A Critique of the Equal Management Act of 1978

W. T. Tête
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When you make the two one, and when you make the inside like the outside and the outside like the inside, and the above like the below, and when you make the male and female one and the same, so that the male not be male nor the female female; and when you fashion eyes in place of an eye, and a hand in place of a hand, and a foot in place of a foot, and a likeness in place of a likeness, then will you enter [the Kingdom].

GENERAL OBSERVATIONS

At first blush, the Equal Management Act of 1978, which is to replace the Civil Code's community of acquets or gains, appears to be a great victory for the rights of women. Every victory, however, has its costs, to the victors as well as to the vanquished.

Critics of the Civil Code have at times concentrated on demolition of a strawman, a mere caricature of what the community actually is. Instead of describing the husband's role of...
head and master accurately as being that of the manager of a patrimonial mass,
some have described it as being one of "Lord and Master," implying that it entails some claim of ownership over the wife's person, or at least some sort of vassalage on the part of the wife. The husband's role has been ridiculed as a relic of Spanish machismo. Critics of the community have shown little awareness that having a single manager is a practical convenience for one carrying on a business. In general, they have depicted the wife's situation as being one of gross inequality. Yet, in marriages of the traditional pattern, wherein the husband is the principal breadwinner and the wife the principal homemaker, the community has provided a kind of proportional equality.

Nevertheless, one who criticizes the Equal Management Act of 1978 must attempt to avoid the error of overstating the extent to which the present community retains the capacity to protect legitimate expectations arising out of marriage. At the

4. The husband's powers under article 2404 are not essentially different from those of a husband under original articles 1421 and 1422 of the French Code civil, which do not even use the phrase found so offensive by critics of the Louisiana Civil Code. Article 1421 of the Code civil begins: "Le mari administre seul les biens de la communauté," which, when translated, reads: "The husband manages the community property alone."

5. This writer has observed that laymen who have followed the controversy really believe that "Lord and Master" is the technical term for "head and master." The current use of Lord and Master may derive from the French. During the Middle Ages, the husband was termed "seigneur" (Lord) or "seigneur et maître" (Lord and Master). With the drafting of the Code Napoleon the husband became the "chef" (head), and thus the term "chef et maître" (head and master) was used in France. See Code Napoleon art. 1388 (1804). It appears that advocates of "women's rights" have used the ancient title "seigneur et maître," "Lord and Master," in their arguments for polemical effect. See 4 H. MAZEAUD & L. MAZEAUD, 1 LEÇONS DE DROIT CIVIL Nos. 283, 294-2 (1969).


7. See text at note 26, infra, for a discussion of real estate and other business transactions.

8. Proportionate equality may be described as an equality where people are not accorded exactly the same thing, but instead are accorded different things which are deemed to be substantial equivalents. Because the things are different, the resulting equality is not arithmetically calculable as such and hence is traditionally described as proportionate. For the distinction between arithmetical and proportionate equality, see generally, ARISTOTLE, NICOMACHEAN ETHICS BK. V. The notion of "equivalent" as found in article 1768 of the Civil Code expresses this Aristotelian idea very succinctly. It may be deemed to be embodied in many institutions of the civil law, including the community property regime provided by the Civil Code.
bottom of the animosity directed at the traditional regime of the Code may lie a core of actual experience that expectations are not being protected.

As Mazeaud and Mazeaud observe, "[R]egimes of community are adapted to an indissoluble marriage." With the rising divorce rate, many wives unexpectedly have found themselves uncherished, unhonored and unemployed. Whereas their ex-husbands' market skills have typically appreciated during the term of the marriage, the ex-wives have found that their own marketability has depreciated. It is understandable that those women who have had such an experience should resent the failure of the community regime to protect them, even though the community was not originally developed to handle such ready dissolution of marriage.

In many marriages both parties have expected the husband to be the breadwinner and the wife to be the homemaker, i.e. what we shall call the traditional pattern of a marriage. The breakdown of such marriages appears to have had an effect on whether people continue to have traditional expectations when entering marriage. Many women apparently have changed their expectations; instead of placing their hopes on sharing the benefits of their husbands' careers, they have come to want careers of their own. Certainly the breakdown of marriage as a lifelong institution is not the only cause of the movement of women into the workforce. Nevertheless, as a matter of economics, one would expect the disintegration of the family to have such an effect on the conduct of those entering marriage.

The increase in working women in turn may have affected

10. The experience recounted in Frank, Barbara Hansen vs. The IRS, Good Housekeeping, Oct. 1978, at 74, may not be atypical: "She was then 50 years old; she had no money; she hadn't had a job in 28 years and she didn't know whether she could get one . . . . After six weeks of job hunting, she managed to find work as a motel hostess/cashier at $88.00 a week. Later she was hired by the telephone company and eventually qualified as a long-distance operator, a job she liked and was good at." Id. at 80.
11. As noted by Pugh, The Spanish Community of Gains in 1803: Sociedad de Gananciales, 30 La. L. Rev. 1, 34-35 (1969): "An absolute divorce which completely dissolved the marriage was impossible under Spanish law. It was possible, however, to have a marriage annulled for reasons of impediment . . . . Although a complete dissolution of a valid marriage was not possible in Spain, a separation of bed and board, termed a divorce, was available."
the practical importance of the protections of the interests of married women provided by the Code. After all, as article 2 of the Civil Code observes, laws “relate not to solitary or singular cases, but to what passes in the ordinary course of affairs.” If the general mode of conduct changes, a law developed to provide a just result for the former mode of conduct may not operate in as just a manner for the new way of life.

Under the Civil Code, the husband’s right as head and master to dispose of the community is balanced by the wife’s privilege of renouncing the community.\(^2\) When the wife’s principal assets have come from her separate, usually inherited property, article 2411 has operated to protect her from the husband’s improvident actions. It is also intended to protect even an impecunious wife from being crushed after dissolution of marriage by debts contracted by her husband.\(^3\)

Where the wife’s principal economic asset is her capacity for earning income, the right to renounce, if invoked, will protect her once the marriage is dissolved from bearing the burden of debt contracted by her husband. However, it does not protect her earnings during the marriage, nor the things acquired by her earnings. The privilege of renouncing may not be perceived as adequate protection, especially by the working wife. If the wife does not consider the privilege of renouncing the community as balancing the power in the husband to dispose of the community, then she may think the situation unjust.

The working wife may also weigh the practical effect of the ultimate right to renounce against the impaired opportunity to obtain credit that once flowed from the husband’s having the power to dispose of her earnings. An inability to obtain sepa-

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12. Though the rights of husband and wife are not identical, they are in a sense equivalents for each other. See note 8, supra.

13. However, this protection is purchased at a high price. Article 2411 provides: “The wife who renounces, loses every sort of right to the effects of the partnership or community of gains. But she takes back all her effects, whether dotal or extradotal.” Failure to renounce the community leaves the wife exposed to the parade of horrors discussed in Frank, supra note 10. Moreover, the draconian application of the Federal Revenue laws cannot be defeated by the renunciation, inasmuch as income to one of the spouses in community is deemed to be income to both. One must observe, however, that there is nothing in the Equal Management Act that will prevent the same hardships from occurring in the future. Such hardships are possible under any regime of community and do not flow from the husband’s head and mastership.
rate credit is directly and immediately perceivable. The effect of the right to renounce lies in the future and cannot be judged as concretely.

Certainly there was a need to adapt the law as found in the Civil Code to the recent changes in society. One might, for example, concede that the Married Women's Emancipation Acts\textsuperscript{14} were incomplete in that they recognized the wife's capacity to contract, but did not leave her with sufficient assets in her separate patrimony for anyone to wish to contract with her. However, any reform, to be truly such, must be a step toward the better protection of the legitimate expectations of both spouses and of third parties who deal with them.

The criteria for a good matrimonial regime have been aptly stated by Professor Robert A. Pascal.\textsuperscript{15} With some risk of oversimplification, they may be restated as follows:

1. A good matrimonial regime will take people as it finds them.
2. A good matrimonial regime must be designed to be acceptable to the spouses throughout their lives.
3. The natural desire of each to control what he or she earns must be recognized so that one spouse does not come to perceive the other as a hindrance to activity.
4. To the maximum extent practicable a good matrimonial regime will be self-operative.
5. To the maximum extent practicable, a good matrimonial regime will directly affect only the parties to the marriage, leaving creditors in the same position as though they were dealing with an unmarried person.
6. A good matrimonial regime will reduce to a minimum the need for proof of authority to act.

The Equal Management Act violates each of these principles. It may be deemed a legislative rejection of these standards; it is not, however, a refutation of their validity. To the extent that the above criteria appear rational, the Act will appear irrational. Furthermore, to the extent that reforms al-

\textsuperscript{15} Pascal, Updating Louisiana's Community of Gains, 49 Tul. L. Rev. 555, 586-87 (1975).
ready legislated were still untried in practice when Equal Management was enacted, the irrationality of the new legislation appears even more manifest. Did Act 679 of 1976 fail to prevent widespread alienation of the family home? Did Act 705 of 1975 fail to permit women to obtain credit on their earnings and mortgage acquisitions?

One cannot ignore the irrational ideological element present in the movement for equal management. The more than four hundred women who are said to have gathered in the state capital, each taking the stand to tell "her hair-raising story," have given the impression that equal management will somehow put an end to all the injustices that one spouse may inflict upon another.

In reality there is little in equal management to prevent the infliction of such injury; the possibility of inflicting injury is merely doubled. The belief that the implementation of "equality" is the ultimate solution is just dead wrong. It is misdirected. The fault lies not in the matrimonial property system, but in the disintegration of marriage itself. "Equality" is no magic cure-all; rather, it is a substitute for thought.

To this writer, it appears that the demand, not merely for reform, but for absolute arithmetical equality between the sexes, is the manifestation of a revolt against the reality of limitations in the human condition. Marriage, by its nature, imposes limitations. If two people are to share a common life together, each will tend to specialize in what he or she does best. So long as two people are not exactly and precisely the same, their total income will be greater if each concentrates his energies on what he or she does best: this is the principle known as "the division of labor," or the "law of comparative advantage," or "specialization." When the wife is more efficient at caring for the children than the husband, it is the couple's advantage for her to concentrate on that task and allow the husband to concentrate on tasks outside the home. The wife may be otherwise equal in ability, or even superior to the husband in ability, yet some specialization will occur. However, specialization has its costs as well as its benefits; it nar-

16. Frank, supra note 10, at 89.
17. See A. ALCHIAN & W. ALLEN, UNIVERSITY ECONOMICS 164.
rows the potential to the actual, inevitably foregoing what might have been.

Those who insist upon arithmetical equality deny this aspect of reality. In reality differences appear between the roles of the sexes in all societies, whether there be any innate differences in abilities between the sexes or not. Certainly differences in roles still exist in our own society.

Professor Eric Voegelin, formerly of Louisiana State University, has analyzed the modern propensity to engage in such denials of reality as Gnosticism.  Although Voegelin's concept of Gnosticism is primarily that of an experiential category to denote the similarities between the internal states of ancient and modern nihilists, it is interesting to note the ancient Gnostic desire to abolish woman, "to make her male, so that she may become a living spirit resembling you males. For every woman who will make herself male will enter the Kingdom of Heaven." Such language expresses in a very symbolic fashion a belief that a radical transfiguration of existence is necessary in order that all human beings may be liberated to achieve their highest potential.

In modern history the belief in the possibility and the necessity of such a transfiguration through human action can be found in the vision of a society:


19. See H. Jonas, Gnosticism, Existentialism & Nihilism, THE GNOSTIC RELIGION (1965). The oldest Christian account of various Gnostic systems is that of Irenaeus, Adversus Haereses, wherein he describes one Gnostic sect as "rejecting the ancient work of God in forming mankind and implicitly blaming him for making male and female for the generation of men." R. Grant, GNOSTICISM AND EARLY CHRISTIANITY 47 (1959). See also text at note 1, supra. Nevertheless, it is well to note the caveat of Professor Gerhart Niemeyer:

There is an inclination to feel that one has said everything when one has called a modern movement 'Gnostic.' In fact, however, one has not said everything. An analogy has limitations. Modern ideological movements are not organized bodies of worship, nor do they worship a radically transcendent God who is alien to this world. Heuristically, the term 'Gnostic' has been most productive, but it must not cut short the detailed analysis of modern thought structures and cultural phenomenon.


where nobody has an exclusive range of activity, but everybody can train himself in every branch; where society regulates general production and thereby makes possible for me to do one thing today and another thing tomorrow, to hunt in the morning, to fish in the afternoon, to be a husbandman in the evening, and to indulge in critical work after supper, as it pleases me, without any necessity for me ever to become a hunter, fisherman, husbandman or critic.21

As adapted to the women's liberation movement, the Gnostic vision of transformation may entail a society in which there are as many househusbands as there are housewives; where a woman's career is as unhampered by the birth and raising of children as is a man's; where any woman may find fulfillment in a career just as a man does; and where the monetary incomes earned by men and women are absolutely equal.

