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THE SUPERIOR POSITION OF THE CREDITOR IN THE COMMUNITY PROPERTY REGIME: HAS THE COMMUNITY BECOME A MERE CREDITOR COLLECTION DEVICE?

Andrea B. Carroll*

I. INTRODUCTION

The community property regime has been lauded as one of the most beautiful and significant achievements of the civil law tradition.1 It is widely accepted as the marital property regime of choice for an astonishing number of countries, including France, Germany, Spain, Brazil, and countless others.2 Even on American soil, where the common law tradition is generally favored over that of the civil law, the community regime has gained significant sway. Nine of our states have rejected the English-inspired marital property regime in favor of the community property structure.3 The

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result is a marital property scheme in a minority of states not quite understood by the masses, but nonetheless admired for its ancient and bold advancements in the area of spousal equality and women's rights.

In the centuries since its adoption in the American community property states, the regime has made significant innovations necessary to retain its suitability in the modern world. Some of these “noble experiments,” however, have morphed the community property regime into something unintended at its inception and somewhat disturbing today.

Created for the purpose of preserving and furthering familial interests, the community as it currently exists in this country seems to have wandered astray. One scholar’s analysis of twentieth-century modifications to the regime even led him to remark that the modern community property regime promotes “the ultimate welfare of no one except those parasites who live on litigation—breeding rules of law.”

On the contrary, there is one party—aside from lawyers, of course—whose welfare today’s community property regime clearly and exceptionally promotes: the creditor.

Creditor protection may be a worthy societal goal, at least generally speaking. But the community regime has gone so far to provide such protection that it has significantly departed from its teleology. The family’s interest is neither furthered nor preserved by the surprisingly broad access to property granted to all sorts of creditors of spouses residing in community property states. And the family is not the only


6. Daggett, supra note 1, at 52.


8. See discussion infra Part III.A.

9. Powell, supra note 7, at 38.
victim of this expansion of creditors' rights. The consistency and utility of marital property laws are threatened by a system that deviates from the fundamental principles behind debt collection and favors spouses' creditors.

This article will begin by demonstrating just how creditor-friendly the community property regime has become. Part II will analyze the rights afforded spousal creditors in the various community property states, comparing them to each other and to their non-community property peers. The section will then discuss, among other things, the unique ability of a creditor in a community property state to seize the property of a person with no connection to a debt—only the misfortune of having married the debtor—both for obligations incurred during marriage and for antenuptial obligations. These rules of creditor collection, when paired with the community property states' generally acerbic rules regarding spousal ability to contract around the onerous rules of debt collection, show the significant protection afforded creditors in the community regime. Part III will suggest that the regime has indeed become too creditor-oriented. When examined in light of the policies behind the regime's promulgation and the regime's reluctance to address the expectations and needs of the spouses and their sophisticated creditors, it will become obvious that the community regime has simply gone too far in placing the rights of creditors above those of the spouses. The reader will certainly be left to wonder whether the community property regime today serves merely as a creditor collection device.

II. THE EXCEPTIONAL CREDITOR BENT OF THE COMMUNITY PROPERTY REGIME

Modern creditors in community property regimes have access to a mass of spousal property almost inconceivable in non-community property states. Of course, they may access their debtor's property. But much more may be available as well.

10. See discussion supra Part II.A.
11. See discussion supra Parts II.B-C.
12. See discussion supra Part III.
13. This article analyzes the creditor collection rules in the nine community property states with a rule—rather than jurisdiction—method of organization in an effort to demonstrate the regimes' significant preference for creditors. Of
A. Preventing the “$2 Bankruptcy”: Creditor Rights to Community Property for Premarital Debts

One not well-versed in the intricacies of the community property regime will likely find the protection afforded antenuptial creditors of the spouses among its most shocking features. It is axiomatic in non-community property states—sometimes referred to as “common law states”—that a creditor’s collection efforts must be directed solely toward his debtor’s property. When a debtor in a common law state marries, the creditor’s ability to collect remains unaffected. The mere fact of marriage neither hurts nor helps a third-party creditor, who may continue to seize any property owned by the debtor spouse. But this is not so in the community property regime. A great windfall comes to the creditor whose struggling debtor marries an employed person in a community property state. That creditor’s rights are substantially expanded by the marriage alone.

While some states now limit creditor access to community property for the antenuptial debts of the spouses, several still provide surprisingly expansive creditor protection. Louisiana’s community property regime is by far the most creditor-friendly on this front. It allows the premarital creditor of a spouse for all manner of debts access to the

course, when any individual community property regime is considered alone, its own internal rules may diverge in terms of whether they grant the creditor or the spouses more protection. Nevada, for instance, takes a stand exceptionally favorable to creditors with regard to the enforcement of matrimonial agreements, see NEV. REV. STAT. § 123.220 (1979) (sanctioning separate property agreements between spouses), but is less creditor-friendly with regard to antenuptial debts. See NEV. REV. STAT. § 123.050 (1975) (limiting creditor access to community property for antenuptial debts of spouses).

14. See, e.g., MCCLANAHAN, supra note 4, § 1:1, at 3.
16. MCCLANAHAN, supra note 4, § 10:1, at 478.
17. Id.
18. See id. § 10:1, at 479.
19. See id.
20. ARIZ. REV. STAT. ANN. § 25-215(B) (2000) (only value of debtor spouse’s contribution to the community property may be seized for his premarital debts); see, e.g., NEV. REV. STAT. ANN. § 123.050 (LexisNexis 2004) (non-debtor spouse’s share of community property not seizable for other’s debts contracted before marriage).
entirety of the community property, including the community property interests of the debtor and non-debtor spouses alike.\textsuperscript{21} Other American community property jurisdictions go almost as far. Idaho has at least suggested that seizure of any and all community property is appropriate for the satisfaction of a premarital debt\textsuperscript{22} and California has legislatively recognized an antenuptial creditor's ability to seize the entirety of the spouses' community property, save any earnings of the non-debtor spouse that are isolated in a distinct account.\textsuperscript{23}

The history behind Louisiana's move toward full community liability for premarital debts is indeed interesting. The Louisiana Supreme Court first provided for this unprecedented access to all community property for premarital debts at a time when state legislation arguably prohibited such access.

The Louisiana Civil Code, from its inception in the year 1808,\textsuperscript{24} provided in article 2403 that "the debts of both husband and wife, anterior to the marriage, must be

\textsuperscript{21} LA. CIV. CODE ANN. art. 2345 (1985).

\textsuperscript{22} In \textit{Action Collection Service, Inc. v. Seele}, 69 P.3d 173 (Idaho Ct. App. 2003), the Idaho Court of Appeals considered whether the wages of the husband-debtor were properly garnished for his premarital debt (a debt incurred with his first wife). Finding no legislation and few cases on point, the court held the garnishment proper. \textit{Id.} at 178. To support its decision, the Idaho court cited an early twentieth-century case in which the Idaho Supreme Court even allowed seizure of community real property for a husband's antenuptial debt. \textit{Id.} at 177. The modern approval of that case suggests that Idaho may sanction seizure of all community property, and not just the debtor spouse's earnings. The court did not address this question, however, as it was not at issue in \textit{Action Collection Service}, in which the creditor sought only a wage garnishment. Future decisions will have to determine whether Idaho will take its creditor protection policies as far as Louisiana has.

\textsuperscript{23} CAL. FAM. CODE § 910(a) (West 2004); see also Lezine v. Sec. Pac. Fin. Servs., Inc., 925 P.2d 1002 (Cal. 1996). Of course, the exemption of non-debtor earnings is a substantial restriction on the creditor. But the availability of other community property, such as community real estate or any other "acquisition," aligns California more with Louisiana than with other community property states providing more limited access.

\textsuperscript{24} The 1808 version of Louisiana's written law was actually not a "Code," properly so called, at all, but rather a "Digest," or compilation of incomplete rules. By 1825, however, the Digest was replaced with a more or less "true Code." See A.N. Yiannopoulos, \textit{Requiem for a Civil Code: A Commemorative Essay}, 78 TUL. L. REV. 379, 383-89 (2003). In any event, a provision identical to Article 2403 persisted from 1808 until the revision of Louisiana's matrimonial regimes rules more than 150 years later.
acquitted out of their own personal and individual effects.\textsuperscript{25} Article 2403 was drawn from Spanish sources,\textsuperscript{26} including legislation providing that “each spouse has the obligation to satisfy from his separate assets his own (or non-community) debts which he contracted before marriage.”\textsuperscript{27} The plain language of both the Louisiana enactment and its Spanish source provision certainly seemed to indicate that only the separate property of each spouse could be seized by a creditor for a debt pre-dating the debtor’s marriage. Such a result appears logical and just, insofar as premarital debts necessarily have no connection to the community. The satisfaction of these debts, under the Louisiana and Spanish statutes, appeared to be limited to property with which the debts were connected—namely, the separate property of the debtor spouse—leaving the spouses’ community property free for seizure by community creditors.

Nevertheless, in \textit{Creech v. Capitol Mack, Inc.}, the Louisiana Supreme Court rejected this interpretation of Civil Code article 2403 and held that the entirety of the community property between husband and wife—including real and movable property—could be seized to satisfy the husband’s premarital debt.\textsuperscript{28} The court acknowledged that the plain language of article 2403 suggested otherwise, but found the article to provide a rule of allocation between the spouses and not one binding on third-party creditors.\textsuperscript{29} In the court’s view, both the Louisiana legislative enactment and its Spanish predecessor “anticipated the personal obligations of the spouses to each other and did not attempt to fix the responsibilities of the community in relation to third parties.”\textsuperscript{30} In other words, the Louisiana Supreme Court held that article 2403 did not preclude creditors of a spouse from seizing both community property and separate property for

\textsuperscript{25} See \textsc{La. Civ. Code Ann.} art. 2403, 1972 \textsc{Compiled Edition of the Civil Codes of Louisiana} (Joseph Dainow, ed.).

\textsuperscript{26} See \textit{Creech v. Capitol Mack, Inc.}, 287 So. 2d 497, 504 (La. 1973); see also \textit{Leonard Oppenheim, The Significance of Recent Louisiana Legislation Concerning the Marital Community—Louisiana Acts 49 and 286 of 1944, 19 Tul. L. Rev. 200, 204-05 (1944).

\textsuperscript{27} \textit{Creech}, 287 So. 2d at 505.

\textsuperscript{28} \textit{Id.} at 499.

\textsuperscript{29} \textit{Id.} at 507.

\textsuperscript{30} \textit{Id.}
an obligation incurred before marriage.\footnote{Id.}

The court’s interpretation of the Louisiana and Spanish authorities in \textit{Creech} was flawed in that it failed to appreciate the scope of the application of the community property regime in Louisiana. The Louisiana Civil Code articulates rules of a community property regime which apply both as between the spouses themselves and as between the spouses and third parties such as creditors.\footnote{LA. CIV. CODE ANN. art. 2325 (1985).} Thus, in the absence of any specific provision to the contrary, Louisiana Civil Code article 2403 should have been interpreted to provide a rule of conduct governing both the spouses and third parties. Even creditors, under a proper interpretation of Louisiana legislation, should be limited to the debtor’s separate property for debts incurred before the establishment of the community property regime.

