

THE RHETORIC OF MARRIAGE, ACHIEVEMENT, AND POWER: AN ANALYSIS OF JUDICIAL OPINIONS CONSIDERING THE TREATMENT OF PROFESSIONAL DEGREES AS MARITAL PROPERTY

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INTRODUCTION

Patterns of judicial rhetoric act both to constrain future interpretations of doctrine and also to offer, through contradictions and unseized opportunities, creative reformulation. A particular set of marital property cases provides an example of these mechanisms and possibilities. These cases arise in situations like that of Janet and Mark Sullivan who, while married, "accumulated some used furniture and two automobiles, both with payments outstanding," and little else of direct material value.¹ However, during the marriage, Mark had attended medical school, and had just completed his residency at the time of their separation. Upon divorce, Janet argued that Mark's medical degree "was obtained by the joint efforts and sacrifices of the couple, that it constituted the greatest asset of the marriage, and that . . . both parties should share in its benefits."² In cases like *Sullivan*, courts must decide whether to categorize the advanced degree itself as divisible marital property.

When appellate judges justify either the acceptance or the rejection of the professional degree as marital property, the opinions they write often invoke rigid rhetorical formulations. These formulations are alternative attempts to describe what marriage means and what achievement means. Of course, it is impossible to escape rhetoric in the crafting of judicial opinions. However, the particular themes used in these cases, whatever the outcome, serve to reinforce gender stereotypes and to obscure the role of power in marital relationships, rather than to reveal the complexities of gender and power. Although the professional degree cases provide a particularly rich illustration of this operation, they are hardly unique—in the arenas of marriage and achievement, or elsewhere. In offering the ensuing analysis, I hope to shed light not only on the mechanisms of these cases but also on the constraints and opportunities of judicial rhetoric generally.

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1. *In re Marriage of Sullivan*, 691 P.2d 1020, 1022 (Cal. 1984).

2. *Id.*

"The very human problems presented" by the Sullivans' divorce case and others like it, in which courts consider whether to treat a professional degree as marital property, prompted the first appellate court issuing an opinion in their case to refer the reader to the 1955 movie, "Not as a Stranger."³ The film, directed by Stanley Kramer and starring Robert Mitchum and Olivia de Havilland—while offering some evidence, as the opinion intended, of the timelessness of issues of support and achievement within marriage—differs in several key respects from the typical circumstances of these cases. The differences and similarities reveal something of what is at stake in the marital property cases.

Robert Mitchum's character, poor but driven in his medical studies, calculatedly convinces a nurse (de Havilland) that he loves her and wishes to marry her, solely for the purpose of accessing her savings account and continued earning power to finance his medical school tuition. The judicial opinions in divorce cases considering the treatment of professional degrees are not nearly as cynical as the movie in their marital portraits. The opinions accept the proposition that the relationships before them, now ending in divorce, began out of mutual feelings unrelated to tuition money and living expenses. Nonetheless, these relationships evolve in such a way that one partner (typically the husband) comes to rely on the other for just this type of material support. Difficulties arise in these cases, according to the opinions, only because a divorce occurs shortly after the advanced degree is obtained, and before any significant material possessions have been accumulated.

The movie also differs from the cases because it contains no suggestion that Olivia de Havilland's character suffers any loss during the years of her husband's medical training (except in her hopes of receiving affection and respect). The opinions, whether finding the degree to be property or not, typically mention the wife's sacrifices of material goods and of her own educational opportunities during the lean years when she is the family's main source of support.

Despite these differences, the movie foreshadows many of the conflicting themes at the intersection of marriage and scholarly achievement that the legal cases began to reveal some two decades later. Although much is made of how singularly driven and independent the Mitchum character is, he is also revealed to be dependent not just upon his wife and others for money, but upon her, an expert surgical nurse, for help in his studies. Although he characterizes his decision to marry in

3. See *In re Marriage of Sullivan*, (formerly 127 Cal. App. 3d 656) (Ct. App. 1982) (depublished) (on file with author); NOT AS A STRANGER (Metro-Goldwyn-Mayer/ United Artists Home Video 1955).

terms of bargain and exchange, at other times he berates his classmates for their materialistic obsession with fees and the money-making potential of their education.

These contradictory themes of independence and mutuality, of acceptance and repugnance toward the language of money, frequently recur in the rhetoric of judicial opinions on professional degrees. As in the film, these cases involve two major life arenas: marriage and scholarly achievement. The tensions created when these arenas remain conceptually isolated and their power dynamics remain unexplored may yet be productively unpacked in a manner relevant to further judicial considerations of their intersection.

What I mean by legal rhetoric may not be immediately obvious. Courts use rhetoric throughout their opinions, but what I have in mind are the patterns of language and of thought that courts resort to in the process of explaining the bases for their outcomes. This rhetoric represents the manner in which appellate courts extrapolate the facts at hand into a more universal pattern, connecting the precedent they will set to the precedent they follow, as well as to social policy goals.⁴

An analogy can be made between this process of deployment of patterns and the process used in traditional storytelling. In describing the task of the oral epic performer, Albert Lord focuses on the singer's use, by necessity, of traditional elements which are creatively recombined through a process that is itself traditional.⁵ The performer creates meaning for the audience by reference to the traditional elements with which they are also familiar. In this article, I will focus on the role of the court in constructing meaning much as the traditional oral narrator does: from the scattered elements of tradition available to it. Although the process of telling the facts may be the most obvious way in which a judge is a storyteller, the rhetoric with which I am concerned is not located in the description of the facts but in the description of the law-dependent-on-facts. It is beyond the facts, in the process of elaborating the rationale for the court's solution to the dilemma presented by the facts, that the court is able to refer for authority, much like the singer, to a more generic story, a cultural or legal pattern.⁶ And, like the oral poet's audience, the

4. It is the part that would be described under both the "holding" and the "rationale" in a student's case brief. See JOSEPH SINGER, *PROPERTY: RULES, POLICIES AND PRACTICES* lii-liii (1993).

5. See ALBERT LORD, *THE SINGER OF TALES* 4-5 (1960).

6. One example of this phenomenon that strikes me as particularly pronounced is in the line of cases recognizing an implied warranty of habitability in leases. Starting with the leading case *Javins v. First National Realty*, 428 F.2d 1071 (D.C. Cir. 1970), courts, in justifying their imposition of this term, have evoked what can be described almost as a creation myth about the transformation of modern society from agricultural to urban:

audience for legal opinions should recognize the sociological pattern referred to as well as the particular themes of legal and social analysis that the court employs in discussing this sociological pattern. Thomas Ross refers to this process as the story of the judicial choice: "Judges, as storytellers, tell their audiences that something happened. The 'something' that happened is the process of choice. Judges choose to exercise their power in a particular way and tell the story of their choice—a story of how one might come to understand the choice."⁷

The rhetoric courts use to justify their decisions is both vitally important and at the same time unimportant to legal decisionmaking. On the one hand, these patterns are not just gloss but intimately connected to doctrine. Although outcomes could exist without their rationales, they are almost never presented that way.⁸ The rationales provide the bases for extending the case beyond the boundaries of its idiosyncratic facts; they are the tools used in future cases to apply and distinguish. The rhetoric is intertwined with doctrine in another way. Just as the oral poet of Greek epic poetry is constrained by traditional formulae and other logistics like meter,⁹ the limited range of patterns available to judges for explaining the doctrinal choice will limit the doctrinal choice itself.¹⁰ If a choice cannot

The assumption of landlord-tenant law, derived from feudal property law that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live.

Id. at 1074; *see also* Jack Spring, Inc. v. Little, 280 N.E.2d 208, 215 (Ill. 1972) ("[T]he nature of today's urban housing market also dictates abandonment of the . . . common law rule Such a rule was perhaps well suited to an agrarian economy"); Boston Housing Authority v. Hemingway, 293 N.E.2d 831, 841 (Mass. 1973) ("The urban tenant in a multiple dwelling unit cares little about the property interest he has acquired."); Green v. Superior Court, 517 P.2d 1168, 1173 (Cal. 1974) ("[A]t the inception of the common law rule, any structure on the leased premises was likely to be . . . easily repairable by the typically versatile tenant farmer. Contemporary urban housing and the contemporary urban tenant stand in marked contrast to this agrarian model."); Steele v. Latimer, 521 P.2d 304, 308 (Kan. 1974) ("[H]ousing practices have undergone dramatic change since the common law rules respecting landlord-tenant relationships were develop[ed] in feudal England. Dwelling habits fashioned under the agrarian atmosphere of those far-off times are hardly suitable for congested urban settings."); Conille v. Pierce, 649 F. Supp. 1133, 1147 (D. Mass. 1986) ("[T]he assumption that a residential lease primarily conveyed an interest in land may have been reasonable in a rural, agrarian society, but has little relevance in an urban setting.").

7. Thomas Ross, *The Richmond Narratives*, TEX. L. REV. 381, 386 (1989).

8. *See generally* Mitchel de S.-O.-F.E. Lasser, *Judicial Self-Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325 (1995) (presenting a contrasting description of the French judicial opinion).

9. *See* GREGORY NAGY, *THE BEST OF THE ACHEANS 2* (1979). For instance, only certain adjectives to describe "the sea" will be suitable because of their metrical rhythm and traditional usage. *See id.* at 1.