The actual effects of the Equal Management Act of 1978 cannot be measured against such a society because such a society simply does not exist: the vision is a projection of what is wished, not a perception of what is real. The Act must be measured against reality—against a society where there are very few househusbands even from among those households where the wife is employed, and where women are as apt to find frustration as fulfillment in a career (just as their husbands might, except that women might find more of an option simply to quit work). The purported equality of the Equal Management Act must be measured against a society where women's earnings are actually, in most cases, less than men's, perhaps because a woman may quit to bear and rear children or will prefer to stay with her husband in Baton Rouge even though the highest paying job available is in Lafayette.

As measured against the society that actually exists, Act 627 appears likely to have a number of adverse effects on the expectations of married persons. It places a risk upon third persons that contracts entered into with a married man may be undone at the instance of that man's spouse. The precau-

tions that many third parties may need to take are apt to prove to be an inconvenience to married persons that will hamper their conducting business. The provisions for joint control with respect to major transactions may lead to friction between the spouses that would not otherwise have existed, particularly where the consent will, as a practical matter, entail obligating the other spouse personally. This inconvenience and friction can, in turn, result in a demand by the husband for the termination of the community during marriage, a demand newly possible under the law. Thus, instead of promoting the protection of the wife's expectations, the new regime can defeat them in new ways.

As a consequence of the likelihood of demands for separation of property, pressures can be expected to be felt at the very core of the family structure. Where the relationship between husband and wife is already shaky, the new pressures may tip the scale in favor of divorce. Where the relationship is otherwise sound, pressure may be exerted against the institution of forced heirship, which limits the extent to which a husband can provide for his wife when they are separate in property.

In sum, it is the thesis of this article that Act 627 is a misdirected effort to remedy what are actually the effects of the breakdown of the family. Perhaps the family is beyond legislative cure, but it is not beyond legislative harm. Act 627 wreaks such harm.

When a project turns out to be a spectacular disaster, as when a new edifice collapses upon those whom it was meant to shelter and protect, the resulting dispute will often turn on the question of whether the fault is one of architecture or design, on the one hand, or, on the other, the fault of flawed workmanship in the execution of the design. If the design itself is faulty, it really does not matter whether the execution of the design is good or bad: the structure will fail. Such is the case with the notion of "equal management."

In passing Senate Concurrent Resolution 54 of 1977 and thus declaring adoption in principle of the concept of "equal management," the legislature made its decision in a vacuum without having an actual text before it to weigh the consequences. The legislators directed the creation of a committee to draft a proposed bill "to implement the concept of equal
management of community property." They got what they asked for, but one may doubt whether they have yet seriously pondered the practical implications of their actions.

Although the percentage of married women in the working force is approaching fifty percent,²² many marriages still attempt to approximate the traditional pattern wherein the husband is the breadwinner and the wife the homemaker. Such is the case even for many of the marriages where the wife works out of what is considered to be more or less temporary economic necessity rather than pursuit of a career. What effect will the new regime have on marriages wherein the parties may wish to live in as traditional a mode as possible? An analysis of the effects of the Equal Management Act cannot ignore such marriages because they do exist.

IMPACT ON THE HUSBAND

Let us consider the effect of depriving the husband in such a marriage of his status as head and master of the community. Where, as in most cases, the principal economic asset of a marriage consists of the earnings of the husband, the main effect of recognizing him as head and master of the community is to grant to the married man the same powers that he would have had he remained single. Under the Civil Code's community of acquets or gains, the man who marries loses none of the power to dispose of or commit his earnings vis-a-vis third parties.

Under Act 627 the man who is married will lose the exclusive use, control and management of his earnings that he enjoyed while single, or while under the community of acquets or gains as found in the Code. The new Act provides: "Each spouse acting alone may manage, control and dispose of his or her separate property and, except as otherwise provided by law, each spouse, acting alone may manage, control and dispose of the community property."²³ This provision may be equitable when applied to marriages where neither spouse can be said to be the principal breadwinner, but what about those marriages where the spouses intend to approximate the traditional mode?

It is one thing to ask that a homemaker with little income of her own give up control of her earnings for the sake of a single administration of family expenses. On the other hand, the spouse who is the sole or principal breadwinner gains almost nothing by virtue of the nominal "equality" provided by the new provision and indeed loses a great deal compared with what he has if he remains single.

The Equal Management Act thus effects a radical change in the status of the married man. One might well begin one's analysis of this change by looking at the adoption of equal management elsewhere.

One writer, comments as follows with respect to the equal management and control law adopted in California:

The fact that each spouse has this unrestrained power over the entire community property may be a necessary evil worthy of toleration, especially when balanced against alleviating the dissimilar treatment of women (based upon the over-inclusive classification by their sex), which arguably was destined to succumb to scrutiny under the Equal Protection Clause or the Equal Rights Amendment, if ratified. From the husband's standpoint, the worst that can be said for the changes in this area is that some husbands will now have to live with the risk of improvident expenditures of the community assets by the wife—a risk the wife has long endured.24

However, to say that the husband will be merely as bad off as is the wife is a gross oversimplification.25 The wife always has a gain to balance the risk where the husband is the principal breadwinner: the interest in that which he acquires. The husband in a traditional marriage has no such gain because the wife generally has little or no income of her own.

It cannot be presumed that the husband will necessarily

24. Adamske, Equal Management and Control in California, 2 COMMUNITY PROPERTY J. 25, 32 (1975). The author of the comment on California law does note, however, that "[o]ne might question whether such broad power to alienate the community property is wise under many circumstances, especially if one's spouse contributes a disproportionate share of the 'income' to the community." Id. at 27. This is at least a tacit recognition that, in a traditional marriage, the husband's situation is indeed different from that of the wife.

25. See note 24, supra.
share a belief in this egalitarian ideology for the sake of which absolute arithmetical equality is demanded. Let us suppose, however, that the husband does attempt to be tolerant, if not for the sake of the current ideological fad, at least out of good will toward his wife. Can a husband and wife, especially a couple trying to lead a married life along somewhat of a traditional pattern, carry on their financial affairs conveniently under the new regime?

**IMPACT ON TRANSACTIONS INVOLVING REAL ESTATE**

Let us consider the matter of real estate transactions. Under the Civil Code, a husband could, and frequently did, alienate community immovables without the participation of the wife, at least prior to 1976. The wife's nonparticipation meant not only that her consent was not required, but also that the wife did not ordinarily become personally obligated by the transaction. Thus for example, her separate property was not liable for the obligation to deliver, the warranty against eviction, and the warranty against redhibitory defects when the husband sold property. Moreover, if the husband had sufficient credit of his own, she did not customarily join in the act so as to become personally liable on the loan secured by a mortgage to acquire the property.

The practice of conducting business on the basis of the husband's consent alone thus provided an important protection for the wife's interests. Her separate property remained separate; she was not personally obligated by what the husband did. The wife's separate property is not likely to remain separate under the Equal Management Act of 1978. The very

26. For discussion of the impact of 1976 amendments, see text at note 47, infra.
28. *La. Civ. Code* arts. 2477-99. Although generally delivery does not result in a problem, an obligation to pay damages can result if delivery is not timely made. *Civil Code* article 2486 provides: "In all cases, the seller is liable to damages, if there result any detriment to the buyer, occasioned by the nondelivery at the time agreed on."
29. *La. Civ. Code* arts. 2500-19. Eviction can lead to the restitution of the price, the restitution of fruits or revenues when the evicted buyer is obliged to return them to the owner, the cost of the suit in warranty, and any damages besides the price that has been paid. See *La. Civ. Code* art. 2506.
31. This issue has been raised in connection with the equal management statutes adopted in other states. Thus Adamske notes that "it can be said that the wife's
abolition of the husband's head and mastership may eliminate the basis for the creditor's refraining from seeking the wife's personal obligation.

In Louisiana the insulation of the wife from the effects of her husband's disposition of community property ultimately flowed from article 2404 of the Civil Code: "The husband is head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife . . . ." This article constitutes a positive expression in Louisiana law of the basic structure of the Spanish community of gains. Mrs. Nina Pugh gives a most accurate and succinct statement of this theory:

Whereas the wife owned equally with her husband, he, as "business manager" of the partnership, actually administered the community of gains. For this reason the husband of ancient Spain and the sociedad were identical in the eyes of all third persons, even as they are today in Spain. In the Spanish concept the wife "had" (Spanish "ayan" from the Latin "habere") the gananciales in the sense of owning and possessing them; but she did not "hold" (Spanish "tiene" from the Latin "tenere") them. The husband, who was said "to have and to hold" the gananciales, was empowered to act in regard to them. He was described as "in actu" (in control) as well as "in habitu" (in present interest). The wife was only "in habitu" or "in habitu et in creditu" (in present interest as creditor) in regard to the bienes gananciales, but no less a co-owner.

Thus, while the wife did indeed have a present one-half interest in the community property under the Spanish regime as under

separate property will be exposed to increased liability by putting her on equal terms with her husband . . . ." Adamske, supra note 24, at 32. Thus "[w]ives with substantial separate property assets will find that the new changes pose a potential threat to these holdings . . . ." Id. at 38. However, the specific provisions of the California law upon which these observations rest do not appear to correspond to any provision of the Louisiana statute. Rather the adverse effects of equal management in Louisiana will flow from the basic change in the underlying theoretical structure of the law.


33. Pugh, supra note 11, at 12.
the regime provided by the Louisiana Civil Code, her interest was different in kind from that of her husband. The practical consequence of this theoretical difference was that third persons could treat the husband as if he were the sole owner when entering into bona fide onerous transactions, such as purchases of immovables.34

The Equal Management Act of 1978 will eliminate the difference in kind between the husband's interest and the wife's interest. The new Act provides in part, that "[e]ach spouse owns a present undivided one-half interest in the community property."35 While the language of this article may seem familiar,36 the absence of any provision in Act 627 of 1978 constituting one spouse the manager or the "head and master" of the community means that the spouses' respective interests are exactly and arithmetically the same.37 This provision may be read as actually implementing Professor Riley's recommendation that "[u]nder the legal regime, each spouse should be declared in the Code to have full ownership of an undivided one-half interest in each asset of the community."38 If the law

34. In Guice v. Lawrence, 2 La. Ann. 226, 228 (1847), the Louisiana Supreme Court observed: "As long as the husband lives and the marriage is not dissolved, the wife must not say that she has gananciales, nor is she to prevent the husband from using them, under the pretext that the law gives her one-half." (Emphasis added.) In Phillips v. Phillips, 160 La. 813, 107 So. 584 (1926), the court disagreed with the Guice case with respect to its interpretation and translation of Febrero as to when the ownership of the wife vests. See discussion at note 36, infra. Phillips did not quarrel with the functional part of the Guice statement that the wife was not to prevent the husband from using the community property by claim of ownership.


36. The statute's language is taken from Civil Code article 2398, omitting, however, that the property is subject to the husband's management. The language appears to be ultimately traceable to Phillips v. Phillips, 160 La. 813, 107 So. 584 (1926), where the Louisiana Supreme Court found that the wife had an ownership interest in half of the community property during the marriage, "subject of course, to the husband's power of administration." Id. at 826, 107 So. at 588. To say that the phrase in the Equal Management Act used without qualification derives from present law is simply not accurate inasmuch as it omits an essential qualification found in the jurisprudence.

The language in Civil Code article 2398 derives from the uncertainties about the Phillips statement apparently created by Creech v. Capitol Mack, Inc., 287 So. 2d 497 (La. 1973). However, the enactment of article 2398 created still more uncertainties. For a discussion of 1976 La. Acts, No. 444, see text at note 48, infra.

37. See note 36, supra.

was intended to provide any less than what Professor Riley urged, it has failed to articulate any alternative theory. Indeed, it is difficult to envision any. In order to integrate the new regime with the rest of the private law, someone must be deemed "the owner" of a thing. Since there is no basis in the legislation for distinguishing one spouse's "interest" from the other's, both must be deemed "the owner" of each thing.

Thus, under the new law, there will be no positive reason why a purchaser should treat only one of the spouses as the vendor. The rationale for treating the husband as such has been removed. Therefore, in practice, the provision that the "alienation, encumbrance or lease" of community immovables "requires the concurrence of the spouses" is likely to mean that the wife must become a principal for all such transactions. She will therefore be personally bound. The protection provided the wife by the Spanish and Louisiana communities of gains is at an end.

The foregoing prediction may be confirmed by comparison with the French practice following the adoption of their new matrimonial regime law in 1965. However, one should note very carefully that any comparison also entails contrasting the new French regime with the new Louisiana one, for the French regime is not one of equal management.