The Louisiana Supreme Court’s mistake of interpretation in \textit{Creech} is a rather moot one now, however. Five years after the \textit{Creech} decision was rendered, Louisiana undertook a complete revision of its matrimonial regimes law.\footnote{Katherine S. Spaht \& Cynthia Samuel, \textit{Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law}, 40 LA. L. REV. 83, 83 (1979).} Article 2403 was suppressed and a new law was established in its place.\footnote{See id. at 85-88.} The new “equivalent” to article 2403 is Louisiana Civil Code article 2345, which has remained unchanged since 1979 and provides that “[a] separate or community obligation may be satisfied during the community property regime from community property and from the separate property of the spouse who incurred the obligation.”\footnote{LA. CIV. CODE ANN. art. 2345 (1985).} Although the new legislation does not expressly address premarital debts, the Louisiana jurisprudence has consistently held that the rule applies to allow seizure of 100\% of the community property for both ante- and post-nuptial debts.\footnote{Rayne State Bank \& Trust Co. v. Fruge, 546 So. 2d 637, 640 (La. Ct. App. 1989) (entirety of community property seizable for guaranty agreements wife signed during marriage without husband’s knowledge); see also Bagwell v. Bagwell, 698 So. 2d 746, 748 (La. Ct. App. 1997) (holding entirety of community property seizable for wife’s premarital support obligation).}

Historical materials surrounding the enactment of
Louisiana Civil Code article 2345 reveal little about the purpose or motives of the legislature in approving the result in Creech and continuing to allow creditors full access to community property for premarital debts. But other community property states’ struggles with the same problem provide some insight. Most state laws allowing access to all or some community property for a spouse’s premarital debts are a direct reaction to the so-called “marital bankruptcy.”

Early in the history of the American community property regime, following the Spanish model, most states rejected the liability of any community property whatsoever for premarital debts. As the United States economy became more creditor-focused, though, concern grew over the idea that the debtor’s marriage often frustrated the separate creditor’s attempt to collect a debt. If community property could not be seized for premarital debts, and virtually all property acquired after marriage, including the earnings of both spouses, became community property, the creditor’s ability to rely on his debtor’s earning stream to satisfy the debt would all but evaporate. A debtor marrying into a community property regime under these old rules of creditor collection basically limited his creditor to attempting to

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37. Unfortunately, the legislative debates surrounding the 1979 matrimonial regimes revision in Louisiana have not been preserved.
38. See, e.g., Action Collection Serv., Inc. v. Seele, 69 P.3d 173, 178 (Idaho Ct. App. 2003); see also Haley v. Highland, 960 P.2d 962, 964 (Wash. Ct. App. 1998) (stating that “[t]he legislature was creating an exception to the judicially-created rule of marital bankruptcy” when it began to allow access to community property for premarital debts in 1969).
40. See id. at 374-78 (“Properly, one spouse’s half share in the community property is just as much the spouse’s property as is the spouse’s separate property, and should not therefore be liable for the other spouse’s antenuptial debts and obligations.”).
collect from the property the debtor took into the marriage. The debtor spouse's future earnings would be immune from the day of the marriage forward. The problem was dubbed the "marital bankruptcy" or the "$2 bankruptcy," as debtors were said to be able to effectively shield themselves from liability to their creditors merely by obtaining a $2 marriage license.43

It is the possibility of this inequitable marital bankruptcy, and the Hobson's choice between it and a windfall to the creditor arising solely from his debtor's marriage, that likely led states such as Idaho, Louisiana, and California to begin allowing the seizure of some community property for premarital debts.44 The question now, however, is whether those legislatures have overcorrected. If Louisiana's rule allowing full access to community property, for instance, is an attempt to prevent the "$2 bankruptcy," has it gone too far? The potential prejudice to a creditor caused by his debtor's marriage could be eliminated in any number of ways that do not involve allowing a creditor to seize all of the spouses' community property and that are likewise more protective of the community. It is, perhaps, a function of the modern legislative process—in which creditors' lobbies abound—that the most creditor-friendly of all solutions was chosen.45

B. Uniting the Spouses in Holy Debt: Seizure of Community Property for Debts Incurred During Marriage

Perhaps the most commonly litigated question surrounding debt collection from spouses is that of determining what property is available to creditors for debts incurred by just one of the spouses during the existence of the community regime. To conveniently answer this question, all nine of the American community property states are typically

categorized into one of two systems—the "managerial system" or the "community debt system." The labels seem convenient, but in truth they are inaccurate. California and Louisiana do not appropriately fall under either system, though they are usually classified as managerial system states. But even more significantly, the choice of one system or the other really does little to change the treatment of creditors. Under both systems, creditors—albeit through the use of different mechanisms—have virtually unfettered discretion to seize a wide variety of property, including nearly all of the spouses' community property.


47. In addition to the significant substantive advantages afforded to creditors, the community property regime offers at least one stunning procedural advantage. The vast majority of the community property states do not require the joinder of the non-debtor spouse for a creditor to enforce a judgment against the community property. In effect, the entirety of the community property of the spouses, including the non-debtor spouse's one-half interest in that community property, may be seized though the non-debtor spouse is afforded no opportunity to object or to dispute the underlying debt.

Only two states, Idaho and Washington, have plainly required the joinder of the non-debtor spouse and they have so held only in the context of community real property. See, e.g., Willes v. Palmer, 298 P.2d 972, 974-75 (Idaho 1956); Northwest Bridge Co. v. Tacoma Shipbuilding Co., 78 P. 996, 997 (Wash. 1904). Washington has overtly rejected the requirement of joinder where immovable property is not sought to be seized. See, e.g., Oil Heat Co. of Port Angeles, Inc. v. Sweeney, 613 P.2d 169 (Wash. Ct. App. 1980).


The problem is most disturbing in the context of garnishment of the non-debtor spouse's wages. Wisconsin has maintained its non-joinder and non-
1. Hinging Creditor Access on Spousal Control—The Managerial System

Today, five community property states—California, Idaho, Louisiana, Nevada, and Texas—are commonly categorized under the managerial system of liability.\(^{48}\) The thrust of the managerial system sanctioned by these states is that any community property the debtor spouse has the right to manage may be seized by his creditor to satisfy a debt incurred during marriage.\(^{49}\) Underlying this rule is the simple notion that any property a debtor has the right to alienate voluntarily to his creditor should also be seizable by that creditor in the absence of debtor consent.\(^{50}\) The rule was designed to prevent a spouse with few or no separate assets from incurring an obligation during marriage, only to have the debt become essentially uncollectible.\(^{51}\) Giving creditors access to some community property—that portion of it that

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notice rule to find that a wife’s wages may be garnished for a debt incurred solely by her husband even where she was not a defendant in or given notice of the underlying action on her husband’s debt. See, e.g., Bank One, 500 N.W.2d at 337.


The theory behind a non-joinder or non-notice rule is that “during marriage the defendant spouse will guard the community interest and give the other spouse whatever notification of the lawsuit he or she should have.” WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 449 (6th ed. 2004). However sound in the abstract, the rule just further clears the way for the creditor. He may assert his rights to all of the community property without even the bother of the joinder of or notice to the non-debtor spouse.

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49. De Armond, supra note 48, at 274.

50. See REPPY & SAMUEL, supra note 47, at 426; see also Smith, supra note 48, at 810.

51. Smith, supra note 48, at 810.
the debtor spouse could voluntarily alienate—promised to alleviate such an inequitable result.

Unfortunately, because of the still inequitable and male-dominated nature of the community property management scheme at the time the managerial system was developed, it could not at first meet this lofty goal. The managerial system for determining the extent of debtor liability was first developed when husbands were the so-called “head and master” of the spousal community in all community property states. Under the head and master management scheme, husband alone could act to obligate the spouses’ community property, either voluntarily or involuntarily.

Problems with the managerial system, as applied to the then-existing community property regime, quickly became apparent. The most significant issue arose when the wife incurred debts, particularly through her tortious actions. Since the wife had no rights of management in the community property under the head and master scheme, none of the community property could be seized to satisfy her debts. If the wife had no separate property, the managerial system’s aim of eliminating the inequities to the creditor was rendered ineffective. Again, the creditor would go unpaid, even if the spouses had a great deal of community property in their possession.

With the late twentieth-century abolition of the head and master scheme in all nine community property states and the move toward a gender-neutral management scheme, the managerial system for debt collection necessarily changed dramatically as well. In theory, it now allows a creditor to seize, either for contractual or tortious debts, any property the new gender-neutral management scheme places within

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53. Under this system, then, all of the community property could be held for the acts of a husband, as he managed it all. Katherine Shaw Spaht, The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage, 63 LA. L. REV. 243, 290 (2003); see also Oppenheim, supra note 26, at 200-202 (1944) (discussing the history of the husband as head and master of the community property with control over the administration of all marital property).
54. Spaht, supra note 53, at 290.
55. See REPPY & SAMUEL, supra note 47, at 345; Frantz & Dagan, supra note 52, at 125.
the control of the debtor spouse. Community property managed exclusively by the non-debtor spouse, or that managed by the spouses jointly, and the separate property of the non-debtor spouse would be immune from seizure in a jurisdiction adhering to a “pure” managerial system.

The most distinctive feature of the managerial system is that it views the purpose of the debt incurred as wholly irrelevant to creditors’ rights. The rule allowing creditors to seize the community property managed by the debtor spouse applies whether the debt is in the interest of or brings benefit to the debtor’s family, or is wholly self-interested, and indeed, may even undermine the household unit. In *Lezine v. Security Pacific Financial Services, Inc.*, for instance, the husband forged and then falsely notarized his wife’s signature on a quitclaim deed to the family home.\(^56\) With the forged deed in hand, husband borrowed $240,000 from a local savings and loan and mortgaged the marital residence as security. Wife had no knowledge of either the forged deed or the loan. And more importantly, husband used the loan proceeds for his own selfish purposes, bringing no benefit to the community.\(^57\) Nevertheless, the California Supreme Court held the community property—including wife’s interest in it—seizable for husband’s fraudulent debt under a managerial system theory.\(^58\)

Although California and Louisiana are often said to follow the managerial system,\(^59\) the label does not appropriately describe the property available to creditors in those states. A strict managerial system would allow a creditor, for a debt incurred during marriage, to seize only the community property managed by the debtor spouse.\(^60\) However, California and Louisiana, by statute, substantially broaden creditor access to reach *all* community property, including that portion of the community property managed jointly, and even that managed exclusively by the non-debtor spouse.\(^61\) The result of these legislative pronouncements is

\(^{56}\) *Lezine* *v.* Sec. Pac. Fin. Servs., Inc., 925 P.2d 1002, 1004 (Cal. 1996).
\(^{57}\) Id.
\(^{58}\) Id. at 1006-07.
\(^{59}\) REPPY & SAMUEL, supra note 47, at 426; De Armond, supra note 48, at 274.
\(^{60}\) See REPPY & SAMUEL, supra note 47, at 426.
\(^{61}\) CAL. FAM. CODE § 910(a) (West 2004); LA. CIV. CODE ANN. art. 2345,
that these states truly cannot be described as falling within the managerial system; management of community property here has no bearing on creditors' rights. But the states are nonetheless grouped with Idaho, Nevada, and Texas under the managerial umbrella to make it abundantly clear that they do not premise creditor access to community property on a finding that the debt at issue is in the interest of the family or somehow imparts a benefit to the community.62 The irrelevance of the purpose of the debt is what unites these five states in the "managerial system."63

At first glance, the managerial system seems rather well-reasoned. It is certainly an uphill battle to assert that a creditor should be able to seize, in satisfaction of the debt owed him, less than his debtor could voluntarily surrender. Moreover, the managerial system seems relatively creditor-neutral. By hinging creditor collection on a management scheme, the rule does not facially reveal a preference for either creditor or spouse. Unfortunately, however, the modern move to an equal management scheme and the creation of a number of "exceptions" to the managerial system in its pure form have undercut the rationality and neutrality of the theory, thereby rendering it, once again, a device that favors the creditor.

The move in California and Louisiana toward creditor access to all community property, regardless of the management rules, rather obviously supports the notion that the managerial system's fundamental principles no longer prevail. The basic rationale behind the managerial system—that is, the correlation between voluntary and involuntary seizure—has been completely undermined. In both California

2350 cmt. (c) (1980). There are a few statutory exceptions in California exempting the earnings of the non-debtor spouse. See CAL. FAM. CODE § 910 Law Revision Commission cmt. (West 2004) (discussing the exceptions to the general rule laid out in § 910).