10. *See* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 527-28 (1986).

be explained, it is hard to imagine it in the first place. On the other hand, within the limited repertoire, the choices among the patterns are not rigidly predetermined, although the "story of choice" may be presented as if they were. There is freedom within the constraint.¹¹ In that sense, the rhetoric is unimportant, at least for determining outcomes; there is no correct rhetoric that determines a correct outcome. Rhetoric and outcome can be combined and recombined with some creative license.

The assertion that rhetoric is both intimately connected to doctrine and at the same time indeterminate for doctrinal outcomes does not result in a complete wash, because the ways in which the rhetorical choices are made are significant for structuring legal thought. First, it is within rhetoric that doctrine is realized and established. Second, legal rhetoric and the doctrine that is realized within it play an important role in society.

Like legal narratives, oral traditional narratives do not merely reflect the values and traditions of the society in which they operate, but are part of the process in which those values and traditions are created and recreated. According to folklorist Barre Toelken, folklore is one arena in which a "cultural worldview," or the distinctive way of thinking about the world that seems natural to a culture, and its rules are transmitted.¹²

As with these oral traditions, the ability to articulate views and beliefs in law is constrained by the availability of language with which to express those views and beliefs. This assertion suggests that there is no policy argument prior to the rhetoric with which it is explicated, just as Judith Butler argues that there is no core gender identity prior to the performance through which it is expressed: "There is no self . . . who maintains 'integrity' prior to its entrance into this conflicted cultural field. There is only a taking up of tools where they lie, where the very 'taking up' is enabled by the tool lying there."¹³ Similarly, the tools for expressing policy arguments are the patterns of rhetoric, but the very policy that is expressed will be enabled by the tool available for use and the manner in which it is deployed.

Vicki Schultz uses her study of a particular line of employment discrimination cases to demonstrate how cases may both structure ways of thinking within legal culture and also affect attitudes outside of the legal arena. After challenging with sociological data the accounts courts have given about women workers' employment preferences, Schultz further

11. Nagy describes a similar combination in his discussion of epic poetry: "To my mind there is no question, then, about the poet's freedom to say accurately what he means. What he means, however, is strictly regulated by tradition." NAGY, *supra* note 9, at 3.

12. See BARRE TOELKEN, *THE DYNAMICS OF FOLKLORE* 227, 233-35 (1979).

13. JUDITH BUTLER, *GENDER TROUBLE* 145 (1990).

argues: "Once we understand that women form their job preferences in response to employers' practices, it becomes clear that courts participate in shaping women's work aspirations all the time."¹⁴ She continues:

When courts accept the lack of interest argument, they permit employers to organize their workplaces in ways that disable women from forming an interest in nontraditional work. When courts impose liability instead, they prompt employers to restructure their workplaces in ways that empower women to aspire to nontraditional jobs. Judicial decisions that reject the lack of interest argument also create a climate in which it is more likely that employers not involved in litigation will undertake genuine affirmative action through creative efforts to dismantle old patterns of sexual hierarchy. That such efforts can alter women's aspirations is clear from the reports of nontraditional women workers. Thus, judges' decisions are embedded in the fabric of organizational life through which women's hopes and dreams as workers are woven.¹⁵

Mary Joe Frug connects the argument that legal discourse shapes ideas with postmodernist theory: "The postmodern position locating human experience as inescapably within language suggests that feminists should not overlook the constructive function of legal language as a critical frontier for feminist reforms. To put this 'principle' more bluntly, legal discourse should be recognized as a site of political struggle over sex differences."¹⁶

Both Frug and Schultz recognize that it is important not to overstate, or overgeneralize, the connection between legal discourse and its impact on society at large. Frug's application of her principle in the area of the law's treatment of the female body suggests that it is often outcomes, particularly when they form coherent patterns, that through reward and deterrence have the greatest impact.¹⁷ Similarly, Schultz's analysis considers the practical impact of outcomes upon employers. However, legal discourse is not just outcomes, but explanations and rationalizations of outcomes. Schultz's careful discussion makes clear that it is the acceptance or rejection of a particular argumentative strategy that can

14. Vicki Schultz, *Telling Stories about Women and Work*, 103 HARV. L. REV. 1749, 1842 (1990).

15. *Id.*

16. MARY JOE FRUG, *POSTMODERN LEGAL FEMINISM* 126 (1992).

17. *See id.* at 129-30 (discussing the impact of legal rules that fail to protect women from abuse, restrict abortion, criminalize prostitution, and make women's sexuality relevant in rape and sexual harassment cases).

affect the attitude of an employer-audience attuned to legal changes in its field. Similarly, Frug suggests that in each case in which a legal rule creates meaning about women's bodies, "[l]egal discourse supports that meaning" through a process of explanation and rationalization.¹⁸

Although society as a whole may be affected by outcomes, it is not likely to be the primary audience for appellate legal opinions. It is the largely homogeneous legal audience that is more akin to the homogeneous folk group whom a traditional narrator addresses.¹⁹ However, if legal narrative affects and defines choices for further legal narratives, the rationalization process has, if nothing else, an impact on outcomes. Furthermore, something of legal discourse makes its way into popular culture—through reports in the press and even dramatizations²⁰—and, as the first *Sullivan* opinion reflects, popular culture makes its way back into legal discourse.²¹ Indeed, Kathryn Abrams argues that "law has been revealed as one of the many social practices whose images, narratives, and depictions contribute to the formation of social constructs" by means of the narratives judges choose to listen to, and the explanations they prefer.²²

Within this process of shaping discourse, there is constraint, but considerable freedom within constraint. Judith Butler argues that the available tools for expressing gender identity are multiplicitous and conflicting, and that this conflict allows for alternative and conflicting combinations and recombinations.²³ In a similar argument, Claude Levi-Strauss has used the analogy of the *bricoleur* to help explain the process of mythical thought. According to Levi-Strauss, the French *bricoleur* collects whatever materials come to hand and uses these materials, indeed is limited to these materials, for a variety of repairs and small

18. *Id.* at 129; see also Ross, *supra* note 7, at 389 (noting that legal discourse "suppresses this connection with violence").

19. Toelken offers a definition of a folk group: "people who share some basis for informal communal contacts, some factor in common that makes it possible, or rewarding or meaningful, for them to exchange informal materials in a culturally significant way." TOELKEN, *supra* note 12, at 33.

20. See, e.g., *Baby M* (ABC television broadcast, May 22, 1988); *Fatal Vision* (NBC television broadcast, Nov. 1994) (story of trial and conviction of Jeffrey MacDonald, accused of murdering his wife and children); *Roe v. Wade* (NBC television broadcast, 1989); see also LESTER L. BROWN, LES BROWN'S ENCYCLOPEDIA OF TELEVISION (1992) (offering further examples).

21. See *In re Marriage of Sullivan*, (formerly 127 Cal. App. 3d 656) at *3 (Ct. App. 1982) (depublished) (on file with author).

22. See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 353 (1995). It is unlikely that legal narrative has anywhere near the impact on societal attitudes toward marriage and achievement as, say, the 1970s television show "Dallas." However, the impact it can have on the attitudes of the legal audience, and the role that such an audience plays in shaping further discourse and further outcomes through the perceived range of available choices, can be significant.

23. See BUTLER, *supra* note 13, at 145 (1990).

constructions.²⁴ Mythical thought, he argues, is limited in a similar manner:

The characteristic feature of mythical thought is that it expresses itself by means of a heterogeneous repertoire which, even if extensive, is nevertheless limited. It has to use this repertoire, however, whatever the task in hand because it has nothing else at its disposal. Mythical thought is therefore a kind of intellectual "bricolage"²⁵

J. M. Balkin has extended Levi-Strauss' *bricoleur* analogy to the process of lawmaking: "The property of *bricolage* requires that human conceptual structures—which include doctrines of law—are always makeshift to a large degree."²⁶

If this analogy accurately describes the adjudication process, then it would be particularly revealing to examine in any legal context not only what aspects of the limited repertoire have been used, and in what combination, but also what aspects of the repertoire have been passed over and what promise new combinations may provide. Michel Foucault urges that "we must conceive discourse as a series of discontinuous segments whose tactical function is neither uniform nor stable."²⁷ Again writing of gender performance, Butler argues "that there is no possibility of standing *outside* of the discursive conventions by which 'we' are constituted, but only the possibility of reworking the very conventions by which we are enabled."²⁸ Similarly, legal rhetoric may need to be reworked rather than simply supplanted.

In judicial discussions of the arenas of marriage and achievement, and their intersection, the role power plays in the dynamic of a married couple's relationship is often overlooked. Although the rhetorical patterns and language choices the judicial opinions deploy enable the opinion

24. See CLAUDE LEVI-STRAUSS, *THE SAVAGE MIND* 17 (George Weidenfeld trans., 1966).

25. *Id.*

26. J.M. Balkin, *Too Good to be True: The Positive Economic Theory of Law*, 87 COLUM. L. REV. 1447, 1488 (1987); see also Susan Etta Keller, *Viewing and Doing: Complicating Pornography's Meaning*, 81 GEO. L.J. 2195, 2233-34 (1993) (drawing a similar connection between Butler and Levi-Strauss and using the *bricolage* analogy for the process of constructing sexuality); N.E.H. Hull, *Networks and Bricolage: A Prolegomenon to a History of Twentieth-Century American Academic Jurisprudence*, 35 AM. J. LEGAL. HIST. 307, 317-19 (1991) (applying the analogy to the process by which jurists like Llewellyn and Pound constructed legal theories, and cataloging other uses of the concept *bricolage* in the legal setting); Mark Tushnet, *The Bricoleur at the Center*, 60 U. CHI. L. REV. 1071 (1993) (applying the analogy to the jurisprudence of Cass Sunstein).