New article 1421 of the French Code civil may be translated as follows: "The husband manages the community alone, except for responsibility for faults which he might have committed in his management. He can dispose of the community property, provided that this be without fraud and under the exceptions that follow." For purposes of our analysis, the important exception that follows is that provided by article 1424, i.e. "[t]he husband cannot, without the consent of the wife, alienate or encumber immovables . . . . He cannot without

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39. An entity theory would not solve the problem. In order not to defeat the purchaser's rights under the warranties flowing from sale, he must be able to go back against previous vendors personally. Otherwise, the right becomes one without substance.
41. C. civ. art. 1421 (writer's trans.). Article 1421 provides: "Le mari administre seul la communauté, sauf à répondre des fautes qu'il aurait commises dans sa gestion. Il peut disposer des biens communs, pourvu que ce soit sans fraude et sous les exceptions qui suivent."
this consent collect the capital forthcoming from such operations.

The key problem in interpreting these articles is whether the wife must be a co-vendor with the same title as the husband and the same responsibility, especially with respect to the obligation of warranty. Two opinions have arisen: one that the wife need not be co-vendor with liabilities equal to her husband, because her husband still has management in principle of the community under article 1421; the other that the wife must be co-vendor with the same obligations as her husband because article 1424 of the French Code establishes a true equality between the spouses for the major transactions. Professor Michel Dagot of the University of Toulouse poses the choice between the two theories in a passage that may be translated thus:

Which conception to adopt? On a purely theoretical plane, one can evoke as evidence the very drafting of article 1424 which only speaks of a simple consent; the drafting of the texts of the Code does seem to preserve a preeminent place to the husband. But on the opposite side one can make the spirit of the reform of 1965, whose egalitarian tendencies cannot be denied, prevail.

On a practical level, even if one considers that the role of the wife is less than that of the husband, one must admit that nothing forbids the wife to go beyond the requirements of general law. The wife can, if she deems it expedient, bind herself personally to the obligations flowing from the sale, whether by becoming a surety for those obligations (if need be solidarily) or by assuming the status of co-vendor (even solidary). In this case, the property of the wife is deemed bound by the obligations born of the sale . . . . It does seem that, whether the theoretical analyses consider in general that the wife only gives her consent . . . . the notarial practice may be oriented towards a more important participation of the wife, corre-

42 C. civ. art. 1424 (writer's trans.) Article 1424 states: "Le mari ne peut, sans le consentement de la femme, aliéner ou grever des droits réels les immeubles . . . . Il ne peut sans ce consentement percevoir les capitaux provenant de telles opérations."
sponding to the second conception—the wife intervening as co-vendor . . . .

The theory according to which the wife in France must participate as co-vendor of community property has been most precisely described as the theory that "the wife is co-proprietor of it under the same title as the husband." That description certainly sounds as though it fits the Louisiana statute even more than it fits the French revision. In practice, however, it appears that the French avoid adoption of any theory through a consistent notarial practice of having the wife obligate herself to the same extent as the husband. This is explained on the ground that the notary is "seeking the security of the other contracting party."

The Equal Management Act of 1978, unlike the French revision, does not preserve to the husband any preeminent role of manager. Louisiana therefore will lack any provision similar to the basis of the alternative French theory requiring only the wife's bare consent. Under the Equal Management Act the wife in Louisiana cannot be treated as anything less than co-owner under the same title as the husband. With the total abolition of the husband's role as manager of the community, the underlying reason for not requiring the wife as co-vendor evaporates.

Further questions are raised by a comparison with French law. One of the reasons for the French notarial practice of requiring the wife to become a co-vendor is that the husband cannot collect the price of the sale without the consent of the wife. Article 1424 of the French Code, quoted in part above, expressly prohibits his doing so. The Equal Management Act of 1978 contains no such provision in express terms. Nevertheless, if the wife is deemed to be co-owner under the same title as the husband, then the buyer's obligation under Louisiana Civil Code Article 2549 "[t]o pay the price of sale" may be

44. 175e CONGRES DES NOTAIRES DE FRANCE, LE STATUT MATRIMONIAL DE FRANCAIS Part 1, No. 369 (May, 1978).
45. Id at No. 370.
46. Id.
47. See Dagot, supra note 43.
deemed to be an obligation toward the wife as well as toward the husband. It would follow, then, that the wife should collect the proceeds as any other co-vendor would. Otherwise, one of the co-owners would not actually have been paid the price of the sale and the buyer’s obligation would not have been discharged. Since there is no longer any theoretical basis to distinguish the husband’s interest from that of his wife, there is no longer any basis to pay the price of the sale to the husband alone.

Confirmation of the belief that the wife will be obligated as a principal for alienations of community property may be found in the notarial practice that arose, at least in New Orleans, after the passage of Acts 444 and 679 of 1976. The former Act enacted article 2398 to provide: “Each spouse owns a present undivided one-half share in the community property subject to the management of the community by the husband in accordance with the rights and restrictions provided by law.” The latter, Act 679, amended article 2334 to add a provision that: “Where the title to community property declared to be the family home stands in the name of the husband alone it may not be leased, mortgaged or sold without the wife’s written authority or consent.”

Like their counterparts in France, Louisiana notaries seek “the security of the other contracting party” when they represent that party in dealing with a married person. As one notary put it, “You’ve got to make the land as negotiable as a check.” Uncertainty arose among the profession as to whether the husbands’ “management” under article 2398 might be something less than the right of disposition, as for example, mere administration without the power to alienate. Moreover, it is possible that a court could interpret the prohibition against the husband’s alienation of property “declared to be the family home” as giving courts authority to make such a declaration even where none had been filed in the public record.

Act 444 went into effect in October of 1976. From that time until now, commitments to issue title insurance in Louisiana have carried provisos such as the following: “The wife must join the husband in executing sales and mortgages creating
interest to be insured."

This has meant, in New Orleans at least, that the wife either signs as principal or gives a power of attorney to the husband to sign for her as principal.

The legislature responded to the notarial interpretation by passing Senate Concurrent Resolution 3 and House Concurrent Resolution 23 of the Second Extraordinary Session of 1976 declaring that Acts No. 444 and 679 were intended to have a more limited effect than some attorneys had deemed possible. The resolutions declared that the Acts were not intended to have the effect of generally impairing the husband's authority to alienate community property. Unfortunately, the two concurrent resolutions were insufficient, at least in New Orleans, to alter the practice of requiring the wife to participate in real estate transactions as a principal. As a matter of public law, such interpretive concurrent resolutions are ineffective to determine what the interpretation shall be. Under the principle enunciated in *State Licensing Board for Contractors v. State Civil Service Commission*, interpretation is a judicial, not a legislative function.

Nevertheless, Act 679 of 1976 could have played a genuine role in reform if either judicial decision or actual legislative amendment had restricted it to those functions which the legislature declared it had actually intended. The possibility of the husband's acting alone to alienate or encumber the family home, of which so much complaint had been made, could have been eliminated by making the declaration of homestead in effect automatic whenever a new home was acquired. This possibility is rendered moot, however, by the adoption of the Equal Management Act.

With respect to real estate transactions, the Equal Management Act will simply perpetuate the practice that has arisen, at least in New Orleans, subsequent to the 1976 amendments. Act 627 of 1978 is a legislative repudiation of the policy reflected in the concurrent resolutions less than two years before.

The Equal Management Act itself does envision that cer-

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48. The author is indebted to Mr. Jess Nelson for providing a copy of the commitment used by Lawyer's Title Company and for other information on the practical aspects of real estate transactions in New Orleans.

49. 240 La. 331, 123 So. 2d 76 (1960).
tain devices expressive of a wife's concurrence, but short of her participation as principal, could be used. However, these devices are rendered worthless by the failure of the Act to make any distinction between the interests of the husband and wife. If the wife is a co-owner, something more than a bare authorization will be necessary. For an example of the Act's presupposition that the wife may not always be required to act as principal, let us turn to the first comment to Revised Statutes 9:2843: "A spouse who joins in a transaction or grants a power of attorney or mandate becomes a party to the transaction unless personal responsibility as a party is expressly negated." A transaction could be theoretically structured so as to negate the wife's personal responsibility as a principal, just as one can contractually exclude the warranty of title by use of a quitclaim. Realistically, however, most purchasers want more than a quitclaim. They want a warranty deed from the owner, and under the Equal Management Act, the wife appears to be co-owner under the same title as the husband. Indeed there are additional and unacceptable risks for any third party who deals with one spouse alone. Revised Statutes 9:2846 provides, in relevant part: "The encumbrance, lease of other alienation of community property made by one spouse without the right to do so is voidable at the instance of the other spouse."

Now suppose that a married man urges a purchaser to rely on an act of his wife that appears to comply with the last paragraph of section 2843 which states: "A spouse may expressly confer upon the other spouse the sole and irrevocable right to alienate, encumber or lease a community immovable ..." Even supposing that the purchaser would be willing, if necessary, to rely on the warranty of just one of the two co-owners of the property, he must first make a determination that the act of the wife purporting to confer upon her husband the right to alienate is indeed a valid one. Comment (b) to Revised Statutes 9:2834 provides: "A matrimonial regime contract is subject to the general rules of conventional obligations except as specifically provided in this Title." If the general rules of conventional obligations apply, then the giving by the wife of the "sole and irrevocable right to alienate, encumber, or lease," or indeed the general requirement of "concurrence" must mean that the wife's consent to the transaction is re-
quired. As Louisiana Civil Code articles 1819 et seq. provide, there is no consent where it has been produced by error, fraud, violence or threats. Suppose that, unbeknownst to the prospective purchaser or lender, the husband is a wife-beater? Or suppose that the husband has misrepresented the nature of the transaction to the wife? Or suppose the husband has promised to give the wife something in exchange for her bare authorization to sell, but the promise was fraudulently made? Then the husband may, in fact, be without right to conduct the transaction. There is the danger that the wife could set aside the transaction by invoking section 2846.

Rather than rely on a bare authorization that may be invalid, it is much better to make the wife a principal to the transaction. Then, at least, there will be an independent cause or consideration for her obligation apart from what may have transpired between her and her husband.

What would be the principal cause for a wife's bare "concurrence" under section 2843? It would be that which the wife was seeking by her agreement. The Equal Management Act clearly contemplates that the spouses may engage in business transactions between themselves. The wife's "concurrence" may well be procured as part of such a transaction.

Suppose the agreement of the wife to concur is vitiated by error. Normally, under the rules of conventional obligation a relative nullity such as that arising from error is only a matter between the parties. However, this limitation on the scope of error arises from the principle of relativity of contracts—that contracts in principle only bind those who are parties to them—as stated in article 1889. In contrast, section 2846 is expressly designed to have effect on third parties—to make the act by one spouse voidable by the other. When it comes into operation, it constitutes an exception to the principle that one is not bound by what transpires between others, by res inter alios acta. The exception created by section 2846 would seem to be sufficient to permit one spouse to raise the nullity of the apparent "concurrence" in bringing an action to set aside the transaction of the other spouse with a third party.

On the other hand, if the wife is a principal to the act of sale, the principal cause of her agreement would flow from the
contract of sale. If she receives the price with her husband, what transpired between her and her husband becomes irrelevant. The seller's principal cause for a sale is receipt of the purchase price. Other matters of motive would be merely subsidiary.

Some third parties might be content to rely upon the doctrine of apparent authority, i.e., if the wife makes manifestations to a third party in some form that the husband has authority and the third party relies on them, the wife ought to be bound. There are at least three reasons why the doctrine might not apply to the wife's bare consent as other than principal: (1) The doctrine applies to manifestations by a principal and the wife would not be such if personal responsibility were negated. (2) Where the wife's consent used to be required, the law recognized the possibility that such consent could be vitiated by proof of threats of violence or fraud by the husband.50 (3) Sec-

50. The history of waiver of the wife's legal mortgage on the property of her husband illustrates this point. At present, there is no general practice of requiring such waiver for all sales made by the husband, apparently because articles 3346 and 3349 require the mortgage or privilege to be recorded in order to be preserved. However, these latter articles derive from legislation in 1869, and, prior to that, it was the practice to require the wife to appear and renounce her mortgage in connection with all sales.

Initially, the Louisiana Supreme Court had held that the wife could not renounce her legal mortgage because this would be binding herself for his debt, which was expressly prohibited by article 2412 of the Civil Code of 1825. Gasquet v. Dimitry, 9 La. 585 (1836). However, in apparent response to the aforementioned litigation, the Louisiana legislature passed an act providing that thenceforth "married women aged above twenty-one years, shall have the right, with consent of their husbands, by act passed before a notary public, to renounce in favor of third persons, their matrimonial, dotal, paraphernal and other rights; provided, that the notary public, before receiving the signature of any married woman, shall detail in the act, and explain verbally to said married woman, out of the presence of her husband, the nature of her rights and of the contract she agrees to." Act of March 26, 1835. Thereafter, the form in common use when the husband sold property, included, after the appearance of the wife, the following: "[S]aid Notary, did inform the said appearer, verbally, apart and out of the presence and hearing of her said husband, that she had by law a legal mortgage on the property of her said husband . . . ." Woodward, Louisiana Notarial Manual 646 (1st ed. 1953). The act of renunciation continued with the wife's declaration that she was fully aware of, and acquainted with, the nature and extent of the matrimonial dotal, paraphernal and other rights and privileges thus secured to her by law, on the property of her said husband, and that she, nevertheless, did persist in her intention of renouncing not only all the rights, claims and privileges hereinabove enumerated and described but all others of any kind or nature whatsoever, to which she may be entitled by any laws now or hereafter in force in the State of Louisiana . . . .
tion 2843 would constitute a sufficient statutory basis for a court not to apply principles of apparent authority. Thus, given a case where the spouse's bare consent was truly vitiated, a court would have ample grounds to set aside the transaction.

