couples today enter marriage believing that neither will or should assume a full-time caretaking role and that even if a spouse does, he or she must be prepared to resume paid employment in fairly short order in accordance with the family’s needs.”).



on continuation of a shared life together.”<sup>77</sup>

In addition, children generate and intensify issues of career sacrifice and underemployment. Childcare makes demands of a couple that are unique and, when children arrive, spouses are more likely to engage in specialization of labor such that one person is the primary caretaker and one the primary economic earner.<sup>78</sup> Some primary caretakers may still work, but forgo career opportunities that would necessitate long hours or significant travel in order to be available and at home. These individuals may choose various forms of contingent labor, part-time work, or other forms of the “mommy track.”<sup>79</sup> Moreover, even individuals who choose to forgo paid employment for only a brief period while the children are very young sacrifice prime years in the paid labor market and often find themselves on career “off-ramps” that can be overcome only with great effort.<sup>80</sup> Consequently, “the responsibility of married women for child care and other housework has major implications for earnings and occupational differences between men and women even aside from the effect on the labor force participation of married women.”<sup>81</sup>

Ultimately, spouses bargain with one another in multiple ways as they navigate the difficulties of developing two careers, caretaking for children and sometimes parents, and maintaining a home.<sup>82</sup> This bargaining involves navigating gender roles—perhaps introducing gender deviance into the equation by allocating responsibilities in nontraditional ways—as well as earning capacities, work preferences, and household needs.<sup>83</sup> Spouses are sometimes very explicit about the

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77. See Regan, *supra* note 47, at 2387.

78. BECKER, *supra* note 73, at 37–38; Gary S. Becker, *A Theory of the Allocation of Time*, 75 *ECON. J.* 493, 512 (1991).

79. See, e.g., Rebecca Korzec, *Working on the Mommy-Track: Motherhood and Women Lawyers*, 8 *HASTINGS WOMEN'S L.J.* 117 (1997); Elizabeth Ty Wilde et al., *The Mommy Track Divides: The Impact of Childbearing on Wages of Women of Differing Skill Levels* (Nat'l Bureau of Econ. Research, Working Paper No. 16582, 2010), available at <http://www.nber.org/papers/w16582>.

80. See generally SYLVIA ANN HEWITT, *CREATING A LIFE: PROFESSIONAL WOMEN AND THE QUEST FOR CHILDREN* (2002). See also ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* (1st ed., 2001); Williams, *supra* note 6.

81. Becker, *supra* note 65, at S55.

82. See MAHONY, *supra* note 13, for examples of how spouses negotiate.

83. See Kelly, *supra* note 67, at 31–33. Different-sex couples may engage in gender “deviant” behavior in which they test, stretch, and reverse gender roles. When men engage in caretaking, however, they often encounter the same concerns and obstacles as women do. See Joan C. Williams & Allison Tait, *Mancession or “Momcession”? Good Providers, a Bad Economy, and Gender Discrimination*, 86 *CHI.-KENT. L. REV.* 857, 865 (2011).

terms of their economic partnerships, discussing how to divide their time in order to meet family needs. Other times, individuals sink into certain roles through trial and error, without much discussion, finally settling on a pattern that works. In both cases, individuals usually make these sacrifices operating on the unspoken understanding that they will be both provisioned and protected by their marital status.

At divorce, not all bargains will or should cause judicial concern. Some sacrifice is endemic to the state of marriage. There are the daily bargains—the work of sharing—that marriages are built on, and these series of small sacrifices do not necessarily demand accounting at the moment of property division. Moreover, marriage should not be a ledger of debits and credits that spouses calculate and recalculate daily. Nonetheless, certain marital bargains in which economic dependency exists alongside sacrifice of income and opportunity are a cause for judicial concern. Certain marital bargains that depend on labor specialization, and that are enriched by the unpaid contributions of one spouse—these are the divorces in which marital property must be reimagined in order to reflect the bargains made by partners during the intact marriage.<sup>84</sup>

## 2. *Updating the Marital Bargain: Same-Sex Couples*

Marriage has conventionally been a foundational site for the creation of gender and the marital bargain has been the template for shaping gender. More recently, same-sex marriage has been celebrated as an evolutionary event in the history of marriage that will help decrease the persistence of gender-role typecasting and specialized labor within marriage.<sup>85</sup> Nan Hunter has observed that same-sex couples differ from different-sex couples in important ways with respect to “household labor, sexual exclusivity, and child rearing,” all of which have been traditionally “associated with the legal definition of marriage.”<sup>86</sup> Some scholars have suggested that same-sex marriage has the potential to provide a new model for marriage by creating marriages that are “empty of gendering processes and practices,” as opposed to different-sex

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84. In addition, as Robert Mnookin and Lewis Kornhauser have demonstrated, “rules and procedures used in court for adjudicating disputes affect the bargaining process that occurs between divorcing couples *outside* the courtroom.” Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979) (emphasis in original).

85. See, e.g., Hunter, *supra* note 3, at 18–19.

86. Nan D. Hunter, *Introduction: The Future Impact of Same-Sex Marriage: More Questions than Answers*, 100 GEO. L.J. 1855, 1865 (2012).

marriages that are “gender-full.”<sup>87</sup>

In support of this theory, a number of studies have shown that, in terms of labor specialization, same-sex couples adopt a more egalitarian approach: “Much research on same-sex domesticity points to a strong egalitarian ideal for division of labour, a reluctance for one spouse to be dependent on the other, and an emphasis on negotiation.”<sup>88</sup> Instead of allocating household labor by gender (wife cooks dinner, husband takes out the trash), “most couples in same-sex relationships do not assign gender roles. The tasks are flexible, often interchangeable between the partners and are often divided by time, ability, and consideration.”<sup>89</sup> This egalitarian concept of domestic labor and marital bargaining correlates with the fact that “most gay men and lesbians are in dual-earner relationships, so neither partner is the exclusive breadwinner and each partner has some measure of economic independence.”<sup>90</sup>

Nonetheless, studies also show that same-sex couples still adopt default patterns of specialized labor within the household, even while preferring a narrative of equality within marriage. One leading study from the 1990s found that, in seventy-five percent of same-sex relationships, one member of the couple “specialize[d] in domesticity.”<sup>91</sup> This tendency to specialize, as with different-sex marriages, increased with the length of the relationship. Therefore, in opposition to the stated desire for and engagement in equal relationships, “some same-sex couples were observed to be enacting a fairly segregated, or specialized, division of labor, whereby one partner concentrated more of his or her energies in domestic work and one partner was more heavily involved in

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87. Abbie E. Goldberg, “Doing” and “Undoing” Gender: The Meaning and Division of Housework in Same-Sex Couples, 5 J. FAM. THEORY & REV. 85, 88 (2013).

88. Robert Leckey, *Marriage and the Data on Same-Sex Couples*, 35 J. SOC. WELFARE & FAM. L. 179, 182 (2013); see also Charlotte Patterson, *Family Lives of Lesbian and Gay Adults*, in HANDBOOK OF MARRIAGE AND THE FAMILY 659, 661 (Gary W. Peterson & Kevin R. Bush eds., 3d ed. 2013) (“Lesbian and gay couples report that egalitarian ways of dividing up labor are the most common.”); Goldberg, *supra* note 87, at 87 (“This literature is consistent in suggesting that same-sex couples divide housework more equally than heterosexual couples.”). Suzanne Kim’s work on name changes within same-sex marriage also bears out the importance of the equality norm for same-sex couples. See Suzanne Kim, *Social Rites of Marriage* (2015) (unpublished manuscript) (on file with author).

89. Suzanne Taylor Sutphin, *Social Exchange Theory and the Division of Household Labor in Same-Sex Couples*, 46 MARRIAGE & FAM. REV. 191, 195 (2010).

90. Letitia Anne Peplau & Adam W. Fingerhut, *The Close Relationships of Lesbians and Gay Men*, 58 ANN. REV. PSYCHOL. 405, 408 (2007).

91. CARRINGTON, NO PLACE LIKE HOME: RELATIONSHIPS AND FAMILY LIFE AMONG LESBIANS AND GAY MEN 187 (1999).

the paid employment sphere.”<sup>92</sup> Similar to egalitarian-minded different-sex couples, same-sex couples generally appear held to a vision of equality within marriage that may “mask substantial observable differences between partners’ actual contributions.”<sup>93</sup>

These findings, that same-sex couples specialize labor, dovetail with related studies that posit specialization of labor according to social exchange theory. Social exchange theory “predicts that greater power accrues to the partner who has relatively greater personal resources, such as education, money, or social standing.”<sup>94</sup> This prediction has proved true with both different- and same-sex couples.<sup>95</sup> In the context of same-sex relationships, studies have found that “older, wealthier men generally had more power in their intimate relationships” and that “the partner with greater financial resources had more power in money management issues” in gay but not lesbian couples.<sup>96</sup> Gay men, like their straight counterparts, tend to believe that “the more successful partner should not have to participate in household labor. It was a form of ‘extra credit’ if the more successful partner did housework.”<sup>97</sup> More generally, findings show that “[w]hen differences in proportional contributions to housework occur in same-sex couples, the partner with less job prestige, less income, or greater job flexibility tends to perform a greater proportion of unpaid work.”<sup>98</sup> Approaching the question from the other side, studies have found sharing of household labor in same-sex couples to be “most common among affluent couples who relied on paid help, and when both partners had less demanding jobs with more flexible schedules.”<sup>99</sup>

Children, moreover, complicate the division of labor in a household. Parenting in different-sex couples is a strong driver of labor specialization and the gendering of carework. This also holds true for different-sex couples raising children, a demographic that is swiftly increasing. A sizeable number of same-sex couples are raising or will raise children as adoption laws, reproductive technologies, and social

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92. Goldberg, *supra* note 87, at 89.

93. Peplau & Fingerhut, *supra* note 90, at 408.

94. *Id.* at 409.

95. *Id.*; see also Becker, *supra* note 78.

96. Patterson, *supra* note 88, at 661.

97. Sutphin, *supra* note 89, at 196.

98. Goldberg, *supra* note 87, at 88 (citations omitted).

99. Peplau & Fingerhut, *supra* note 90, at 408.

norms shift.<sup>100</sup> An estimated thirty-four percent of lesbian couples and twenty-two percent of gay male couples living together are already raising children, according to census data.<sup>101</sup> As the number of children living in same-sex households increases, so will the number of same-sex couples who must “master new tasks, cope with new demands on their time, and deal with role transitions of various kinds.”<sup>102</sup>

Already, Martha Ertman notes, “[o]ne in three gay male couples raising kids have one parent at home full-time, the same rate as straight couples with kids. Lesbians lag behind with one in four having one parent engaged in full-time homemaking.”<sup>103</sup> Another study from 2011 found that the majority of a sample group of lesbian parents “divided paid labor unequally (e.g., one partner worked full-time and one partner worked part-time), which often led to inequalities in the division of unpaid labor.”<sup>104</sup> Increasingly, then, “among the gay and lesbian couples that have children, rates of stark specialization . . . are comparable to the rates among heterosexual parents.”<sup>105</sup> Qualitative data likewise indicates the possibility of strong gendering being reinscribed through parenting. One study subject, a gay father raising two adoptive children with his partner, remarked:

[I’m] in charge of the childcare, I’m the mom basically. I have definitely taken on the role of the mother at home . . . in some ways we kind of entered into the situation with that understanding . . . he even said before we had kids like, “well you have to be the mommy” kind of thing, like, he didn’t want to be, he wanted me to be the nurturer.<sup>106</sup>

As Ramona Oswald has stated: “[B]eing lesbian or gay is not in itself

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100. In 2010, approximately 16,000 same-sex couples had an adopted child, reflecting a significant increase from 2000, when 6477 same-sex couples had adopted children. GARY J. GATES, WILLIAMS INST., *LGBT PARENTING IN THE UNITED STATES* 3 (2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>. Same-sex couples are six times more likely than their different-sex counterparts to be raising foster children. *Id.* Overall, more than 125,000 same-sex couple households, almost twenty percent of all same-sex couple households, include nearly 220,000 children under the age of eighteen. *Id.* at 2–3.

101. Peplau & Fingerhut, *supra* note 90, at 414.

102. Patterson, *supra* note 88, at 666.

103. ERTMAN, *supra* note 68, at 128. The fact that lesbians tend to specialize labor less may suggest a greater commitment to relationship equality.

104. Goldberg, *supra* note 87, at 89.

105. Martha Ertman, *Marital Contracting in a Post-Windsor World*, 42 FLA. ST. U. L. REV. 479, 506 (2014).

106. Ramona Faith Oswald et al., *Queering “The Family,”* in HANDBOOK OF FEMINIST FAMILY STUDIES 43, 45 (2009) (alterations in original).

enough to transcend heteronormativity.”<sup>107</sup>

As with different-sex couples, there are a number of factors that produce and maintain power as well as gender in a same-sex marriage. Nan Hunter includes among the factors: “the presence of children, the power dynamics related to being the sole biological parent in a couple, income differences between partners, the length of the relationship, women’s experience of and commitment to employment outside the home, and the strength of individual desire to conform to gender expectations.”<sup>108</sup> Furthermore, the way that same-sex couples navigate the household economy should not be automatically “mapped onto the heterosexual ‘template,’ in which economic providing and domestic activities are presumed to have identical meanings and dynamics as in heterosexual couples.”<sup>109</sup>

Nevertheless, the reality is that both earnings and gender have a tenacious hold on intimate ordering in marriage because of the ways in which couples create marital bargains and differentially value individual contributions. Same-sex couples make the same type of marital bargains that different-sex couples do. Same-sex spouses bargain over who will do what housework, in other words, the routine chores that comprise the maintenance of a household and a shared life. Likewise, same-sex spouses experience the same spectrum of economic bargaining positions: Some individuals make career sacrifices so that their partners can take on new responsibilities, some experience periods of economic dependency while obtaining education or while job searching, and yet others take on the role of provider either by inclination or for practical reasons.