27. MICHEL FOUCAULT, 1 *THE HISTORY OF SEXUALITY* 100 (1980).

28. Judith Butler, *For a Careful Reading*, in *FEMINIST CONTENTIONS* 136 (Ben Habib et al. eds., 1995).

writers to ignore power, the use of other patterns as well as other recombinations of the same patterns and language choices could allow courts to take power into account and develop a richer, more complex adjudication of these difficult disputes.

In Part I of this article, I present and analyze the rhetorical patterns used by decisions, both majority and dissent, in cases involving the rights of divorcing parties to professional degrees. In Part II, I argue that the outcome of these cases is more closely connected to these rhetorical patterns than to any prior doctrine regarding either the nature of property outside of the marital context or equality in the allotment of marital property rights. In Part III, I explain how legal rhetoric structures thinking in the context of the professional degree cases. In particular, I argue that the use of the ambiguous term "sacrifice" enables courts to describe a woman's contribution to her husband's professional education in a manner that reinforces gender stereotypes—ones that may be class-based and race-based as well—and that obscures the role of power. Finally, in Part IV, I offer suggestions for fruitful sources for judicial scavenging in the mode of Levi-Strauss's *bricoleur*, so that opinions might better take power dynamics into account. I argue not only that the term "sacrifice" may be unpacked for deployment in the service of a more complex understanding of power in these types of circumstances, but also that the cases themselves offer an incipient recognition of the more complex gender dynamics found in such marriages when the courts' efforts to maintain rhetorical consistency conflict with stylistic consistency.

I. THE RHETORIC OF MARRIAGE AND ACHIEVEMENT

A. *The Doctrinal Issue: Enhanced Husband, Other Wife*

Just as a storyteller might use the phrase "Once upon a time" to establish the antiquity and thereby the authority of her tale, jurists writing about professional degrees and marital property will often refer to the pervasiveness of the situation they face in order to establish that they are dealing with a more generic story, a cultural pattern. The court in *DeLa Rosa v. DeLa Rosa* uses such a device to establish the beginning of the tale: "The case at bar presents the common situation where one spouse has foregone the immediate enjoyment of earned income to enable the other to pursue an advanced education on a full-time basis."²⁹ The court in

29. *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755, 758 (Minn. 1981).

Washburn v. Washburn, which refers to this situation as “so familiar as to be almost a cliché,” presents the denouement of this typical case:

These sacrifices are made in the mutual expectation that the family will enjoy a higher standard of living once the degree is obtained. But dissolution of the marriage intervenes. Because the family spent most of its resources on the degree, there may be few or no assets to be distributed. The student spouse has the degree and the increased earning potential that it represents, while the supporting spouse has only the dissolution decree.³⁰

While the actual facts of the cases may stray from these particulars, the courts, with an eye toward precedent creation, have this standard tale of hope and disillusionment in mind. A further common element in these common situations, as far as it is possible to gather from the reported cases themselves, is that the husband is the spouse who leaves the marriage with the professional degree and with whatever enhanced earning capacity or prospects for status and prestige it offers. The wife is the spouse for whom the courts can find no standard means of recompense—no traditional property to divide and no cognizable claims for traditional alimony because she is demonstrably self-sufficient.³¹ In their careful use of gender neutral language, the opinions typically ignore this gendered arrangement. Indeed, bereft of gender-specific referents, the courts and commentators have devised a number of somewhat awkward terms to refer to the parties, for example: “enhanced spouse” and “other spouse.”³²

Deborah Batts has identified four different approaches that courts have used to resolve the dilemma presented by this common tale.³³ In the first approach, identified by Batts as the majority, courts refuse to recognize a

30. *Washburn v. Washburn*, 677 P.2d 152, 155 (Wash. 1984).

31. In the last few years a limited number of cases have been brought in which husbands sought an interest in their wives' degrees. *See, e.g.*, *Kaufman v. Kaufman*, 616 N.Y.S.2d 65, 67 (App. Div. 1994) (husband given credit in distributive award for wife's master's degree); *McSparron v. McSparron*, 619 N.Y.S.2d 163 (App. Div. 1994) (court considered both wife's medical license and husband's law license in making award); *Haywood v. Haywood*, 415 S.E.2d 565, 571 (N.C. Ct. App. 1992) (husband's contributions to wife's master's degree to be used as factor in determining equitable distribution of other property). Regardless of the role assumed by each spouse, the marriages in all the cases (as well as the image of marriage presented) are heterosexual.

32. *See* Deborah A. Batts, *Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorces*, 63 N.Y.U. L. REV. 751, 752 (1988).

33. *See id.* at 767-75. I focus on cases considering a property claim with respect to professional degrees. For an example of a contract-based claim, *see* *Kuder v. Schroeder*, 430 S.E.2d 271 (N.C. Ct. App. 1993) (rejecting wife's claim that husband breached contract to support her after she supported him through his education because of preexisting obligation for marital support); *cf. id.* at 275-76 (Greene, J., dissenting) (arguing that wife stated a cause of action in unjust enrichment).

professional degree as a marital asset, finding it inconsistent with other forms of property.³⁴ While these courts are willing to consider adjustments in other property awards, and standard maintenance and alimony awards,³⁵ these possibilities may provide little recompense under the circumstances described in *Washburn* above, where there “may be few or no assets to be distributed”³⁶ and where the wife is capable of supporting herself.³⁷ Courts employing the second and third approaches identified by Batts expand, to varying degrees, the scope of alimony and maintenance in an effort to recognize and compensate contributions made by the working wife. Under the second approach, courts will allow limited reimbursement—repaying the wife for her direct contributions; or rehabilitation—offering the wife funding for her future education.³⁸ Courts following the third approach are a bit more expansive, ignoring some of the typical restraints on alimony or maintenance. For instance, they might consider more than the direct financial contributions in assessing reimbursement, or grant rehabilitative awards in the absence of demonstrated need.³⁹ Under the final approach, courts recognize the degree as property, declare a present value for it based on projections of enhanced earning capacity, and divide that value according to statutory guidelines.⁴⁰ While New York is the only firm adherent to this approach, several dissents in other states have advocated adopting it.⁴¹

34. See Batts, *supra* note 32, at 767; see also *In re Marriage of Graham*, 574 P.2d 75, 77 (Colo. 1978).

35. See Batts, *supra* note 32, at 767. This type of flexibility is available in equitable distribution jurisdictions.

36. *Washburn v. Washburn*, 677 P.2d 152, 155 (Wash. 1984).

37. See *Graham*, 574 P.2d at 78-79 (Carrigan, J., dissenting); see also Batts, *supra* note 32, at 767.

38. See Batts, *supra* note 32, at 767-71.

39. See *id.* at 772; see, e.g., *Haugan v. Haugan*, 343 N.W.2d 796, 802-03 (Wis. 1984) (offering several different approaches to maintenance available, ranging from reimbursement for the costs of the degree to “the present value of the student spouse’s enhanced earning capacity”). A maintenance award based on enhanced earning capacity might be seen as more consistent with the property approach. See *infra* note 67 and accompanying text.

40. See Batts, *supra* note 32, at 774-75; see also *O’Brien v. O’Brien*, 489 N.E.2d 712, 716 (N.Y. 1985).

41. See, e.g., *Washburn v. Washburn*, 677 P.2d 152, 161 (Wash. 1984) (Rosellini, J., dissenting); *Hodge v. Hodge*, 520 A.2d 15, 24-25 (Pa. 1986) (Larsen, J., dissenting) (arguing that although the degree itself may not be property, the enhanced future earning capacity is marital property to be divided); cf. *Bold v. Bold*, 574 A.2d 552, 557 (Pa. 1990) (responding to statutory amendments enacted after the *Hodge* decision and, while not holding the degree or enhanced future earning capacity to be property, allowing a generous remedy of “equitable reimbursement”).

The case of *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978), is sometimes characterized as falling into the category of determinations that the degree is property. There, the court, despite agreeing with *Graham* that the degree itself was not property, held that “it is the

So far, these approaches simply define possible outcomes, not the rhetoric used to justify these outcomes. The rhetoric in the opinions associated with Batts' second and third approaches presents something of a puzzle. Many of these opinions will declare themselves to be aligned with one of the two extremes: either the first approach, which can be called the "denying" approach, or the last, which can be called the "granting" approach. Their rhetoric can best be understood with this alignment in mind, and I have grouped them accordingly. Others, however, are not so firmly aligned and partake in a conflicting manner of the rhetoric of both extremes.

potential for increase in future earning capacity made possible by the law degree . . . which constitutes the asset for distribution by the court." *Id.* at 891; *but cf. In re Marriage of Janssen*, 348 N.W.2d 251, 253-54 (Iowa 1984) (applying *Horstmann* to support an award of alimony based on husband's enhanced earning capacity); *In re Marriage of Berger*, 431 N.W.2d 387, 389 (Iowa Ct. App. 1988) (awarding alimony and stating that the treatment of a degree as a marital asset "misunderstands the holding of *Horstmann*"); *In re Marriage of Francis*, 442 N.W.2d 59, 62-63 (Iowa 1989) (distinguishing between the degree itself and the enhanced earning capacity to conclude that only the latter is an asset for distribution, but concluding that alimony "is the proper vehicle by which to achieve equity"); *see also Hubbard v. Hubbard*, 603 P.2d 747, 752 (Okla. 1979) (holding that degree is not property, but stating that its award in lieu of property settlement "for fair compensation for [the wife's] past investment" places it "in the minority of jurisdictions affording relief by means of property settlement").