Finally, it should be noted that section 2846 only makes transactions "made by one spouse" voidable. With the joinder of both spouses as principals the transaction is no longer one "made by one spouse." For that reason, again, the simplest and most prudent course of action is to make the wife a principal.

The same analysis largely applies to mortgages. It could be argued that since one may mortgage one's own property to secure the debt of another, the wife might be able to mortgage her interest in the community to secure her husband's debt without being personally obligated. However, a creditor who lends money to the husband would be giving nothing in exchange for the wife's consent. The cause for that consent would remain a matter between the spouses. Suppose that the apparent consent were later to prove vitiated? To take unnecessary risks is not good business.

Additional practical considerations would appear to dictate that the wife be a principal on the loan as well as on the mortgage. Prior to the Equal Management Act, a lender could

Woodward, Louisiana Notarial Manual 646-47 (1st ed. 1953). The form was dropped in the later edition of the book, inasmuch as it had become obsolete. This provision was similar to forms in use in other states during the time when married women were considered under the authority of their husbands. For example, the standard South Carolina form stated that the wife "did this day appear before me, and upon being privately and separately examined by me, did declare that she does freely, voluntarily and without any compulsion, dread, or fear of any person or persons whomsoever, renounce, release and forever relinquish . . . all her interest . . . ." F. Campbell, John's American Notaries 442 (1951). The Texas form required that a married woman must be examined privately and apart from her husband. Id. at 443. Of course, these clumsy modes of verifying that the wife's consent was not coerced are ill-adapted to the requirements of modern business transactions. The forms should illustrate, however, that the problem of a third party's ascertaining that the wife's consent is free of any vice may not be so simple a matter as relying on her signature alone. The recent publicity given to the problem of battered wives should give one pause before relying on any unverified consent of the wife. In connection with the wife's waiver of her legal mortgage on the husband's property, see also Porche v. LeBlanc, 12 La. Ann. 778, 779 (1857), where the court stated: "Neither do we consider her husband's stipulation to procure her renunciation as affecting in the least her contract with appellees, in the absence of any allegation or proof of threats of violence, or fraud on his part." (Emphasis added).

rely on his assessment of the financial reliability of the husband alone, because the husband is the one who ultimately makes the decisions that spell the difference between solvency and insolvency. The Equal Management Act is designed to give those decisions equally to the wife, but the Act does nothing to increase the financial resources available to the family. The total credit allowable based on the total family income will be no greater than before. The only way for the creditor to assure, as a practical matter, that the wife takes the loan sought by the husband into account in her spending is to make the loan jointly to husband and wife. Otherwise, the wife might, from the creditor’s viewpoint, dissipate the family assets and yet escape responsibility for the loan in question by walking away from the community. Therefore, it appears likely that in all major credit transactions, whether secured by mortgage or not, the wife will be bound as principal along with the husband.

To the extent that the wife is required to join in acts as principal where she would not have done so before, she is of course, less protected. The requirement that she join in an act can produce an entirely new friction in a marriage. If a wife will not join in an act, the husband may be frustrated in his efforts to enter into particular transactions. If she agrees to participate, she may become legitimately apprehensive about the security of her separate property.

Obviously, the problems engendered by the Equal Management Act for real estate transactions are not confined to the moment of the passage of the actual sale or mortgage. The practical problems that are likely to arise from the requirement that the wife consent to sales of immovables are likely to be similar to those that have arisen in France. Of the latter, Professor Dagot observes:

*The practical problem* is posed at the stage of agreement to sell because, at the time of the drafting of the authentic act, it must be well recognized that the intervention of the notary does not permit the husband to sell the community immovable alone, except for error of the notary on the status of the immovable. Each time the problem of the lack of consent of the wife is posed, it has raised a simple
agreement to sell in which the wife has not intervened. ...\(^{52}\)

Thus the failure, inability, or unwillingness of the wife to accept offers to purchase is more likely to cause a deal to fall through than the wife’s balking at the final transfer.

Anytime that a purchaser makes an offer, there is a danger that the prospective vendor will do what is called shopping. He may take the offer to another prospective purchaser to induce the second prospect to make a higher offer. He can then go back to the original offerer and repeat the process. To hold shopping to a minimum, it is good practice to make offers for as short a time as possible. Suppose that the homemaker simply is not available when the offer is made? Does acceptance of an offer to purchase constitute an “other alienation of community property made by one spouse” such that if the husband does accept on his own the transaction would be voidable under section 2843? If so, then the purchaser could not even hold the husband for damages. Even if section 2843 were construed so as not to permit the wife to have her husband’s acceptance of an offer to purchase declared null, it would still have to preclude specific performance. Thus, the purchaser would only be left, at the most, with a right to damages.

The contract to sell could be made subject to a condition that the wife’s participation as principal be obtained. Yet the purchaser in those circumstances would be vulnerable to often unprovable collusion between the spouses to avoid the first commitment in favor of a second, better one. Even in the absence of collusion, the purchaser would be vulnerable to the wife’s shopping the offer. After all, the statute does not compel her to consent.

An equivalent opportunity to renege when the spouses are prospective vendees is also present. Very frequently, offers are made subject to the condition that purchaser is able to obtain adequate financing. The wife’s consent will be required under section 2843 for the encumbrance of the property by the mort-

gage necessary to secure financing. If, after the offer is made and accepted, the wife, acting in the interest of the couple, decides that the purchase is an undesirable one, she can kill the transaction by exercising her right to refuse.

For those who engage in frequent real estate transactions, section 2843 might be used to minimize inconvenience. If the wife, pursuant to that article, expressly confers "the sole and irrevocable right to alienate, encumber or lease a community immovable" in the form of a customary power of attorney authorizing the husband to bind her personally, then the transaction could take place without her further consent. Yet it still would constitute an act between her and the third party. Given the current judicial interpretation of the requirement that a mandate be express and special to sell, many attorneys might accept an act pursuant to a recorded power of attorney authorizing the husband to sell any immovable within a particular parish, except the family home specially described. Others would probably not deem such a power sufficient, given the literal language of the Code.

In any event, a power to sell would not grant a power to mortgage. The latter may be even more doubtful, as the jurisprudence in that area is less established.

53. One might argue that the Equal Management Act, by excluding acquisition of immovables from instances where concurrence of spouses will be required, expresses a legislative intent not to require a spouse to join in an act of mortgage where the property in question is being acquired. Nevertheless, Civil Code article 3300 provides: "Conventional mortgages can only be agreed to by those who have the power of alienating the property which they subject to them." Article 3308 of the Civil Code provides: "Future property can never be the subject of conventional mortgage." Under these articles, the acquired property must first pass into the patrimony of the purchaser, before the purchaser can mortgage it. When it passes into his patrimony, it becomes community property. Therefore, consent of the wife will be necessary to the creation of a mortgage, even where the immovable is being acquired.


56. The judicial interpretation appears to be contra legem. Article 2994 provides that a power of attorney "may be either general for all affairs or special for one affair only." A general power of attorney to alienate property in a parish would appear to be just that—general. Therefore, under the structure of the Code, a general power would not appear to be within article 2997, which requires that the power of attorney be special to sell or buy.
EFFECT ON BUSINESS TRANSACTIONS OTHER THAN REAL ESTATE

The difficulties that the Act is likely to engender with respect to carrying on business are not limited to the field of real estate. Let us consider the implications of Revised Statutes 9:2844, which provides:

A spouse who manages a community business without the participation in management of the other has the sole right to acquire, encumber, alienate or lease the movable assets of the business but cannot exercise this right alone if the encumbrance, alienation or lease comprises all or substantially all of the movable assets of the business or affects movables issued or registered in the name of the spouses jointly or the name of the other spouse alone, as provided in R.S. 9:2843 and R.S. 9:2845. A spouse who is a partner has the sole right to alienate, encumber or lease the accompanying partnership interest.

This provision appears to be most similar to provisions of the equal management acts of Washington and Nevada, which are discussed later. To point up most clearly the problem this language poses, we may contrast it with language apparently still found in California community property law.

When we turn to California, we find that a provision of the California statutes antedating the equal management act, but not expressly repealed by it, provides as follows: "A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest." There is no

57. CAL. CIV. CODE § 5125(d) (West), as quoted in Macdonald, Community Property Businesses: The Impact of Equal Management, 4 COMMUNITY PROPERTY J. 153 n.31 (1977).

All citations in this article to laws of other American states are taken from the text of these laws as they appear in the COMMUNITY PROPERTY JOURNAL. The actual texts of these statutes are not readily available to the Louisiana practitioner. Yet reference is made in the Equal Management Act to provisions of California, Idaho, New Mexico, Nevada, and Washington statutes as being sources of provisions of the equal management law. Moreover, section 10 of the Equal Management Act declares: "The source notes, comments, and special notes contained in this Chapter reflect the intent of the legislature." Normally, the legislature makes it clear that the comments are not to be deemed part of the law itself. The language of section 10 was not found in the version of the equal management laws first introduced as Senate Bill 597.
equivalent of this language in the Louisiana Equal Management Act. Thus, the question arises as to whether a husband can lawfully bar a wife from what section 9:2844 describes as "participation in management" of "a community business." In other words, does the husband have an obligation to take on the wife as a business partner?

Professor James Macdonald of the University of Idaho has posed the problem presented by the adoption of equal management as follows:

The possible impacts of equal management on community property businesses can best be illustrated by posing a common hypothetical situation. Suppose that the husband is operating a retail sales and repair shop as a sole proprietorship in a building leased from a third party. The assets of the business are entirely community property. Before the advent of equal management, it would have been clear that he had the right to sole management and control of the business without interference by his wife. He alone would set policy and make management decisions, and his customers and creditors could rely on his business judgment in making their decisions in dealing with him, lending money to him and the like. The theoretical question raised by equal management, of course, is the extent to which the wife can now mandate different policies and

This writer would argue that section 10 constitutes a solemn expression of legislative will. Therefore, it and the matters referred to by it fall within the definition of law in article 1 of the Louisiana Civil Code. For that reason, it would appear that the Equal Management Act is unconstitutional under the state constitution as an attempt by the legislature to incorporate by reference the laws of other jurisdictions. See La. Const. art. 3, § 15(B). In any event, it is certainly difficult to locate primary materials evidencing the laws of such states. The unavailability of materials from other states is particularly unfortunate inasmuch as it appears from the various articles that are available in the Community Property Journal that there are severe problems occasioned by the adoption of the equal management principle in those other states. In addition to Macdonald, supra, the following articles should be studied: (1) Adamske, supra note 24; (2) Crapo, Equal Management and Control of Idaho Community Property, 2 Community Property J. 67 (1975); (3) Cross, Management and Voluntary Disposition of Washington Community Property, 2 Community Property J. 13, 19 (1975). For a contention that equal management has not resulted in practical problems, see Keddie, Equal Management and Control of Arizona Community Property, 2 Community Property J. 9 (1975). Most of the writers, however, find that the implementation of equal management does pose serious problems that have yet to be faced.
management decisions. The answer to this question will obviously be important to customers and creditors who have been relying on the known business judgment and policies of the husband. Uncertainty as to the extent, if any, of the non-participating spouse's management rights would be especially intolerable where the business involved associates, partners, investors and employees.  

Under the community of acquets or gains provided by the Civil Code the husband can, of course, elect to manage the business himself even if it is comprised of community property. However, under the new provisions the husband's sole right of administration is to be no more. Consequently, one must consider the possible operation of the provision in section 2838 that "[e]ach spouse owns a present undivided one-half interest in the community property." If the wife is a co-owner of business assets, under the same title as the husband, what is to prevent her from stepping in to manage and control that business under Revised Statutes 9:2842, which provides that "[e]ach spouse, acting alone may manage, control and dispose of the community property"?