One key point of traction in sociological findings is that “unequal incomes within a couple make it ‘incredibly difficult to resist those patterns of dominance’ that cohere around the role and status afforded the higher earner.”<sup>110</sup> Unequal incomes correlate with (and potentially produce) labor specialization and have traditionally been a hallmark of marriage as well as gender definition within the household. A second key idea is that marriage encourages spouses to specialize labor by

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107. *Id.* I leave to the side in this paper the question of whether the heteronormative frame is normatively problematic for same-sex relationships and whether same-sex couples should be pushing against this frame. Instead, I focus on how to change divorce rules to accommodate both same-sex and different-sex couples who are regulated by rules that encourage sharing and labor specialization on entry and then penalize this behavior upon exit.

108. Hunter, *supra* note 86, at 1866.

109. Goldberg, *supra* note 87, at 92–93.

110. Leckey, *supra* note 88, at 182 (citations omitted).

holding out the legal promise of financial protection if divorce occurs. For this reason, presumably, studies reveal that different-sex cohabiting partners specialize labor at a much lower rate than different-sex married partners: “[M]arried couples are noticeably different from all other household types,” and the “division of household labor is . . . more egalitarian in different sex cohabiting couples than in different-sex married couples.”<sup>111</sup> Consequently, it is possible that same-sex marriage will not transform marriage; rather, marriage may transform same-sex couples.<sup>112</sup> If same-sex couples assign and perform household work according to either financial earnings or conventional gender lines, gender stereotypes will continue to inscribe themselves in marriage. If courts persistently fail to capture unpaid contributions when dividing marital property, gender will likewise continue to inhere in marriage, to the detriment of the feminized party upon divorce. Equitable distribution rules must evolve to better reflect marital bargains, capturing specialized labor and economic partnership in particular, thereby increasing the potential to rewrite gender norms in marriage for everyone.

## II. LEARNING TO DIVIDE THE DOMESTIC DOLLAR

Equitable distribution statutes have the potential to redress gendered imbalances in both same- and different-sex marriages caused by unequal division of household labor and market participation during marriage. To achieve this goal, courts have construed the category of marital property expansively. For example, the Maryland Supreme Court has stated: “Our cases have generally construed the word ‘property’ broadly, defining it as a term of wide and comprehensive signification embracing everything which has exchangeable value or goes to make up a man’s wealth—every interest or estate which the law regards of sufficient value for judicial recognition.”<sup>113</sup> While the trend among courts has indeed been to include an increasing number of assets within the marital estate, the problem of career assets—in particular, one spouse’s contributions to another’s career—continues to hamper the success of these statutes.

In this Part, I discuss the continued exemption of certain career assets from inclusion in the marital estate or, if included, from the presumption

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111. Hunter, *supra* note 86, at 1866.

112. See, e.g., Suzanne Goldberg, *Why Marriage*, in MARRIAGE AT THE CROSSROADS (Marsha Garrison & Elizabeth Scott eds., 2012); Eitelbrick, *supra* note 3, at 1; see also Polikoff, *supra* note 3, at 1546 (“[A]n effort to legalize lesbian and gay marriage would make a public critique of the institution of marriage impossible.”).

113. Archer v. Archer, 493 A.2d 1074, 1079 (Md. 1985) (citations omitted) (internal quotation marks omitted).

of equal division. I begin by describing the ways in which courts fail to properly compensate spousal contributions made by a non- or low-earning spouse to the high-earning spouse's career success. I discuss why courts have exempted these assets from the marital estate and from equal division. As compensatory mechanisms, courts have used distribution and support. I argue, however, that both of these strategies are inadequate as well as theoretically misguided. I ultimately evaluate judicial models for transforming career assets into marital property that is subject to equal division, and propose further modifications to divorce rules.

### A. *Questioning the Career Asset Carve-Outs*

Lenore Weitzman, in *The Divorce Revolution*, defined career assets as “tangible and intangible assets that are acquired as a part of either spouse’s career or career potential . . . . [These assets include] pension and retirement benefits, a license to practice a profession or trade, medical and hospital insurance, the goodwill of a business, and entitlements to company goods and services.”<sup>114</sup> Career assets are key marital assets because, for the majority of divorcing couples, whether same- or different-sex, these assets are a primary source of wealth.<sup>115</sup> Professional training, advanced education, and earning capacity are extremely valuable “in our modern, knowledge-based economy . . . [where] human capital is the most important form of wealth produced during most marriages.”<sup>116</sup> The failure to include enhanced earning capacity in the marital estate means therefore that, in different-sex marriages, “most wives are cut off from property rights in the key family asset—the wage of the ideal worker,”<sup>117</sup> and “women’s per capita income and standard of living tend to decline substantially following divorce while those of men tend to increase.”<sup>118</sup> The problem, however, is not limited to women because it is, at root, one of gender and earning power. The failure of courts to capture unpaid spousal contributions will also impact men in different-sex marriages who choose the role of “wife,” just as it will affect any same-sex couples who

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114. WEITZMAN, *supra* note 24, at 110.

115. In the majority of divorces, there is little property to divide. Couples likely own a home and participate in a pension plan; in fact, they are more likely to own debt than assets at the termination of a marriage. Garrison, *supra* note 11, at 667.

116. Singer, *supra* note 59; *see also* Kelly, *supra* note 12, at 163–65.

117. Williams, *supra* note 6, at 2236.

118. Garrison, *supra* note 11, at 633. In addition, contrary to the stated goals of equitable distribution, the burden falls the hardest on women exiting long-term marriages. *Id.* at 739.



choose to specialize in household labor.

1. *The Last Citadel: Professional Degrees and Family Businesses*

Courts have included career assets as marital property gradually and in piecemeal fashion. Despite valuation difficulties, states now include pensions as part of the marital estate. Courts may also include patents and some other illiquid future income streams.<sup>119</sup> Courts generally include professional or “enterprise” goodwill in marital property, although there are some holdout states that refuse to do so.<sup>120</sup> Courts have, however, routinely refused to characterize professional degrees and enhanced earning capacity as marital property. In addition, courts have persistently undervalued the contribution of non-owning spouses to increases in value to family businesses and other corporate shares. These assets and contributions remain problematic carve-outs to the presumption (or mandate) of equal division of marital property.

*Professional Degrees.* The conventional and even cliché story of professional degrees and enhanced earning capacity is a familiar one. Wives take any available job in order to scrape together money to pay for household and sometimes even tuition for the husband while he is in school. Then, when the husband finishes school and embarks on a new career, he leaves the wife. The West Virginia Supreme Court described the typical situation in *Hoak v. Hoak*<sup>121</sup>: “The supporting spouse . . . made personal financial sacrifices and consented to a lower standard of living than she would have enjoyed had her husband been employed. She postponed her own career plans and presumably overlooked many current needs for the prospect of future material benefits.”<sup>122</sup> While this narrative may sound dated to some, educational attainment and professional degrees remain valuable assets as the

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119. See *Majauskas v. Majauskas*, 463 N.E.2d 15, 17 (N.Y. 1984).

120. Professional goodwill, like a professional degree, is a career asset that courts have debated extensively because it contains elements of personal achievement. With goodwill, however, courts have found a way to differentiate between personal and enterprise goodwill and generally have been willing to allow professional goodwill to be characterized as marital property. In a survey of jurisdictions discussed in *May v. May*, 589 S.E.2d 536 (W. Va. 2003), the West Virginia Court found that thirteen courts made no distinction between personal and enterprise goodwill, counting them both in calculations of marital property and dividing them. Five courts counted neither as marital property. Constituting the plurality, twenty-four states differentiated between enterprise and personal goodwill, and counted enterprise goodwill as marital property. See *id.* at 543.

121. 370 S.E.2d 473 (W. Va. 1988)

122. *Id.* at 477 (“The appellant’s sacrifices would have been rewarded had the marriage endured. The divorce has left Rebecca Hoak at a substantial disadvantage when compared with her ex-husband.”).

workplace evolves and the needs of the labor market change. Advanced education has become almost a requirement in some areas for career advancement, and many couples agree that they will jointly make sacrifices at some point in their marriage to further the education of one partner. Accordingly, the legal questions persist even though gender roles are evolving and two earner families are more the norm than at any time in the past. Despite the importance and ubiquity of educational attainment, courts almost uniformly refuse to count professional degrees or any enhanced earning capacity as marital property. As Hanoch Dagan and Carolyn Frantz observe: “Perhaps the most common objection to division of earning capacity on divorce is that it is not property.”<sup>123</sup> In a statement typical of courts around the country, the Colorado Supreme Court set forth this common objection:

An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.<sup>124</sup>

Courts focus on the need for property to be heritable or at least marketable—to conform to a classic model of property ownership. Nonetheless, as Joan Williams has observed: “Many modern property rights also clash with a model of absolute, alienable, inheritable, and exchangeable entitlements. Examples are pensions and goodwill which are widely recognized as property despite their lack of heritability.”<sup>125</sup> Other forms of property, from life estates to partnership rights, are likewise inalienable yet recognized as property. What courts do not recognize is that “future earning capacity is not just a personal attribute: It is an income-generating asset . . . capable of treatment as property.”<sup>126</sup> Moreover, “engaging in an essentialist inquiry into the nature of

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123. Frantz & Dagan, *supra* note 75, at 109; *see also* Williams, *supra* note 6, at 2268 (“Courts, with few exceptions, have rejected wives’ claims that the degrees are marital property, often using broad language to the effect that human capital does not have the attributes traditionally associated with property.”).

124. *In re Marriage of Olar*, 747 P.2d 676, 679 (Colo. 1987) (citing *In re Marriage of Graham*, 574 P.2d 75, 77 (Colo. 1978)). “While pension rights, as in *Deering*, constitute a current asset which the individual has a contractual right to receive, such rights are plainly distinguishable from a mere expectancy of future enhanced income resulting from a professional degree. The latter is but an intellectual attainment; it is not a present property interest.” *Archer v. Archer*, 493 A.2d 1074, 1079–80 (Md. 1985).

125. *See* Williams, *supra* note 6, at 2271.

126. Frantz & Dagan, *supra* note 75, at 109.

property simply masks the inherent normative choices” to reward earning and devalue unpaid, underpaid, and household labor.<sup>127</sup>

Another persistent argument against making a degree or enhanced earning capacity marital property is that the valuation of these assets is too difficult and speculative. The Maryland Supreme Court, refusing to characterize a professional degree as marital property, stated: “At best, it represents a potential for increase in a person’s earning capacity made possible by the degree and license in combination with innumerable other factors and conditions too uncertain and speculative to constitute ‘marital property’ within the contemplation of the legislature.”<sup>128</sup> These arguments confuse property characterization with property valuation. That is to say, difficulties that arise in valuing a professional degree should not drive the characterization of the degree, but rather should be taken up in the valuation stage of property division. Furthermore, even acknowledging that valuation for degrees is complicated, it is clear that courts have methods and options at their disposal. Courts routinely find the value of other future income streams, such as pensions. Furthermore, courts have adopted an “if and when” approach in the valuation of patents, a method that might be particularly apt for degrees because of the speculative and variable nature of future income.

Finally, one of the most resonant sets of arguments derives from the notion of personal merit. Courts, guided by culturally entrenched notions of individual accomplishment, are reticent to attribute the professional achievements of one spouse to the partnership unit.<sup>129</sup> Success in the professional world is perceived as “a constitutive component of the individual self”<sup>130</sup> and the normative argument against it “arise[s] from autonomy.”<sup>131</sup> In addition, approaching the question from an autonomy standpoint, critics have argued that making these career assets part of the marital estate would consign the earner to a specific job and salary level,

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127. *Id.*

128. *Archer*, 493 A.2d at 1080; *see also* *Mahoney v. Mahoney*, 453 A.2d 527, 532 (N.J. 1982) (“Valuing a professional degree in the hands of any particular individual at the start of his or her career would involve a gamut of calculations that reduces to little more than guesswork.”).

129. *Regan*, *supra* note 47, at 2355 (“The resulting visceral sense that the husband’s income is property earned by the sweat of his brow thus may lead a court to regard a claim on post-divorce income as a request for redistribution of property from one who has labored in the market to one who has not.”).

130. *Frantz & Dagan*, *supra* note 75, at 109. This derived from a Lockean notion of labor and property. *See Regan*, *supra* note 47, at 2350 (“Labor desert theory, the idea that property rights are justified as a reward for the expenditure of one’s labor, is perhaps ‘the principal normative theory of property.’”).

131. *Frantz & Dagan*, *supra* note 75, at 109.

thereby removing the option for career changes that reduced the earner's income. Even feminist critics note that we should be "wary of the idea that one person could have an ownership interest in the person of another. Indeed, the history of marriage law itself cautions against giving spouses property interests in each other's person."<sup>132</sup> For all these reasons, courts have refused to count professional degrees as marital property.

*Family Businesses.* Under the right conditions, an increase in value to a family business or other corporate shares is marital property. If the business shares were acquired during marriage, then they are generally always characterized as marital property. The problem then becomes not how to characterize the property but rather what percentage of the property to award to the contributing (non-owner) spouse. Even if the shares were acquired by one party before the marriage, and would therefore generally count as separate property, any increase to the shares produced through a couple's joint labor is considered marital property. What courts require is a nexus between the increase in value and the contributions of a spouse,<sup>133</sup> and if the court fails to find the nexus, appreciation is deemed to be passive and the asset remains separate property. The concept underlying this conversion of separate property into marital property is that one spouse should not be unjustly enriched by the contributions of the other.

When spouses directly contribute and the value that they add to a joint enterprise is measurable—when, for instance, a spouse is an employee of the company and works directly for the benefit of the company—courts routinely award a percentage of the increase in value to the non-owning spouse. Even if the spousal contribution is indirect, however, courts are supposed to take spousal contributions into account. A New York court stated in *Brennan v. Brennan*<sup>134</sup>:

[M]arriage is an economic partnership, the success of which is dependent not only upon the respective financial contributions of the partners, but also on a wide range of nonremunerated services to the joint enterprise, such as homemaking, raising children and providing the emotional and moral support

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132. Singer, *supra* note 58, at 124.