In Michigan, the intermediate appellate courts have considered the issue on several occasions. In one case, *Woodworth v. Woodworth*, 337 N.W.2d 332 (Mich. Ct. App. 1983), the court allowed a remedy, like that in *O'Brien*, *see infra* note 67 and accompanying text, of "a percentage share of the present value of the future earnings attributable to the degree," while noting that "whether or not an advanced degree can physically or metaphysically be defined as 'property' is beside the point." *Id.* at 337, 335. Other panels, such as the court in *Olah v. Olah*, 354 N.W.2d 359 (Mich. Ct. App. 1984), reject the characterization of the degree as a marital asset and award alimony instead. *See id.* at 361-62; *see also Postema v. Postema*, 471 N.W.2d 912, 916 (Mich. Ct. App. 1991) (reviewing and comparing the decisions of different panels). The court in *Postema* appears to take a middle ground, rejecting the approaches of both *Woodworth* and *Olah*, but supporting an equitable claim that would "reimburse the spouse for unrewarded sacrifices, efforts and contributions toward attainment of the degree." *Id.* at 919.

Finally, a decision of the Kentucky intermediate appellate court gained notice for its holding that a professional degree may be classified as marital property. *Inman v. Inman*, 578 So. 2d 266, 269 (Ky. Ct. App. 1979) (measuring the remedy on the basis of the spouse's contributions, not expectation damages). The case was revisited three years later by the state's Supreme Court after remand and a return to the appellate court. *See Inman v. Inman*, 648 S.W.2d 847, 852 (Ky. 1982) (refusing to overturn original decision because it had not been appealed, while stating in dicta that court would not characterize a degree as marital property but would allow a remedy measured by the supporting spouse's contributions); *see also Lovett v. Lovett*, 688 S.W.2d 329, 330, 333 (Ky. 1985) (accepting review "to resolve the uncertainties" created by the *Inman* decisions and authorizing courts to "treat the professional degree and license as relevant factors to be considered in the standard of living established during the marriage, awarding maintenance based thereon").

Cases like those of the Michigan and Kentucky appellate courts, although not the definitive law of their respective states, are nonetheless relevant to my analysis. This is because they represent, like dissents, interesting examples of legal reasoning on the subject, and also because they have formed, at least for a time, the background precedent against which other cases were decided or analyzed.

B. *The Themes*

In the course of arriving at these results, judicial opinions offer rhetoric of marriage and achievement that follows four main themes. As explained below, these rhetorical themes typically correlate with either the granting or denying outcome approaches taken by the opinions.

1. Marriage as Sharing

One theme that emerges is the portrayal of marriage, when it works, as a relationship in which there are identical and mutual hopes and expectations and an equal sharing of the burdens involved in attaining these goals. For example, courts may note ruefully that “[t]he supporting spouse’s sacrifices would have been rewarded had the marriage endured and the mutual expectations of both of them been fulfilled,”⁴² or describe the relationship as one where “both parties work toward the education of one of the partners.”⁴³ Of course, courts are faced with situations in which the marriage has failed, and so the image of the sharing marriage exists as a hortatory ideal, rather than as a real reflection of the circumstances. Courts nevertheless often justify their results by reference to this image.

2. Independent Achiever

An equally strong theme is one that features the individual work and effort that goes into acquiring an advanced degree. When following this theme, courts emphasize the independence of the achievement rather than the dependency within the marital unit. For example, “an advanced degree is the memorialization of an individual’s ‘attainment of the skill, qualification and educational background which is the prerequisite of the enhanced earning capacity.’”⁴⁴

42. *Mahoney v. Mahoney*, 453 A.2d 527, 534 (N.J. 1982).

43. *Haugan v. Haugan*, 343 N.W.2d 796, 800 (Wis. 1984).

44. *Martinez v. Martinez*, 754 P.2d 69, 81 (Utah Ct. App. 1988) (Jackson, J., dissenting) (quoting *Wehrkamp v. Wehrkamp*, 357 N.W.2d 264, 266 (1984)).

3. Marriage as Joint Economic Enterprise

Closely related to the marriage as sharing theme, but not identical to it, is the analogy of marriage to a business partnership. This analogy has a good deal of general support in case law on divorce.⁴⁵ This theme also creates an image of marriage-as-mutual-enterprise, but uses the language of investment and expectation (in the contract remedy sense) rather than sharing and expectation (in the colloquial sense of "dashed expectations"). Despite the similarity, then, the image this theme conjures up in the mind of the reader has almost the opposite impact from the romantic imagery of the marriage as sharing model:

A supporting spouse expects that any contribution made to the student spouse's education or career potential is an investment in the future—a future in which every family member will benefit. No prudent business partner would expend time, effort and money without the promise of a return on his or her investment.⁴⁶

4. Hostility to Economics

Finally, perhaps in reaction to the seeming coldness of the previous theme, another theme emerges from the cases, one that displays a hostility to the idea of reducing either marriage or the process of educational achievement to an economic model. One court summarizes this perspective by arguing that an approach which reimburses the wife for the money spent on the degree

presumes that the value of a degree is the amount of money spent in obtaining it. We think this presumption is not warranted . . . It treats the parties as though they were strictly business partners, one of whom has made a calculated investment in the commodity of the other's professional training, expecting a dollar for dollar return. We do not think that most marital planning is so coldly undertaken.⁴⁷

45. See, e.g., *Goldman v. Goldman*, 589 A.2d 1358, 1359 (N.J. Super. Ct. Ch. Div. 1991); *Mele v. Mele*, 544 N.Y.S.2d 25 (N.Y. App. Div. 1989); *Walker v. Walker*, 368 S.E.2d 89 (S.C. Ct. App. 1988); *Van Duinwyk v. Van Duinwyk*, 511 A.2d 975 (R.I. 1986). All of these cases expressly hold that marriage is viewed as a partnership under equitable distribution theory.

46. *Hodge v. Hodge*, 520 A.2d 15, 25 (Pa. 1986) (Larsen, J., dissenting); see also *In re Marriage of Francis*, 442 N.W.2d 59, 65 (Iowa 1989) (characterizing wife's homemaker services and earnings as her "capital investment" in husband's medical education).

47. *DeWitt v. DeWitt*, 296 N.W.2d 761, 767 (Wis. Ct. App. 1980).

Despite their strong difference in tone, themes number 1 (marriage as sharing) and number 3 (marriage as joint economic enterprise) most often appear in close proximity.⁴⁸ Both typically appear in cases in which the court or a dissent either recognize the degree as marital property, or perceive themselves to be offering or advocating a generous award on some other basis (granting approach). In counterpoint, the image of the independent achiever (number 2) and the attitude of hostility to economic language (number 4) both appear in cases in which the court denies relief on the basis of property concepts or perceives itself to be limiting or curtailing the award on some other basis (denying approach).

In other words, courts will tell a particular story about heterosexual marriage, one which focuses on seemingly competing images of devoted sharing and cold economic reality, to justify a generous award of compensation to a wife who has supported her husband through his advanced education. However, courts will tell a different story, one which focuses on the lonely and unquantifiable achievement of the husband, when they deny such compensation. It should be noted that the themes correlate more consistently with the court's perception of what it is doing—for example, if it believes itself to be recognizing a new interest with a concomitant generous award—than with the dollar amount actually granted. Courts that allow a property interest will sometimes value that interest at a relatively low amount, while those denying a property interest may nonetheless allow some form of maintenance that ends up being comparatively large. Nonetheless, the themes will more closely correlate with courts' perception of whether their approach is granting or denying. Of course, there are a number of cases that mix and match these themes in different arrangements, and many in which the effort to hold these themes together reveals considerable tension. In every case, the counterpoints of the competing themes remain a point of tension, whether they are expressed or unstated.

C. Cases at the Top of the Charts

In this section, I highlight the cases that are most significant, both in terms of their impact on the area, and in terms of what they offer for discussion. As I discuss the use of the themes within these cases, I will refer, where relevant, to some of the many other cases that have considered this issue.

48. See, e.g., *Hubbard v. Hubbard*, 603 P.2d 747, 751 (Okla. 1979) (describing both the "total joint commitment" of the couple and the wife's "investment in the education").