62. See REPPY & SAMUEL, supra note 47, at 426; De Armond, supra note 48, at 274.

63. It should be noted that while a creditor's ability to collect from the community property does not depend on the classification of the debt as community or separate, the order in which he may be able to seize property may. Both California and Texas, for instance, have promulgated so-called "marshalling" statutes, which may have the effect of requiring a creditor on a "separate debt" to attempt to reach the debtor's separate property before going after community property. See, e.g., CAL. FAM. CODE § 1000 (West 2004); TEX. FAM. CODE ANN. § 3.203 (Vernon 2006).
and Louisiana, a creditor may seize even property that the non-debtor spouse may not voluntarily alienate—for example, the non-debtor spouse’s vehicle. And neutrality—that is, reluctance to protect either the creditor or the spouses in preference to the other—in these two states is virtually non-existent. The state legislatures’ decision to favor creditors over spouses is all but stated outright.

Less easily recognized, however, is that Idaho and Nevada have just as severely undercut the neutrality and rationality of the managerial system. The neutrality of the system was, in effect, undermined by the abolition of the head and master rule. The regime chosen by eight of the nine community property states to replace the previously male-managed community was, and remains today, equal management. All community property states but Texas follow this scheme, allowing each spouse alone the right to manage, control, and even dispose of virtually any type of community property. The result of the new equal management scheme, when it is linked with the managerial system of creditor collection, is that virtually everything owned by the spouses is up for grabs. With equal management, the managerial system is really one that allows for seizure of just about all community property, for any self-interested and non-family-related debt, without such a harsh

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64. See CAL. FAM. CODE § 910(a) (West 2004); LA. CIV. CODE ANN. art. 2351, cmt. b (1985).
65. McCLANAHAN, supra note 4, § 9:12, at 466.
66. Texas has adopted a “separate but equal” scheme of management, wherein each spouse retains the exclusive right to manage what he brings into the marriage. TEX. FAM. CODE ANN. § 3.102 (Vernon 2006); see also McCLANAHAN, supra note 4, § 9:12, at 467; REPPY & SAMUEL, supra note 47, at 345.

Of course, equal management is only a default rule. Some property is excepted. Community real estate, for instance, is typically managed jointly by the spouses, meaning that the concurrence of both is required for its alienation. See McCLANAHAN, supra note 4, § 9:12, at 468.
68. Indeed, at least one scholar has remarked that “with the advent of [equal management] comes an increase in the liability of community property for the debts of the spouses.” Robert J. Stumpf, Note, Tort Debts Versus Contract Debts: Liability of the Community Under California’s New Community Property Law, 26 HASTINGS L.J. 1575, 1575-76 (1975).
label. Connecting the creditor collection theory with the realities of equal management reveals that the managerial system is no longer neutral. As it is applied in today's community property regime, it could hardly favor creditors more.

Worse yet, the rationality of the managerial system has been destroyed by a broadening that renders its fundamental principles inoperative. Specifically, even states like Idaho and Nevada, both of which have equal management and operate under a "pure" managerial system 69 (i.e., do not extend the rule to allow for seizure of all community property as in California and Louisiana 70), have wholly ignored the system's application as it pertains to items managed by the spouses jointly. Community real estate gives rise to the most significant departure from the managerial system's basic principles. Even in a state with an equal management scheme, real estate is an asset that must typically be managed by the spouses jointly. 71 The alienation of community real estate, in particular, requires the concurrence of both spouses. 72 Nonetheless, both Idaho and Nevada have allowed the seizure of community real estate for a debt incurred by just one spouse during marriage. 73 This extension of pure managerial system theory is problematic because it is inconsistent with the very premise on which the managerial system is based—that of creditor access to property the debtor spouse could alone obligate voluntarily. 74 Allowing a creditor to reach community real property gives him far more rights than those given to the spouses themselves.

In short, the change from the head and master scheme to equal management, the broadening of the managerial system in equal management states to include even jointly managed

69. See REPPY & SAMUEL, supra note 47, at 448 (describing the meaning of "pure" community debt system).
70. See id., at 426; see also supra note 64 and accompanying text.
71. See, e.g., IDAHO CODE ANN. § 32-912 (2006); NEV. REV. STAT. § 123.230(3) (LexisNexis 2004).
74. See REPPY & SAMUEL, supra note 47, at 426.
property, and the decisions of California and Louisiana to allow creditor access to all community property and not just that managed by the debtor spouse, have morphed the managerial system in ways not envisioned at its inception. As a result, it is now extraordinarily creditor-friendly.

2. Delimiting the "Shadowy Boundary" Between Acts "Serving the Community" and "Individual Frolics"—The Community Debt System

Arizona, New Mexico, Washington and Wisconsin have rejected the managerial system and instead opted for what has become known as the "community debt system." The idea behind this system is that community property should not be held for any and all debts incurred by either spouse during marriage. Rather, in keeping with the status of the community as a combination of property in the interest of and for the benefit of both husband and wife, the community—and particularly the non-debtor spouse's interest in it—should be held only for a debt either spouse incurs "while acting for a community benefit or purpose." Once this purpose or benefit test is met, the obligation is classified as a "community debt" and the result, in all community debt states but Wisconsin, is that the entirety of the community

75. Powell, supra note 7, at 36.
76. See Reppy & Samuel, supra note 47, at 444; De Armond, supra note 48, at 275; McDonald v. Senn, 204 P.2d 990, 998 (N.M. 1949).
77. Smith, supra note 48, at 808. Creditors for debts with no such beneficial connection to the spouses—that is, creditors for separate debts—certainly may not seek satisfaction from all of the community property in a community debt state. But whether even the debtor's one-half interest in the community property may be held varies among the four states subscribing to the community debt system.


78. Wisconsin limits liability for community tort debts incurred during marriage to "the property of [the debtor] spouse that is not marital property and [that] spouse's interest in marital property." Wis. Stat. Ann. § 766.55(2)(c)(2)(cm) (West 2001). For contract debts, Wisconsin is aligned with
property may be seized in satisfaction of the debt. The creditor’s interest, then, extends to both his debtor’s one-half interest in the community property and to the innocent non-debtor spouse’s one-half interest.

The rule is likely to strike the reader as logical. But its application, once again, demonstrates that, perhaps even as much as the managerial system, the community debt system protects creditors at the expense of an innocent spouse. This result does not obtain through the operation of the fundamentals of the community debt system itself. Rather, it follows from the creation of an evidentiary presumption that is intended to aid in the application of the rule and because of the definitions of community and separate debts that courts have created to determine precisely what marital property may be bound for a debt incurred during marriage.

First, three of the four states subscribing to the community debt approach employ a presumption that a contractual obligation incurred by a spouse during marriage is one for the benefit of the community, and thus is a community debt. The fourth community debt state, Wisconsin, takes the presumption even farther, applying it to tort as well as contract debts.

Of course, the presumption means that a spouse claiming that a debt is separate bears the burden of marshalling evidence and so proving. Moreover, every community debt state has held that it must be overcome not with the traditional civil litigation standard of preponderance, but

the other three community debt states in allowing seizure of all community property. Id. § 766.55(b).

79. See, e.g., N.M. STAT. ANN. § 40-3-11(A) (West 2006) (“Community debts shall be satisfied first from all community property in which each spouse owns an undivided equal interest . . . , excluding the residence of the spouses. Should such property be insufficient, community debts shall then be satisfied by the residence of the spouses . . . .”); ARIZ. REV. STAT. ANN. § 25-215 (2000) (stating that the entirety of community property may be seized for obligations bringing community benefit).


82. See, e.g., United Bank of Ariz., 805 P.2d at 1019.

rather by clear and convincing evidence. Wisconsin even allows the debtor spouse to make the presumption conclusive, and therefore irrebuttable, by executing a unilateral, signed statement before the obligation is incurred stating that “the obligation is or will be incurred in the interest of the marriage or the family.” The evidentiary effect of such a presumption, plainly, is to put the creditor at a significant advantage before the collection process even begins.

Second, even setting aside the presumption, community debt states have defined the concept of the community debt so broadly that “only a slight connection with the community has been required.” Perhaps the most egregious examples come from Washington. In LaFramboise v. Schmidt, for instance, the Washington Supreme Court found a tort judgment for sexual assault on a six-year-old child to be a community debt. Only the husband perpetrated the assault, but because the crime occurred while the child was staying in the family home under a paid baby-sitting arrangement, the court determined that it was “done in the course of the community business” and was therefore a community debt.

Likewise, the Washington Court of Appeals held in Benson v. Bush that an assault by a husband who sprayed pepper spray in the plaintiff’s face gave rise to a community obligation for damages. The altercation in Benson occurred on husband’s porch, where the plaintiff’s and husband’s dogs began fighting. After breaking up the dog fight, plaintiff and husband argued. “Sometime during the melee respondent husband said, ‘I would like to kill you and your dog.’” When the plaintiff turned to leave, husband became enraged, “spun [him] around” and sprayed the chemical into his face. The court found the debt for plaintiff’s damages to be community,

88. Id. at 486.
89. Id.
91. Id. at 929.
92. Id. at 930.
holding that husband's act "was in the course of or in connection with the management of the community property."\textsuperscript{93}

The debts in \textit{LaFramboise} and \textit{Benson} bear so little relation to the community that it strains credulity to obligate the community under a community debt theory under such circumstances. The debts certainly brought no community benefit, and arguably did not even maintain a sufficient connection to any "community purpose" to warrant seizure of the entirety of the community property. Perhaps the real driving force behind classifying such debts as community is that when the focus is on tort debts and the typically innocent victim, these results seem more justifiable. It could be argued that, as between the innocent victim and tortfeasor spouse, putting the victim in a greater position to be compensated for his damages warrants a stretching of the community debt principle.

But one must remember that, in so stretching the community debt concept, Arizona, New Mexico, and Washington allow seizure of the non-debtor’s interest in the community property.\textsuperscript{94} Husband’s rape in \textit{LaFramboise}, for instance, would result in a proper garnishment of his wife’s wages, possibly for the remainder of her working life. Such a result once again puts the creditor in a superior position vis-à-vis both his debtor spouse and an innocent spouse with no connection to the debt other than marriage to the debtor.

All in all, for debts one spouse incurs during marriage, it is difficult to say whether creditors fare better under the managerial or community debt system. The truth is that they fare quite well under both. No matter the system, the creditor is very likely to have access to the entirety of both the debtor and non-debtor spouse’s interests in the community property, for any and all manner of debt.

\textbf{C. Double-Dipping: Creditor Access to Non-Debtor Separate Property}

In addition to the exceptionally broad access a creditor has to the community property interest of both spouses, creditors often get an even further boon in that they may be

\textsuperscript{93} Id. at 929.
\textsuperscript{94} See supra text accompanying note 80.
able to seize the non-debtor spouse's separate property. In theory, creditors in a community property regime are not given such broad rights of access. Indeed, nearly every community property state, as a general rule, prohibits seizure of a spouse's separate property for the other spouse's debt. The problem is that exceptions have begun to proliferate that threaten to swallow the general rule. Nowadays, every American community property state recognizes at least some theory which permits the separate property of the non-debtor spouse to be seized for debts incurred by the other.

The most common exception to the general rule prohibiting seizure of the non-debtor's separate property is embodied in the "necessaries doctrine." Recognized by statute today in five of the nine community property states, the gist of the doctrine is that both spouses are personally liable for certain debts, no matter who incurs them.


96. See REPPI & SAMUEL, supra note 47, at 427-28 for a general discussion of the necessaries doctrine.

97. See CAL. FAM. CODE § 914 (West 2004); NEV. REV. STAT. ANN. § 123.090 (LexisNexis 2004); TEX. FAM. CODE ANN. § 3.201(a)(2) (Vernon 2006); WASH. REV. CODE ANN. § 26.16.205 (West 2005); WIS. STAT. ANN. § 766.55(2) (West 2001). Although no statute in New Mexico sanctions the doctrine's application, it was applied by the New Mexico Supreme Court back in 1940. See Nicholas v. Bickford, 100 P.2d 906 (N.M. 1940).