133. Professional goodwill is treated similarly, in that it is generally characterized as marital property, subject to equitable division, and courts look for a nexus or demonstration of spousal contribution in order to determine the correct division. *See, e.g., Gaskill v. Robbins*, 282 S.W.3d 306 (Ky. 2009) (requiring trial court to differentiate between personal and enterprise goodwill in valuing wife's oral surgery practice).

134. 479 N.Y.S.2d 877 (App. Div. 1984).

necessary to sustain the other spouse in coping with the vicissitudes of life outside the home.<sup>135</sup>

In this way, courts have understood that the equitable distribution statutes are meant to capture the unpaid labor produced by the non-earning spouse.

Accordingly, in *Brennan*, a case about what percentage of a husband's dairy farm would go to the wife at the time of the divorce, the trial court was obliged to calculate what percentage of the increase in value to the dairy farm was attributable to the wife, in order to make the property award. The court observed that "[p]rosperity and growth" in the dairy business occurred during the marriage, in no small part because the wife "pledged her personal credit for its debts and contributed indirectly to its success through her services as a homemaker and mother."<sup>136</sup> Not including the increase in value in the marital estate, the court stated, would "violate the letter and spirit of the Equitable Distribution Law."<sup>137</sup> Following *Brennan*, in *Price v. Price*,<sup>138</sup> a 1986 case about the appreciated value of one spouse's stove business,<sup>139</sup> the court reiterated that an increase in company value was marital property even if one partner's contributions were indirect, further concluding that there was no requirement for a contributing spouse to prove a causal link between contribution and increase in value.<sup>140</sup>

Despite these precedent-setting cases, courts have nevertheless created a presumption against equal division in these cases.<sup>141</sup> In *Arvantides v. Arvantides*,<sup>142</sup> a New York case decided one year after *Brennan*, the appellate court remarked: "Although plaintiff's contributions as a homemaker are indeed worthy of full

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135. *Id.* at 880.

136. *Id.* at 880-81. The husband was entitled to credit for the "value of his initial capital contribution to the spousal enterprise consisting of his premarital cattle and equipment." *Id.* at 881.

137. *Id.*

138. 503 N.E.2d 684 (N.Y. 1986).

139. At stake was the increase in value to defendant's ownership interest in the Unity Stove Company (Unity), a family business engaged in the wholesale supply of kitchen parts and appliances. *Id.* at 685.

140. *Id.* at 687.

141. Legal procedure also places the contributing spouse at a distinct disadvantage since, in most states, the non-earning spouse bears the burden of proving her contributions. The task of proving an increase in value is difficult when valuation methods conflict. In addition, the contributing spouse may not have access to all the documentary evidence—held by the other spouse—needed in order to prove the increase. Proving contributions may be similarly difficult, especially when the contributions are indirect and consist of the daily work of maintaining a home and family.

142. 478 N.E.2d 199 (N.Y. 1985).

consideration . . . there is no requirement that the distribution of each item of marital property be on an equal or 50–50 basis.”<sup>143</sup> The court thereafter reduced the wife’s award in her husband’s dental practice from fifty to twenty-five percent, citing the “modest nature”<sup>144</sup> of her contributions without actually discussing what the wife’s contributions were. In *Capasso v. Capasso*,<sup>145</sup> several years later, a New York court awarded the wife only twenty percent of the two million dollar increase in value to the construction business started and run by the husband.<sup>146</sup> The court awarded this low percentage despite the fact that the wife had “immersed herself in [the business], dedicating herself to and identifying with the husband’s success.”<sup>147</sup> She had “contributed directly and significantly to [the company’s] success”<sup>148</sup> by making room for the business operations office in their home, doing paperwork and “legwork”<sup>149</sup> for the company, and routinely discussing “business matters”<sup>150</sup> with her husband. She consulted with the accountant regarding company business and she regularly entertained her husband’s customers and colleagues. She also raised the children and managed the housework, freeing her husband’s time for his business. The husband, for his part, contended only that his wife’s services were not “extraordinary,” “unusual,” or “significant.”<sup>151</sup>

This trend to downplay spousal contributions, both direct and indirect, to the increase in value of a family business has continued almost without interruption.<sup>152</sup> In 2013, in Mississippi, an appellate court affirmed the Chancellor’s ruling that interest in two grocery stores owned by a husband was separate property because “any contribution to these two grocery stores by [the wife] was minimal at best, and there was no increase in value during the marriage that was attributable to [the

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143. *Id.* at 200 (internal citations omitted).

144. *Id.*

145. 517 N.Y.S.2d 952 (App. Div. 1987).

146. *Id.* at 963.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* For similar results with reversed gendering, see *Teitler v. Teitler*, 549 N.Y.S.2d 13, 14 (App. Div. 1989). The court awarded the wife seventy-five percent of the increase in value to her art business because “her efforts were considerably more instrumental in its operation and success than were the administrative and sales services performed by plaintiff, who was eventually replaced by a part-time employee.” *Id.*

152. For the exception to this rule, see the discussion of *Sykes v. Sykes*, *infra* Part II.B.2.

wife].”<sup>153</sup> Although the wife had worked occasionally in the floral department at one of the stores, the court discounted this involvement and failed to even mention her work within the home.<sup>154</sup>

These types of work patterns and spousal contributions also define some same-sex households and will, in the absence of rule reform, cause similar inequities. An important recent cohabitant property rights case in Illinois, *Blumenthal v. Brewer*,<sup>155</sup> provides a preview of the problems of one spouse contributing to the other’s business success and the wealth imbalances caused by the specialization of labor in a same-sex household. In that case, two women had been in a marital-like relationship for twenty-six years before the relationship dissolved. The two women met at graduate school, “exchanged rings as symbols of their lifelong commitment to each other,”<sup>156</sup> and presented themselves to their families and friends as a committed couple. One woman—Brewer—obtained a law degree, the other—Blumenthal—a medical degree. The couple had three biological children through Assisted Reproductive Technology and the couple deliberately allocated “work and family” responsibilities such that the lawyer “stayed home for a while as the children’s primary caregiver and then pursued employment in the public sector where she had regular work hours and no travel requirements.”<sup>157</sup> The lawyer, as the stay-at-home parent, took care of all household management chores and “[t]his arrangement enabled [the doctor] to devote time to her medical career and become the family’s primary breadwinner.”<sup>158</sup>

When the relationship ended, Blumenthal requested partition of the house that the couple owned jointly. Brewer filed a counterclaim, requesting “to receive sole title to the property so that the couple’s overall assets would be equalized after she stayed at home with the couple’s three children while Blumenthal was the family’s breadwinner.”<sup>159</sup> More specifically, Brewer requested that a constructive trust be imposed over the residence “to prevent unjust enrichment arising

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153. *Larson v. Larson*, 122 So. 3d 1213, 1216 (Miss. Ct. App. 2013).

154. *Id.* Justifying the decision to characterize the property as separate, the court concluded: “[The wife] did not actively participate in the business, did not participate in business decisions, and did not invest or contribute money to its ongoing operations.” *Id.*

155. 24 N.E.3d 168 (Ill. App. Ct. 2014), *appeal allowed*, 31 N.E.3d 767 (Ill. 2015).

156. *Id.* at 170.

157. *Id.*

158. *Id.*

159. *Id.* at 169.

from Blumenthal's greater net worth at the end of the relationship."<sup>160</sup> Speaking to the question of net worth, the court remarked "due to the disproportionate time and attention that Blumenthal was able to give to her career during the relationship, Blumenthal has not only a valuable medical practice, but also more income and savings than Brewer."<sup>161</sup>

The court acknowledged, then, that Blumenthal's superior financial position at the dissolution of the relationship was created through not only Blumenthal's labor but also Brewer's contributions. While property distribution was not the claim before the court,<sup>162</sup> a look at the couple's assets makes clear that Blumenthal's medical practice—and any increase in its value during the time of the couple's relationship—would form a key part of the marital estate. Speculating as to what property division under equitable distribution would look like, Brewer would be entitled to a percentage of the increase in value to Blumenthal's practice and Blumenthal's professional goodwill could also be valued and equitably distributed. Extrapolating from precedent, however, Brewer would receive only a small percentage of the increase in value to Blumenthal's practice and her indirect contributions to the practice would not likely be properly compensated. The relationship between Brewer and Blumenthal gives us a preview, then, of how specialized labor will remain problematic for all couples until indirect contributions—mainly housework and carework—are counted as full participation in marriage.<sup>163</sup> Moreover, their relationship and its dissolution reveal how persistent the problem of gender will be in the absence of reform.

## 2. *Distribution and Support as Compensatory Mechanisms*

Courts prefer to use distribution and support, rather than reconstruction and expansion of the marital estate, as compensatory

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160. *Id.* at 172.

161. *Id.*

162. The legal question before the court was whether Brewer could continue with her claim, given the strong precedent of *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979) (ruling against division of cohabitant assets on public policy grounds).

163. For a similar case, see *Londergan v. Carrillo*, No. 08-P-1699, 2009 WL 2163186 (Mass. App. Ct. July 22, 2009). Londergan was the primary caretaker of the couple's children and had been the stay-at-home mother, while Carrillo "assumed the role as breadwinner and worked demanding hours as a surgeon." *Id.* at \*1. This agreement to specialize labor resulted in significant income disparity. The trial court judge "determined that Carrillo's gross income as an orthopedic surgeon . . . was an estimated \$201,856 . . . Londergan, although trained as a lawyer, had a gross income of \$37,960." *Id.* Londergan received a two-year award of rehabilitative alimony. *Id.*



mechanisms.<sup>164</sup> All equitable distribution states set forth a list of factors for courts to consider in distributing marital property, and permit courts great discretion in deciding how to weigh the various factors. Most states factor in the contributions made by each party to the marital wealth of the couple.<sup>165</sup> North Carolina, for example, specifies that courts shall consider “[a]ny equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker” as well as “[a]ny direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.”<sup>166</sup> Moreover, equitable distribution statutes uniformly allow courts the discretion to consider “[a]ny other factor which the court finds to be just and proper.”<sup>167</sup>

Using distribution, however, has its drawbacks. One drawback is that, in the context of professional degrees, if one spouse has enjoyed enhanced income flowing from the other’s degree for a number of years, the court takes this into consideration and generally disallows or discounts any discretionary compensation.<sup>168</sup> Another problem is that, in some states, equitable distribution statutes mandate equal division. Equal division precludes courts from using discretion to compensate economic dependents. Even when states do not mandate equal distribution, courts

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164. The Colorado Supreme Court observed in *In re Marriage of Olar*, 747 P.2d 676 (Colo. 1987), that, in order to avoid unfairness, “[t]he contribution of one spouse to the education of the other spouse may be taken into consideration when marital property is divided.” *Id.* at 680; *see also* *Roberts v. Roberts*, 670 N.E.2d 72, 76 (Ind. Ct. App. 1996) (“Therefore, while Indiana does not permit a degree to be included as marital property, and further will not allow an award of future earnings unless the spouse qualifies for maintenance, nevertheless the earning ability of the degree-earning spouse may be considered in determining the distribution of the marital estate.”).

165. N.C. GEN. STAT. ANN. § 50-20 (West, Westlaw through 2015 Reg. Sess.); TEX. FAM. CODE ANN. § 8.051 (West, Westlaw through 2015 Reg. Sess.). Martha Fineman notes that the factors that courts use can be broken down into four categories: title, fault, need, and contribution. *See* FINEMAN, *supra* note 48, at 41.

166. N.C. GEN. STAT. ANN. § 50-20.

167. *Id.* § 50-20(c)(12).

168. *Washburn v. Washburn*, 101 Wash. 2d 168, 179–81, 677 P.2d 152, 159 (1984). The *Washburn* Court explained:

We point out that where a marriage endures for some time after the professional degree is obtained, the supporting spouse may already have benefited financially from the student spouse’s increased earning capacity to an extent that would make extra compensation inappropriate. For example, he or she may have enjoyed a high standard of living for several years. Or perhaps the professional degree made possible the accumulation of substantial community assets which may be equitably divided.

*Id.* at 181, 677 P.2d at 159; *see also* *Nelson v. Nelson*, 736 P.2d 1145, 1147 (Alaska 1987).

are unlikely to deviate from equal division because many distribution statutes require the court to put in writing its reasons for deviation. Courts are, in addition, concerned that these decisions are more likely to be overruled on appeal. A wife's contributions are therefore likely to be undercompensated in the push for equal division. Accordingly, the "[f]ormal equal division of marital property does little to resolve the deeper substantive inequality between men and women."<sup>169</sup>

Most courts, however, use maintenance awards rather than distribution to compensate contributing spouses because the majority of couples do not have sufficient liquid assets to make distribution matter. As the Colorado Supreme Court noted: "[Distribution] is effective only if sufficient marital property has been accumulated by the parties during their marriage."<sup>170</sup> The Alaska Supreme Court, in *Nelson v. Nelson*,<sup>171</sup> described the classic professional degree dilemma: "Typically, one spouse attains a degree while the other provides support; then a divorce occurs soon after graduation. Usually there are few assets immediately available, but one spouse leaves the marriage with an education and increased earning potential, while the other spouse is given nothing for her efforts."<sup>172</sup> Because of these liquidity problems, courts commonly conclude that maintenance is the most suitable method for compensation.<sup>173</sup> As with distribution, alimony statutes allow courts to consider a number of factors in awarding maintenance, including "[t]he contribution by one spouse to the education, training, or increased earning power of the other spouse,"<sup>174</sup> and "[t]he contribution of a spouse as homemaker."<sup>175</sup>

There are, nevertheless, problems with the maintenance approach. To begin, the low- or non-earner must often pass a needs test in order to qualify for alimony. In Texas, for example, the party seeking maintenance must show either that she "is unable to earn sufficient income to provide for [her] minimum reasonable needs because of an

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169. Frantz & Dagan, *supra* note 75, at 121.

170. *In re Marriage of Olar*, 747 P.2d 676, 680 (Colo. 1987).

171. 736 P.2d 1145 (Alaska 1987).

172. *Id.* at 1146.