1. *Graham*

The leading case for the position that professional degrees are not property is *In re Marriage of Graham*.⁴⁹ The majority opinion avoids any of the themes defining marriage itself (number 1 or number 3). Indeed, it seems to demonstrate a distaste for talking about marriage at all, rushing through the details of the marriage in its recitation of the facts:

The trial court determined that during the marriage petitioner [Ms. Graham] contributed seventy percent of the financial support, which was used both for family expenses and for her husband's education [toward a bachelor's degree and then an M.B.A.]. No marital assets were accumulated during the marriage. In addition, the Grahams together managed an apartment house and petitioner did the majority of housework and cooked most of the meals for the couple. No children were born during the marriage.⁵⁰

This brief synopsis of the couple's married life highlights those facts that make the case both typical and potentially sympathetic. As the court glibly points out in its final paragraph, in which it details those remedies normally available in the absence of a property division of the degree, none of these are in fact available to Ms. Graham. There is no traditional property to be divided, and Ms. Graham is sufficiently capable of supporting herself so that maintenance, which would be based on need, was not sought.⁵¹

The court focuses on the educational degree and the process by which such a degree is acquired, rather than on the marital relationship. Following theme number 4, hostility toward economics, the court finds an educational degree to be the antithesis of what it would consider "property," a concept it ties to market alienability:

An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of "property." It does not have an exchange value . . . on an open market. It is personal to the holder.

49. See *In re Marriage of Graham*, 574 P.2d 75 (Colo. 1978).

50. *Id.* at 76.

51. See *id.* at 78. Subsequently, the Colorado Supreme Court upheld *Graham* but interpreted the relevant statute to allow maintenance in similar cases, even when the wife is capable of supporting herself. See *In re Marriage of Olar*, 747 P.2d 676, 680-81 (Colo. 1987).

It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged.⁵²

In similar opinions, other courts direct their hostility at the economic valuation of the marriage itself:

[W]e reject the view that the economic element necessarily inherent in the marital institution (and particularly apparent in its dissolution) requires us to treat marriage as a strictly financial undertaking upon the dissolution of which each party will be fully compensated for the investment of his various contributions.⁵³

Although the *Graham* majority describes its perspective as emanating from "the broad views of the concept of 'property,'" the "helpful definition" of property it references is potentially even broader than the court's focus on exchange value: "[E]verything that has an exchangeable value or which goes to make up wealth or estate."⁵⁴ One could certainly mount an argument that an M.B.A. "goes to make up wealth."⁵⁵ Nonetheless, the *Graham* majority chooses to associate "property" with cash transactions, and to dissociate the educational process from that image: "[An educational degree] may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property."⁵⁶ In reaching this conclusion, the court focuses on the "many years of previous education," as well as the "diligence and hard work" that have gone into achieving a degree.⁵⁷ Such "diligence and hard work" is presumably that of the student alone. Similarly, the court in *DeWitt* suggests that efforts to value

52. *Graham*, 574 P.2d at 77; see also *Hodge v. Hodge*, 520 A.2d 15, 17 (Pa. 1986) (insisting on a "traditional definition" of property); *Archer v. Archer*, 493 A.2d 1074, 1080 (Md. 1985) ("At best" degree "represents a potential for increase in a person's earning capacity made possible by the degree and license in combination with innumerable other factors and conditions too uncertain and speculative to constitute 'marital property'"); *Lowery v. Lowery*, 413 S.E.2d 731, 731-32 (Ga. 1992) (value "too speculative").

53. *Pyeatte v. Pyeatte*, 661 P.2d 196, 207 (Ariz. Ct. App. 1982).

54. *Graham*, 574 P.2d at 77 (quoting BLACKS' LAW DICTIONARY (rev. 4th ed. 1968)) (emphasis added).

55. However, some courts have maintained that the value of the degree holder's enhanced future earning capacity cannot represent assets earned during marriage, but rather "represents money or assets earned after dissolution" which would preclude it from consideration as marital property. *Hoak v. Hoak*, 370 S.E.2d 473, 476-77 (W. Va. 1988).

56. *Graham*, 574 P.2d at 77; see also *Ruben v. Ruben*, 461 A.2d 733, 735 (N.H. 1983) (quoting *Graham*); *Archer*, 493 A.2d at 1080 (describing a professional degree as an "intellectual attainment"); *Helm v. Helm*, 345 S.E.2d 720, 721 (S.C. 1986) (same).

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

the degree based on cost “fail[] to consider the scholastic efforts and acumen of the degree holder.”⁵⁸ Through this focus, which evokes theme number 2 of the independent achiever, the opinions also dissociate the degree achieving process from the marital relationship itself.

The *Graham* dissent, in contrast, emphasizes the connection to the marital relationship. Justice Carrigan focuses on images of sharing and sacrifice (“[t]he case presents the not-unfamiliar pattern of the wife who, willing to sacrifice for a more secure family financial future, works to educate her husband . . .”),⁵⁹ as well as on the business partnership analogy: “Her earnings not only provided her husband’s support but also were ‘invested’ in his education in the sense that she assumed the role of breadwinner so that he would have the time and funds necessary to obtain his education.”⁶⁰ In arguing in favor of a determination that the degree is property, the dissent lobbies for a more expansive view of marital property, citing circumstances such as the goodwill value of a business in divorce, or tortious interference with a spouse’s ability to earn an income, where future earning capacity has been considered a subject for compensation.⁶¹

Other cases taking the granting approach focus even more strongly than the *Graham* dissent on the mutuality of the marriage as sharing theme. This is how the court in *Woodworth* describes the marital relationship under review:

The facts reveal that the plaintiff’s law degree was the end product of a concerted family effort. Both parties planned their family life around the effort to attain plaintiff’s degree . . . While the law degree did not preempt all other facets of their lives, it did become the main focus and goal of their activities.⁶²

58. *DeWitt v. DeWitt*, 296 N.W.2d 761, 767 (Wis. Ct. App. 1980); see also *Gessner v. Gessner*, 614 So. 2d 307, 309 (La. Ct. App. 1993) (“The professional degree is formal recognition of an individual’s competency and skill . . . The definition of property in Louisiana cannot be so extended and distorted to include within that definition a professional degree and license.”); *Johnson v. Johnson*, 855 P.2d 250, 252 (Utah Ct. App. 1993) (“Bonafide degrees cannot be bought; they are earned. They cannot be sold; they are personal to the named recipient.”) (citation omitted).

59. *Graham*, 574 P.2d at 78 (Carrigan, J., dissenting).

60. *Id.*

61. See *id.* at 78-79.

62. *Woodworth v. Woodworth*, 337 N.W.2d 332, 334 (Mich. Ct. App. 1983); see also *Olah v. Olah*, 354 N.W.2d 359, 362 (Mich. Ct. App. 1984) (Maher, P.J., concurring) (“The facts of this case present an even more cogent example of two people working together towards a family goal than did the facts in *Woodworth* itself.”); *Postema v. Postema*, 471 N.W.2d 912, 915 (Mich. Ct. App. 1991) (“[I]t is not the existence of an advanced degree itself that gives rise to an equitable claim for compensation, but rather the fact of the degree being the end product of the mutual sacrifice, effort, and contribution of both parties as part of a larger, long-range plan intended to benefit the family as

The court further rebuts contentions that acquiring a degree is a solitary process:

The degree holder has expended great effort to obtain the degree not only for him- or herself, but also to benefit the family as a whole. The other spouse has shared in this effort and contributed in other ways as well, not merely as a gift to the student spouse nor merely to share individually in the benefits but to help the marital unit as a whole.⁶³

Yet, the court characterizes the process of obtaining a degree as a "family investment."⁶⁴

The court in *Hubbard* similarly connects the marriage as sharing theme (emphasizing the "total joint commitment to Dr. Hubbard's education and training") to the business metaphor: Ms. Hubbard "would leave the marriage without either a return on her investment or an earning capacity similarly increased through joint efforts."⁶⁵ The court in *Haugan* makes an even more explicit, and rapid, connection between the marriage as sharing and joint economic enterprise theme: "In a marriage of significant duration, the marital partners in sharing life together—with all its joys, sorrows, debts, and assets—share the return on their investment in the marriage."⁶⁶

2. O'Brien

In *O'Brien v. O'Brien*, the New York Court of Appeals adopted the perspective of the *Graham* dissent.⁶⁷ As in *Graham*, the wife had earned most of the money and performed most of the housework during the husband's education and training, in this case to become a medical doctor. The marriage ended when that training had been completed.⁶⁸ The

a whole.").

63. *Woodworth*, 337 N.W.2d at 334.

64. *Id.*

65. *Hubbard v. Hubbard*, 603 P.2d 747, 750-51 (Okla. 1979); see also *Hodge v. Hodge*, 520 A.2d 15, 25 (Pa. 1986) (comparing marriage partner to a business partner who invests "in the development of a new idea" and who would be "entitled to share in whatever profit it generates"); *Inman v. Inman*, 578 S.W.2d 266, 268 (Ky. Ct. App. 1979) (finding that unless the degree is treated as property, "the spouse who has devoted much of the product of several years of labor to an 'investment' in future family prosperity is barred from any return on his or her investment"); *Washburn v. Washburn*, 677 P.2d 152, 165 (Wash. 1984) (Rosellini, J., dissenting) ("The degree was a family investment, rather than a gift or benefit to the degree holder alone.").

66. *Haugan v. Haugan*, 343 N.W.2d 796, 800 (Wis. 1984).