Section 2844 may not be sufficient to bar the wife. It appears deliberately to stop short of granting one spouse sole management and control of a business, as recognized by the California statute. Although the California statute itself is not altogether free from ambiguity, it at least does appear to recognize the principle that one spouse may preclude the other spouse from joining in or interfering with the management of a business comprised of community property. Its purpose has been described as that of preventing "obvious problems which would arise if one spouse attempted to use his or her power of management and control to interfere with the other's business enterprises." To the extent that the Louisiana statute may have the same purpose, it nonetheless appears to be far less direct than the California statute. It may be questioned, however, whether even adoption of the California statute would be

58. Macdonald, supra note 57, at 150.
sufficient to prevent interference by one spouse with another's business given a logically rigorous civilian application of the principle of co-ownership under the same title as reflected in section 2838.

If the wife is indeed the co-owner of community property under the same title as the husband by virtue of Act 627, it follows that she may exercise all the rights of an owner. She may thus assert a right to direct dominion over the assets of a business and a right to an equal voice in the management and disposition of them. Section 2844 merely states what happens if the wife in fact does not participate; but if she wants to participate in the management of a business, she may have the option under section 2838, her husband's wish to the contrary notwithstanding. Perhaps in practice this right will only be exercised when a marriage is deteriorating. At such times Revised Statutes 9:2847, providing for judicial resolution of disputes between the spouses, would not be adequate to resolve the deadlocks which would arise from dual control over a business. In the absence of the right to preclude one spouse, the conduct of a business is apt to become chaotic during such troubles.

The effect of section 2844 on third parties during more normal periods may be more limited than in other states with equal management, though not as limited as in California. It is unfortunate that some of the actual wording of the provision appears to be drawn from troublesome Washington and Nevada legislation which, as Professor Macdonald has stated, "employ terms and phrases likely to generate more litigation than the very problem at which they are directed."60 The Washington act provides as follows:

Neither spouse shall acquire, purchase, sell, convey, or encumber the assets, including real estate, or the good will of a business where both spouses participate in its management without the consent of the other: Provided, That where only one spouse participates in such management the participating spouse may, in the ordinary course of such business, acquire, purchase, sell, convey or encumber

60. Macdonald, supra note 57, at 153.
the assets, including real estate, or the good will of the business without the consent of the nonparticipating spouse.\(^{61}\)

The Nevada act is substantially the same.\(^{62}\)

Unlike the foregoing, section 2844 does not expressly prohibit one from purchasing and selling even particular assets of a business without the consent of one's spouse "participating" in the management. On the other hand, by recognizing the sole right of the spouse who manages without the participation of the other, the section seems to imply the need for joint action where there is such participation. Nevertheless, the second paragraph of the comment to section 2844 declares: "When both spouses participate in the management of a community business, either spouse acting alone may acquire, encumber, alienate and lease the movable assets of the business, subject to the limitations in §2843." If this comment be given the full statutory force apparently contemplated by section 10 of the Act, then section 2844 should be construed merely as denying to the non-participating spouse any power to alienate movable assets of the business or acquire such assets for the business.

If section 2844 were construed contrary to the legislative comment to require joint consent wherever both spouses participate in the management of a business, commerce would be substantially impaired. Louisiana's legislation would then be subject to the same criticisms that have been leveled at the Washington statute.

Writers have noted that Washington's "bifurcated approach to the problem presents a significant ambiguity on its face and employs terminology whose definition must be ex-

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62. NEV. REV. CODE § 123.230.1(0 (1975) states:

Neither spouse may acquire, purchase, sell, convey, or encumber the assets, including real property and good will of a business where both spouses participate in its management without the consent of the other. If only one spouse participates in such management, he may, in the ordinary course of such business, acquire, purchase, sell, convey, or encumber the assets, including real property and good will of the business without the consent of the nonparticipating spouse.

The foregoing is as quoted in Macdonald, supra note 57, at 152 n.15.
pected to require litigation."63 As Professor Macdonald states:

The troublesome undefined terms are "participate," "management," "consent," and "in the ordinary course of business." . . . The statute does not, however, deal with the question which it raises concerning the degree of activity which will be held to constitute "participation" and the nature of the activity which will qualify as "management."64

Does section 2844 raise the same general problems as "consent" or "conciliation" previously discussed? Does it matter that the section leaves undefined the terms "management" and "participation"?

If the provision were construed to require joint consent where both spouses participate in the management of a community business, then as a practical matter, third parties would never be safe in dealing with either spouse alone. There is simply no standard whereby a third party can determine that a wife does not, in some manner, participate in management. Therefore, transactions might be voidable at the instance of the wife whose concurrence is not obtained. However, so long as section 2844 be construed as not requiring joint consent, then third parties might not be put in such grave jeopardy by the vagueness of the terms "management" and "participation." The transactions would be valid without the joinder of the other spouse in many instances.

Nevertheless, sections 2843 and 2844 do require joint consent whenever the transaction involves "all or substantially all" of the assets. Will there be problems? This limitation on the business manager's authority to act alone appears to be a vague phrase denoting that which is not considered to be "in the ordinary course of such business" as that phrase is used in the Washington legislation. The limitation applies regardless of "participation" in "management."

In many circumstances, it will be difficult for a third party

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63. See Macdonald, supra note 57, at 152, discussing Professor Macdonald's own views and those of Professor Harry M. Cross. See also Cross, Management and Voluntary Disposition of Washington Community Property, 2 COMMUNITY PROPERTY J. 13, 19 (1975).

64. Macdonald, supra note 57, at 152.
treating with a spouse to know whether the transaction proposed involves "all or substantially all" of the assets of a community business. A third party must therefore act on the assumption that the wife has the option to set aside the transaction under section 2846. For example, it is possible to finance transactions by chattel mortgages on stocks of merchandise and other movable property in bulk. If, for instance, a wholesaler sells a stock of summer clothes to a retail merchant and secures that sale by bulk chattel mortgage, the wholesaler must either require the participation of the other spouse or risk the possibility of that spouse's attacking the validity of the transaction.

The examples of doubtful instances may be multiplied indefinitely as we move from business to business. What about the tenant farmer who wishes to sell some cattle, or to sell some of his farm equipment, or to pledge his crop? Can anyone safely purchase non-negotiable accounts receivable from a merchant who is trying to raise money to avoid bankruptcy? Can the merchant who buys a number of items of handmade furniture from a carpenter or a craftsman be sure he is safe when he plans an advertising campaign to increase demand and make the furniture appreciate in value? Perhaps he had better get the craftsman’s wife’s "concurrence," or, better yet, her participation as principal.

Finally, let us focus on the last sentence of section 2844: "The spouse who is a partner has the sole right to alienate, encumber or lease the accompanying partnership interest." Apparently, this is the only restriction provided in the Equal Management Act on the homemaking wife's exercise of the powers granted by section 2842 (to manage, control and dispose of community property) over the husband's interest in property used to carry on business in a partnership with someone else. If that be the case, and if the husband has no authority under

67. The co-ownership under Act 627 could detrimentally affect an assignment pursuant to articles 2642-54 of the Civil Code. However, the comment to Revised Statutes 9:2845 states that "Commercial Law... govern the negotiation of instruments issued in the name of one spouse alone." La. R.S. 9:2845, comment (Supp. 1978). Therefore, if the merchant were assigning promissory notes, this problem would not arise.
the Act to preclude the wife from participation in his business set up and operated with community property, then what is to prevent the wife from stepping in and insisting on her right to manage and control the accompanying partnership interest, short of alienating it? It does not appear that the partnership exception to the wife's power to act as co-owner is broad enough to protect partners. Perhaps its narrowness would give one pause in taking on a partner who is a married man not separate in property.

**IMPACT ON THE FAMILY STRUCTURE**

Having considered some of the possible adverse effects of Act 627 on doing business in the State of Louisiana, let us now turn to the adverse impact on equal management on the structure of the family in this state.

It appears at first that there may be an inconsistency, in principle at least, between the Equal Management Act and article 120 of the Civil Code. The latter provides: "The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obliged to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition." Turning to the obligation of support, it should be noted that, despite the literal language of article 120, the wife is not without obligations of support toward the husband. Article 119 describes the obligations of support of the spouses as mutual, and article 138(8) makes the intentional non-support of either spouse by the other a ground for separation. Therefore, the apparent inconsistency in principle between the Equal Management Act and article 120 may not be so great as it first seems with respect to the obligation of support. Of course, one can point out that the article is based on the presupposition that the wife lacks direct access to her husband's earnings. One may question whether there can, indeed, be any true non-support where the spouse has such direct access. However, that is but a minor matter.

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68. This is not to say that there is no inconsistency. Under the Civil Code it is the husband who primarily decides "whatever is required for the convenience of life" short of failure to support. Equal management deprives him of this ability, even though article 120 charges him with the responsibility. See La. Civ. Code art. 120.
More serious than it may appear at first is the matter of the wife's duty to reside where the husband chooses. The wife's equal right under section 2842 to the management, control and disposition of community property logically entails the equal right to choose her employment. After all, the earning ability of the spouses may be the principal asset of the community. However, the freedom of the wife to choose her employment is limited by her obligation under article 120 to live with her husband. Under that article, if he decides to take a job out of town, she must follow him. If she wishes to take a job out of town, she may not do so consistently with article 120. If she takes the job anyway, she may be found guilty of abandonment under article 138(5). This finding would in turn bar her from obtaining alimony under article 160, or under any similarly worded article drafted to grant the husband a right to alimony in order to overcome constitutional objections to the present alimony law.

Equal management may mean that the wife is no longer obligated to remain with her husband when her best economic opportunity lies elsewhere. In those circumstances, she may be able to leave without fault. The husband may consequently be exposed to alimony liability in circumstances where previously he would have had a defense.

In our presently highly mobile society, the best economic opportunities are frequently not those closest to home. This very phenomenon has already greatly attenuated the lineal family of ascendants and descendants. Now we must confront the effect of the phenomenon on the relationship of husband and wife.

If a society commits itself absolutely to the goal of economic equality between men and women, that equality must be purchased at the expense of the family. Otherwise, married women will tend to turn down offers for jobs away from their husbands. If women turn down such offers, they voluntarily restrict the demand for their services and their corresponding compensation. To the extent that equal management repre-

69. Under new article 215 of the French Civil Code, the spouses are to choose their residence by agreement. If they do not agree, then the decision of the husband prevails, except that the wife may apply to court for authorization to have a distinct residence. The court may also decree where the children shall reside in such a proceeding.
sents Louisiana's ideological commitment to absolute arith-
metical equality, it can be expected to promote, rather than
hinder, the disintegration of what remains of the family. There
would appear to be some very significant social costs, although
perhaps not easily quantified, in undermining the principle
that families have an obligation to stay together, even though
that obligation be frequently honored in the breach. Equal
management is thus one more step in the long process of ero-
sion of the family entity.

There is, of course, a readily apparent inconsistency of
principle between the Equal Management Act and the struc-
ture of the family law with respect to children. Articles 215 et
seq. are not egalitarian. The father under the law, has final
authority over children according to article 216. Additionally,
the father is normally the administrator of the estate of minor
children during marriage under article 221. One may doubt,
however, whether the practical consequences of this inconsis-
tency will be very great.

It cannot be seriously argued that equal management abol-
ishes the preference accorded the father. Nor can it be believed
that equal management constitutes a legislative mandate to
the judiciary to reverse their practice, contra legem, of prefer-
ing the mother to the father in custody matters. Nevertheless,
equal management does import principles of radical equality
into family law that are destined to have some eventual im-
port.70

One area that could be affected is that of child support.
Although both spouses have an obligation under articles 227
and 229 to support the children, in practice the father is the
one condemned to pay money to an ex-spouse for child support
after dissolution. Since alimentary obligations will fall into the

70. The French amended their Code in 1970 to make it egalitarian on this point.
The original law was more heavily paternal than in Louisiana, but under France's new
article 213, both spouses are to assure the moral and material direction of the family,
to provide for the education of their children, and to provide for their future
"together."

The French did not at the same time disturb the husband's titular status as sole
administrator of the community subject to exceptions. The theory that the wife is a
co-owner under the same title of the community property appears to have developed
independent of the amendment to article 213 and the other amendments of 1970.
community under the new Act, an ex-husband with custody may be able to collect child support from his remarried spouse's second community since she has equal management thereof.

The immediate practical adverse effects of equal management on the family are likely to be more indirect than those discussed above. In part, effects on the family structure flow from the impact of Act 627 on the husband's doing business. However, the damage that the Equal Management Act will cause is not confined to that directly resulting from the hampering of commerce. It is necessary to recur to basic principles of community property law to understand fully how the very principle of equal management undermines the family structure.

Although article 2404 of the Civil Code entrusts the management of the community of acquets or gains to the husband, article 2410 of the present law balances the grant of power to the husband with a grant of privilege to the wife. Article 2410 reads as follows: "Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during marriage, by renouncing the partnership or community of gains." The husband, of course, has no such privilege under the Code. Article 2425 of the present law grants the wife an additional privilege:

The wife may, during the marriage, petition against the husband for a separation of property, whenever her dowry is in danger, owing to the mismanagement of her husband, or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims.