173. *Olar*, 747 P.2d at 680 ("The situation in which the dissolution of marriage occurs before the benefits of the advanced degree can be realized, and where no marital property is accumulated, requires us to look to another remedy for the inequity that results for the working spouse. Another option . . . [is] an award of maintenance as a need is demonstrated."); *Washburn*, 101 Wash. 2d at 180–81, 677 P.2d at 159 (awarding maintenance and providing equitable factors for adjusting award).

174. N.C. GEN. STAT. ANN. § 50-16.3A(b)(6) (West, Westlaw through 2015 Reg. Sess.).

175. *Id.* § 50-16-3A(b)(12).

incapacitating physical or mental disability”<sup>176</sup> or that she “has been married to the other spouse for 10 years or longer and lacks the ability to earn sufficient income to provide for [her] minimum reasonable needs.”<sup>177</sup> Not surprisingly, courts have construed “reasonable needs” very differently, with some courts adopting an extremely narrow reading of the term such that it means “the minimum requirements to sustain life.”<sup>178</sup> Making even a small salary, therefore, could preclude a spouse from being eligible for maintenance and, consequently, any compensatory amount encompassed in the support award.

Even if a spouse is eligible to receive maintenance, courts are not in agreement regarding the type of alimony that is appropriate. Many courts do not use permanent or rehabilitative alimony for the purpose of compensating spousal contributions.<sup>179</sup> Moreover, courts in some states have refused to award reimbursement alimony, the third kind of alimony that exists, on the grounds that: “Marriage is not a business arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce. Rather, as we have said, ‘marriage is a shared enterprise, a joint undertaking . . . in many ways it is akin to a partnership.’”<sup>180</sup> Those courts that do award reimbursement alimony generally limit the amount of reimbursement to the cost of the education.<sup>181</sup> In *Hoak v. Hoak*,<sup>182</sup> for example, the Court endorsed this

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176. TEX. FAM. CODE ANN. § 8.051(2)(a) (West, Westlaw through 2015 Reg. Sess.).

177. *Id.* § 8.051(2)(b). The third provision allows for maintenance if the spouse seeking maintenance is “the custodian of a child of the marriage of any age who requires substantial care and personal supervision because of a physical or mental disability that prevents the spouse from earning sufficient income to provide for the spouse’s minimum reasonable needs.” *Id.* § 8.051(2)(c); see also *Olar*, 747 P.2d at 681 (“[A] trial court may use an award of maintenance as a tool to balance equities and compensate a spouse whose work has enabled the other spouse to obtain an education; however, this tool is available for use only where the spouse seeking maintenance meets the statutory threshold requirements of need.” (emphasis added) (quoting *In re Marriage of McVey*, 641 P.2d 300, 301 (Colo. App. 1981))).

178. *Olar*, 747 P.2d at 681 (“This ‘threshold of need’ was not defined in *McVey*, but appears to have incorporated the concept of the minimum requirements to sustain life.”).

179. See *In re Marriage of Francis*, 442 N.W.2d 59, 63 (Iowa 1989) (“The alimony of which we speak is designed to give the ‘supporting’ spouse a stake in the ‘student’ spouse’s future earning capacity, in exchange for recognizable contributions to the source of that income—the student’s advanced education. As such, it is to be clearly distinguished from ‘rehabilitative’ or ‘permanent’ alimony.”).

180. *Washburn v. Washburn*, 101 Wash. 2d 168, 181, 677 P.2d 152, 159–60 (1984) (quoting *Mahoney v. Mahoney*, 453 A.2d 527, 533 (N.J. 1982)).

181. See, e.g., *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755, 758–59 (Minn. 1981); *Hubbard v. Hubbard*, 603 P.2d 747, 750–53 (Okla. 1979); *Beeler v. Beeler*, 715 S.W.2d 625, 627 (Tenn. Ct. App. 1986); *Hoak v. Hoak*, 370 S.E.2d 473, 475–79 (W. Va. 1988).

182. 370 S.E.2d 473 (W. Va. 1988).

approach because it avoided complicated questions of valuation: “Unlike an award based on the value of a professional degree, reimbursement alimony is based on the actual amount of contributions, and does not require a judge to guess about future earnings, inflation, the relative values of the spouses’ contributions, etc.”<sup>183</sup> This conception of enhanced earning capacity, narrowing compensation to reimbursement, fails to capture the workings of the larger marital bargain.

Finally, distribution and maintenance are not only flawed mechanisms for compensating spousal contributions but also theoretically inapposite.<sup>184</sup> Using distribution or maintenance to solve the compensation problem puts the non- or low-earner’s award in the realm of discretionary decision-making and judicial generosity: “[Alimony] places men’s claims to family wealth in the nondiscretionary realm of entitlement, while women’s and children’s claims are relegated to the discretionary realm of family law, where the issue is one of whether courts will redistribute ‘the man’s income.’”<sup>185</sup> A distribution or spousal support award profoundly fails to reflect the idea of marriage as an economic partnership in which two individuals share equally in the financial successes and losses of the unit. Distribution and maintenance, in this way, fail to capture the normative good of the property framework, which is to “encourage people to invest, to labor, and to plan carefully” such that “people will work and trade and make everyone collectively better off.”<sup>186</sup>

### B. *Why and How to Reward Spousal Contributions*

The question—understanding that the same problems that have plagued different-sex couples will continue to burden same-sex

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183. *Id.* at 477–78 (awarding the wife \$100,000 as reimbursement alimony, calculating “all financial contributions towards the former spouse’s education, including household expenses, educational costs, school travel expenses, and any other contributions used by the supported spouse in obtaining his or her degree or license” (emphasis in original) (quoting *Mahoney*, 453 A.2d at 535)).

184. Practically speaking, property division also has a number of benefits for the receiver: There is no tax on a lump sum received as part of property division (while alimony is taxable), there is no risk of non-payment, and there is no issue of discounted present value. See Mnookin & Kornhauser, *supra* note 84, at 962.

185. Williams, *supra* note 6, at 2234. *But see* Regan, *supra* note 47, at 2350 (“The suggestion by some feminists that a property-based model of autonomy and obligation marginalizes many women’s experiences should at least give us pause in relying on property rhetoric to argue that women should have greater claims on their husbands’ post-divorce income.”).

186. See Carol M. Rose, *Rhetoric and Romance: A Comment on Spouses and Strangers*, 82 GEO. L.J. 2409, 2417 (1994).

couples—is how courts should reflect the notion of economic partnership and compensate spouses for specialization of labor in marital property division. The idea of reimbursement, as we have seen in the alimony context, falls far short of appropriate compensation. Another approach is to compensate the low-earner for household labor by placing a market value on this labor at the time of divorce. This approach is also problematic because of the systemic devaluation of care and domestic work. Herma Hill Kay argues for approaching “the degree dilemma through the analysis of the loss incurred by the supporting spouse rather than attempting to divide the gain realized by the supported student spouse.”<sup>187</sup> Rhode and Minow likewise contend that “spouses should be entitled to a proportion of each other’s past and future earning potential commensurate with their contribution to the relationship and with the personal loss in earning potential that it has entailed.”<sup>188</sup> The idea of lost opportunity or wages is problematic because it presents the same problems of valuation that plague professional degrees and is sufficiently speculative to make it an unappealing method of assessment for courts. Lost opportunity may be, however, the most promising theoretical grounds for awarding contributing spouses a share of the earning spouse’s income post-divorce.

What is critically important, regardless of the approach,<sup>189</sup> is that courts reduce the focus on individual entitlements and base marital property division on shared accomplishment.<sup>190</sup> Sharing, Dagan and Frantz posit, is the “linchpin of [marital] community” and essential to its success is the rejection of individual interest: “Sharing requires spouses to ‘infuse[] costs and benefits with an intersubjective character’ and to

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187. Kay, *supra* note 9, at 31; see also Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1 (1989); Allen M. Parkman, *Recognition of Human Capital as Property in Divorce Settlements*, 40 ARK. L. REV. 439 (1987).

188. Rhode & Minow, *supra* note 47, at 201. Joan Krauskopf also endorses the contribution theory. See Joan M. Krauskopf, *Recompense for Financing Spouse’s Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379 (1980). A significant problem with the contribution approach is that “there is a risk that the traditional devaluation of domestic labor will lead to low estimates of the value of those contributions to the acquisition of enhanced earning power.” Regan, *supra* note 47, at 2355.

189. The three main strategies discussed for compensating female labor at home are strikingly similar to those evaluated at the turn of the nineteenth century in the context of allowances for wives. Viviane Zelizer notes that the strategies were “payment (direct exchange); an entitlement (the right to share); and gift (one person’s voluntary bestowal on another).” VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* 42 (1995).

190. Rhode & Minow, *supra* note 47, at 203.

reject any 'strict accounting based on individual merit.'<sup>191</sup> In other words, to make equal partnership work, spouses must act daily "with reference to a collective welfare that powerfully informs the calculation of individual utility."<sup>192</sup> Key to this shift in perspective is the understanding that the "[t]he ideal-worker's salary . . . reflects the work of two adults: the ideal-worker's market labor and the marginalized-caregiver's unpaid labor."<sup>193</sup> The family income does not only represent the separate work of two individuals but also the shared work of two people who have bargained for joint success. Therefore, while "the husband owns his wage vis a vis his employer, . . . this does not determine whether he owns it vis a vis his family."<sup>194</sup>

This approach to marital earnings operates on the premise that the socio-legal meaning of the high-earner's wage transforms from market wage to domestic dollar. That is, the wage the husband earns is a *market dollar* with respect to the workplace and its purchasing power. However, in the marital context—in home budgeting, on tax returns, and at divorce—that dollar is a domestic one, to be shared by spouses. Once the wage is earmarked as *domestic dollar*, not only does its meaning change, so does its ownership.<sup>195</sup> A contributing spouse has, from this perspective, an entitlement to the earning spouse's income as during the intact marriage. Post-divorce, the contributing spouse has a property claim to some amount of future income based on both contributions that were never properly compensated as well as lost opportunity. Alternately, the contributing spouse has a property claim if we believe that marriage rules should support a "vision of marriage as an egalitarian liberal community . . . [that] accommodates community, autonomy, and

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191. Frantz & Dagan, *supra* note 75, at 82–83. This theory can cut both ways; historically individual accounting was disallowed, and this barred married women from recovering their assets. See *supra* notes 69–70 (discussing concept of sharing within relationships).

192. MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 147 (1995). But see Rose, *supra* note 186, at 2413–15 (pointing out that marital bargains may also be inequitable and spouses may in fact engage in counting debits and credits even within an intact marriage). While undoubtedly true, the model of equal partnership is normatively preferable and should be assumed for purposes of equitable distribution, absent antenuptial agreements to the contrary.

193. Williams, *supra* note 6, at 2229. This may be akin to Cynthia Starnes' analogy of the marriage as a partnership and divorce as a buyout. See Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993).

194. Williams, *supra* note 6, at 2229.

195. For a discussion of the domestic dollar and the concept of social earmarking, see ZELIZER, *supra* note 189, at 35–70 (1995).

equality.”<sup>196</sup> In this section, I discuss the ways in which New York courts have valued spousal contributions, thereby actualizing the notion of economic partnership.

1. *A Proposal to Value Enhanced Earnings*

Highlighting the importance of treating enhanced earning capacity as property, Dagan and Frantz state: “A commitment to the ideal of marriage as an egalitarian liberal community requires treating spouses’ increased earning capacity as marital property.”<sup>197</sup> They further underscore the importance of this career asset by observing: “The joint creation of careers is often one of the most important projects of marriage. Therefore, excluding earning capacity from the marital estate ‘makes a mockery of the equal division rule.’”<sup>198</sup> A strong model for judicial decision-making premised on an egalitarian idea of the *domestic dollar* comes from New York. This recognition of the shared ownership of a domestic dollar is evident in New York’s treatment of professional degrees. New York is the only state to recognize professional degrees as marital property, and the case that established the rule in 1985, *O’Brien v. O’Brien*,<sup>199</sup> is instructive. The *O’Brien* Court began by stating that professional degrees were capable of being characterized as marital property because “our statute recognizes that spouses have an equitable claim to *things of value* arising out of the marital relationship and classifies them as subject to distribution by focusing on the marital status of the parties at the time of acquisition.”<sup>200</sup> Marital property, the Court stated, was a statutory creation “of no meaning whatsoever during the normal course of a marriage and arises full-grown, like Athena, upon the signing of a separation agreement or the commencement of a matrimonial action.”<sup>201</sup> That “traditional common law property concepts” did not align with all forms of marital property, the Court remarked, was neither surprising nor troubling.<sup>202</sup>

The Court further observed that the legislative history of the statute confirmed the appropriateness of treating a professional degree as

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196. Frantz & Dagan, *supra* note 75, at 133; see also HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE PROPERTY LAW 161–92 (2013).

197. Frantz & Dagan, *supra* note 75, at 107–08.

198. *Id.* at 108.

199. 489 N.E.2d 712 (N.Y. 1985).

200. *Id.* at 715 (emphasis added).

201. *Id.*

202. *Id.*

marital property. "Equitable distribution was based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker."<sup>203</sup> The Court recounted how Mrs. O'Brien had devoted almost all of the time during their nine-year marriage to putting her husband through medical school, working the entire time and "contribut[ing] all of her earnings to their joint effort."<sup>204</sup> At the close of his education, her husband left her and, had the degree not been counted as marital property, she would have been left with nothing. The Court therefore allowed the degree to count as property and remanded the case for a determination of its value.<sup>205</sup>

*O'Brien* provided precedential authority for extending the logic of the medical degree as marital property to a law degree,<sup>206</sup> an accounting degree,<sup>207</sup> a podiatry practice,<sup>208</sup> the licensing and certification of a physician's assistant,<sup>209</sup> a Master's degree in teaching,<sup>210</sup> and a fellowship in the Society of Actuaries.<sup>211</sup> Based on the idea that the marital estate consists of "things of value" acquired during marriage, a New York court also extended the ruling to encompass celebrity status.<sup>212</sup> In *Elkus v. Elkus*,<sup>213</sup> the husband of opera singer Frederica Von Stade claimed that the celebrity status she gained during their marriage as an opera singer was due, in large part, to his contributions to her career. He claimed that this celebrity status was marital property, and the court agreed.<sup>214</sup>

In all of these cases, the New York courts put front and center the

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203. *Id.* at 716 (citation omitted).