Arizona has apparently rejected the necessaries doctrine. See, e.g., REPPI & SAMUEL, supra note 47, at 428 (citing Samaritan Health Sys. v. Caldwell, 957 P.2d 1373 (Ariz. Ct. App. 1998)).

Strangely, Louisiana courts have inappropriately recognized the necessaries doctrine. See, e.g., Hall v. Lilly, 666 So. 2d 1328, 1331 (La. Ct. App. 1996) (holding husband's separate property liable for a promissory note for funds to build a home signed by wife alone). The Hall court relied on Louisiana Civil Code article 2372, which provides: "A spouse is solidarily liable with the other spouse who incurs an obligation for necessaries for himself or the family." Id. (quoting LA. CIV. CODE ANN. art. 2372). Article 2372, however, expressly applies only to spouses who have opted out of the community property regime and into a "separation of property regime," as it falls under the chapter of the Louisiana Civil Code entitled "Separation of Property Regime." See 16 KATHERINE S. SPAHT & W. LEE HARGRAVE, LOUISIANA CIVIL LAW TREATISE, MATRIMONIAL REGIMES 312 (2d ed., West Group 1997). There is no foundation in the Louisiana Civil Code, the primary source of law in Louisiana, see James L. Dennis, Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent, 54 LA. L. REV. 1, 3 (1993), for an application of the
personal liability, then, means that both the debtor and non-debtor spouses’ shares of the community property may be seized, but more importantly, that creditors may even access the non-debtor spouse’s separate property.98

Separate property liability is, at least in principle, limited under the necessaries doctrine. Although the community property states recognizing such a doctrine often use differing terminology—restricting this personal liability to expenses for “necessaries”99 or, alternatively, “expenses of the family”100—the notion is the same. The separate property of a non-debtor spouse will only be held for a debt needed to support the family.

Early in the doctrine’s history, one court defined it to include:

[S]uch articles of food or apparel, or medicine, or such medical attendance and nursing, or such provided means of locomotion, or provided habitation and furniture . . . and the like . . . as the husband, considering his ability and standing, ought to furnish his wife for her sustenance, and the preservation of her health and comfort.101

The idea behind the doctrine was that it furthered the spouses’ now mutual duty to support each other.102

Modern barbarizations of the doctrine have extended it beyond recognition, though, such that it now covers much more than what the average person would likely consider life-sustaining or necessary. Expenses for a maid,103 and even paying an appellate attorney to render legal aid on a criminal conviction for marijuana possession104 have become necessaries in the modern community property regime. The result, of course, is that creditors benefit. The expansion of the necessaries doctrine has allowed them to reach even

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101. Sharpe Furniture, Inc. v. Buckstaff, 299 N.W.2d 219, 221 (Wis. 1980) (citing Warner & Ryan v. Heiden, 28 Wis. 517, 519 (Wis. 1871)).
102. See id.
beyond community property to the separate property of the non-debtor spouse for debts that arguably carry little benefit for the family. ¹⁰⁵

The necessaries doctrine is not the only theory community property states have employed to allow creditors to seize the separate property of the non-debtor spouse. A number of community property states have also employed agency theories for this purpose.¹⁰⁶ Agency theory has been applied in cases involving contractual liability, of course. For example, in *Lucci v. Lucci*,¹⁰⁷ the Washington Supreme Court found a husband personally liable for loans incurred solely by his wife for the purpose of maintaining a grocery store business.¹⁰⁸ Husband was illiterate, and perhaps as a consequence, his wife managed the business exclusively.¹⁰⁹ When the wife alone signed a note for groceries for the store, husband was nevertheless held responsible—and therefore his separate property bound—under agency principles.¹¹⁰ The court reasoned that "by [the spouses'] mutual agreement [wife] was the managing agent of the grocery business."¹¹¹

Perhaps more strangly, community property states have even used the agency doctrine to impose liability on the non-debtor spouse in tort cases. In *Zernott v. Hobbie*,¹¹² for instance, a Louisiana appellate court found a husband personally liable for the injuries of a minor victim struck by a car driven by his wife.¹¹³ The court premised its holding on the notion that the husband was "vicariously liable" for his wife's torts.¹¹⁴

¹⁰⁵. Indeed, as one commentator remarked, "Recognizing that most doctrine-of-necessaries cases today do not involve a neglectful spouse who refuses to provide food, shelter, and clothing to the other spouse, it becomes apparent that the doctrine owes its continued existence to its use as a collection device for creditors." Shawn M. Willson, Comment, *Abrogating the Doctrine of Necessaries in Florida: The Future of Spousal Liability for Necessary Expenses After Connor v. Southwest Florida Regional Medical Center, Inc.*, 24 FLA. ST. U. L. REV. 1031, 1043 (1997).


¹⁰⁸. *Id.* at 396, 399.

¹⁰⁹. See *id.* at 396.

¹¹⁰. *Id.*

¹¹¹. *Id.*


¹¹³. *Id.* at 732.

¹¹⁴. *Id.* Admittedly, agency and vicarious liability theories are not
Community property states have applied theories of ratification to the spouses with mixed results. In *Alphonse Brenner Co. v. Phillips*, a Louisiana court found that a husband's use and enjoyment of non-necessary furniture purchased by his wife obligated husband's separate property. The husband made "no objections to the purchases made by his wife," and his "ratification" of her purchase rendered him personally liable. On the other hand, the Washington Court of Appeals, in *Smith v. Dalton*, while not rejecting the application of a ratification theory to bind a non-debtor spouse's separate property in theory, refused to apply it to obligate a wife's separate property for a boat purchased by her husband.

The wife's acts in *Smith* arguably rivaled those of the husband in *Phillips*. The divergent results are difficult to justify, as Mrs. Dalton apparently made no objection to her husband's purchase or procurement of the loan for a boat (though the evidence does indicate that she had minimal participation in both transactions). Wife did use and enjoy the boat for leisure purposes "several times," presumably as synonymous. Absent any better explanation for the court's holding, however, community property scholars have couched the *Zernott* decision as one resting on principles of agency. See, e.g., REPPY & SAMUEL, supra note 47, at 427.


Both the *Zernott* and *Bonura* decisions were rendered during the head and master period in Louisiana, when only husband could act to bind the community property. See supra notes 52-53 and accompanying text (describing the "head and master" management scheme). In this light, it makes a bit more sense that the courts would stretch to meet the principles of agency. In the absence of agency, the community property would not be bound for either wife's torts or contracts, and wife's separate property would be the only property available to satisfy the debt. With the abolition of the head and master doctrine in Louisiana in 1980, courts should now be more hesitant to employ agency, as creditors now have full access to the entirety of the community property in Louisiana for a wife's debts. See LA. CIV. CODE ANN. art. 2345 (1985); see also REPPY & SAMUEL, supra note 47, at 426.

116. *Id.*
117. *Id.*; see also *Royal Furniture Co. of Baton Rouge v. Benton*, 256 So. 2d 614, 616 (La. 1972).
119. *Id.* at 708.
120. *Id.* at 710.
the husband in Phillips used and enjoyed the furniture. Nevertheless, the Washington court found such use of the boat insufficient to give rise to ratification.\textsuperscript{121}

Even quasi-contractual theories like unjust enrichment are occasionally employed in community property states to bind the non-incurring spouse's separate property. In \textit{First State Bank & Trust Co. v. Fireman's Fund Insurance Co.}, a Louisiana court found a husband personally obligated for his wife's embezzlement debt on a theory of unjust enrichment where the embezzled funds were deposited into a joint checking account.\textsuperscript{122} Arguably, unjust enrichment was inappropriately used for creditor access to separate property, at least under the facts of \textit{First State Bank}. When the embezzled funds were deposited into the joint bank account there, it was the "marital community" that profited and not the non-debtor husband.\textsuperscript{123} The unjust enrichment should therefore have been repaid from the community property, and not the non-debtor's separate property. Nevertheless, quasi-contractual theory has been applied, at least in Louisiana, to hold separate property.\textsuperscript{124} Other states have plainly rejected the application of such a theory to bind the separate property of the non-debtor spouse.\textsuperscript{125}

Finally, some scholars suggest that the Roman law principle of \textit{negotiorum gestio}, or "management of the affairs of another," may apply in Louisiana—though likely not in any other American community property state—\textsuperscript{126} to give

\begin{footnotes}
\footnoteref{121} \textit{Ratification was also rejected by the Washington court in Nichols Hills Bank v. McCool}, 701 P.2d 1114 (Wash. 1985), where a wife specifically expressed her disapproval of a loan her husband made to their son.

\footnoteref{122} \textit{First State Bank & Trust Co. v. Fireman's Fund Ins. Co.}, 399 So. 2d 729 (La. Ct. App. 1981). Ratification was not a possibility in \textit{First State Bank} because husband had no knowledge of his wife's embezzlement. \textit{Id. at 731}.

\footnoteref{123} \textit{Compare id. with Smith}, 795 P.2d at 710 (finding no individual "enrichment" to spouse that did not use item purchased by other).

\footnoteref{124} See, e.g., \textit{SPAHT & HARGRAVE}, supra note 97, at 313 (discussing \textit{First State Bank}, 399 So. 2d 729).

\footnoteref{125} See \textit{Smith}, 795 P.2d at 710.

\end{footnotes}
creditors access to the non-incurring spouse's separate property.\textsuperscript{127} No Louisiana court has ever applied these principles for such a purpose, but the doctrine certainly seems ripe for application here. The institution of \textit{negotiorum gestio} allows a person to act to manage another's affairs, even without authority, when he reasonably believes the other would sanction such action.\textsuperscript{128} More importantly, it imposes on the person whose affairs are managed a duty "to fulfill the obligations that the manager has undertaken."\textsuperscript{129} Whether this duty may allow a creditor access to separate property has yet to be litigated, but the scope of the rule certainly leaves open the possibility.

In sum, what seems like a relatively straight-forward, and rather creditor-limiting rule in community property states—that creditors typically may not seize the separate property of a non-debtor spouse—is not so limiting after all. The promulgation of exceptions such as the necessaries doctrine, agency theory, ratification and quasi-contractual theories such as unjust enrichment and perhaps even \textit{negotiorum gestio} have so eroded the general rule that it hangs on only by a thread. A creditor trying to seize a non-debtor spouse's separate property in a community property state these days will likely not be disappointed by the wide variety of options available.

\textbf{D. Sacrificing Autonomy in the Marital Relation: Creditor Ability to Disregard Spousal Separation of Property Agreements}

Spouses domiciled in any of the nine community property states today are free to contract around their state's legal regime.\textsuperscript{130} They can and do modify the legal regime (both

\textsuperscript{127} \textit{Spaht} \& \textit{Hargrave}, \textit{supra} note 97, at 312.
before and after they marry) in a myriad of ways.\textsuperscript{131} Spouses may, for example, increase the assets of the community\textsuperscript{132} by adopting the "universal community," whereby the community includes not only the acquets and gains of the marriage, but also any property brought into the marriage by either spouse.\textsuperscript{133} Spouses may likewise decrease the assets of the community\textsuperscript{134} by agreeing that the fruits of separate property, which are community property in most community property jurisdictions,\textsuperscript{135} will remain separate property. Management provisions may be modified, as may the rules regarding the spouses’ rights to reimbursement upon dissolution.\textsuperscript{136} The possibilities are virtually endless.