This provision has been interpreted judicially to permit the wife to obtain a separation of property to protect her earnings. Again, the husband has no such privilege.

71. A rule contrary to that expressed by this article would mean that a husband who marries a second time would owe his second spouse reimbursement for the use of his earnings to pay any alimony or child support obligations that the husband might owe because of his previous marriage.

The effect of these articles under the present law must be judged in the context of the principle enunciated in article 2329 of the Civil Code: “Every matrimonial agreement can be altered by the husband and wife jointly before the celebration of marriage; but it cannot be altered after the celebration.” Since, under article 2399 of the Civil Code, parties to a marriage are deemed to have tacitly contracted to adopt community of acquets or gains in the absence of a contrary agreement, under present law no community of acquets can be altered by the parties after marriage.

Thus, under present law, the wife can ultimately protect herself from being bound by the husband’s actions by renouncing the community upon termination of the marriage. Before termination of the marriage, she can protect herself and her earnings from the mismanagement of the husband by obtaining a separation of property. Finally, since the community regime cannot be altered during marriage, the wife is protected from any pressure the husband might exert to force her to divest herself of her one-half interest in property he will acquire.

Equal management makes it necessary to extend protections previously afforded the wife against the husband’s mismanagement to the husband as against the wife’s mismanagement. In addition, equal management necessitates a broadening of the protection against mismanagement. Since, as article 2 states, the provisions of law “generally relate not to solitary or singular cases, but to what passes in the ordinary course of affairs,” the new law must take into account a new event in such ordinary course: the possibility of mismanagement by spouses having little or no earned income and little or no business experience. Finally, in order to minimize disruptive judicial coercion in an on-going marriage, it is admittedly better to let the spouses work out a new arrangement between themselves, rather than to force the spouses to have recourse solely to the courts to protect themselves from mismanagement by the other spouse. Therefore, as a logical consequence of equal management, the matrimonial regime should be capable of alteration by the parties.

Thus Revised Statutes 9:2856(A) provides:
A spouse during the marriage may obtain a judgment substituting the separation of property for the regime that has existed to that time, whenever that spouse's interest in that regime is threatened or diminished by the fraud, fault, neglect, or incompetence of the other or when the disorder of the other's affairs jeopardizes that spouse's interests under their matrimonial regime.

One should observe that the foregoing not only extends the remedy of separation of property to the husband, it broadens the remedy considerably over what is stated in article 2425. One wonders how those who are responsible for the above envision bedroom conversation between the spouses after one has filed suit against the other alleging "fraud, fault, neglect or incompetence."

Turning to the "voluntary" mode of altering an existing regime, Revised Statutes 9:2834 provides, in part: "A contract, whether establishing a matrimonial regime or modifying or terminating an established regime, may be entered into at any time before or during marriage." Thus, the protection that the wife has under present law against being pressured into a new arrangement is removed.

Let us again recur to our hypothetical traditional marriage wherein the husband is the principal breadwinner and the wife the principal homemaker. If the husband is a businessman, he may well decide that he cannot conveniently conduct his financial affairs under a regime of community of property, for the reasons discussed above or for other reasons of a like nature. Even if the husband is not a businessman, he may find that the new regime is not to his liking. Perhaps he is old fashioned and is trying to keep a tight rein on family finances. He may find that merchants are eager to extend additional credit to his wife pursuant to section 2842, which provides in part that "[e]ach spouse, acting alone may manage, control and dispose of community property." Even a model modern husband who finds it difficult to make ends meet may fear that such added credit will be too great of a financial burden on the family.

So the husband asks the wife for a change of matrimonial regime from community to separate property. If she initially refuses to agree, he may point out to her instances of what he considers her extravagance and indicate that he has been ad-
vised by counsel that he may bring a suit for separation of property when his interest in the community property is threatened by such acts. Perhaps she agrees to the termination of the community by contract rather than face a lawsuit by her husband, or perhaps she consults her lawyer, who advises that her extravagance has been insufficient to warrant a separation of property. Nevertheless, if there is truth in the saying "love flies out the window when the solicitor comes in the door," the marriage has been damaged. Even if the wife acquiesces in the change of regime, resentment will result that would not otherwise have been present.

The retrospective operation of the equal management law on marriages existing prior to its passage is particularly harsh. The second paragraph of Revised Statutes 9:2833 states: "Unless otherwise stipulated in their contract, the provisions of the legal regime that they have neither excluded, limited nor modified retain their effect as imposed by law." The purpose of this paragraph is succinctly stated in the comment to that section: "The second paragraph rejects the tacit contract theory of the legal regime." Thus, it is the intent of the legislation not only to change the law, but to legislatively reverse the basic principles of the Civil Code so as to avoid the constitutional objection that the law is one impairing the obligation of contracts or depriving persons of property without due process of law. To this end, section 9 of Act 627 makes the new regime retroactively applicable to existing marriages, except where the parties have an explicit marriage contract.

Consequently, a wife of twenty-five years will find herself divested of her vested right in the property to be acquired by her husband during the marriage because the husband can bring about a change in regime to terminate the community, either by "agreement" or by his newly acquired right to bring an action for separation of property. Thus also will the husband of twenty-five years be divested of his vested right to control the property he has acquired through his industry for the community and of his ability to control acquisitions for the remainder of the term of the marriage.

This divesting does raise the constitutional issues which the legislation seeks to avoid. Contract is more than a mere "theory" with respect to the present community of acquets or
gains as provided by the Louisiana Civil Code: it is an accomplished solemnly-declared, legislatively-created, juridical situation. All of the articles directly relating to Community Property are found in book III, title VI of the Civil Code—"OF THE MARRIAGE CONTRACT, AND OF THE RESPECTIVE RIGHTS OF THE PARTIES IN RELATION TO THEIR PROPERTY." The very placement of this title in book III constitutes it as the first of the nominate contracts treated in the Code—followed by sale, exchange, lease, etc. The provisions themselves are not comprehensible without an understanding that the articles are contractual. For example, if the legal regime under the Code did not constitute a matrimonial agreement, the provision prohibiting marriage contracts after celebration of marriage would not apply. There would be no applicable positive provision to prohibit modification of the community. Yet clearly under the Civil Code as it existed prior to the Equal Management Act of 1978, such alteration would have been invalid.

As drafted, the Act will work an immediate and senseless divesting of property of those already married. Consider the implication of the retrospective operation of Revised Statutes 9:2841, which reads: "Obligations incurred by a spouse before or during the community regime may be satisfied from the community and from the separate property of the spouse who incurred the obligation." Section 9 of the Act provides that the new regime itself, including the above section, will take effect on January 1, 1980 "and shall be applicable to the property and obligations of all spouses whether the spouses were married or whether property was acquired or an obligation was incurred prior to or after January 1, 1980, unless the spouses have adopted a matrimonial regime by express contract . . . ." Suppose that after thirty years of marriage a couple has acquired a home, largely from the husband’s earnings. Yet, prior to the marriage, the wife had had a money judgment rendered against her, which judgment had never been collected owing to the wife’s lack of funds, but which had been renewed by the judgment creditor. Under section 2841 the judgment creditor will, after January 1, 1980, be able to have the house seized and
sold to satisfy his judgment.\textsuperscript{73}

This hypothetical points up the extreme to which the deprivation of property under the Act may extend. This deprivation, however, is not limited to the extreme: the Act is designed to be a deprivation of the property right of the husband under the Code to obligate the property acquired during the marriage to secure his own contracts. It divests him of the capacity to act as owner with respect to said property.

If the new regime be arguably suited to the new mode of marriage, it is certainly unsuited to the traditional and still predominant mode. No logical reason is apparent why the wife’s ante-nuptial creditor should be able to seize the community assets other than a blind egalitarianism willing to stick with an absolute rule of equality to the last and most absurd consequence. The ability of the husband’s ante-nuptial creditors to seize his earnings after marriage is a practical necessity. This ability to seize all assets of the community under the community regime presently provided by the Code is a logical consequence of the difference in the spouses’ interests under the Code. However, to permit the wife’s ante-nuptial creditor now to come in and seize the whole community where there is to be no difference in the interests of the spouses makes little practical sense. To say that to do so is a logical application of equal management is true—but it is also a demonstration of the absurd consequences of that principle.

Whether Act 627 will ultimately be declared unconstitutional is not the main point. The principal issue should be whether the new regime deprives the spouses of legitimate expectations that each had upon entering the marriage. The new law will deprive both spouses in a traditional marriage of something of value. The wife loses the law’s protection against being divested of her interest in the property to be accumulated by her husband, by a change in the regime. The husband who may have always cherished “being his own boss” loses the sole management of his business affairs. The Act deprives the husband of the valuable exclusive right of ownership, the right to commit the community assets as a common pledge of his creditors.

\textsuperscript{73} The ante-nuptial claims of the IRS against the wife could likewise be satisfied out of the community.
If the wife becomes co-owner by virtue of the Act and is granted the same title to community property accumulated in the past that the husband previously had, then the husband must be deemed to have been deprived of title to assets of his patrimony by legislative expropriation without compensation.

One must also consider the probable increase in regimes of separation of property. It appears likely that many people will wish to take advantage of the liberal provisions of the law enabling the creation of regimes of separation of property either by contract or by litigation. It is impossible to predict the extent to which resort will be had to regimes of separation, but it should be pointed out that separation of property will not put an end to all of the uncertainties created by equal management. Moreover, to the extent that people do avail themselves of separation of property, new social pressures on the structure of the Louisiana family are likely to arise.

Turning first to the insufficiency of the regime of separation to completely eliminate the problems created by equal management, one should note the first sentence of Revised Statutes 9:2834, which provides: "A contract, whether establishing a matrimonial regime or modifying or terminating an established regime, may be entered into at any time before or during marriage." The question arises as to whether the statute provides a rule of public order. Although at first blush the use of "may" would appear to make the rule a permissive one, in this context it can also be read as the equivalent of a declaration that parties shall have the right to enter a contract at any time. When read in pari materia with Revised Statutes 9:2848, section 2834 does appear to be mandatory. Section 2848 provides: "The regime is dissolved by the death of one of the spouses, by a judgment of divorce or separation from bed and board, by a judgment decreeing the separation of property, or by the contract of the spouses." All other items of the list are certainly mandatory, and "contract of the parties" may be likewise. At any rate, it is at best uncertain whether a clause prohibiting alteration of the contract during the term of the marriage would be valid. Such a permanent marriage contract would be inconsistent with the principle of modification at any time. Whereas article 2329 of the present Civil Code requires that the contract be effective for the entire term of the mar-
riage, section 2834 may require that no contract can be made so effective. There is more possibility for stability in a requirements contract or a municipal bond than may be permitted in a matrimonial regime under the new law.

Within the marriage the continuing possibility of change from whatever the present regime is, be it community or separation of property, could have the same effect as a pebble in one’s shoe—a constant source of irritation until one takes the thing off. The wife, having previously agreed to her husband’s demand for a regime of separation of property, may, as she perceives her security melting away, begin a campaign for the reinstitution of a community. The husband, who may have initially decided to bear the inconvenience of a community, will always have the opportunity to change his mind and begin his own campaign for a revision of the regime.

Third parties dealing with the husband will never be able to rely completely on the fact that he is separate in property. One making a loan to the husband for use in his business must bear in mind that the husband may enter into a community regime after the loan is made. Thus the lender will probably require the wife to become a surety. After all, she may later acquire the power to waste the husband’s assets.

74. With respect to the possibility of postnuptial contracts, the comment to Revised Statutes 9:2834 states: “This change, however, is consistent with modern French law: French Civil Code Article 1397.” The statement is not accurate. Article 1397 does permit spouses to modify the contract after two years of marriage, but the French Civil Code only permits such agreements “in the interest of the family” and requires that they be submitted to a court for approval. See H. Mazeaud & L. Mazeaud, supra note 5, at No. 43. Mazeaud & Mazeaud still treat the French matrimonial regime as being in principle, immutable, although they recognize that the principle has been eroded by the provisions of the new regime. Of the new law the authors state:

The change requested by the spouses not only can injure one of them, perhaps unconsciously, but also the children—in a more general manner, the interest of the family. To protect these interests, the law requires the approval of the agreement of the spouses by the District Court. Moreover, the judge must not content himself with investigation whether the planned modification is contrary to the interest of the family; he must grant approval only if this modification is conformable to the interest of the family; the interest of the family must necessitate the change (writer’s trans.).

H. Mazeaud & L. Mazeaud, supra note 5, at No. 49-2.

The requirements of the French Civil Code, which are ignored by the comment to Revised Statutes 9:2834, seem precisely designed to prevent the type of abuse in the change of matrimonial regimes which the Louisiana Equal Management Act makes possible.
Suppose that a prospective purchaser is making an offer to buy a building from a husband who represents that he is separate in property. Should the offer be made to the husband only? Since one generally does not run a complete title search before making an offer, would not a purchaser be wiser to make the offer to the husband and wife jointly? The building may have been acquired when the husband was still under the community. Errors as to the status of the property as community or separate will increase with the changeability of regimes—perhaps even to the point where it no longer is prudent business practice to omit the wife from the offer to purchase any property other than inherited immovables.