204. *Id.*

205. Mrs. O'Brien was subsequently awarded \$188,800. *O'Brien v. O'Brien*, 502 N.Y.S.2d 250, 251 (1986).

206. *Cronin v. Cronin*, 502 N.Y.S.2d 368 (Sup. Ct. 1986).

207. *Vanasco v. Vanasco*, 503 N.Y.S.2d 480 (Sup. Ct. 1986).

208. *Morton v. Morton*, 515 N.Y.S.2d 499 (App. Div. 1987).

209. *Morimando v. Morimando*, 536 N.Y.S.2d 701 (App. Div. 1988).

210. *McGowan v. McGowan*, 535 N.Y.S.2d 990 (App. Div. 1988).

211. *McAlpine v. McAlpine*, 539 N.Y.S.2d 680 (Sup. Ct. 1989).

212. *Elkus v. Elkus*, 572 N.Y.S.2d 901, 902 (App. Div. 1991) ("Things of value acquired during marriage are marital property even though they may fall outside the scope of traditional property concepts." (citations omitted)).

213. 572 N.Y.S.2d 901 (App. Div. 1991).

214. *Id.* at 903 ("Any attempt to limit marital property to professions which are licensed would only serve to discriminate against the spouses of those engaged in other areas of employment. Such a distinction would fail to carry out the premise upon which equitable distribution is based, i.e., that a marriage is an economic partnership . . .").



idea of economic partnership.<sup>215</sup> *O'Brien* introduced the concept of enhanced earning capacity to describe the income differential that not only degree attainment but also spousal contributions produce. It is this combination of professional success and spousal sacrifice that courts must capture in order to better reflect marital bargains that rely on specialized labor and unpaid spousal contributions. Consequently, contributing spouses should have a property right to a portion of the earning spouse's income not just during marriage but also for a certain number of years post-divorce in order to equalize their financial situations and "ameliorate the serious problems gender inequality causes in the marital relationship."<sup>216</sup> The number of years or the dollar amount that the contributing spouse receives could be measured by the amount of time and the degree to which the spouses specialized their labor. Valuation methods such as the "if and when" method could also help alleviate autonomy concerns with respect to the earning spouse by allowing for modification of the award due to career change or other changes in financial circumstances.

Ultimately, the professional degree question is no more than a signal of the larger question of spousal contributions. As New York courts have recognized, characterizing professional degrees and celebrity status as marital property is an imperfect but useful way to capture the value of these contributions. In order to avoid "property hoarding,"<sup>217</sup> as Martha Ertman calls it, courts must recognize enhanced earning capacity as it exists in multiple forms and patterns in order to capture and compensate spousal contributions. This will help both different- and same-sex couples by clarifying the rules around spousal contributions and recognizing that both education and earning capacity are critical family assets, rather than individual ones, when couples arrange to specialize labor.

## 2. *A Case Study: Home Management and Dragon Slaying*

New York courts have been leaders in conceptualizing degrees and status as marital property. They have also established strong precedent

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215. Even in New York, however, percentages that courts award are decreasing, and ten percent is the current standard. *See* *Esposito-Shea v. Shea*, 941 N.Y.S.2d 793, 797 (App. Div. 2012) ("Under the circumstances, it cannot be said that Supreme Court abused its discretion in limiting the husband's distributive share of the wife's law degree to 10% of its overall value." (citations omitted)); *Carman v. Carman*, 802 N.Y.S.2d 558 (App. Div. 2005); *Farrell v. Cleary-Farrell*, 761 N.Y.S.2d 357 (App. Div. 2003); *Brough v. Brough*, 727 N.Y.S.2d 555 (App. Div. 2001).

216. *Frantz & Dagan*, *supra* note 75, at 122.

217. *ERTMAN*, *supra* note 68, at 130.

for compensating contributing spouses in the context of family business or corporate assets. While trial courts have decreased awards over the past few decades, lowering the percentage of the increase in value going to the contributing spouse, a New York trial court recently reconfirmed the principles of economic partnership in a case from 2014, *Sykes v. Sykes*.<sup>218</sup> In that case, one of the major questions confronting the court was what percentage of value in the husband's business to award the wife.<sup>219</sup> The husband had started a hedge fund while they were married, and the two parties stipulated the value of the hedge fund at eight million dollars at the time of divorce.<sup>220</sup> The wife claimed that she was entitled to half the value, while the husband claimed she was entitled to no more than five percent.<sup>221</sup>

The dispositive question, then, was what contributions the wife had made to the husband's career success. The court first observed: "Considering defendant's lack of training or experience in business or finances in general, let alone in hedge funds or the world of mortgage-backed securities, she cannot be expected to have been directly involved in the workings of [the hedge fund]."<sup>222</sup> Nevertheless, the court stated that, following cases like *Price*, nonremunerated services and indirect contributions were to be considered of value in the equation.<sup>223</sup> Consequently, substantial trial time went toward establishing (or contesting) the extent of the wife's contributions. The husband "took the position that even though defendant did not work outside the home and was very much a 'stay-at-home mom,' her contributions on the domestic front were ultimately quite limited."<sup>224</sup> He argued that his wife did not perform housework, did not cook or clean, and did not even perform the task of "removing the plastic from the dry cleaning."<sup>225</sup> The wife, he argued, "outsourced most domestic chores"<sup>226</sup> and was reliant on staff to

218. *Sykes v. Sykes*, No. 313085, 2014 WL 1797010 (N.Y. Sup. Ct. May 2, 2014).

219. *Id.* at \*1.

220. *Id.* at \*4.

221. *Id.* The court noted from the outset that the presumption in such cases was not one of equal division. *Id.* at \*4–5 ("Although the law often favors a distribution of marital assets that is as equal as possible, especially in a marriage of a fairly long duration such as this, it cannot be said that a fifty-fifty division of a titled spouse's business is the standard irrespective of the contribution by the non-titled spouse. Contrary to what defendant argues, case law has long confirmed that business assets are to be treated differently from other assets for purposes of equitable distribution.").

222. *Id.* at \*5.

223. *Id.*

224. *Id.* at \*7.

225. *Id.* at \*6.

226. *Id.*

perform most household chores as well as childcare.<sup>227</sup> The husband also presented evidence that the wife entertained infrequently, and failed therefore to take on the role of “corporate spouse.”<sup>228</sup>

The wife, at trial, did not contest her husband’s assertions that she outsourced a great deal of household labor. Nor did she try to establish that she had been an asset to his business development through her social efforts and activities. Instead, she testified about the nature and the specifics of the bargain that the two had agreed upon:

My husband always said that he wanted us—he wanted to be the one that would be in charge of the money and working, slaying the dragons on Wall Street; and I would be the one in charge of the home, the family, our son, anything else. He also said he liked to keep his home life separate from his work life because he really wanted space where he relaxed and just would calm down, because there were so many stresses with his job. And that was my job, to make sure when he came home he could be rejuvenated and go back out and slay the dragons on Wall Street.<sup>229</sup>

The agreement, according to the wife, provided for a high degree of specialized household labor and left her in charge of the domestic sphere.

Evaluating the competing evidence concerning the wife’s contributions to her husband’s financial success, the court accorded great weight to the wife’s testimony about the couple’s marital bargain. Referencing their explicit oral agreement to “divide and conquer,” the court stated it was “disingenuous” for the husband to “denigrate” the value of his wife’s role when it was exactly what they had bargained for. With respect to being a corporate wife, the court remarked that the husband seldom socialized with colleagues or asked his wife to throw parties or invite colleagues over for dinner. Addressing the larger question of the wife’s contributions, the court concluded that she had contributed to her husband’s success in context-appropriate ways. The court observed that social norms prescribed that the wife employ a full staff, delegate a range of menial chores, and hire full-time help for childcare purposes.<sup>230</sup> Referencing household management responsibilities taken on by women running great estates, the court remarked:

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227. *Id.* at \*6–7.

228. *Id.* at \*5.

229. *Id.* at \*7 (citation omitted).

230. *Id.* at \*6.

Like a latter-day Cora Crawley, Countess of Grantham, who unquestionably runs the household at Downton Abbey despite the presence of Mr. Carson, Mrs. Hughes, Mrs. Patmore and Daisy, defendant unquestionably ran the Sykes household in New York, East Hampton and Paris despite the presence of cooks, personal assistants and the person who unsheathed the dry cleaning.<sup>231</sup>

A wife who engaged in neither paid labor nor housework was, the court stated, a signal of status for the husband.<sup>232</sup>

Ultimately, the court awarded the wife thirty percent of the value of her husband's hedge fund.<sup>233</sup> While the judicial result did not yield an equal division of the husband's interest in the business, it did intentionally reflect the ideals of economic partnership and value the contributions of both partners according to the bargain they had struck. Moreover, rather than discounting unpaid spousal contribution to the business as "modest"<sup>234</sup> or passive, the court fully understood that the wife's active role as both home manager and status symbol added significant value to the marriage. This reasoning captures what is critically important—an understanding of both economic partnership and the shared ownership of the domestic dollar. Applying this judicial logic to the *Blumenthal v. Brewer* case, for example, would result in an award of similar proportions of the value of Blumenthal's medical practice going to Brewer to compensate her for caretaking and lost opportunity. Accordingly, this reasoning can, looking forward, provide guidance for courts in both different- and same-sex divorces because it addresses both why and how to value spousal contributions, particularly within conventional marital bargains.

### III. ENLARGING THE MARITAL GRID

If *which* assets to count as marital property is the first challenge that courts confront in making property distribution more equitable, *when* to start counting is the second. The general rule in equitable distribution is that courts characterize as marital property only those assets that the

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231. *Id.* at \*7.

232. *Id.* One of the highest forms of conspicuous consumption for a household is to have a highly educated wife and mother who does not work outside the home. See THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* (2007). For a more light-hearted take, see WEDNESDAY MARTIN, *PRIMATES OF PARK AVENUE: A MEMOIR* (2015).

233. *Sykes*, 2014 WL 1797010, at \*8.

234. See *Arvantides v. Arvantides*, 478 N.E.2d 199, 199–200 (N.Y. 1985).

couple acquired during the span of the marriage.<sup>235</sup> Therefore, even if a couple has lived together for ten or twenty years before deciding to marry, the assets acquired before the marriage do not form part of the marital estate. The problem is that economic partnership is rarely perfectly coextensive with marriage. A New York court framed the problem this way:

Does the “confidential relationship” suddenly blossom at the time of the posing of the age-old question: “Will you marry me?” When does the romantic relationship become transformed into a confidential or fiduciary relationship? . . . Attempting to pinpoint the exact time when the “fiduciary relationship” emerged will plunge the court into the hearts of both parties and ask this court to determine the exact degree of emotional attachment between two persons.<sup>236</sup>

Trying to pinpoint the precise moment that an economic partnership begins is a difficult proposition. However, in order to fully incorporate the concept of marriage as an economic partnership in rules governing divorce, courts will have to enlarge the marital grid and look beyond traditional rules around timing. In addition, with the first wave of same-sex divorces appearing on their dockets, property questions raised by “hybrid” relationships—in which couples have cohabited for significant amounts of time and built a shared life together before marrying once they were legally able—will be particularly pressing.

In this Part, I discuss ways that courts have, in the past, avoided privileging the moment of marriage as the only indicator of a serious economic partnership between intimates. First, I discuss the concept of “pre-marital” property and how it can provide a blueprint for courts addressing claims relating to particular assets, such as the family home. Subsequently, I analyze the question of when to begin measuring or counting more generally, in cases that are not asset specific. For example, I examine how a court should define the durational measure of a relationship for the purposes of defining the marital estate or awarding maintenance. I propose that courts rely on legal markers and signals of legal intent, for reasons of both autonomy and efficiency, to determine when a partnership begins.

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235. Any other assets belonging to individuals are considered to be separate property and not subject to division. The categories of marital and separate property are statutorily defined, as are typical exceptions such as gifts or bequests received during marriage. *See, e.g.*, 23 PA. STAT. ANN. § 3501 (West, Westlaw through 2015 Reg. Sess.).

236. *McKeown v. Frederick*, No. 12/5055, 2013 WL 3068697, at \*6 (N.Y. Sup. Ct. June 18, 2013).

### *A. Transforming Non-Marital into Pre-Marital Property*

Couples cohabit before marrying for various reasons—they want a “test period” before marriage, they are planning to marry but are saving money first, they want to take advantage of the economic benefit of two people living together but are not ready to marry. At this particular historical moment, same-sex couples have cohabited rather than married in many cases not because of personal preference but rather on account of legal prohibition. In the case of different-sex cohabitants, the couples may decide sooner or later to marry; in the case of same-sex cohabitants, waves of couples are marrying as they obtain the legal right to do so. If and when any one of these long-term cohabiting couples divorce, courts will be faced with the property claims produced by “hybrid” relationships in which the couple has both cohabited, living as if married, and then subsequently married.

These “hybrid” divorces will be the most difficult for courts to assess—and risk the most unfair results—when couples, for one reason or another, have placed most assets and property in the name of one partner or when the parties have specialized labor before marriage. In these cases, to not count property acquired during the cohabitation period at the moment of distribution has the potential to create great economic harm and hardship for the low earner or non-title-holder. The courts are not, however, without guidance. Relevant examples exist with cases involving different-sex hybrid marriages, which demonstrate how courts can produce equitable results. In this section, I discuss legal strategies that courts have used in order to evaluate hybrid relationships and grant rights to cohabiting partners who subsequently marry. Furthermore, I analyze why it is preferable for courts to enlarge marital estates and create property subject to equitable distribution rather than deploy equitable remedies, which is the traditional judicial approach to cohabitant property claims.