67. See *O'Brien v. O'Brien*, 489 N.E.2d 712 (N.Y. 1985).

68. See *id.* at 745.

O'Brien court rejected the husband's contention, sounding in the *Graham* theme of independent achievement, that his medical license "is not property at all but represents a personal attainment in acquiring knowledge."⁶⁹ Instead, it held that the policies and language of the state's equitable distribution laws demanded a more expansive view of marital property, one that would include within its scope items like a professional degree or license that had value in their acquisition and benefits, even if they lacked an exchange value.⁷⁰

The primary policy that the court found in its domestic relations statute governing divorce was the theme of marriage as joint economic enterprise (number 3): "Equitable distribution was based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker."⁷¹ They also found that "few undertakings during a marriage better qualify as the type of joint effort that the statute's economic partnership theory is intended to address than contributions toward one spouse's acquisition of a professional license."⁷² Following this analogy, the court determined that the compensation due was not reimbursement of direct expenses but the present value of the earning capacity, in the same way that a spouse would receive her share of the present value of a house to which she had contributed.⁷³ There is little language reflecting the marriage as sharing theme (number 1) in this opinion; when the marital relationship is described without reference to the business metaphor, it is through terms like "contribution" and "sacrifice."⁷⁴

Significantly, the New York court distinguishes its result from those of other states on the basis of its equitable distribution statute and corresponding legislative history. The court found the husband's argument based on precedent in other states unpersuasive "because decisions in other states rely principally on their own statutes, and the legislative history underlying them, and because the New York legislature deliberately went beyond traditional property concepts when it formulated the Equitable Distribution Law."⁷⁵ However, the statutory provisions cited, which direct courts to consider as marital property "all property . . . regardless of the

69. *Id.* at 746.

70. *See id.* at 747.

71. *Id.*

72. *Id.*

73. *See id.* at 749.

74. *See id.* at 747 ("Working spouses are often required to contribute substantial income as wage earners, sacrifice their own educational or career goals and opportunities . . ."); see also discussion of the use of the word "sacrifice," *infra* notes 299-313 and accompanying text.

75. *Id.* at 746 (citation omitted).

form in which title is held" and to consider in the distribution of other assets contributions to the other party's career enhancement, seem to be on par with similar provisions in other equitable distribution statutes.⁷⁶ Ultimately, the court provides no direct legislative history to suggest otherwise.

The concern expressed in the New York statute about "the form in which title is held" would appear to be simply a response to previous regimes in which parties were only entitled to keep that property which was held in their name prior to marriage.⁷⁷ Indeed, the majority in *Graham* notes the "comprehensive meaning" of property under the Colorado Uniform Dissolution of Marriage Act, and suggests that it is consistent with its laws to allow a spouse's contribution to the other's education to be taken into account in distributing other tangible assets.⁷⁸ Additional provisions described by the *O'Brien* court, such as one directing that "[w]here equitable distribution of marital property is appropriate but 'the distribution of an interest in a business, corporation or profession would be contrary to law' the court shall make a distributive award in lieu of an actual distribution of the property,"⁷⁹ suggest a more expansive view, but could be open to multiple interpretations.⁸⁰ Indeed, it has been suggested that the New York legislature "merely enacted a rule

76. N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney 1986); see also N.Y. DOM. REL. LAW § 236(B)(5)(d) (McKinney 1986), which states:

[T]he court shall consider:

(6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party.

Id. Note also COLO. REV. STAT. § 14-10-113 (1987), which provides:

[T]he court shall . . . divide the marital property . . . in such proportions as the court deems just after considering all relevant factors including:

(a) The contributions of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;

. . .

(d) Any increases or decreases in the value of the separate property of the spouse during the marriage or the depletion of the separate property for marital purposes.

Id.

77. See COLO. REV. STAT. § 14-10-113(3) (1987) ("All property acquired . . . is presumed to be marital property, regardless of whether title is held individually . . .").

78. *In re Marriage of Graham*, 574 P.2d 75, 76, 78 (Colo. 1978).

79. *O'Brien v. O'Brien*, 489 N.E.2d 712, 716 (N.Y. 1985) (citation omitted).

80. The provision cited by the Court of Appeals in another case, which allows for lump sum payments "in lieu of or to supplement, facilitate or effectuate the division or distribution of property," while facilitating the court's holding in *O'Brien*, does not seem to identify the major stumbling block preventing other courts from fashioning a similar remedy. See *Majauskas v. Majauskas*, 463 N.E.2d 15, 19-20 (N.Y. 1984) (quoting N.Y. DOM. REL. LAW § 236(B)(1)(b)(5)(e) (McKinney 1986)); see also *O'Brien v. O'Brien*, 489 N.E.2d 712, 715 (N.Y. 1985).

similar to that which had been in force in most other American states for quite some time. Such a law gives courts discretion in dividing property, not in defining it."⁸¹ The New York court, despite its protestations to the contrary, chose the route it took and the themes it emphasized over other possibilities. By basing its holding on the supposed idiosyncracies of the New York statute, however, the *O'Brien* court has provided other states with an easy means for distinguishing this case.⁸²

As noted above, courts in other states have allowed themselves more options than the two extremes represented by *Graham*, where no award was made on the basis of the wife's contribution, and *O'Brien*, where the award was a share of the present value of the enhanced earning capacity. As mentioned earlier, the themes these opinions follow correlate more closely with the perception of granting or denying expressed in the opinion than with the dollar amount of the award.

3. *Sullivan*

The doctrinal choices available in a community property jurisdiction are somewhat different from those in an equitable distribution jurisdiction. The history of *In re Marriage of Sullivan* provides an example of one way in which these issues play out under a community property regime.⁸³ One dissent at the intermediate appellate level points out that, under California law, some of the equitable adjustments made by other states are not available: because anything classified as community property must be divided equally, the ability to adjust the distribution of traditional property to reflect contributions is not available, and flexibility to award rehabilitative or reimbursement maintenance is curtailed.⁸⁴

The California appellate court's initial method for fashioning a remedy within these constraints, and the one providing the most interesting elaboration, is no longer actually available for inspection: because the holding was modified upon rehearing, the original *Sullivan* case has been

81. Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 69 n.171 (1989).

82. *See, e.g.*, *Downs v. Downs*, 574 A.2d 156, 158 (Vt. 1990) (distinguishing *O'Brien* by noting the "legislative mandate" upon which the New York court relied).

83. *See In re Marriage of Sullivan*, 184 Cal. Rptr. 796 (Ct. App. 1982).

84. *See id.* at 820 (Ziebarth, J., concurring in part and dissenting in part); *see also id.* at 825 (explaining that community property jurisdictions are not uniform in the constraints they impose); *cf. Washburn v. Washburn*, 677 P.2d 152, 157-58 (Wash. 1984) ("[A] division of property and liabilities is controlled not by their character as separate or community, but rather by what is just and equitable. . . . [T]he only limitation placed upon the trial court's ability to award maintenance is that the amount and duration, considering all relevant factors, be just.").

“depublished.”⁸⁵ Available nonetheless through the LEXIS computerized research service, it provides an interesting twist on some of the common themes. In a unique move, the court found that Dr. Sullivan’s medical degree and accompanying license, were property, but not community property.⁸⁶ In holding that the degree was instead the separate property of the husband, the court marshalled the theme of independent achievement:

As we observed above, the acquisition of an education, degree and license to practice are the result of a process that goes on for many years and are the cumulative product of those many years of previous study and training. Therefore it seems clear that even where an educational degree and/or license to practice are acquired during a marriage, that the process that culminated in such an achievement was commenced long before the date of marriage. Therefore, even if they could constitute “property” for some purposes, it is an item of “property” that the possessor of same has brought into the marriage. It cannot be something that was totally acquired during the marriage.⁸⁷

The court found that the degree was property, albeit separate, akin to “a separate property business or professional practice that has been conducted during the course of a marriage.”⁸⁸ It then applied doctrine unique to the community property regime, requiring reimbursement to the community (or the marital property pot) for any community funds expended, or even for efforts made by either spouse to enhance the separate property, and applied them to this item of separate property:

We therefore hold, absent an agreement to the contrary, where the community has not received any real economic benefit from the acquisition by one of the parties of an education, degree and/or professional license during the marriage, that as a minimum the community should be reimbursed for the amount of any community funds that were expended to acquire the education, degree and license.⁸⁹

85. See generally *In re Marriage of Sullivan*, (formerly 127 Cal. App. 3d 656) (Ct. App. 1982) (depublished) (on file with author); see also Paige M. Baker, *Depublication: The New Starchamber*, 18 W. ST. U. L. REV. 313 (1990) (detailing the depublication criteria and procedures in California and criticizing the impact of the process on both legal argumentation and scholarship).

86. *Sullivan*, (formerly 127 Cal. App. 3d 656), at *16.

87. *Id.* at *14.

88. *Id.* at *16.

89. *Id.* at *17.

Perhaps because of the community property constraints, this case provides a rare example of a link between the independent achiever theme and a finding that the item in question is property of some kind.⁹⁰ It therefore casts into question the assertions by other courts that the independent nature of the degree acquiring process makes the degree incompatible with notions of property.