Let us turn next to the effect of separation of property on the family. First, one must consider the practical effect that any proliferation of regimes of separation will have on forced heirship. For well over a century, Louisiana has maintained a unique balance between a continental European protection of the lineal family—the ascending and descending lines of relationship—and the Anglo-American protection of the immediate family focusing on the relationship between husband and wife. Louisiana entered the union with basically a continental stress on the lineal family. Under the Digest of 1808 and the Code of 1825 the wife was not a regular heir. By a series of Acts in 1844, 75 1910,76 1916,77 1920,78 and 193879 the wife’s position was gradually strengthened. Under article 915, the surviving spouse is now a regular heir as to a portion of the community where there are no descendants. If there are children of the marriage, the spouse has a legal usufruct under article 916. Act 680 of 1975 amended article 916 to provide that where the usufruct was confirmed by testament the usufruct would not be deemed to impinge on the legitime. Finally, in 1976, Act 227 added article 916.1 to provide the deceased spouse with an additional usufruct on community property constituting the family home, which likewise would not count as an impingement on the legitime.

75. 1844 La. Acts, No. 152.
These changes operated to place the surviving spouse in a position by operation of law better than that spouse would have enjoyed under continental civil law. At the same time, Louisiana never abandoned the continental principle of forced heirship between ascendants and descendants. The result has been, in effect, a borrowing of the best from both worlds. Under present law, the husband may generously provide for the wife in community, yet some effort is made to maintain recognition of the lineal family. The law of forced heirship functions rather well in accomplishing its original Roman purpose of minimizing conflict between generations over property matters. It accords a limited freedom of disposition acceptable to most, while at the same time protecting descendants against the insecurity of being at the whim of their parents in their declining years. Whereas the common law does in fact offer some protection to descendants through testamentary attacks on grounds of insanity or of undue influence, the Roman law considered such an approach unseemly.

To the extent that equal management promotes separation of property, it renders the protection of the wife’s interests in the law of inheritance largely nugatory. The spouses’ very substantial interests in inheritance have developed in connection with the regime of community property. No substantial rights have been developed in connection with separate property.

Other states adopting equal management obviously did not have to consider any such adverse effects on the wife’s rights of inheritance. The Louisiana legislature, however, should have given some thought to such a possibility.

Under the structure of the Civil Code, it is impossible in most circumstances for spouses separate in property to accord to each other the same interest in inheriting property that they would have had if they had remained in community. If the spouses are separate in property, there will be no usufruct over

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80. For a somewhat simplified account of the evolution of forced heirship from the “complaint of an undutious will” (Querela inofficiosi testamenti), see B. Nicholas, AN INTRODUCTION TO ROMAN LAW 261-64 (1962). Nicholas makes the interesting observation that “this contrast between the Common law and the Civil law not only helped to make intestacy far more common on the Continent that in England but also led, particularly in France, to a progressive parceling out of the family property and to the absence of that English figure, ‘the younger son.’” Id. at 264.
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the family home as provided in article 916.1. Apart from the family home, suppose a husband dies leaving three children of the marriage and property that he had acquired in the course of the marriage worth $90,000. In a regime of community, half of what the husband has accumulated would go to the wife by right of community, and she would inherit a usufruct over the other half. Under article 1493 the husband could have even left $15,000 of his share of the community to the wife, leaving his forced heirs with only $10,000 each. In this simple hypothetical, the wife would receive $60,000 and the children $30,000. The wife could even be left a usufruct over the children's share. If however, the spouses were separate in property, the husband would be forced by article 1493 to leave $60,000 to the children, there would be no usufruct over their share in favor of the wife, and the wife could only take a bare $30,000.

To the extent that most husbands in a traditional marriage in Louisiana today are most concerned with providing first for the financial security of their wives after their deaths and only secondly for that of their children, the limitations of forced heirship may become intolerable if spouses find themselves forced to adopt a regime of separation. Spouses may, however, attempt to defeat forced heirship through exploitation of their ability to enter into onerous contracts with one another under article 1790 of the Civil Code as amended by the equal management law, to remove any mention of incapacity between the spouses.81

To the extent that such transactions generate taxable revenues, fraudulent usage will be discouraged. However, sales are likely to be particularly troublesome. Section 5 of the Equal Management Act repeals article 2446 of the Civil Code, which provides:

A contract of sale, between husband and wife, can take place only in the three following cases:

81. LA. R.S. 9:2834 (Supp. 1978). It is doubtful whether article 1790 as it originally stood was sufficient in and of itself to create any special interspousal incapacity to contract inasmuch as the last sentence thereof merely stated that the incapacities "take place only in the cases specially provided by law, under different titles of this Code." Nevertheless, article 1790 had been judicially interpreted to provide a general incapacity. See, e.g. Ward v. Ward, 339 So. 2d 839 (La. 1976).
1. When one of the spouses makes a transfer of property to the other, who is judicially separated from him or her, in payment of his or her rights.
2. When the transfer made by the husband to his wife, even though not separated, has a legitimate cause, as the replacing of her dotal of other effects alienated.
3. When the wife makes a transfer of property to her husband, in payment of a sum promised to him as a dowry.

Saving, in these three cases, to the heirs of the contracting parties, their rights, if there exist any indirect advantage.

The last clause of that article recognizes that there is a danger to heirs in permitting the contract of sale between spouses. It seeks to protect the heirs from that danger by reserving unto them their rights, “if there exists any indirect advantage.” The “indirect advantage” to which the article refers is any advantage over and above the permissible equivalents contemplated in paragraphs 1 through 3. Such advantage would be, in effect, a donation.

Under former article 1749, repealed in 1942, all donations between the spouses were revocable. Article 1751, now repealed by the Equal Management Act, further restricted donations by prohibiting the spouses from making any reciprocal donations by one and the same act. Finally article 1754, not yet repealed, provides: “Husbands and wives can not give to each other, indirectly, beyond what is permitted by the foregoing dispositions. All donations disguised, or made to persons interposed, shall be null and void.” Whatever the purpose of these articles may have originally been, they operated to protect forced heirs. The repeal of the provision making donations essentially revocable, which in turn had replaced the absolute prohibition of such donations in Roman law, eroded the protection of forced heirs somewhat. Nevertheless, the forced heir retained his action for reduction of a donation inter vivos by one spouse to another if the donation impinged on the legitime.\(^\text{82}\)

Prior to the Equal Management Act, it was not difficult

for courts to scrutinize acts of sale between the spouses. There were few such sales, and those that did occur had at least to appear to fit into one of the three categories, the third of which, dowry, was obsolete. However, the repeal of article 2446, together with article 1751, opens new horizons for disguised donations. If the spouses wish to defeat forced heirship over the course of their marriage, they may freely engage in “sales” whereby each transfers to the other either money or something of value for a price. So long as the price is not higher than the cost of acquisition, there should be no taxable income.

True, the forced heir will still retain at least the right to bring an action for reduction, however, he will have a very difficult burden of proof to meet—the burden of showing that the transaction in question was not a bona fide sale. Who is going to be able to trace the actual value of the things sold in past years, the disposition of any price actually paid, and the subjective intent of the parties to the transaction long after the fact? The burden will become almost impossible to meet.

With respect to immovables, as a practical matter the rights of forced heirs will usually be defeated if the spouse to whom the property is given sells it to a third party purchaser. Article 1517 of the Civil Code provides that the “action of reduction or revendication may be brought by the heirs against third persons holding the immovable property . . . .” Nevertheless, under the jurisprudence the rights of the forced heirs are cut off against third party purchasers in a cash sale where the donation itself has been disguised as a sale.

83. Under article 1754, the heir should have an even greater right—a right to have the disguised donation declared absolutely null when it is between husband and wife since “[a]ll donations disguised, or made to persons interposed, shall be null or void.” LA. CIV. CODE art. 1754. Additionally, under a theory of absolute nullity, the heir should be able to pursue the property into the hands of third parties, although it is doubtful that the courts will permit such an exception to the public records doctrine. However, so long as the property remains in the hands of the spouse, it would be subject to full return. See, e.g., Thibodeaux v. Herpin, 6 La. Ann. 673 (1851). Whether the courts will apply article 1754 even as between the spouses remains to be seen.

84. Owen v. Owen, 336 So. 2d 782 (La. 1976); Thompson v. Thompson, 211 La. 468, 30 So. 2d 321 (1947). Alternatively, by application of article 1754, the courts could hold this to be an exception to the public records doctrine. This possibility might make title unmerchantable until the contention is settled. Eventually, the title problems created by application of article 1754 to donations disguised as sales are likely to result in application of the public records doctrine.
Most people with agreements for separation of property are apt to find devices to defeat forced heirship rather inconvenient. To the extent they would prefer to put a surviving spouse in as good a position as if there had been a community, demand for abolition of forced heirship will increase. Thus, by prompting an increase in regimes of separation of property, equal management may entail the abolition of a fundamental institution that has been repeatedly accorded constitutional status in the state. The result can only be further disintegration of the lineal family in Louisiana.

The equal management law is likely to have other, less dramatic, adverse impacts on the lineal family. For example, with the possibility of frequent changes of matrimonial regime during the course of a marriage, it may become extremely difficult to determine whether any unregistered movable is or is not community. Did Father buy that Ming vase back in December 1981 when he was separate in property or was it acquired in December 1980 when he had a community? Family wars can be fought over less. These disputes are likely to become quite serious when determination must be made as to the status of such items as property purchased with funds accumulated from dividends and selling of stock.

**IMPACT OF EQUAL MANAGEMENT ON TROUBLED MARRIAGES**

The ready dissolubility of marriage poses problems for any regime of community. One of the alleged needs for a revision

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85. Although the Equal Management Act may prove to be the proximate cause of the abolition of forced heirship, it will not be the initial cause of a movement towards such abolition, which was already underway prior to passage. See Nathan, Assault on the Citadel: A Rejection of Forced Heirship, 52 Tul. L. Rev. 5 (1977); Lemann, In Defense of Forced Heirship, 52 Tul. L. Rev. 20 (1977); LeVan, Alternatives to Forced Heirship, 52 Tul. L. Rev. 29 (1977).

86. See, e.g., LA. Const. art. 12, § 5; LA. Const. of 1921 art. 4, § 16. As Professor LeVan states: "In 1974 the opponents of forced heirship had an opportunity to remove it from the protection of the Louisiana Constitution. They failed. Their frontal assault met with surprising resistance, which surely proceeded from something stronger than mere tradition." LeVan, supra note 85, at 29. The Equal Management Act of 1978 may accomplish indirectly what the opponents of forced heirship failed to accomplish through direct assault.

87. In addition, it will be necessary to study the possibility of revising the law with respect to the capacity of the testator, to accord children even the protection permitted them in common law states. The Civil Code is not a body of law that lends itself easily to piecemeal revision, recent practice to the contrary notwithstanding.
of Louisiana law is that "not all marriages are so smoothly run." However, as Mazeaud & Mazeaud observe, an attempt to design a regime for troubled marriages commits "the error of the doctor who, to preserve the health of his healthy patients, places them on a regime for the ill." It may well be true, as Professor Riley argues, that when the end of a community is approaching "even the most agreeable of families have a tendency to become very conscious of legal rights." Nevertheless, there is utterly no reason to believe that harmony is promoted by encouraging people to exercise their rights to the fullest at all times. Yet the Equal Management Act may well do just that.

The question must be raised as to whether the equal management system will increase the potential for abuse immediately prior to divorce. One writer notes of the California equal management law:

In the case of a harmonious marital relationship this newly created ability of either spouse to secretly encumber the community property may be of little significance. On the other hand, if the marriage relationship is unstable because one of the spouses is secretly contemplating separation or dissolution, or if one of the spouses has spendthrift tendencies, disastrous results might befall the community with little, if any, recourse available to the unsuspecting spouse.

Fortunately, there will be limits to such abuse under the Louisiana law. The wife herself will be personally obligated by such purchases. Thus, she will have a rational profit-maximizing motive to make them only within a very narrow range. Abuses of the power to spend will be largely confined to the acquisition of consumables or services. For example, a wife could perhaps, make the husband pay half the cost of a trip to Europe by purchasing a tour package on credit before the overt rupture. However, under the new regime, the husband might be able to

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89. H. MAZEAUD & L. MAZEAUD, supra note 5, at No. 522.
91. Adamske, supra note 24, at 27.
bring a claim for damages resulting from “fraud or bad faith in the management of the community property,” if such action did occur. Whatever other abuses in the nature of predisolution extravagances do occur will be the product of irrational conduct designed to bring ruin on the other spouse at the expense of one’s own rational self-interest. Of course, one may observe that spouses going through a divorce do frequently act irrationally.