#### *1. Recognizing Relationships on the Marital Fringe*

Because most legal rights and responsibilities in a romantic relationship begin at the moment of marriage, courts often do not assess premarital moments of commitment and partnership. Nevertheless, myriad markers of commitment to a romantic and economic partnership have always existed—the moment of engagement being the most historically salient. Historically, women obtained a circumscribed set of rights at the moment of engagement, and could bring legal claims

against their fiancés for things such as breach of promise.<sup>237</sup> Even in the modern context, courts have used engagement as a privileged moment in claims concerning the measuring of a marital estate. These cases provide precedent for courts to rule that equitable division of property should encompass certain “pre-marital” property pursuant to the economic partnership theory.<sup>238</sup>

A set of New Jersey cases is particularly instructive. In 1985, *Coney v. Coney*<sup>239</sup> turned on the question of whether a wife, who held sole title to the marital residence that was purchased when the couple was unmarried, could exempt the property from equitable distribution.<sup>240</sup> At the time of divorce, the couple had lived together for seventeen years and been married for only seven of those years. The wife argued that the house was separate property and that her husband’s reimbursement should be limited to mortgage pay-down. The court disagreed.

In analyzing the claim, the court suggested that three categories of property existed: non-marital property, cohabitation property, and pre-marital property.<sup>241</sup> Non-marital property was property that “the party seeking equitable distribution had nothing to do with prior to the marriage, either by way of funds or services.”<sup>242</sup> The court defined cohabitation property as “that which arises out of cohabitation of the parties, not followed by a marriage,”<sup>243</sup> and proposed that equitable

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237. See MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 34 (1985); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (2012).

238. In situations where the trajectory of cohabitation leading to marriage is reversed (i.e., cohabitation occurs after divorce), courts have also been amenable to providing remedy for economic dependents. See *Pickens v. Pickens*, 490 So. 2d 872, 875 (Miss. 1986) (allowing for equitable distribution of post-marital property, stating “our law authorizes and sanctions an equitable division of property accumulated by two persons as a result of their joint efforts. This would be the case were a common law business partnership breaking up”). The Court added that the assets subject to distribution were “by no means limited to a consideration of the earnings of the parties and cash contributions made by each to the accumulation of the properties.” *Id.* at 876. The Court continued: “As any freshman economics student knows, services and in kind contributions have an economic value . . . . Where, as here, the man accepted the benefit of such services, he will not be heard to argue that he did not need them and that their economic value should not be considered as the woman’s economic contributions to the joint accumulation of property between them.” *Id.*

239. 503 A.2d 912 (N.J. Super. Ct. Ch. Div. 1985).

240. *Id.* at 914. (“By the time of settlement, defendant had already obtained a divorce from her former spouse, but plaintiff’s action was still pending. Therefore, title was taken in defendant’s name alone, and she executed a mortgage for \$16,000 to complete the settlement.”).

241. *Id.* at 916–18.

242. *Id.* at 916.

243. *Id.*

remedies were appropriate in these cases. The third category, pre-marital property, “occurs where one or both marital parties acquired either personal or real property jointly and made contribution to the same before marriage.”<sup>244</sup> The court pointed out that “[t]his theory rests on the proposition that property so acquired was in ‘contemplation of marriage’ and therefore subject to equitable distribution.”<sup>245</sup> Accordingly, the court concluded that, because the “parties acquired the property specifically for family purposes” and both made “substantial contributions thereto,” the value of the property was to be equally divided.<sup>246</sup>

Three years later, *Weiss v. Weiss*<sup>247</sup> turned on the same question of whether a home, purchased by an engaged couple before marriage, was exempt from equitable distribution because only one party held title to the house.<sup>248</sup> The court concluded, referencing *Coney*: “[W]e believe that for the purpose of triggering a right of equitable distribution a marital partnership may be found to have commenced prior to the marriage ceremony . . . . This conclusion recognizes that the ‘shared enterprise’ of marriage may begin even before the actual marriage ceremony.”<sup>249</sup> Placing two conditions on this ruling, the court stated that the parties must have adequately expressed the intention for the asset to be a shared one and that they must have acquired the asset in specific contemplation of their marriage.<sup>250</sup> Similarly, in *McGee v. McGee*,<sup>251</sup> a New Jersey trial court included a family home owned by one party and purchased prior to marriage in the marital estate.<sup>252</sup> In so doing, the court explained that “[t]he case can be viewed from the vantage point of the shared enterprise of marriage beginning before the ceremonial act.”<sup>253</sup>

Finally, in *Berrie v. Berrie*,<sup>254</sup> a New Jersey court expanded the rule concerning pre-marital property to encompass assets other than the marital home.<sup>255</sup> In that case, the plaintiff’s wife sought equitable

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244. *Id.* at 917.

245. *Id.*

246. *Id.* at 919.

247. 543 A.2d 1062 (N.J. Super. Ct. App. Div. 1988).

248. *Id.* at 1063.

249. *Id.* at 1065; see also *In re Marriage of Altman*, 530 P.2d 1012 (Colo. App. 1974); *Stallings v. Stallings*, 393 N.E.2d 1065 (Ill. App. Ct. 1979); *Bender v. Bender*, 386 A.2d 772, 778–79 (Md. 1978).

250. *Weiss*, 543 A.2d at 1065.

251. 648 A.2d 1128 (N.J. Super. Ct. App. Div. 1994).

252. *Id.* at 1134.

253. *Id.*

254. 600 A.2d 512 (N.J. Super. Ct. App. Div. 1991).

255. *Id.* at 518.



distribution of the value of unregistered corporate stock held by her husband, as measured from the date they began cohabiting rather than the date of marriage.<sup>256</sup> Relying on *Weiss*, the court concluded: “If the parties by their combined efforts work as part of this ‘partnership’ to increase the value of an asset held by one of them, such increase in value . . . might be subject to treatment as a partnership interest, which in turn might be subject to equitable distribution.”<sup>257</sup> The court added that divorce rules were to be construed “to effectuate the public policy underlying the equitable distribution law, which is to recognize that marriage is ‘a shared enterprise, a joint undertaking, that in many ways . . . is akin to a partnership.’”<sup>258</sup>

Another example, this one from Washington, demonstrates a similar judicial approach to pre-marital property and highlights how these problems are already relevant to same-sex couples. In *Walsh v. Reynolds*,<sup>259</sup> Jean Walsh and her partner Kathryn Reynolds began living together in 1988.<sup>260</sup> The women lived together for twenty years, and Walsh worked primarily as Reynold’s housekeeper, a job for which Reynolds paid her.<sup>261</sup> Walsh also gave birth to two children who Reynolds adopted.<sup>262</sup> In 2010, the women separated and sought to dissolve their domestic partnership, which had been registered in California in 2000 and Washington in 2009.<sup>263</sup> A main point of contention was how to distribute the proceeds from the sale of the family home. In 2003, the couple had purchased and moved into a home in Federal Way. Both women “signed the deed, which expressly stated that they were ‘acquir[ing] all interest’ in the property ‘as joint tenants with right of survivorship, and not as community property or as tenants in common.’”<sup>264</sup>

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256. *Id.*

257. *Id.*

258. *Id.* (citing *Smith v. Smith*, 371 A.2d 1 (N.J. 1977) (quoting *Rothman v. Rothman*, 320 A.2d 496 (N.J. 1974))).

259. 183 Wash. App. 830, 335 P.3d 984 (2014), *review denied*, 182 Wash. 2d 1017, 345 P.3d 784 (2015).

260. *Id.* at 836, 335 P.3d at 986.

261. *Id.* at 836–37, 335 P.3d at 986–87.

262. *Id.* at 836, 335 P.3d at 987.

263. *Id.* at 836–37, 335 P.3d at 986–87. Washington is a community property state that recognizes “equity” relationships, or common-law marriage. So at the time of the relationship dissolution, the couple was considered by the court to be in an “equity” relationship.

264. *Id.* at 838, 335 P.3d at 987 (citation omitted). Because the mortgage was in Walsh’s name alone, the trial court concluded and the appellate court affirmed that they could not be joint tenants. Instead, the court said, they were tenants in common.

During the dissolution procedure, Walsh claimed that the proceeds should have gone to her alone rather than being split evenly by the trial court because she “made *all* financial contributions towards the mortgage and reconstruction of the Federal Way house . . . from her separate property funds.”<sup>265</sup> Reynolds had not contributed to either the down payment or mortgage payments. In addition, Walsh had paid all the utility bills. Walsh “concede[d] that Reynolds contributed to the property in the form of ‘sweat equity.’”<sup>266</sup> The trial court took this “sweat equity” into consideration and awarded Reynolds close to half the equity value of the home.<sup>267</sup> The appellate court affirmed this award, concluding that it was “just and equitable” considering Reynolds’ “non-financial contributions to the property.”<sup>268</sup> The court, therefore, brought the family home into the marital estate despite the fact that Reynolds alone was financially responsible for the house and distributed its value equitably on account of its shared use and Walsh’s non-economic contributions. This result is akin to what the result would likely have been using New Jersey’s pre-marital property concept. The result is, furthermore, exemplary because it underscores the economic partnership at work in the couple’s relationship rather than the couple’s marital status.

## 2. *Equitable Distribution Instead of Equitable Remedy*

In *Blumenthal v. Brewer*, as in many other cohabitant cases, one party requested the imposition of a constructive trust, a conventional equitable remedy.<sup>269</sup> In cases that turn on the question of property rights for hybrid marriage partners, courts are confronted with one main choice. Courts can choose to enlarge the marital estate by including the contested asset and subsequently employ equitable distribution. Alternately, judges can deploy the same equitable remedies that are also used to provision cohabitants in cases of relationship termination. The court in *McGee*

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265. *Id.* at 853, 335 P.3d at 995 (emphasis in original) (citation omitted).

266. *Id.* (citation omitted).

267. *Id.*

268. *Id.* at 855, 335 P.3d at 996 (“We hold that the trial court did not abuse its broad discretion in the manner in which it crafted a just and equitable division of the parties’ non-separate properties, including its allocation of the equity in the Federal Way property, after balancing the parties’ respective needs and contributions.”). The court also observed that “[t]he trial court also based its decision, in part, on the fact that it did not award any maintenance to Reynolds, the party with far less income and earning potential.” *Id.*

269. See the discussion of *Blumenthal v. Brewer*, 24 N.E.3d 168 (Ill. App. Ct. 2014), *supra* notes 155–63 and accompanying text.

elaborated on this choice: “The case can be viewed from the vantage point of the shared enterprise of marriage beginning before the ceremonial act, . . . or as one in which equitable remedies such as constructive trust, quasi contract or quantum meruit are invocable for equitable reasons.”<sup>270</sup>

Some courts, however, have pointed out that certain equitable remedies are inapposite. For example, in *McKeown v. Frederick*,<sup>271</sup> a New York case in which the husband sought to impose a constructive trust on the shared home, the court declined to do so.<sup>272</sup> The court reasoned that the imposition of a constructive trust was the incorrect remedy because “constructive trusts are ‘fraud-rectifying’ remedies rather than ‘intent-enforcing remedies.’”<sup>273</sup> Similarly, the Rhode Island Supreme Court stated, in another case concerning two former spouses disputing ownership of the shared home: “It is well settled that ‘[t]he underlying principle of a constructive trust is the equitable prevention of unjust enrichment of one party at the expense of another in situations in which legal title to property was obtained by fraud or in violation of a fiduciary or confidential relationship.’”<sup>274</sup> Unless fraud exists, constructive trust may not be the appropriate remedy.<sup>275</sup>

Implied or quasi contract has met with more success in courts that are reliant on leading cohabitant rights cases, *Marvin v. Marvin*<sup>276</sup> in particular, to provide precedent.<sup>277</sup> Implied contract claims more closely reflect the idea of a partnership agreement existing between the two parties. The implied contract prevents the “provider from free riding” and prevents unjust enrichment.<sup>278</sup> This is particularly important when a couple specializes household labor and one member of the couple not

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270. *McGee v. McGee*, 648 A.2d 1128, 1134 (N.J. Super. Ct. App. Div. 1994).

271. No. 12/5055, 2013 WL 3068697 (N.Y. Sup. Ct. June 18, 2013).

272. *Id.* at \*17.

273. *Id.* at \*4.

274. *Dellagrotta v. Dellagrotta*, 873 A.2d 101, 111 (R.I. 2005) (citing *Renaud v. Ewart*, 712 A.2d 884, 885 (R.I. 1998)).

275. See *Carnivale v. Carnivale*, 885 N.Y.S.2d 871, 878 (Sup. Ct. 2009) (“Use of the cause of action for constructive trust should not be distorted by courts as a device for enforcing an alleged intent to confer a benefit, gain, gift, or a material expression of love . . . [or] abused and misused as a means of redressing disappointed expectations, frustrated intentions, and failed hopes.”).

276. 557 P.2d 106 (Cal. 1976).

277. For discussion of the beneficial uses of implied contract, see Elizabeth Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 225 U. CHI. LEGAL F. 225, 258 (2004) (“[C]ontract law can provide efficient default rules to clarify the implied understandings about property and support obligations between parties in long-term intimate unions.”).

278. ERTMAN, *supra* note 68, at 184.

only develops her career but also benefits from the unpaid contributions of the other. In *Blumenthal v. Brewer*, for example, a court might easily find that the couple had an implied contract to divide labor roles and compensate the homemaker accordingly. Nonetheless, a number of states are resistant to deploying implied contract in the service of cohabitant rights, and some states are beginning to legislate new rules for cohabitant property and palimony claims. The New Jersey legislature, for example, amended the state statute of frauds in 2010 to read that no action can be brought by “one party to a non-marital personal relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination” unless the agreement is in writing and both parties obtained independent counsel.<sup>279</sup> In a leading New York case on cohabitant property rights, *Morone v. Morone*,<sup>280</sup> the Court similarly ruled that any claim to property rights for a cohabitant had to be based on an explicit contract.<sup>281</sup> In the absence of an explicit contract or marriage status, the Court stated, it was too difficult to determine what kind of bargain the parties had made.<sup>282</sup> The Court remarked that, as with common law marriage, allowing cohabitant property claims “could work substantial justice in certain cases, [but] there was no built-in method for distinguishing between valid and specious claims.”<sup>283</sup>

The most significant problem, however, with the use of equitable remedies to provision partners in hybrid marriages is that equitable remedies entrench compensation in the realm of judicial discretion rather than legal entitlement, transforming a right into a discretionary award.<sup>284</sup> Equitable remedies therefore replicate the problems inherent in using distribution and maintenance instead of property division to compensate spouses for their unpaid contributions. Courts choosing to look at assets

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279. N.J. STAT. ANN. § 25:1-5 (West, Westlaw through 2015). Subsequently, in New Jersey, court decisions have clarified that “oral palimony agreements predating the 2010 Amendment to the Statute of Frauds are not extinguished by the new law.” *Maeker v. Ross*, 99 A.3d 795, 805 (N.J. 2014).