Upon rehearing, the court changed its mind. After a lengthy statement of the facts and procedural history, the court tersely concluded that a professional degree could be neither separate nor community property, because it did not have the necessary attributes of property.⁹¹ The court drew its definition of property from a previous case where it had considered community property only and determined that it must be "susceptible of ownership in common, of transfer and survival."⁹² The final irony of the *Sullivan* history is that, while the case was on appeal to the California Supreme Court, the California legislature amended the Family Law Act to allow for the same type of reimbursement remedy ordered in the first, depublished appellate decision, and none other.⁹³ The Supreme Court was left to adjudicate whether this provision was to apply to the *Sullivans* retroactively, and concluded that it did.⁹⁴

4. *Mahoney*

Some cases appear to be in conflict over which course they have taken. In them, one can see the full panoply of themes play out as the courts negotiate this ambiguity. *Mahoney v. Mahoney* is such a case.⁹⁵

There are a number of opinions that allow or advocate some reimbursement or rehabilitation maintenance.⁹⁶ However, I have grouped many of these under either the granting or denying approach, not just because they exhibit themes consistent with these approaches, but because the attitude assumed by the authors is consistent with either the granting⁹⁷

90. *But cf.* *Frausto v. Frausto*, 611 S.W.2d 656, 659-60 (Tex. Civ. App. 1981) (specifically rejecting this approach under a community property regime that, unlike California's, allows trial courts to consider range of factors including education and earning capacity in dividing estate).

91. *See In re Marriage of Sullivan*, 184 Cal. Rptr. 796, 800 (Ct. App. 1982).

92. *Id.*; *see also* *Franklin v. Franklin*, 155 P.2d 637, 641 (Cal. Dist. Ct. App. 1945).

93. *See* CAL. FAM. CODE § 2641 (West 1995).

94. *See In re Marriage of Sullivan*, 691 P.2d 1020, 1023 (Cal. 1984).

95. *Mahoney v. Mahoney*, 453 A.2d 527 (N.J. 1982).

96. *See supra* notes 38-39 and accompanying text.

97. For the granting approach, *see In re Marriage of Francis*, 442 N.W.2d 59, 65-66 (Iowa 1989) (approving award labeled alimony yet calculated on the basis of enhanced future earning capacity); *Haugan v. Haugan*, 343 N.W.2d 796, 800 (Wis. 1984) (finding that "[a] compensatory

or denying approach.⁹⁸ Other opinions, like *Mahoney*, do not so align themselves and display, as might be expected, themes consistent with both approaches.

Early in its opinion, the *Mahoney* court rejects the contention that the professional degree is property.⁹⁹ In so doing, the court connects the theme of individual achievement with a hostility toward economic valuation: "A professional license or degree is a personal achievement of the holder. It cannot be sold and its value cannot readily be determined."¹⁰⁰ Using that antipathy toward valuation, the court appears to offer a direct critique of the idea that marriage is a joint economic enterprise: "Marriage is not a business arrangement in which the parties

award to the supporting spouse can ensure that both marital partners . . . participate in the financial rewards attributable to the enhanced earnings of the student spouse" while allowing that compensation be made through maintenance awards); *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755, 758 (Minn. 1981) ("The equities weigh heavily in favor of providing a remedy to the working spouse in such a situation and the district courts have the equitable authority to provide that relief."); *Postema v. Postema*, 471 N.W.2d 912, 917 (Mich. Ct. App. 1991) ("[W]here a concerted family effort is involved, a spouse's entitlement to compensation constitutes a recognized right."); *Bold v. Bold*, 574 A.2d 552, 556 (Pa. 1990) (upholding and defending trial court's award of "equitable reimbursement"); see also *In re Marriage of Weinstein*, 470 N.E.2d 551, 559 (Ill. 1984) (asserting that cases finding the degrees to be property "represented a last resort method to justify a compensatory award to the supporting spouse . . . available only where the remedies of property distribution, maintenance, or unjust enrichment awards were not available in order to reach an equitable result").

98. For the denying approach, see *Wisner v. Wisner*, 631 P.2d 115, 122 (Ariz. Ct. App. 1981) (finding that "marital property concept simply 'does not fit,'" yet allowing education to be a factor in determining maintenance); *Pyeatte v. Pyeatte*, 661 P.2d 196, 207 (Ariz. Ct. App. 1982) (refusing to "strike a balance regarding the contributions of each to the marriage and then translate that into a monetary award," yet allowing limited reimbursement); *In re Marriage of Olar*, 747 P.2d 676, 680 (Colo. 1987) (refusing to overturn *Graham*, yet addressing "the adequacy of the remedy" in terms of maintenance).

The readiness of courts to adopt the granting approach without an explicit recognition of the degree as property is sometimes aided by statutory changes that give courts greater flexibility in fashioning maintenance awards. See, e.g., *In re Marriage of Lundberg*, 318 N.W.2d 918, 922 (Wis. 1982) (noting significant amendments in relevant statutes that earlier court had relied on in denying relief); *Haugan*, 343 N.W.2d at 800 (citing explicit references to a spouse who contributes to the other's education in these same amended statutes); see also Robert J. Levy, *Marriage, Divorce and Property: Revolution; Partnership Approach Led to Major Changes*, 16 NAT'L L.J. S12 n.13 (1993) (asserting that some legislatures have responded to the negative economic impact on women under no-fault divorce regimes by enacting statutory presumptions for "permanent maintenance"); but see Marygold S. Melli, *The United States: Continuing Concern with the Economic Consequences of Divorce*, 31 U. LOUISVILLE J. FAM. L. 491, 494 (1992/93) ("Although spousal support, usually called alimony or maintenance, continues to generate considerable appellate court case law, it is difficult to identify the directions of the developments.").

99. See *Mahoney*, 453 A.2d at 531; but see *id.* at 533-34 (finding it "patently unfair that the supporting spouse be denied the mutually anticipated benefit while the supported spouse keeps not only the degree, but also all of the financial and material rewards flowing from it," and supporting an award of reimbursement alimony).

100. *Id.* at 531.

keep track of debits and credits, their accounts to be settled upon divorce.”¹⁰¹ The court then begins the next sentence with “Rather,” as if about to offer a direct counterpoint to the marriage as joint economic enterprise theme, but surprisingly continues thus: “as we have said, ‘marriage is a shared enterprise, a joint undertaking . . . [I]n many ways it is akin to a partnership.’”¹⁰² Of course, the court has just seemingly rejected what is a fairly accurate description of a business partnership.

What makes the quoted sentence something less than nonsensical is the very ambiguity of terms like “partnership” and “joint enterprise” that both connect and separate the themes of marriage as joint economic enterprise and marriage as sharing. Indeed, it is the double meaning (business and romantic) of “partnership” that no doubt fueled the proliferation of the marriage as joint economic enterprise analogy. This ambiguity allows the court to embrace a marriage as sharing theme, and thereby justify a generous award, without abandoning the anti-economics perspective that flowed from its use of the independent achiever theme.¹⁰³ The independent achiever theme was used to justify in the first instance the rejection of the contention that the degree was property.¹⁰⁴

As the *Mahoney* opinion develops its argument in favor of a large maintenance award, it continues to ride the edge between marriage as sharing and marriage as joint economic enterprise. For instance, it notes that “the supporting spouse made financial contributions toward her husband’s professional education with the expectation that both parties would enjoy material benefits flowing from the professional license or degree”¹⁰⁵ and, further, that her “sacrifices would have been rewarded had the marriage endured and the mutual expectations of both of them been fulfilled.”¹⁰⁶ In each of these examples, however, through its language of contribution and mutual expectation, one can see the opinion slipping over into an embrace of the economic concept it earlier rejected. The court manages to tell two tales at once, one of marriage and one of achievement, but not without conflict and ambiguity.

As in *Mahoney*, courts in other cases find themselves torn. In *Hoak*, for example, the court noted:

101. *Id.* at 533.

102. *Id.*

103. *See id.* at 535-36.

104. *See id.* at 531.

105. *Mahoney*, 453 A.2d at 533.

106. *Id.* at 534.

Although we decline to follow New York in its holding on marital property, we agree that to allow a student spouse to leave a marriage with all the benefits of additional education and a professional license without compensating the spouse who bore many of the burdens incident to procuring the degree would be unfair.¹⁰⁷

The conflict may similarly play out among the themes: while "a degree of any kind results primarily from the effort of the student spouse who earns it" (independent achiever), the wife's "sacrifices would have been rewarded had the marriage endured" (marriage as sharing).¹⁰⁸ Or, while "[m]arriage is not a business arrangement" (hostility to economics), "the supporting spouse . . . made financial contributions to her husband's education with the expectation that his degree would mean a higher standard of living for them both"¹⁰⁹ (joint economic enterprise). The *Hoak* court relies explicitly on *Mahoney* as precedent to justify a reimbursement alimony award while addressing these conflicting concerns.¹¹⁰

Although marriage and achievement are not inherently in conflict, the *Mahoney* case reveals that the themes, or the ways courts have developed for talking about these areas of human experience, do seem to create such contradictions. At the same time, because of the tension between the themes, it seems that courts are in fact free to choose, at least to the extent that they may choose the theme, outcome, or combination they prefer.

II. DOCTRINAL SOURCES

In the previous section, I demonstrated the correlation between the rhetorical themes courts have employed and the outcomes they have reached. In this section, I explore the role that background doctrine may play. I conclude that the outcome of the cases is more closely tied to the rhetorical patterns discussed in Part I than to any determinate notion of the nature of property or of equality in the allotment of marital property rights.