Even with all of these possibilities, by far the most commonly executed matrimonial agreement in community property states is the separation of property agreement.\textsuperscript{137} Perhaps not coincidentally, these agreements are the ones most likely to affect creditors’ rights to collect on debts owed by the spouses. When spouses sign a separation of property agreement, they typically agree that the property each acquires—through earnings, inheritance, or any other vehicle—during marriage will remain his separate property.\textsuperscript{138} Essentially, they are excluding the legal regime matrimonial agreement. In Louisiana, for example, spouses may enter into matrimonial agreements derogating from the rules of the legal regime of community property set out in the Louisiana Civil Code, but they may not "renounce or alter the marital portion or the established order of succession" or "limit with respect to third persons the right that one spouse has alone under the legal regime to obligate the community or to alienate, encumber, or lease community property." LA. CIV. CODE ANN. art. 2330 (1985).

\textsuperscript{131} While postnuptial contracts were once disfavored, the last twenty years have seen their acceptance grow such that they are now on par with prenuptial agreements. \textit{See} Laura Schofield Bailey, \textit{Note, Marital Property Agreements—Being Creative with the New Legislation}, 43 LA. L. REV. 159, 160 (1982) (Louisiana prohibited post-nuptial agreements until 1979); Rebecca Glass, Comment, \textit{Trading up: Postnuptial Agreements, Fairness, and a Principled New Suitor for California}, 92 CAL. L. REV. 215, 222-23 (2004).

\textsuperscript{132} SPART \& HARGRAVE, \textit{supra} note 97, at 538.


\textsuperscript{134} SPAHT \& HARGRAVE, \textit{supra} note 97, at 539.


\textsuperscript{136} SPAHT \& HARGRAVE, \textit{supra} note 97, at 540-43.

\textsuperscript{137} REPPY \& SAMUEL, \textit{supra} note 47, at 33; see also SPAHT \& HARGRAVE, \textit{supra} note 97, § 8.9, at 539.

\textsuperscript{138} \textit{See} SPAHT \& HARGRAVE, \textit{supra} note 97, § 8.9, at 539 (discussing the
of community property altogether if they sign the agreement before marriage, or, if they sign during the course of the marriage, are “effectively dissolv[ing] the community even though the marital relation continues to exist.”

The impact of a separation of property agreement on a creditor, assuming it binds him, is great and apparent. That creditor will now have rights of access to the property of the debtor spouse only. He will have no ability to reach property earned or acquired by the non-debtor spouse. Further, these basic rules are not altered based on the debtor spouse’s inability to pay. If the creditor in a community property state becomes a party to a juridical relation with an unemployed spouse with no substantial assets, for example, the creditor’s recourse after a binding separation of property agreement, with the limited exceptions addressed in prior sections, is solely to squeeze anything possible from the unemployed debtor spouse. Reaching the other spouse’s assets is generally not a possibility. In essence, the signing of a separation of property agreement by spouses domiciled in a community property state, if binding on a creditor, puts that creditor in the same position he finds himself in the forty-one non-community property states.

The fairness of this change in position for the creditor depends upon the timing of the creditor’s relationship with the debtor spouse. There are two possibilities. A creditor may have established a relationship with his debtor prior to the execution of a separation of property agreement; thus, relative to the separation of property agreement, he is an “existing creditor.” On the other hand, a creditor may have established a relationship with his debtor subsequent to the signing of the matrimonial agreement; thus, relative to the

ability to designate various property under such an agreement in Louisiana, including a total separate property regime).

139. Joann H. Henderson, Marital Agreements and the Rights of Creditors, 19 IDAHO L. REV. 177, 203 (1983). A marital agreement executed during the existence of a community property regime may have a particularly strong effect on creditors, as it may “transmute[]” community property to separate property. See id. at 177; see also REPPY & SAMUEL, supra note 47, at 33.

140. See McCLANAHAN, supra note 4, § 10:1, at 478.

141. Id.

142. See SPAHT & HARGRAVE, supra note 97, § 8.9, at 539 (“Specified assets can be kept out of the community . . . .”).

143. See McCLANAHAN, supra note 4, § 10:1, at 478 (discussing jurisdictions without community property systems).
separation of property agreement, he is a “future creditor.”

In theory, at least, existing and future creditors should garner substantially different legal treatment. One might expect that community property states would sanction the enforcement of separation of property agreements against future creditors of the spouses, but not against existing creditors. After all, existing creditors have arguably established justifiable expectations that are not present, at least to the same degree, for creditors who have not yet lent. Surprisingly, however, no community property state overtly distinguishes between these two classes of creditor.144 Both existing and future creditors' fates are bound up together in the various state laws that determine whether third parties will be affected by matrimonial agreements.

At first blush, it may seem that the spouses' ability to contract around the legal regime of community property in all of the American community property states strikes a blow to all creditors. It is apparently the lone instance in the community regime when the rights and freedom of the spouses take precedence over their creditors. Yet in this case, appearances are deceiving. While it is true that, if binding, matrimonial agreements may significantly limit the rights of creditors, community property states have displayed an almost shocking resistance to applying these contracts to creditors.

1. Complete Ineffectiveness

Nevada provides the starkest example of this resistance. Spouses are permitted (through special statutory authority) to enter into matrimonial agreements which change the characterization of property that would be community under the state's default regime.145 Separate property agreements, of course, do just that, and thus are sanctioned by Nevada law.146 However, such agreements are “effective only as between” the spouses.147 Third parties, most notably creditors, may disregard these agreements altogether, as they are wholly inapplicable to them. No other American

144. See generally id. § 10:6-7 (discussing creditors' rights, but identifying a distinction between the type of debt rather than the type of creditor).
146. Id. § 123.070.
147. Id. § 123.220.
community property state so blatantly allows the rights of creditors (either existing or future) to trump the freedom spouses have to contract with one another and to have that contract be respected by outsiders.

2. **Effectiveness Only Upon Actual Notice to Creditor**

Wisconsin has taken an only slightly less creditor-friendly stance on the enforceability of separation of property agreements affecting creditors. A separation of property agreement there may not "adversely affect[] the interest of a creditor unless the creditor had actual knowledge of that provision when the obligation to that creditor was incurred . . .". 148

This statutory provision makes Wisconsin's rule one that, in effect, though not facially, treats existing and future creditors differently. Under this actual knowledge rule, existing creditors necessarily are unaffected by the spouses' separation of property agreement, as they could not have had actual knowledge of an agreement not in existence at the time credit was extended. 149 Existing creditors, therefore, receive complete protection under Wisconsin's actual knowledge rule.

However, the rule seems to entail at least the possibility that separation of property agreements between the spouses will have significant negative impact on future creditors. Those creditors aware150 of an agreement contrary to the community property regime will be bound by that agreement and will hold only the rights creditors in common law states enjoy—namely, the right to access the debtor spouse's property alone.151 The reality of the rule's application, though, is much less antagonistic to creditors.

148. WIS. STAT. ANN. § 766.55(4m) (West 2001). The Uniform Marital Property Act, on which Wisconsin's community property rules are based, contains the same provisions. UNIF. MARITAL PROPERTY ACT § 8(e), 9 U.L.A. 103 (1983).

149. See, e.g., Bank One, Appleton, NA v. Reynolds, 500 N.W.2d 337, 338-39 (Wis. App. 1993) (finding that the marital property agreement did not preclude bank's seizure of wife's wages under guaranty agreement where obligation was entered into earlier).

150. Recordation of a matrimonial agreement in Wisconsin provides a creditor neither actual nor constructive notice. WIS. STAT. ANN. § 766.56(2)(a) (West 2001).

Although Wisconsin’s actual knowledge rule does not expressly distinguish between creditors in tort and contract, its effect is to divide the two. Tort creditors of the spouses, even after a separation of property agreement is signed, will likely lack knowledge of the agreement.\textsuperscript{152} As such, there is "no effective way, by marital property agreement, that spouses may limit the exposure of marital property for tort obligations incurred," precisely because of this lack of knowledge.\textsuperscript{153} For tort creditors, then, the seemingly harsh actual knowledge rule may as well be the Nevada "no effect" rule.\textsuperscript{154} It is essentially the same, though less transparent.

Even for contractual relationships, the actual knowledge rule has the effect of placing the burden of imparting knowledge of the matrimonial agreement on the spouses rather than their creditors. In effect, it sets up perverse incentives for a creditor, putting him in a better position if he doesn’t inquire into the existence of or take steps to discover whether the spouses have executed a separation of property agreement.\textsuperscript{155} The duty to inform is left on the shoulders of the spouses, who are typically less sophisticated, and especially given the lack of creditor incentive to raise the issue of a marital agreement, much less likely to bear it.

In the end, for all types of credit relationships, Wisconsin’s knowledge rule is exceptionally benevolent to creditors. In its application, it is not at all far removed from the Nevada approach of prohibiting spousal separation of property agreements from affecting creditors altogether.


\textsuperscript{153} WIS. STAT. ANN. § 766.55 legislative council note.

\textsuperscript{154} See, e.g., Schultz v. Sykes, 638 N.W.2d 76, 79-80 (Wis. Ct. App. 2001) (finding a marital agreement ineffective against plaintiff establishing tort by wife because plaintiff had no knowledge of the agreement at the time of the tort).

\textsuperscript{155} Wisconsin does require creditors covered by the Wisconsin Consumer Act delivering written credit applications to include a notice that "no provision of a marital property agreement . . . adversely affects the interest of a creditor unless the creditor, prior to the time credit is granted, is furnished a copy of the agreement . . . or has actual knowledge of the adverse provision when the obligation to the creditor is incurred." WIS. STAT. ANN. § 766.56(2)(b) (West 2001). The rule is a good start at shifting the burden of proof to creditors that should be expanded beyond transactions involving written credit applications.
3. Effectiveness Upon Recordation

Several community property states attempt to balance the rights of the spouses to enter into an agreement effectively modifying their legal regime with the rights of creditors by imposing a recordation requirement.156 Under such a theory, a separation of property agreement is binding between the spouses from the moment of its execution, but binds third-party creditors only if recorded.157 States forcing recordation do so in substantially different ways, with different results obtaining for creditors of the spouses. The common thread, though, is that a recordation requirement of any kind for the enforceability of matrimonial agreements makes for one of the most spouse-friendly alternatives. Yet even with recordation requirements, creditors garner significant protection.

a. For Any Effectiveness at All

Louisiana has taken a comparatively bold step in favor of placing spousal rights to enter into binding marital agreements above creditors' rights.158 The Louisiana Civil Code provides that "a matrimonial agreement . . . is effective toward third persons as to immovable property, when filed for registry in the conveyance records of the parish in which the property is situated and as to movables when filed for registry in the parish or parishes in which the spouses are domiciled."159 Any type of creditor, for any type of property, then, is bound by a matrimonial agreement only if it is recorded.

The Louisiana Civil Code goes farther than any other community property state in favoring the spouses by enforcing separation of property agreements against both tort and contract creditors consistently and against creditors with concerns in both movable and immovable property consistently. It also adopts the most spouse-friendly solution in hinging the enforceability of matrimonial agreements on recordation because it rejects inquiries into actual notice.160

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156. See, e.g., IDAHO CODE ANN. §§ 32-917 to -919 (2006); LA. CIV. CODE art. 2332 (1985).
158. See REPPY & SAMUEL, supra note 47, at 79-80.
159. LA. CIV. CODE art. 2332 (1985).
160. See Lee Hargrave, Public Records & Property Rights, 56 LA. L. REV. 535,
The actual knowledge of a creditor surrounding the execution of a matrimonial agreement is irrelevant in Louisiana; he is bound by the agreement only if it is properly recorded.\footnote{See id.}

\textbf{b. For Real Estate Only}

Idaho requires marital agreements, including separation of property contracts, to be recorded, but scales back the Louisiana rule to require recordation only for contracts that affect real estate.\footnote{IDAHO CODE ANN. §§ 32-917 to -919 (2006). The language of the Idaho statute actually only covers "marriage settlements," but it has been construed to apply to marital agreements such as separation of property contracts as well. See Stevens v. Stevens, 16 P.3d 900, 903 (Idaho 2000); see also W.J. BROCKELBANK, THE COMMUNITY PROPERTY LAW OF IDAHO 81-82 (1962).} Under such a rule, some creditors, namely mortgagees, are highly protected. They are not bound by separation of property agreements unless those agreements are recorded in the county of the real estate's situs.\footnote{IDAHO CODE ANN. §§ 32-917 to -919 (2006); see also Henderson, supra note 139, at 179.} There is certainly a possibility that a creditor may be prejudiced by such a recordation rule; he may lose his right to collect in accordance with his expectations if he does not check the records and discover a separation of property agreement. But most would likely find such a result appropriate. "Greater care is taken with realty transactions; more money is involved than with many items of personal property so that a title search and insurance are customary. . . ."\footnote{Henderson, supra note 139, at 180.}

The real estate recordation requirement seems to strive toward the same worthy goal that Louisiana's recordation requirement does—making matrimonial agreements between the spouses enforceable only by creditors who have notice of them and, contrary to the Wisconsin method, actually placing the burden of gaining that knowledge on the creditor rather than the spouses. But the Idaho rule misfires in at least two ways.