280. 413 N.E.2d 1154 (N.Y. 1980).

281. *Id.* at 1158. Regarding the constructive trust, a court in 2013 mentioned that “constructive trusts are ‘fraud-rectifying’ remedies rather than ‘intent-enforcing remedies.’” *McKeown v. Frederick*, No. 12/5055, 2013 WL 3068697, at \*4 (N.Y. Sup. Ct. June 18, 2013) (citations omitted).

282. *Morone*, 413 N.E.2d at 1157–58.

283. *Id.*

284. *See* Regan, *supra* note 47, at 2307 (“Typically, an individual deploys property rhetoric when she wishes to frame a claim to resources as a request for the recognition of a right arising either by virtue of her own efforts or as the result of a transaction involving an exchange for fair value.”).

acquired outside of marriage as cohabitant property rather than pre-marital property neither further the goals of economic partnership nor reflect the true nature of marital bargains.

### B. *Measuring Duration and Modified Formalism*

Although creating pre-marital property provides a solution for asset-specific claims and contests, there are also property questions that turn on the durational measure of the relationship, such as division of income, pension, and other cumulative assets. Duration matters for the calculation of certain benefits, such as social security, and for awards of spousal maintenance.<sup>285</sup> Likewise, duration matters because length of marriage is a critical factor that courts use in the distribution phase of property division.<sup>286</sup> Courts therefore need to know not just how to characterize a particular asset but also when to “flip the switch” and start counting property for inclusion in the marital estate. This raises the question of when an economic partnership begins. In this section, I provide a framework for knowing when an economic partnership exists through the identification of legal markers. I also discuss why this formalist framework has advantages over a functionalist approach, for reasons of both judicial efficiency and personal autonomy.

#### 1. *Timing Relationships Through Legal Markers*

In a recent case from Connecticut, *Mueller v. Tepler*,<sup>287</sup> the State Supreme Court ruled that a same-sex partner could assert a spousal loss of consortium claim against physicians even though she was not married to the plaintiff at the time of the alleged negligent conduct.<sup>288</sup> The Court concluded, however, that the partner would have to prove that “the couple would have been married when the underlying tort occurred but for the existence of a bar on such marriages under the laws of this state.”<sup>289</sup> The natural question that follows is how a same-sex couple

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285. See, e.g., N.J. STAT. ANN. § 2A:34-23 (West, Westlaw through 2015).

286. See, e.g., 23 PA. STAT. ANN. § 3502(1) (West, Westlaw through 2015 Reg. Sess.).

287. 95 A.3d 1011 (Conn. 2014).

288. *Id.* at 1030.

289. *Id.* at 1026. The Court also created a requirement that “the marriage would not have been inconsistent with public policy,” which it said “places clear limits on liability for such claims.” *Id.* But see *Charron v. Amaral*, 889 N.E.2d 946, 951 (Mass. 2008) (“[H]owever sympathetic we may be to the discriminatory effects the [invalidated] marriage licensing statute had . . . to allow Kalish to recover for a loss of consortium if she can prove she would have been married but for the ban on same-sex marriage could open numbers of cases in all areas of law to the same argument.”).

proves that they would have been married absent legal impediment. As Hanoch Dagan and Michael Heller observe, “boundary disputes . . . pose a challenge to legal architects.”<sup>290</sup> What actions and behaviors should a court look to as signals? I propose that courts should look for instances of clear legal intention to form an economic partnership. Courts need to have bright-line markers because boundary “concerns may justify heightened formalities for entry.”<sup>291</sup> The legal moments can be asset-specific, as in the case of a family home. In these cases, the court does not have to determine a starting point but rather the intention tied to the purchase of an asset. More difficult are determining which legal moments communicate the beginning of a partnership period, a point at which a court can start counting marital property.

In same-sex hybrid cases it is likely—at least for the duration of this transitional period—that couples will have entered into domestic partnerships or civil unions prior to being legally married. These are true markers of legal intent to live as if married and to enter into an economic partnership involving shared benefits, assets, and dependency. Domestic partnerships and civil unions clearly mark moments outside of marriage that demonstrate partnership formation.<sup>292</sup> For this reason, the Social Security Administration allows an applicant for spousal benefits to tack on time spent as registered domestic partners to time of marriage.<sup>293</sup> Accordingly, a court looking at the facts of *Blumenthal v. Brewer* for property division purposes would, for example, have this option in deciding when to begin measuring the marital estate. In that case, several instances of legal intention existed because the couple was not only a functional family; they “also took legal steps because of their lifelong commitment.”<sup>294</sup> They cross-adopted their three children, documented their partnership in the Chicago “Domestic Partner Registry,” and took out a marriage license in Massachusetts.<sup>295</sup> A court might, therefore, begin counting assets in the marital estate as of the moment the couple became registered domestic partners.

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290. Hanoch Dagan & Michael Heller, *Freedom of Contracts* 55 (Columbia Law & Econ., Working Paper No. 458, 2013), available at <http://ssrn.com/abstract=2325254>.

291. *Id.*

292. See Kelly, *supra* note 67, at 44 (“Other good evidence is if a couple registers as domestic partners under a system of rules that recognizes marriage-like legal obligations between partners.”).

293. See GN00210.004 *Non-Marital Relationships (Such as Civil Unions and Domestic Partnerships)*, SOC. SECURITY ADMIN., <http://policy.ssa.gov/poms.nsf/lnx/0200210004> (last visited Aug. 18, 2015). This has helped many same-sex couples reach the nine-month minimum.

294. *Blumenthal v. Brewer*, 24 N.E.3d 168, 171 (Ill. App. Ct. 2014), *appeal allowed*, 31 N.E.3d 767 (Ill. 2015).

295. *Id.* at 171–72.

In another example, *Walsh v. Reynolds*, several such indicators existed and the Washington appellate court was called upon to review the question of when the couple's "equity relationship" began for property division purposes.<sup>296</sup> In that case, the couple registered as domestic partners in California in 2000 and in Washington in 2009.<sup>297</sup> The trial court determined that the "equity relationship" began on January 1, 2005, the date on which California amended its domestic partnership statute to extend community property rights to registered domestic partners.<sup>298</sup> Walsh contended on appeal that the starting point for measuring their marital property was 2009, when the couple registered their domestic partnership in Washington.<sup>299</sup> Reynolds, on the other hand, claimed that the "equity relationship" began in 1988 at the start of their relationship.<sup>300</sup>

The appellate court stated: "There are several other dates [other than that used by the trial court] that could serve as starting points for application of this doctrine here," and discussed using the date on which the couple registered as domestic partners in California in 2000.<sup>301</sup> The court also suggested that Washington's traditional common law test, a five-factor test, was applicable in the situation at hand, particularly because the trial court had remarked that the common law rule would have governed "had Walsh and Reynolds been a legally recognized heterosexual marriage."<sup>302</sup> Ultimately, the appellate court reversed the trial court and remanded the case for new findings with respect to when the "equity relationship" began and, subsequently, a revised order for property distribution.<sup>303</sup>

Furthermore, because same-sex couples were unable to access marital benefits prior to *Windsor v. United States*,<sup>304</sup> and, subsequently, *Obergefell v. Hodges*,<sup>305</sup> many have been encouraged to engage in estate planning and to draft cohabitation agreements. LGBT organizations like

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296. *Walsh v. Reynolds*, 183 Wash. App. 830, 830, 335 P.3d 984, 984 (2014), *review denied*, 182 Wash. 2d 1017, 345 P.3d 784 (2015).

297. *Id.* at 837–38, 335 P.3d at 987.

298. *Id.* at 840, 335 P.3d at 988–89.

299. *Id.* at 851, 335 P.3d at 994.

300. *Id.* at 841, 335 P.3d at 989.

301. *Id.* at 847, 335 P.3d at 992.

302. *Id.* at 847–48, 852–53, 335 P.3d at 992, 995 ("We see no reason why the five *Long* 'equity relationship' factors that the trial court applied to the parties' post-2005 relationship should not also apply to their pre-2005 domestic partnership relationship in California.")

303. *Id.* at 859, 335 P.3d at 998.

304. 570 U.S. \_\_\_, 133 S. Ct. 2675 (2013).

305. 576 U.S. \_\_\_, 135 S. Ct. 2584 (2015).

Gay & Lesbian Advocates & Defenders,<sup>306</sup> Lambda Legal,<sup>307</sup> and the National Center for Lesbian Rights<sup>308</sup> began, in the early days of the gay rights and marriage equality movements, to offer robust information about same-sex estate planning and legal strategies for obtaining economic partnership rights outside of marriage. Martha Ertman, claiming that family law should support “Plan B” contracts, observes that “the long history of family exchanges argues for spouses holding onto their contractual freedom.”<sup>309</sup> These types of contracts are legal indicators of both shared purpose and relationship commitment, and act as a strong signal for courts to begin measuring and counting pre-marital property. These contracts may take the shape of designated beneficiary agreements, such as the ones that exist in Colorado, which allow unmarried parties to give each other rights such as “the right to have standing to sue for wrongful death” in the event of one party’s death and to name each other as beneficiaries in testamentary trusts for the purposes of a nonprobate transfer on death, pension plans, and life insurance.<sup>310</sup> Other legal markers may include any form of registered partnership that approximate what Erez Aloni calls for in the form of a “registered contractual relationship.”<sup>311</sup> These contracts all provide a means for same-sex couples (and also different-sex couples) to signal intent. Looking forward, these types of relationship contracts—like pre-marital and marital contracts—also provide a means for both same- and different-sex couples to shape the contours of their relationships by opting out of default sharing rules and marking certain kinds of property or income as separate.

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306. See generally GAY & LESBIAN ADVOCATES & DEFENDERS, LEGAL PLANNING FOR SAME-SEX COUPLES: PREPARING FOR THE UNEXPECTED (2014), available at <http://www.glad.org/uploads/docs/publications/legal-planning-couples.pdf> (providing estate-planning advice and resources for same-sex couples).

307. See generally LAMBDA LEGAL, TAKE THE POWER: TOOLS FOR LIFE AND FINANCIAL PLANNING (2014), available at [http://www.lambdalegal.org/sites/default/files/publications/downloads/take\\_the\\_power\\_-\\_2014\\_-\\_complete\\_pdf\\_for\\_website.pdf](http://www.lambdalegal.org/sites/default/files/publications/downloads/take_the_power_-_2014_-_complete_pdf_for_website.pdf) (providing an online guide for same-sex estate planning).

308. See generally NAT’L CTR. FOR LESBIAN RIGHTS, YOUR LEGACY OF JUSTICE: PLANNED GIVING QUESTIONS & ANSWERS FOR LGBT PEOPLE (2013), available at <http://www.nclrights.org/wp-content/uploads/2013/07/NCLR-Estate-Planning-11.04.13.pdf>.

309. ERTMAN, *supra* note 68, at 175. Plan B contracts, as opposed to Plan A ones, are those that contract for something other than the marital default rules. See also Scott, *supra* note 277, for a discussion of the uses of contract law in family design.

310. See *Colorado’s Designated Beneficiary Agreement Act*, COLO. BAR ASS’N, <http://www.cobar.org/index.cfm/ID/21614> (last visited Aug. 19, 2015); *Designated Beneficiary Agreement*, DENVERGOV.ORG, <https://www.denvergov.org/Portals/777/documents/MarriageCivilUnions/Designated%20Beneficiary%20Agreement.pdf> (last visited Aug. 19, 2015).

311. Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 574, 576, 607 (2013).



Civil unions, registered domestic partnerships, designated beneficiary relationships, and relationship contracts all enable couples to signal a clear legal intent. These legal relationships allow couples to share a variety of assets as well as benefits, such as health care, just as they grant individuals certain rights, such as beneficiary rights and standing rights to pursue certain claims.<sup>312</sup> The intent is not an implicit one made manifest through either time and work put into a relationship or shared living. Instead, in these instances, couples make an affirmative decision to define their relationship through a legal framework and, in all cases except private contracting, the couple chooses to mediate their relationship through the State. These are opt-in relationships that require consideration and planning as well as personal agency. That these relationship forms constitute dispositive examples of legal intention is evident from the fact that many states have automatically converted either civil unions or domestic partnerships into marriages.<sup>313</sup>

Some scholars and commentators suggest a functionalist approach and the use of significant events in the life of a couple, such as the start of cohabitation or the birth of shared children, to determine the beginning date of the couple's relationship. This type of functional analysis has roots in common law marriage. In common law marriage, courts traditionally looked for indicators of economic entanglement, such as the sharing of living expenses and the establishment of joint bank accounts, including checking, savings, or investment accounts, as well as cohabitation and shared parenting.<sup>314</sup> In Washington, the five-factor test for determining whether a couple is engaged in an "equity" or "meretricious" relationship underscores the role of functionality. The factors include continuous cohabitation, relationship duration, relationship purpose, pooling of resources, and parties' intent.<sup>315</sup> Likewise, the American Law Institute, in its model rules for granting

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312. See e.g., *Colorado's Designated Beneficiary Agreement Act*, *supra* note 310.