Other provisions of the Equal Management Act are likely to have more of an impact. The husband who is trying to carry on business as usual during a period of strain may have cause to expedite dissolution of the marriage rather than attempt reconciliation. If the wife does have actual co-ownership of a business under section 2838 and if section 2844 permits her to exercise that right by demanding “participation in management,” then the wife’s attorney may be able to extort a favorable settlement from the husband by having the wife exercise her rights.\(^9\)

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93. The following observation in DuBos, For Better or Worse: Louisiana's Head and Master Law Is Going, Going . . ., 13 New Orleans 43, 48 (Nov., 1978), is worthy of note:

For example, if a husband manages a “community” business himself, he might be reluctant to liquidate the community and risk having to sell the business. A responsible wife would also prefer not to force a sale during separation proceedings, but she also wants to get her share of the “community” pot. By petitioning for an administrator and having one put in charge of that business—from top to bottom—she will usually find the husband eager to get on with the settlement.

The statement may not be accurate with respect to administration. No provisions have been enacted yet in the Code of Civil Procedure to implement the scheme of appointment of an administrator as set forth in Revised Statutes 9:2851 through 9:2852(D). Under section 9 of Act 627, these provisions do not become effective until such code articles have been enacted. Yet the observation does point up the leverage which the disgruntled spouse could exert by interfering with the operations of a “community business.”

It might be possible to avoid some of these problems through incorporation. As Professor Cross observes of the Washington statute with respect to community property businesses: “It seems probable that an incorporated business will not be within the new provision.” Cross, supra note 63, at 13. Yet Cross observes: “If all, or almost all, shares of a corporation are owned by the spouses, it would not be surprising to conclude that the paragraph applied if in the operation of the business the corporate form were largely ignored.” Cross, supra note 63, at 19. Moreover, a husband who incorporates to avoid the application of equal management to his business might expose himself to an action to compensate the wife for any loss sustained in the
One may also question the implications of the recognition by Revised Statutes 9:2411 that spouses may sue each other during marriage for "a loss sustained as a result of fraud or bad faith in the administration of the community property by the other spouse." Arguably, this section merely removes the procedural bar to the exercise of the substantive right already provided by article 2404 of the Civil Code. Nevertheless, the emphasis given the principle of civil responsibility for "fraud or bad faith" is somewhat greater in Act 627 than in the present legislation. The very removal of any head and master seems to imply greater limits on discretionary acts than at present. The Act seems to envision that claims for fraud will ordinarily arise when a community is dissolved. For example, Revised Statutes 9:2852, in providing for dissolution, recognizes that the process of dissolution may entail "[c]laims of one spouse against the other for fraud or bad faith in the management of the community," and apparently these claims are to be treated as "reimbursements and adjustments . . . due between the spouses."

Act 627 is certainly not as onerous as it could have been in imposing civil responsibility between the spouses. It is to the credit of the drafters that they apparently chose to follow the California standard in this regard, particularly in comparison with the French standard of simple fault, which has been deservedly criticized.

94. CAL. CIV. CODE § 5125(e) (1976) states: "Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property." Macdonald, supra note 57, at 154 n.42.

95. New article 1421, para. 1 of the French Code civil provides that the husband shall "be responsible for the faults which he [has] committed in his management." H. MAZEAUD & L. MAZEAUD, supra note 5, at No. 294-2, observes:

The government had had only the intention to prevent the gross faults of the husband. But, in the course of the discussion in the Assembly a fierce advocate of married women brought it about that any fault whatsoever of management might entail the civil responsibility of the husband with respect to his wife. The courts will learn—without doubt some indulgence. In any case, the husband is no longer Lord and Master of the community. Not only may his fraudulent acts be criticized, but even his imprudent acts and his negligent
Nevertheless, the standard of "fraud or bad faith" for purposes of the Equal Management Act will necessarily be quite vague. The spouses cannot be deemed to be simple fiduciaries of each other. Each is entitled to act for his own interest, but to what degree? Absent the status of head and master, the husband may well be subjected to stricter judicial scrutiny of his acts than previously.

The husband who is attempting to act in subjective good faith may nevertheless find himself being second-guessed by the judiciary if a business transaction sours or if he invests in a project for his own pleasure—such as perhaps taking out a hunting lease. If worries about judicial second-guessing strike before the marriage becomes troubled, they may lead to separation of property; if after troubles begin, they may expedite divorce.

It would not be unreasonable for the husband to fear that the wife’s lawyer will exploit the full possibilities of the "fraud or bad faith" provision in order to harass him. Indeed, any claim of reimbursement can be so abused. Under Revised Statutes 9:2839 damages awarded a wife for claims of loss sustained as a result of fraud or bad faith will fall into her separate estate. The wife, unlike the husband, does still have a judicial mort-

ones. Will notaries still advise future spouses that they should marry under regime of the community? (Writer’s trans.).

96. See Riley, supra note 88, at 35. In arguing for the abolition of the husband’s role as manager, Professor Riley compares the husband’s discretionary administration of the community with administration of the property of a minor by father, or by tutor, or the administration of an interdict’s property by a curator, or the administration of the decedent’s estate by a succession representative. “The husband is not watched . . . He has no need to get court approval for acts normally beyond the powers of administration . . . He has no need to make periodic reports of his administration . . .” Riley, supra note 88, at 35. However, in each of these instances to which the husband’s power is being compared, the party in question is a fiduciary; he is one who acts for the interest of another. Accordingly there are clear standards whereby to judge his actions. In the contractual realm, a party may be obligated to pay damages beyond those contemplated at the time of the contract, if he breaches a contract in bad faith. Article 1934 defines bad faith for contractual purposes as “a designed breach . . . from some motive of interest or ill will.” In the case of the husband’s obligation to act in good faith, however, there will generally be no specific obligation against which to measure his conduct comparable to that obligation breached by a contracting party as mentioned in article 1934. Moreover, the husband is entitled to act out of motives of self-interest in using the community property, even under the new regime. What then will be the standard to determine the presence of bad faith? Whatever standard is adopted is likely to be so broad as to permit extensive second-guessing.
gage on her spouse's property to secure her claims with respect to his property.\textsuperscript{77} Recording such a mortgage\textsuperscript{88} can, and frequently does, wreak havoc on the conduct of business. With the encouragement of claims for fraud or bad faith by the Equal Management Act, this practice may increasingly be used as a lever to force husbands into a favorable divorce settlement.

Other adverse effects of the equal management law on marriages troubled to the point of breakup are likely to be more indirect. It would appear that the removal of any interspousal incapacity to contract from article 1790 will necessitate more of an arms-length bargaining approach than has hitherto been necessary at such times. Prior to Act 627 of 1978, agreements between the spouses prior to divorce whereby the wife waived her claims for alimony were considered to be null. In \textit{Ward v. Ward},\textsuperscript{99} the Louisiana Supreme Court found that, under article 1790 of the Code, a husband and wife were incapable of contracting with each other, except for limited circumstances in which a sale between husband and wife would be valid. The court found that an alimony waiver agreement did not come within any of those exceptions.

The Equal Management Act, by repealing article 2446 and amending article 1790 so as to remove the language referring to an incapacity between the husband and wife, makes it uncertain whether the former prohibition against waivers of alimony will stand. To the extent that the jurisprudence has predicated that prohibition on articles 1790 and 2446, as in the \textit{Ward} case, the basis for the prohibition has been eroded. Indeed, one might even ask whether stipulations in marriage contracts against alimony might not be valid. However, courts could still find that the rules of articles 148 and 160 of the Civil Code were mandatory and that any waiver of alimony would still be void as contrary to the public order. In any event, the very possibility of a pre-divorce waiver of alimony rights will dictate that the wife retain divorce counsel at an early stage to prevent such waiver from occurring without due consideration of all possible consequences.

\textsuperscript{97.} \textit{La. Civ. Code} art. 3319.
\textsuperscript{98.} \textit{La. Civ. Code} art. 3349 requires such recordation.
\textsuperscript{99.} 339 So. 2d 839 (La. 1976).
The removal of any interspousal incapacity to contract will affect matters other than alimony. A spouse who is willing to agree to an informal accommodation to the other spouse in the hope of a reconciliation may find himself prejudiced by a holding that such an accommodation in fact constitutes a contract between the spouses. For example, a husband may be reluctant to put the family home up for sale immediately after separation, and be willing to let the wife continue to remain in it pending the ultimate outcome of their difficulties. The wife, for her part, might well construe such an accommodation to be a binding obligation by the husband not to sell the house for a considerable period of time. If, subsequently, the husband despairs of a reconciliation and takes steps to force a partition, he may be met with an argument that he has agreed to let the wife stay and that his agreement constitutes an enforceable contract.100

Generally speaking, lawyers are apt to be reluctant to advise that their clients deal informally with any hostile party. The possibility that a client may involve himself in such an ambiguous situation will probably necessitate confining contacts between the spouses to more formal channels of communication. Unfortunately, such greater formality and resulting lack of accommodation, together with earlier retention of counsel, will be apt to reduce the possibility of reconciliation after an initial disruption.

CONCLUSION

The action of the Louisiana legislature in abolishing the traditional community appears truly radical when compared to what was done in France after a revolution:

In the areas where French law was already unified on the basis of Roman law, such as the law of obligations, it is hard to cite a single innovation. In other areas, the draftsmen had to choose among the various customary laws (including Roman law, which was the customary law of the Midi and of Alsace). But here too, what caution! In

100. Although an absolute or long-term non-partition agreement would run afoul of Civil Code articles 1289 and 1297, under articles 1289 and 1298 an agreement that there not be partition "for a certain limited time" might be valid.
the area of matrimonial property, one can hardly maintain
that a logical system was invented, for the code adopted
as its general rule the centuries-old community property
system as regulated in the customary law of Paris. Then,
in order to accomodate the feelings and practices of the
Midi, it provided for a dowry system that could be
adopted by antenuptial contract.101

The Equal Management Act does not accommodate in any way
the "feelings and practices" of people in a traditional marriage.
Moreover, the need for such a radical revision is unproved.
In 1975 the legislature passed Act 705, legislation that was
tantamount to adding the wife's earnings to her patrimony for
purposes of enforcing her contracts. Thus Revised Statutes
9:3584 presently provides: "A woman's earnings during mar-
rriage are responsible for the satisfaction of debts incurred by
her either before or during marriage, provided that nothing
contained herein shall be construed so as to prevent a woman's
separate property from being responsible for satisfying her sepa-
rate debts." Similarly, Revised Statutes 9:3585 secures the
wife's right to mortgage property in the process of purchasing
it. These provisions actually go a long way toward supplying
the deficiency left by the Married Women's Emancipation
Acts. Because of these sections, a creditor can now know that
the wife's earnings are assets standing behind her contracts.
However, owing to the passage of the Equal Management Act,
these provisions were never given time to work.

Most of the individuals with whom this writer discussed
the Equal Management Act, particularly the practicing attor-
neys, believe that the 1978 legislation was a mistake. However,
others, some of considerable learning in the law, believe that
the statute will not be harmful. "The sky will not fall," as one
friend put it.

Rational discourse between those of differing views on the
legislation has been rendered very difficult by the extraordi-

community property." Thus the legislature made its decision on the principle of equal management purely in the abstract without regard to the consequences that might become apparent upon examination of a specific text. Second, the legislators passed what they knew to be defective legislation, delaying the effective date, so as to give additional time to those mandated to draft the measure to repair the most glaring defects without disturbing the sacrosanct idea of equal management. These decisions have removed the apparent responsibility of those charged with drafting the law and left them in the position of merely following orders. Who is there to answer for this legislation? No one? This absence of apparent responsibility is indeed unfortunate. Those who think the legislation will be without practical effect are wrong. Indeed, they are more tragically wrong than those who actively sought the legislation and were thereby willing to take a stand.

One must not only judge the legislation by its direct effects, but also by its no less real indirect effects. Legislation affects the very way people think. It becomes part of a common frame of reference. As Albert Camus once observed: "People can think only in images." As we approach 1984, these images are increasingly being generated by the government and decreasingly generated by the private sector of society.

What image of the Equal Management Act will eventually be carried to the public at large: that marriage is some sort of commercial transaction? that marriage is a matter of bargaining between the spouses, each to promote his own self-interest? that the important questions of marriage are matters of judicially enforceable rights? that the government, not the individual conscience, should be the ultimate determiner of everyday family life? that absolute arithmetical equality is to be expected in a marriage? that spouses should each play essentially the same role in a marriage? Never mind if such a scheme will not work—anything else would not be in step with a contemporary ideology which demands absolute equality.

Before the Equal Management Act is allowed to go into effect, its learned draftsmen should each be asked the old Socratic question of what does he profess for himself. Perhaps

103. PLATO, GORGIAS 447.
then someone would take a stand against discarding over a millennium of European experience in favor of less than a decade of experimentation.