First, the rule is flawed in that it fails to deal with the spouses' relationship with the vast majority of their creditors by limiting its application to separation of property agreements affecting real estate. The rule plainly leaves
creditors dealing with the spouses on personal property unprotected. Spousal separation of property agreements presumably can affect these future creditors of the spouses on debts relating to personal property, and they may be forced to take subject to unknown, and even "secret," separation of property agreements.165

If such a rule prevailed in Idaho because it was found to best balance the rights of the spouses with those of their creditors, the rule would be justifiable, and maybe even praiseworthy for elevating the spouses' ability to make binding agreements above creditors' rights. It seems more likely, though, that it is just another inconsistency without theoretical justification. Particularly given the large volume of wealth associated with personal property transactions these days, personal property creditors of the spouses should be granted the same rights to contest spousal separation of property agreements as those granted to real estate creditors. Idaho missteps in treating the two classes of creditors differently.

Second, the Idaho recordation rule leaves tort creditors unprotected. Mortgagees or any other creditors with some connection to a particular parcel of spousal land will check the records for a separation of property agreement or fairly be limited to the separate property assets of the incurring spouse. Judgment creditors, and especially tort creditors, are not in such a position for advance planning.166 The recordation of a matrimonial agreement will not be discovered by these parties until well after the debtor-creditor relationship has arisen, yet the contract will nevertheless bind them. The "notice" function of the recordation requirement is wholly ineffective here.

While it makes some sense to enforce separation of property agreements even against creditors not in a position to discover them in advance of the creation of a juridical relation with the spouses, it does not make sense to do so in the way Idaho does. Idaho's rule essentially favors the contractual, real estate-oriented creditors over the spouses, but then subordinates tort creditors to the spouses. If Idaho's goal in adopting a recordation requirement is to allow

\[165. \text{Id.}\]
\[166. \text{See id.}\]
creditors the opportunity to discover separation of property agreements before they will be bound by them, then the state should adopt a rule that affords the same protection to tort creditors of the spouses—with no possibility of discovering a recordation before the obligation is incurred—as is granted to contractual creditors like mortgagees. In short, the laudable spousal protection that could be achieved through a recordation rule is ill-applied when it is limited to real estate scenarios. The result—placing contractual creditors above the spouses but tort creditors behind them—is theoretically indefensible and inequitable.

4. Effectiveness as to Creditors Only Upon Mutual Observance by the Spouses

Finally, Washington allows matrimonial agreements between the spouses to be enforced against creditors only when those agreements are “mutually observed” by the spouses. The rule aims to ensure that marital agreements are not “shams” or deals undertaken solely to immunize the spouses from liability to their creditors.

Washington courts have applied the requirement to allow creditors to garnish the wages of a non-debtor spouse despite the existence of a separation of property agreement. In re Diafos, for instance, a premarital tort creditor of the husband sought to garnish the non-debtor wife’s wages, claiming that, as community property, they were seizable for husband’s tort debt. Wife defended on grounds that she and her husband had signed a prenuptial agreement establishing a regime of separation of property, and that the agreement precluded husband’s creditor from seeking recourse from her earnings. The court allowed the creditor

167. Mumm v. Mumm, 387 P.2d 547, 549 (Wash. 1964). This theory of enforceability of marital agreements is different from the others discussed in this section because it is not solely a matter of creditor enforcement. To be valid even between the spouses themselves, a marital agreement in Washington must be mutually observed. Id. However, its frequent use as a creditor-asserted defense makes it an appropriate subject for study here. See, e.g., Kolmogar v. Schaller, 316 P.2d 111 (Wash. 1957); In re Diafos, 37 P.3d 304 (Wash. Ct. App. 2001).
168. See, e.g., Kolmogar, 316 P.2d at 111; In re Diafos, 37 P.3d at 304.
169. In re Diafos, 37 P.3d at 306.
170. Id. at 308.
to attempt an attack on the marital agreement and noted that "[c]ourts will honor a challenged property agreement between husband and wife if the party asserting the protection of the agreement can demonstrate by clear and convincing evidence . . . that both spouses have abided by the agreement."172

The idea behind requiring mutual observance before a marital agreement will bind creditors is basically an equitable one. The Diafos court explained that "it would encourage a sorry state of affairs in our domestic relations . . . [if spouses were able] to charge the community with all the expenses of the living . . . and credit the separate estate with the gross earnings." In light of this policy objective, the mutual observance requirement is often described as a ban on "disproportionate[] subsidizing." Use of one spouse's separate earnings to pay for everyday expenses that benefit the couple and simultaneous attempts to use a separation of property agreement to block creditor access to those same earnings—or disproportionate subsidizing—is prohibited.

The gist of the rule is that spouses may not assert a marital agreement against a third-party creditor when they themselves are not complying with the spirit of the agreement and truly remaining "separate in property."

Whatever the justification for the rule, it provides another hurdle for spouses attempting to deviate from the community property regime's harsh collection rules. The spouses' contract may be scrutinized on yet another basis not covered under the general rules of contract enforcement. A finding of non-observance, once again, can only help the Washington creditor.

When the rules regarding creditor seizure of community

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171. Prior jurisprudence and doctrine indicated that separation of property agreements in Washington would not be binding on existing creditors—those “whose basic claim[s] existed at the time of the agreement.” See Fisher v. Marsh, 125 P. 951 (Wash. 1912); Cross, supra note 130, at 107 (1986). More recent Washington jurisprudence, with the Diafos decision standing as a clear example, has apparently rejected the distinction and allowed both existing and future creditors to be bound by marital agreements provided they are not mutually observed. See In re Diafos, 37 P.3d at 304.

172. Id. at 309.

173. Id. (quoting Kolmorgan, 316 P.2d at 111).

174. See, e.g., id. at 309; REPPY & SAMUEL, supra note 47, at 460.

175. In re Diafos, 37 P.3d at 309.
property, both for debts incurred during and before marriage, are considered along with doctrines allowing creditor access to non-debtor separate property, the picture for the spouses is bleak enough. Since the tide toward equal management swept the community property states:

The wife may now obligate the community funds, not only for the debts she creates during the marriage, but also for her antenuptial debts . . . . The common funds are now available to creditors of both husband and wife during marriage, and an individual spouse's creditors may seek satisfaction from the community assets . . . as well as from the separate assets of the debtor-spouse. Married women, formerly wailing for access to one-half of the community property as security for their debts to promote increased extension of credit to them now have that credit in double measure . . . It is the best of all possible worlds for the creditor.176

The rules trending toward non-enforcement of matrimonial agreements against third-party creditors merely reinforce this creditor superiority.

III. ARE CREDITORS OVERPROTECTED?

Creditors of spouses living under the community regime are in a demonstrably strong position. But is this really a problem? It is certainly a relevant consideration in evaluating “the excellence of a system of law applicable to marital property.”177 If the community property regime is to continue to stand the test of time and persist in the American states in the midst of overwhelming acceptance of the common law marital property system, its efficacy will have to be continually supported. The propriety of the system should be evaluated both with reference to “the ‘fairness’ of the adjustments made by it between spouse and spouse” and “by the extent to which it affords adequate protection to all parties concerned when the family” deals with creditors.178 The community regime does a great deal to help the spouses’ creditors. Arguably, it does too much in light of its purpose,

177. Powell, supra note 7, at 16-17.
178. Id. at 17.
other more general laws, and party expectations.

A. Straying from the Rationale Behind the Regime

An examination of the rationale behind the adoption of the community regime in the nine community property states shows just how far the regime has strayed from its initial goals. The reasons typically cited by the western and Spanish-influenced states for their nineteenth-century initial adoption of the community property system are really quite clear. At the time, the most salient and well-respected feature of the community was its innovations in the area of women's rights.\(^\text{179}\) Simply put, the early community property regime was perceived as a system that improved upon the common law's treatment of women.\(^\text{180}\)

The community property regime's history demonstrates its strides in this area. The regime is believed to have originated as early as the fifth century with Germanic tribal peoples.\(^\text{181}\) Far from wallflowers and servants, the female role in these societies was one of partnership with the male in the varied, and often violent, tasks required for daily survival.\(^\text{182}\) "[T]he wives who shared the fighting were thought to be worthy of a share in the spoils."\(^\text{183}\) Thus, while the common law of the time subscribed to a theory of "merger," whereby a wife's legal personality merged with her husband's upon marriage and she was incapable of owning property,\(^\text{184}\) the civil law began to conceive of the wife's status in marriage differently.

This perception of the wife as a valuable contributor to the family gave rise to the notion that the mass of acquets during marriage to which each spouse contributed—"the community"—should be shared equally by the spouses.\(^\text{185}\) The

180. See MCKAY, \textit{supra} note 5, at 64-65; Kirkwood, \textit{supra} note 5, at 11.
182. See DAGGETT, \textit{supra} note 181, at 4.
183. Id.
community regime, then, diverged from the common law through its recognition of the marriage between husband and wife as a sort of economic partnership.\footnote{186}

The traceable history of the adoption of the community property regime in the few American states that have chosen it reveals that this same purpose prompted the initial adoption of the regime. Unfortunately, few legislative discussions have been preserved that enable historians to look into the minds of early nineteenth-century lawmakers deciding between the traditional common law matrimonial property scheme and the then-foreign community property regime.\footnote{187} The relatively scant record that does exist, however, is quite telling.

California's 1849 Constitutional Convention, surprisingly, provides the most insight. The delegates to the convention had before them not a choice between adoption of a common law or community property system, but rather a proposal making clear that property acquired by a wife before marriage and afterwards by donation would be her separate property.\footnote{188} The proposed "Section 13" read:

All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.\footnote{189}

Even though the decision of whether to adopt the community property regime was not plainly raised by Section 13's text, the delegates "realized that . . . Section 13 embodied something more than simply the establishment of married women's property rights, and that it was rooted in Spanish law."\footnote{190} The delegates, then, spent the majority of their time

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\begin{flushleft}
186. Erlanger & Weisberger, supra note 3, at 771. \\
187. Kirkwood, supra note 5, at 9. \\
189. Id. at 257. \\
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in this area debating the community and common law systems for handling spousal property. 191

Speaking in favor of Section 13 and the civilian notion of community property in general, one delegate—Tefft, a New York lawyer originally from Wisconsin 192—argued its necessity to protect the "helpless" family from a husband "bringing] his family to penury and want." 193 More light-heartedly, delegate Halleck, a bachelor and California's then-Secretary of State,194 noted:

I am not wedded either to the common law or the civil law, nor as yet, to a woman; but having some hopes that some time or other I may be wedded . . . I shall advocate this section in the Constitution, and I would call upon the bachelors in this Convention to vote for it. I do not think we can offer a greater inducement for women of fortune to come to California. It is the very best provision to get us wives that we can introduce into the Constitution.195

Without much objection, Section 13 was adopted, and became a part of California's 1849 Constitution.196 And while the provision did not clearly mandate a community regime, by the late nineteenth century, California was recognized as a community property state.197

More than one hundred years later, the state of Louisiana was revisiting the community property articles of its Civil Code, first put into written form in 1808. 198 The reporter of a group of scholars that worked under the Louisiana State Law Institute to revise Louisiana's matrimonial regimes law,199 in discussing the policies that should be in the foreground of any reform, cited, among other
things, the community's: (1) "recognition of spouses as equals"; (2) allowance of "freedom . . . to agree that each may serve the family in different ways without either one suffering any lesser position in relation to property by a choice of a function that does not directly bring new wealth into the family"; and (3) "encourage[ment] of each spouse to serve the family with best abilities, and encourage[ment] of mutual respect for the service each performs."^200

The comments of both the delegates to the 1849 California Constitutional Convention and the reporter on Louisiana's matrimonial regimes revision are important because they demonstrate the impetus for the adoption and retention of the community property regime. It seems that scholars and lawmakers in the nineteenth century, just as in the twentieth century, desired "[to] implant[] a more equitable property system for spouses and [to] provid[e] a family binder at a time of apparent crisis in the family relation."^201 Both the California delegates' and the Louisiana reporter's comments make this clear. The driving forces behind the adoption and retention of community property regimes were a desire to protect the family, grant equality and recognize both spouses' contributions, and even encourage immigration and new marriages.