313. For example, once Connecticut began permitting same-sex marriage, the state converted all civil unions into marriages. NAT'L CTR. FOR LESBIAN RIGHTS, MARRIAGE, DOMESTIC PARTNERSHIPS, AND CIVIL UNIONS: SAME-SEX COUPLES WITHIN THE UNITED STATES (2015), <http://www.nclrights.org/wp-content/uploads/2015/07/Relationship-Recognition.pdf>. Likewise, in Delaware, on July 1, 2014, all remaining civil unions were automatically converted to marriages by operation of law. *Id.* For a survey of how states have treated this issue, see *id.* This strategy of converting civil unions into marriages is problematic from an autonomy standpoint, because in many states it is automatic rather than opt-in.

314. GÖRAN LIND, *COMMON LAW MARRIAGE: A LEGAL INSTITUTION FOR COHABITATION* 536-42 (2008).

315. *Walsh v. Reynolds*, 183 Wash. App. 830, 846, 335 P.3d 984, 991 (2014), *review denied*, 182 Wash. 2d 1017, 345 P.3d 784 (2015).

domestic partners' rights, looks to continuous cohabitation and length of relationship, as well as economic entanglement.<sup>316</sup>

From this perspective, joint bank accounts or investments made together certainly indicate shared economic purpose, as do instances of more discretionary spending, such as joint charitable giving.<sup>317</sup> These indicators do not, however, demonstrate the level of relationship commitment necessary to switch on the counting of marital property. These factors could signal that two people are anything from roommates to investment partners. The problem is that, “[i]n comparison with marriage, cohabitation relationships are not regulated by clearly defined norms that prescribe behavioral expectations of financial support and sharing.”<sup>318</sup>

Alternately, courts using a functional analysis have also looked to cohabitation, shared parenting, and various types of non-legal wedding and commitment ceremonies to indicate partnership.<sup>319</sup> While these are undoubtedly important events and do represent a type of lived intimacy, they do not necessarily signal an intention to form either a legal or an economic unit.<sup>320</sup> The presence of children means that two individuals share responsibility for the project of childrearing. Shared parenting is, however, not necessarily an indicator or a continuing intimate relationship, and it is something that even most divorced couples do. Childbearing and rearing is, increasingly, a project that is disaggregated from marriage or even intimate relationships.<sup>321</sup> Continuous cohabitation is also thought to indicate a shared life and strong form of intimacy. However, cohabitation has many guises and couples who cohabit do so for a variety of reasons—for efficiency purposes, to try shared living in contemplation of marriage, or out of economic necessity.<sup>322</sup> This

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316. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 (Supp. 2002).

317. See Kelly, *supra* note 67, at 44 (“[T]he key assessment is how much the couple has merged their financial resources.”).

318. Scott, *supra* note 277, at 248.

319. See generally Allison Tait, *Polygamy, Publicity and Locality: The Place of the Public in Marriage Practice*, 2011 MICH. ST. L. REV. 173 (2011).

320. Moreover, the issue of economic partnership with respect to a child is mediated through questions about child support, which are bracketed here.

321. See Cheryl Wetzstein, *Census: More First-Time Mothers Give Birth out of Wedlock*, WASH. TIMES (July 8, 2014), <http://www.washingtontimes.com/news/2014/jul/8/census-more-first-time-mothers-give-birth-out-wed/?page=all>; *Meet the Co-Parents: Friends Not Lovers*, THE TELEGRAPH (July 31, 2011), <http://www.telegraph.co.uk/women/mother-tongue/8659494/Meet-the-co-parents-friends-not-lovers.html>.

322. *Cohabitation F.A.Q.*, UNMARRIED EQUALITY, <http://www.unmarried.org/cohabitation/faq/#cohabreasons> (last visited Sept. 28, 2015).

variation in levels of commitment makes it difficult to say that cohabitation signals a clear intent to be in a binding legal relationship.

In fact, courts that backdate property rights to the beginning of a relationship or cohabitation may, in fact, be contravening the intention of the partners, and creating economic injustice. In the *Walsh* case, if the trial court determined that the “equity relationship” began when the two women started living together, the court would have no way of knowing what the couple’s actual intention was at the time.<sup>323</sup> Using the moment that they registered their domestic partnership in California, however, allows the court to know with greater certainty what the parties intended. Discussing this problem, Katherine Franke relates the example of a lesbian couple who dated—with periods of conflict and separation—for a number of years before getting married. During the divorce proceedings, the court “‘back-dated’ their marriage to when [the couple] started dating rather than to when they legally married.”<sup>324</sup> Franke states that the “easy and obvious choice”<sup>325</sup> would have been for the court to use the date of marriage. Instead, the judge “wrote in her judgment that prior to marriage, ‘they had a nine year relationship when they functioned as a couple.’”<sup>326</sup> This backdating to a functional relationship moment rather than a legal one resulted in the wealthier spouse being liable for alimony and property division when the couple had made an oral agreement to the contrary prior to their marriage. As Elizabeth Scott has remarked: “The challenge is to design clear criteria that separate marriage-like unions from those in which the parties are not married because they do not want marital commitment or obligations.”<sup>327</sup> What is important, then, is that courts look to legal indicators outside of marriage that signal the intention to form an economic partnership.

## 2. *Enabling Judicial Efficiency and Personal Autonomy*

There are drawbacks to using legal markers as opposed to more

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323. One of the five factors in determining whether an equity relationship exists is “parties’ intent.” *Walsh v. Reynolds*, 183 Wash. App. 830, 846, 336 P.3d 984, 991 (2014), *review denied*, 182 Wash. 2d 1017, 346 P.3d 784 (2015). However, at the dissolution of a relationship, parties may easily disagree or remember differently what intent existed at what point in time.

324. KATHERINE FRANKE, *WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY* (forthcoming 2015).

325. *Id.*

326. *Id.*

327. See Scott, *supra* note 277, at 258. Scott proposes the use of length of relationship as a primary criterion. *Id.* at 259 (“[A] cohabitation period of substantial duration is the best available proxy for commitment.”).

functional and informal ones. Using legal markers privileges those individuals who have access to legal representation and can write cohabitation agreements, wills, and other legal documents. These are often the same individuals who have assets to protect, investments to manage, and jobs that provide access to retirement savings as well as health care and other benefits. In other words, the use of legal markers increases the pre-existing systemic bias against economically disadvantaged populations. These populations do not have access to legal advice, to jobs with benefits like healthcare or life insurance, or even sometimes to bank accounts. These groups are less likely to own property, make wills, or engage in any estate planning. They are, overall, less likely to have resources to protect or the understanding of what benefits they might receive through legal planning. To bias the system of property rules against these populations may seem both descriptively unjust and normatively undesirable.

There are, nonetheless, substantial benefits to a modified formalist approach both in terms of judicial efficiency and personal autonomy.<sup>328</sup> First, having a set of rules or factors for courts to use in determining when an economic partnership merits judicial notice and treatment as a marital or pre-marital relationship relieves courts from the burden of extremely fact-intensive personal inquiries into intimate relationships. One New York court stated the problem in this way:

[J]udicial inquiry into the timing and context of premarital “promises” or “statements of present intention” will involve judges in matters of the heart that are intrusive on sensitive subjective feelings—when did we love each other enough to be considered in a fiduciary relationship—and lead to speculation and solipsistic moral judgments, which the courts are incapable of easily adjudicating and appellate courts will be challenged to review.<sup>329</sup>

Courts can rarely know what two individuals promised one another in the absence of documentary evidence, not least because at the point of divorce both parties usually recall quite differently what promises they made and which were broken. Asking courts to adjudicate these kinds of

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328. In describing a modified formalist approach, I take one of the definitions put forth by Frederick Schauer, namely “the concept of decisionmaking according to *rule*.” Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509, 510 (1988) (emphasis in original); see also Rebecca Aviel, *A New Formalism for Family Law*, 55 *WM. & MARY L. REV.* 2003, 2010 (defining formalism as “the extent to which family law doctrines provide determinate instructions that can be more or less mechanically applied to domestic relations disputes”).

329. *McKeown v. Frederick*, No. 12/5055, 2013 WL 3068697, at \*17 (N.Y. Sup. Ct. June 18, 2013).

questions without rules, or at the very least a set of guidelines, is administratively burdensome and an endeavor prone to error.<sup>330</sup> Bright line rules therefore aid courts in evaluating cases effectively and consistently, and these “precise rules” that provide clear starting signals in turn help individuals “predict the consequences of future contingencies and to plan and structure their lives accordingly.”<sup>331</sup> These types of inquiries, moreover, recall the common law marriage framework, which most courts and legislatures have rejected as against public policy.<sup>332</sup>

Finally, relying on rules rather than functional analyses provides a safeguard against conscription. There are couples who, according to a functional analysis, are engaged in an economic partnership and would therefore count as “married.” However, to count some of these couples as married when they were not may result in unfair property division. Take Franke’s example of a couple who cohabited and shared expenses yet were not married. Despite their demonstrated intention to regulate their own relationship arrangement before marriage, the court used a functional analysis and conscripted them into marriage before they were legally married. The outcome was to the detriment of their agreement and intentions, and arguably unfair to the one who ended up paying alimony and dividing a larger pot of marital property than she intended. On the other hand, in *Blumenthal v. Brewer*, the court could have used legal markers, such as the moment when the couple entered their names into the Domestic Partnership Registry or obtained a marriage license—to start counting marital property. In that instance, backdating would not have contravened the intention of the parties, which was to organize their lives, their household, and their assets as if they were married.

Both same- and different-sex couples may prefer to remain off the marital grid for any number of personal reasons, and courts should

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330. *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980) (“For courts to attempt through hindsight to sort out the intentions of the parties and affix jurial significance to conduct carried out within an essentially private and generally noncontractual relationship runs too great a risk of error.”).

331. DAGAN, *supra* note 196, at 194; *see also* Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 747, 785 (2015) (“Formality also provides convenient evidence of marriage. Formality cuts against the fraud concerns that plague elective marriage regimes, which must examine myriad forms of evidence for indicia of intent to be married.”); Kelly, *supra* note 67, at 43 (“[D]efault rules in family law . . . are more predictable, can more reliably protect vulnerable persons, and are more easily applied by families without legal assistance.”).

332. *See Morone*, 413 N.E.2d at 1155 (holding use of implied-contract theory was “inconsistent with the legislative policy enunciated in 1933 when common-law marriages were abolished in New York,” and declining to follow *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976)).

recognize and respect this choice.<sup>333</sup> There are couples who have philosophical objections to the institution itself. Women—in both same- and different-sex relationships—may choose not to opt into a legal relationship that is fraught with the vestiges of historical oppression. Some couples may simply decide that they prefer a relationship unmediated by the State. Couples may also have financial concerns. For the majority of couples, there are financial incentives to marry. However, this is not true for everyone. Certain couples face a tax penalty upon marriage, and may choose therefore to remain unmarried. Other couples choose not to marry because they might lose benefits or other entitlements in doing so. Older couples in particular may choose to live as if married without legally marrying in order to keep certain pension or military benefits. Individuals also lose spousal support once they remarry. Furthermore, certain individuals may choose not to marry to protect themselves financially—to maintain a separation of debt between themselves and their partner, to protect their credit rating, or to avoid liability for medical expenses or other possible new debt. For the sake of these couples, and in order to protect personal autonomy, courts should safeguard the individual's right to stay unmarried and not be judicially conscripted into an economic partnership. Rather, courts should use legal markers to evaluate when pre-marital property exists and enlarge marital estates.

## CONCLUSION

After the battle for marriage equality comes the reality of divorce. As an increasing number of same-sex couples avail themselves of new marriage rights, same-sex couples will also be divorcing in increasing numbers. This Article addresses the ways in which divorce and marital property rules threaten to undermine the goals of marriage equality without attention and reform. Issues arising in same-sex divorces highlight the failing of current marital property rules to properly compensate *all* spouses for their marital contributions and underscore the ways in which courts have failed to take seriously the idea of economic partnership, the cornerstone concept of equitable distribution.

The two major failings of the equitable distribution statutes relate to *when* the calculation of the marital estate begins and *what* gets counted as marital property. The timing concern made salient by same-sex “hybrid” cases—in which the spouses have been long-term cohabiting

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333. See Clarke, *supra* note 331, at 35 (“Formal marriage also gives couples the ability to stay off the grid, opting out of legal marriage and the benefits and burdens it might entail.”).

partners but short-term marital partners—is the question of when an economic partnership begins. Economic partnerships between romantic partners do not magically begin at the moment of marriage. Instead, they develop at various points of intimacy and commitment both in and outside of marriage. A couple may develop an economic partnership while on the path to marriage (just as couples often maintain economic ties after marriage). Consequently, I propose that courts use the category of “pre-marital” property, in hybrid cases, to count assets and income acquired outside of but in contemplation of marriage. Courts should, in these cases, start counting pre-marital property from the point at which the couple made a sufficient showing that they possessed the intent to form an economic partnership as well as a legal relationship.

With respect to what gets characterized as marital property, the central problem is the resistance of courts to properly count spousal contributions, whether to the education of the other spouse or to the other spouse’s business interests, when characterizing and distributing property. By undervaluing these spousal contributions, courts are failing to recognize the marital bargains in place and the economic partnerships at work. Individual partners in a marriage should not be financially penalized for the householding arrangements that put them into low-paid or unpaid jobs for the benefit of the couple. The conventional approach of compensating the low earner at divorce through distribution or support is both inadequate and theoretically inapposite. If courts were instead to count as property one spouse’s contributions to the degree that the spouse enhances the other’s earning capacity and presume an equal division, it would positively impact how spouses bargain with one another, how diverse roles get valued in the marital bargain, and how gender is both prescribed and performed within marriage.

These proposals for change, inspired by the advent of same-sex divorce and the need for divorce equality, provide a blueprint for courts as they encounter an increasing number of same-sex divorces. At the same time, these proposals will benefit all couples, in that modified equitable distribution norms will better reflect the infinite variety of marital bargains that couples make. Reforming equitable distribution in order to better reflect the ideal of marriage as an economic partnership will help reshape the gendered contours of marriage by recalibrating the values attached to various forms of labor. Ultimately, equitable compensation for spousal contributions will help advance the aims of marriage equality by bringing about divorce equality.