Despite this strong undercurrent of family values, which propelled the adoption of community property laws, the rights of creditors were not ignored either in Louisiana's late twentieth-century revision or in the 1849 California Constitutional Convention. In California, for instance, a number of vociferous delegates decried the burden on creditors resulting from the insulation of any property of either spouse. Delegate Botts, an attorney and magazine editor from Virginia,^202 spoke most openly in favor of creditors' rights:

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201. DAGGETT, supra note 181, at 310; see also MCKAY, supra note 5, at 65 ("In this combat of social forces the advantage of the community property system is that it is a conservative power operating to keep for us the old spirit of the family.").

I want to know to whose benefit is this provision to enure? What is the provision? That a married woman shall enjoy the use and control of her own property without any regard to the acts and doings of her husband; that is to say, that the husband and wife together may enjoy my property and yours, and become possessed of thousands and thousands, leaving us beggars; and then, sir, under this system, while they are indebted to us together for that which they here jointly used and occupied, under the pretense of this clause, they may leave us pennyless while they revel in luxury.203

Section 13 ultimately passed despite these creditor concerns. Thus, while creditors’ interests were certainly considered in the adoption of the community property regime in California, they were “subordinated to the well-being and interest of the family.”204

This glance at history highlights the problem with the community regime today. The community property states have taken gradual steps in favor of creditors’ rights in different areas which, viewed individually, are nearly imperceptible. But when considered in globo, it becomes obvious that this emerging favoritism for creditors is taking us farther and farther away from allowing the community regime to serve the purposes for which it was created.

To the extent state lawmakers sought to prevent families from being rendered helpless by one spouse’s bad acts through the adoption of the community regime,205 many of today’s American community property regimes are a failure. The liability of the entirety of the community property in Louisiana for either spouse’s premarital debts, for instance, subjects the family to considerable financial risk for debts likely wholly unconnected to it. This modern “innovation” did not come from the community’s Spanish ancestors206 and clearly leans away from the family protection behind adoption of the community property regime.

Similarly, if delegate Halleck’s desire to attract women to

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203. BROWNE, supra note 188, at 268.
204. John D. Lyons, Development of Community Property Law in Arizona, 15 LA. L. REV. 512, 524 (1955) (quoting 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 468-69 (1943)).
205. See supra text accompanying notes 192-197.
a community property state, or more appropriately in today’s world, citizens in general, is one shared by the populus, the American community property regimes are bound to fail. Few persons with knowledge of a scheme allowing seizure of all community property for antenuptial debts and refusing to enforce a valid separation of property agreement avoiding this harsh effect would choose such a regime on its merits. The regime itself, at least today, should push prospective citizens to flee! Assuming any spouse were choosing among potential domiciles solely on the basis of their matrimonial regimes—which, of course, is unlikely—the creditor-friendly nature of the community property regime may overwhelm its positive partnership-like features and make it an easy loser in comparison with the marital property regime of the forty-one common law states.

The problem may even be more severe though. For those spouses—likely the vast majority—who choose a domicile for reasons other than the property regime it affords, the new creditor bent of the community property regime may even discourage marriage. Particularly when a state refuses to recognize the validity of a matrimonial agreement establishing a separate property regime, few choices remain available. Unable to contract out of an undesirable regime, and unwilling to move, the parties may opt for some arrangement other than marriage. The community’s envisioned “binder at a time of apparent crisis in family relation” is all but destroyed.

B. Ignoring Creditor Repayment Estimates

Yet another problem with the broad grant of rights to creditors in community property states is that reasonable creditor expectations are either overlooked or ignored. Creditors in both contract and tort may well win the figurative lottery if their previously single debtors marry in a community property state. The creditor may experience a

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207. See supra text accompanying notes 194-195.
209. See DAGGETT, supra note 181, at 310.
windfall not possible in the forty-one non-community property states in having available for seizure assets to which he should not have reasonably anticipated access.\textsuperscript{210} The most egregious example of such a windfall, of course, is the liability of the entirety of the spouses’ community property for the premarital—and likely wholly un-family-related—debt of a single spouse.\textsuperscript{211}

In contractual arrangements, “credit is [typically] extended based on an estimate of the debtor’s ability to repay out of future income.”\textsuperscript{212} Because of the bargain struck by the parties, the creditor should certainly be permitted to collect from the debtor in accordance with his estimates. Holding the debtor’s wages after marriage immune merely because those wages have become part of the community between husband and wife, besides making possible the marital bankruptcy, is problematic because it removes fairly estimated income from the creditor’s grasp.\textsuperscript{213} Indeed, every American community property state has so recognized in allowing for the seizure of some community property to satisfy a single spouse’s premarital debt.\textsuperscript{214}

What some community property states have failed to recognize, however, is that overcorrecting to prevent the marital bankruptcy\textsuperscript{215} results in inequities just as severe. “Antenuptial creditors extend credit . . . while [the debtor spouse] has only a separate estate; they do not bargain for, and should not, after the marriage, be entitled to the benefit” of a community estate that includes the non-debtor spouse’s earnings and acquisitions.\textsuperscript{216} Allowing an antenuptial creditor to seize the entirety of the community property simply gives that creditor a windfall in allowing him not only the future income and acquisitions of his debtor, but also those of a third party to the debtor-creditor relationship. The creditor gets an unbargained-for advantage.\textsuperscript{217}

\begin{itemize}
\item \textsuperscript{210} See supra Part II.A.
\item \textsuperscript{211} See supra Part II.A.
\item \textsuperscript{212} Thomas G. Fischer, Annotation, Liability of Community Property for Antenuptial Debts and Obligations, 68 A.L.R. 4th 877, 883 (1989).
\item \textsuperscript{213} McClanahan, supra note 4, at 490; Fischer, supra note 213, at 883.
\item \textsuperscript{214} See supra notes 21-23 and accompanying text.
\item \textsuperscript{215} See supra Part II.A.
\item \textsuperscript{216} Creech v. Capitol Mack, Inc., 287 So. 2d 497, 513 (La. 1973) (Summers, J., dissenting).
\item \textsuperscript{217} See 1 Joseph M. Perillo, Corbin on Contracts § 1.1 (rev. ed. 1993)
\end{itemize}
For contract creditors, then, the rule of full community property seizure should be rejected in favor of a rule that more accurately effectuates the parties' expectations at the time of their agreement. Allowing a creditor to access some of the community property of a debtor who was single when the debt was incurred and later marries is necessary to prevent the marital bankruptcy and to appropriately honor the creditor's future income estimates, thereby giving him his bargained-for due. But given the contrary interests of the family, and the need for protection of the earnings of a new spouse uninvolved in the debt, these problems can be less intrusively handled by allowing the premarital creditor to seize only his debtor's wages after marriage. More expansively, a creditor could be granted access to his debtor's one-half interest in the community property, regardless of the means of acquisition. This approach may even better honor creditor income estimates, as a creditor will typically consider not only earnings, but also profits from passive investments and any other "income" the prospective debtor is likely to bring in when making the lending decision. Some community property states have adopted these more modern solutions, appropriately balancing the interests of the spouses vis-à-vis their creditors. Other community regimes, particularly Louisiana, in allowing seizure of the entirety of the community property for either spouse's premarital contractual obligations, remain woefully inadequate.

The idea that a creditor should have access to community (describing the very purpose of the body of contract law as a means of ensuring that bargains are upheld and reasonable expectations protected).

218. In lieu of either articulated solution, present Spanish law generally immunizes the community property from the spouses' premarital debts. See Creech, 287 So. 2d at 509 n.12 (discussing the Codigo Civil de Espana). However, once all community obligations have been satisfied and the separate property of the debtor spouse has been extinguished, the community property may be held. See id.

219. See, e.g., NEV. REV. STAT. ANN. § 123.050 (LexisNexis 2004) ("Neither the separate property of a spouse nor his share of the community property is liable for the debts of the other spouse contracted before the marriage."); WASH. REV. CODE § 26.16.200 (1983) (debtor's earnings bound for his premarital debt, provided judgment is entered within three years of marriage); WIS. STAT. ANN. § 766.55(2)(c)(1) (West 2001) (stating premarital debt may be satisfied from debtor's separate property "and from that part of marital property which would have been the property of that spouse but for marriage").

220. See supra text accompanying notes 24-45.
property only insofar as it honors his expectations before the debtor-creditor relationship was solidified is certainly less persuasive when torts are considered. The tort creditor, of course, bargains for nothing, and is entitled to be made whole for his damages without regard to his expectations. Full liability of community property, however, still goes too far. It allows the seizure of the non-debtor spouse’s earnings, which have no connection to the other’s premarital debt. This windfall a tort creditor gets when his previously single debtor marries is simply inappropriate. Such a boon cannot be sanctioned where the earnings and income of the innocent spouse are at stake. “If courts would maintain the integrity of the community regime . . . , in a conflict between the rights of the creditor and the security and well-being of the wife and family, the choice must lie with the interpretation favoring the wife and family.”

C. Providing Unnecessary Layers of Protection

Further problems with the creditor-friendly nature of the rules governing marital property in community property states are exposed when other, more general legal rules in those jurisdictions are given due consideration. Quite often, the community property regime provides a creditor protection duplicative of that afforded all parties under other basic legal principles. The community property states’ move toward binding separate property under the necessaries doctrine and toward disregarding the provisions of separation of property agreements are just two examples of unnecessary overprotection.

1. Agency as a Replacement for the Necessaries Doctrine

The proliferation of rules binding the non-debtor spouse’s separate property for debts for necessaries incurred by the other certainly increases the likelihood that a creditor for necessaries will succeed in recovering the monies due him. An additional theory of recovery often not available in non-community property states is now granted the creditor.

221. See Cross, supra note 152, at 455.
222. Creech, 287 So. 2d at 513 (Summers, J., dissenting).
223. See Willson, supra note 105, at 1043-1044.
224. Most common law states at some point recognized the necessaries
The problem with the necessaries doctrine as applied here is that, once again, it goes too far. Doctrines of agency, well-accepted in every state no matter its marital property scheme,225 could just as competently handle the problem with less theoretical discord. When agency principles are applied between the spouses, the result is the same as that of the necessaries doctrine—the separate property of the non-debtor spouse is held for the debt, despite the non-debtor's lack of participation in the debt's creation.

Taking agency seriously as the only method of binding the non-debtor's separate property could potentially result in fewer proper seizures of such property than the necessaries doctrine currently allows. Since the abolition of the head and master scheme of management, spouses are no longer considered agents of each other merely by virtue of their marital relationship.226 To bind a non-debtor's separate property under agency theory, actual, implied, or apparent authority would be needed, as with all principal-agent relationships.227 But such authority, particularly implied, would likely exist for debts incurred for the shelter, food, and clothing of the spouses. Such debts—those that truly embody the meaning of the word "necessaries"—comport with the original concept of the necessaries doctrine.228

The true advantage of jettisoning the necessaries doctrine in favor of a reliance on agency principles is that it would prevent courts from having to expand the concept of "necessaries" ridiculously, and from thereby rendering the doctrine utterly illogical. The purpose of the debt would be less important, and instead, the authorization of the non-


228. See Sharpe Furniture, Inc. v. Buckstaff, 299 N.W.2d 219, 221 (Wis. 1980).
debtor, through actual or apparent authority, would be the critical inquiry. There is simply no need for the necessaries doctrine given modern agency theory.

2. Fraudulent Transfer Statutes for the Protection of Existing Creditors

The community property push toward allowing creditors to disregard marital agreements that are otherwise binding between the spouses likewise unnecessarily overprotects. Rules governing fraudulent transfers are now a part of the law in all nine community property states,229 and these rules provide a remedy to those creditors most deserving of special protection when a debtor spouse attempts to modify the community property regime. Less deserving creditors should bear the burden of self-protecting.

To understand how the problem of the enforceability of marital agreements against third-party creditors would be treated absent special, and overreaching, community property rules, it is necessary to do what most community property states seem to have rejected—that is, to treat existing and future creditors separately. Once such a division is made, it becomes easier to see how the current community property treatment of creditors affords them too many rights.

Existing creditors are those unquestionably worthy of the greatest protection, particularly those that lent to just one spouse while the community regime was in progress.230 It could certainly be argued that, given the proliferation of marital agreements and the likelihood that the spouses could opt out of the community at any moment, a creditor should

229. See Marsha E. Simms, Acquisition Financing, in PRACTISING LAW INSTITUTE, ASSET-BASED FINANCING 2006, at 346-47 (2006) (noting that all community property states but Louisiana have adopted the Uniform Fraudulent Transfer Act). The Louisiana Civil Code allows creditors to use the revocatory and/or oblique actions to set aside transfers that would likely qualify as fraudulent transfers in other states. LA. CIV. CODE ANN. arts. 2036, 2044 (1987).

230. Of course, a creditor may lend to an unmarried spouse, who later marries and signs a separation of property agreement. In this situation, it is even easier to see why the community property rules rejecting the application of marital agreements to existing creditors should be set aside. The creditor here stands in the shoes of all creditors for antenuptial debts and there is no justification for allowing him to recover more than his future income estimates, particularly when allowing him more would require setting aside an otherwise valid contract between husband and wife.
never form an expectation of seizing any of the non-debtor spouse's community property.231 To the extent such expectations can be properly formed, though, they are more appropriately formed by the creditor that lends to a married spouse involved in an ongoing community property regime. Given the proliferation of divorce nowadays, creditor reliance on marital status as a continuing one may be unreasonable. But at least the non-debtor spouse here is identified—indeed, she exists, and has already formed a relationship with the debtor—and her income could conceivably be considered in the decision of whether to extend credit, albeit to the debtor spouse alone. When the married debtor spouse later enters into a separation of property agreement, his creditors arguably deserve some protection, as their reasonable expectations may not be honored by holding them to the separation of property agreement “made in the face of [the] existing debt.”232

But granting an existing creditor the necessary relief does not require a resort to any sort of complete non-application of marital agreements, recordation rule, or mutual observance requirement that the community property states have developed. The problem is capably handled by principles of fraudulent transfer. Indeed, such concepts, as “the main source of protection for unsecured creditors whose debtors improperly transfer property . . . , are particularly appropriate for transfers between spouses, where the transfer is viewed with some suspicion.”233

Applying the community property states’ basic fraudulent transfer principles would allow a creditor to reach property transferred “with intent to defraud,” as well as any property transferred by an insolvent debtor.234 A narrowly-tailored rule like this more appropriately balances the rights of the spouses to make meaningful adjustments to their own marital property regime (and to enforce that agreement

231. Moreover, even as to the debtor spouse's property, the creditor has no interest in any particularized item. He may expect to be able to seize, for instance, his debtor's wages, but he does not know what those wages will be and the debtor may do plenty to reduce that which is available. See Henderson, supra note 139, at 204.
232. 1 GARRARD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES §320, at 559 (rev. ed. 1940).
233. Henderson, supra note 139, at 186.
234. Id.; see also IDAHO CODE ANN. § 55-913 (2003).
against third parties) with the rights of creditors that arose before that agreement than does a broad rejection or recordation rule.235

Admittedly, fraudulent conveyance principles will not often apply to allow future creditors of the spouses to ignore a matrimonial agreement made before the debt was incurred. Absent some right in the creditor existing before the fraudulent transfer, there is no basis on which to set aside the agreement.236 Fraudulent transfer principles typically only apply to allow existing creditors relief.237 This result just demonstrates the beauty of the solution in this context. Future creditors deserve no protection from a marital agreement that existed before the obligation was ever incurred. As will be demonstrated in the next section, applying the fraudulent transfer principles in this context as well—to refuse a future creditor the right to set aside his debtor's existing marital agreement—more properly allocates the burden between the creditor and the spouses.

D. Inappropriately Placing the Burden

As applied to future creditors of the spouses, the various rules on marital agreement enforceability, in effect, place the burden on spouses to act to make their otherwise valid agreement effective against third-party creditors. For example, the spouses must record their agreement in Louisiana,238 or give all of their prospective creditors actual notice of it in Wisconsin.239 In Nevada, the spouses are utterly incapable of making a separation of property

235. Some courts have suggested that fraudulent transfer or conveyance provisions are inadequate remedies for the spouses' creditors because the most common type of marital agreement is the separation of property agreement, which arguably does not amount to a "transfer." See, e.g., Pietri v. Pietri (In re Pietri), 59 B.R. 68, 70-71 (Bankr. M.D. La. 1986). Arizona, at least, has expressly rejected such a narrow interpretation of the term "transfer" and has allowed an existing creditor to use the state's Uniform Fraudulent Transfer Act as a shield to a marital agreement that purported only to change the "character of [the spouses'] future earnings." State v. Wright, 43 P.3d 203, 205 (Ariz. Ct. App. 2002).
237. Id.
238. See supra Part II.D.3.a.
239. See supra Part II.D.2.
agreement that binds their creditors. These rules are, indeed, creditor-friendly, and, again, I submit, too creditor-friendly in light of the alternatives.

Future creditors of the spouses, at least their voluntary or contractual creditors, have an extraordinary ability to self-protect that weighs against giving them additional special protection. Most simply, the creditor can develop appropriate expectations as to what property may be available to satisfy the debt of his prospective married debtor by asking! Certainly, creditors can bear the simple burden of “inquir[ing] as to agreements between the spouses and the status of their property.” Such a question could protect the creditor quite nicely if accompanied by a rule estopping spouses who claim “they have not and will not contract out of the community property system” from “later claim[ing] otherwise.” Such questions may seem silly for informal transactions involving movable goods or services, for example, but, no matter the type of transaction, if the creditor chooses not to ask, he should be bound by the agreement between the spouses, and, as he would be in any non-community property state, allowed to recover only from his debtor’s property.

Further, a creditor desiring additional protection may require security for the debt, thus binding a particular piece of property to guarantee repayment, or even better, demand the signature of both spouses, making the property of either seizable.

Because today’s community property regime is one from which spouses are given the right to opt out and spouses make widespread use of all manner of matrimonial agreements to do just that, no creditor should be able to

240. See supra Part II.D.1.
243. Id.
244. See Newman, supra note 15, at 526 n.177.
245. Henderson, supra note 139, at 208. Federal law imposes some restrictions on a creditor’s ability to demand the signatures of both spouses. For a comprehensive discussion of these limitations, see Todd M. Johnson, Limitations on Creditors’ Rights to Require Spouses’ Signatures Under the ECOA and Washington Community Property Law, 4 U. PUGET SOUND L. REV. 333 (1981).
246. See supra note 130 and accompanying text.
seriously contend that he was unaware that the spouses may have modified the community principles governing debt. Thus, "[t]he issue comes down to a policy question: Who should have the burden to protect his interests?" Must the spouses explain their deviation from the community property regime to a prospective creditor, "or should the creditor have to protect himself by inquiring as to the state of the spouses' property rights?" Placing the burden on a creditor to overcome the argument that the spouses' separation of property agreement binds him more logically and appropriately balances the parties' rights. In view of the level of sophistication and already "significant protection [given creditors] under [state] community property doctrine" and the creditors' "opportunity to self-protect [by inquiring as to the spouses' status or requiring that both spouses incur the debt] in the case of premarital agreements that abrogate community property principles," a set of special community property rules governing creditor respect for separation of property agreements is just too much.

Some argue that placing the burden of overcoming a marital agreement on creditors is improper because tort creditors cannot fairly bear it. "Tort liability cannot be planned in advance" and a future tort creditor of the spouses cannot protect himself through negotiation. Moreover, such a scheme has been criticized as a costly one that would "increase[] the price to all customers" of creditor products and services. It has been said that "all spouses would have to bear increased costs for the benefit of those who elect to change the ownership of their property."

These arguments, however, overlook the fact that the
forty-one non-community property states have been operating in this manner for centuries. Tort creditors in common law states may not seize both spouses' wages for one's tortious activity, despite the fact that those debts are unanticipated. 255 A tort creditor deserves to be made whole from the property of the party that injured him. 256 That the tortfeasor later marries a spouse with hefty earnings should not give the victim an additional debtor to pursue. Moreover, non-community property states certainly have not seen costs skyrocket merely because creditors are limited to seizing their debtors' property alone. There is no evidence to suggest that goods and services are more expensive in these common law states than they are in community property states.

In short, there is no economic justification for retaining the current creditor-friendly rules regarding the enforceability of marital agreements. The burden the creditor in a community property state would have to bear if the rules involving enforcement of marital agreements were changed to allow for broader applicability to creditors would be no greater than the burden the creditor in a non-community property state bears every day. In the absence of an economic justification, and in light of the strong familial interest and creation of the community property regime to protect rather than to hinder the economic efforts of married couples, 257 the current rules overprotecting creditors with regard to their avoidance of spousal agreements seem unjustified.

IV. CONCLUSION

The modern community property regime is extraordinarily creditor-friendly. Some modifications of the general rules of creditor collection are necessary in the community context to effectively balance the rights of the spouses and their creditors. The problem of the potential "$2 bankruptcy," for example, necessitates holding some community property for a spouse's premarital debts to avoid sanctioning marriage as a means of debt avoidance. But

255. See McCLANAHAN, supra note 4, at 478; Newman, supra note 15, at 526 n.177.
257. See Riley, supra note 201.
providing full community property liability is unnecessary and unfair. The future earnings of the non-debtor spouse should not be held under any theory, and particularly where they are unanticipated by the creditor. Likewise, full community property liability for debts incurred during marriage is inappropriate. A creditor lending to a married person in a community property state gets the undeserved perk of an additional party’s assets without bearing any responsibility for making that party a debtor. Such results would never obtain in a common law jurisdiction, where a creditor, absent agency or some other exceptional theory, has rights to his debtor’s property alone. Yet the spouses are often not free in community property states to adopt the rules of debt collection that would apply in those forty-one states without meeting exceptionally onerous requirements.

The community regime’s deviation from the common law scheme of marital property in this regard is unwarranted and unnecessary. Nothing inherent in viewing spouses as contributing, among themselves, to a sort of partnership—and sharing equally in that partnership during marriage and beyond—necessitates a substantially divergent regime from that obtaining in the common law with respect to third-party relations with the spouses. Indeed, community property jurisdictions, while retaining their innovations in the area of family support and protection, would do well to borrow appropriate rules of debt collection from common law states. In so doing, the community property regime may have a greater hope of maintaining its attractiveness to married couples for the centuries to come.