107. *Hoak v. Hoak*, 370 S.E.2d 473, 477 (W. Va. 1988).

108. *Id.* The majority opinion in *Lovett v. Lovett*, 688 S.W.2d 329 (Ky. 1985), mixed in its perspective because it was both retreating from earlier case law that had found the degree to be property yet authorizing generous maintenance, combines both themes in one sentence: "In the instant case, these assets were produced by the combined efforts of the husband, by his application of his abilities and his diligence, and by the contribution of the wife" *Id.* at 332.

109. *Hoak*, 370 S.E.2d at 478, 477.

110. *See id.* at 478; *see also* *Washburn v. Washburn*, 677 P.2d 152, 159-60 (Wash. 1984) (offering lengthy quotation from *Mahoney* to justify a generous maintenance award while maintaining that it "is not our intent" to "treat[] marriage as a commercial enterprise").

A. Property Law

In the cases in which courts consider whether professional degrees are marital property, the passages describing the nature of marriage and the nature of individual achievement have a familiar ring to them, not just because we can discern patterns within this one doctrinal area itself, but because courts respond to or invoke patterns from the traditional consideration of the nature of property. Indeed, those attempting to arrive at a conclusion about the nature of professional degrees, including courts and commentators, have often looked to traditional discussions of the nature of property generally.

For the most part, writers of treatises on property, at least in the updated versions of their works, acknowledge an open-ended or indeterminate quality in defining the term "property." They issue the standard warning that the term is not to be applied in the lay sense of the thing subject to legal interests (the dirt and grass or pewter urn),¹¹¹ but they also acknowledge a great variety in the legal interests themselves. Powell, for instance, cites four varying factors in traditional definitions of property:

The *persons* who have property can differ in their social roles and status. The *relationships* which are the constituent rights, powers, privileges, and immunities of property can vary almost indefinitely. The *objects* as to which property is recognized can differ from the songs and magical formulas of a primitive people, to the land, corporate shares, or copyrights of today. The *sanctions* can vary from the belief that disease will lay low an offender to the highly complex machinery of law courts and sheriffs.¹¹²

Cunningham et al., using language from Bentham and ideas from Hohfeld, note: "If 'property' is a legally protected 'expectation' of deriving certain advantages from a 'thing,' it follows that 'property' is comprised of legal relations between persons with respect to 'things.' These legal relations may be of widely varying types."¹¹³ Cribbet goes so far as to suggest that "it will be seen that property can exist in relation to an infinite number of things, real and personal, tangible and intangible."¹¹⁴ Finally, Thompson acknowledges, "[i]t is impossible to arrive at a comprehensive definition

111. See, e.g., RICHARD R. POWELL & PATRICK J. ROHAN, 1 POWELL ON REAL PROPERTY § 7, at 8 (1992).

112. See *id.* § 7, at 10-11.

113. ROGER A. CUNNINGHAM ET AL., PROPERTY § 1.2, at 3 (2d ed. 1993).

114. JOHN E. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 4 (3d ed. 1989)).

of 'property' that will satisfy all of the situations and tests to which such a definition will be subjected under the law."¹¹⁵ He proceeds to catalog a host of these situations and tests, many of which conflict with one another.¹¹⁶

No doubt the positions these treatise writers take on the variability of the meaning of property reflect the transformation of the conception of property in the nineteenth century described by Kenneth Vandeveldel.¹¹⁷ During this time, property ceased to be considered absolute in nature with respect to physical objects.¹¹⁸ According to Vandeveldel, this process helped to delegitimize the rule of law and to allow courts to determine property interests by reference to policy.¹¹⁹ Indeed, he notes that, as a result, "the treatise writer could conclude . . . that property protected many more and different interests in 1925 than in 1765 and that the protection was of a variable rather than a fixed nature."¹²⁰

Thomas Grey suggests that this process of divorcing the legal concept of property from the physical item itself continues to evolve and affect financial structures in the twentieth century. He argues that those who are involved in a modern economy "must be able to design new forms of finance and control for enterprise, which can take maximum advantage of the efficiencies of scale and division of function, forms that fractionate traditional ownership and that create claims remote from tangible objects."¹²¹

Indeed, the underlying conflicts that created the crisis and transformation in the nineteenth century continue to reassert themselves in treatises issued at the end of the twentieth century. Thompson, in particular, in a manner part Gilbert and Sullivan patter song, part exorcism, lets the conflicts speak through him in the form of broad and particular statements from dozens of twentieth century cases.¹²² The most prominent conflicts lie between statements of an absolute quality—which are both restrictive (in the sense that the standard for what counts as property is rigorous) and sweeping (in the sense that if what you have is

115. GEORGE THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 5, at 26 (1980).

116. *See id.* § 5.

117. *See* Kenneth J. Vandeveldel, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980).

118. *See id.* at 329-30.

119. *See id.* at 330.

120. *Id.* at 366.

121. Thomas C. Grey, *The Disintegration of Property*, in PROPERTY 75-76 (J. Pennock & J. Chapman eds., 1980).

122. *See* THOMPSON, *supra* note 115, § 5.

deemed property then you get a lot)—and examples that are both less restrictive in their definition of what counts as property and less sweeping in the benefits available to a property holder. For instance, the statement “[p]roperty, in a legal sense, consists in the domination which is rightfully and lawfully obtained over a material thing, with the right to its use, enjoyment and disposition,” is followed in the next paragraph by the example, “[t]he right to sue for damages for personal injuries is a chose in action and therefore property.”¹²³ On the one hand, “[t]he right to acquire and own property and to deal with it and use it as the owner chooses, so long as such use harms no one, is a natural right which does not owe its origin to constitutions”; on the other hand, “[t]he right of property is a legal right and not a natural right, and must be measured by reference to rights of others and of the public.”¹²⁴

Thompson’s section on “What is property” ends abruptly with the absurdly specific example that “[t]he right to free games won on a pinball machine is property,” citing a case in which free games were held to be personal property, for the sole purpose of determining that the machine which dispensed the free games for a high score violated an anti-gambling statute that prohibited game playing for something “of value.”¹²⁵ This follows the statement: “Within the limits of the law, an owner of property may do as he pleases with it; he may dispose of it in any manner that he desires, in the absence of a showing of a lack of mental capacity, fraud or undue influence.”¹²⁶ Thompson’s confusing array of property interests may be viewed as an illustration of Grey’s argument that “we no longer have any coherent concept of property encompassing both simple thing ownership, on the one hand, and the variety of legal entitlements that are generally called property rights on the other.”¹²⁷

One of the typical ways in which Thompson’s sweeping statements are restricted is by the added requirement that, in order to be property, something must have exchange value: “The term, in its most general sense, includes everything that has an exchangeable value.”¹²⁸ Similarly, but not identically, an important benefit available with something designated property is alienability: “There can be no definition of ‘property’ which does not include the power of disposition and sale, as

123. *Id.* at 26-27.

124. *Id.* at 30.

125. *Id.* at 33 (discussing *State v. Sandfer*, 226 P.2d 438 (Okla. Crim. App. 1951)).

126. *Id.* at 32-33.

127. Grey, *supra* note 121, at 78.

128. THOMPSON, *supra* note 115, at 26.

well as the right of private use and enjoyment.”¹²⁹ The first might apply to the definition by which free pinball games may be considered property. In the opinion, much is made of the fact that the free game is worth the five cents an additional game would cost.¹³⁰ However, something of exchangeable value will not necessarily be capable of being exchanged (alienability). It is quite possible for a state that allowed playing pinball for free games to hold that the free games belonged only to the person who won them and were forfeited if not played by her, without disturbing the determination that they are her personal property, worth the five cents she would otherwise have paid for a second game.¹³¹

Value and alienability play a similar role in other treatises. Some, like Powell, emphasize that property arises as a response to valuation: “Viewing property as the cluster of usages which operates to distribute the available supply of scarcities, a new opportunity for new property rights arises whenever technological advances, or social changes, reveal a new scarcity.”¹³² Others, like Cunningham, reference economic theories, which maintain that once we deem something property, free transferability, including sale, is necessary to provide the incentive for efficient use of resources.¹³³ Again, these characteristics are not coextensive, as property interests may be created in response to valuable and scarce resources, yet not include alienability as part of the bundle of interests.¹³⁴

129. *Id.* at 31.

130. *See Sandfer*, 226 P.2d at 443-45.

131. If free games were less ephemeral and hung around through divorce, whether the pinball wizard's nickel-providing spouse would have a claim to a portion of their value could not necessarily be decided by their alienability or inalienability.

132. POWELL & ROHAN, *supra* note 111, § 13, at 26.

133. *See CUNNINGHAM*, *supra* note 113, § 1.1, at 3.

134. The concept of alienability in the works of the twentieth century treatise writers becomes confused further in their consideration of the role of potential creditors. One reason that the power of sale appears in the more sweeping absolutist statements may be to flavor the right of transfer with an element of control over transfer; if you're going to have a fantasy image of property you want to have the best fantasy ever: “Within the limits of the law, an owner of property may do as he pleases with it; he may dispose of it in any manner that he desires” THOMPSON, *supra* note 115, at 32. Of course, elsewhere, it is pointed out that “[o]rdinarily this right to enjoyment may not be coupled with the ability to keep it from claims of creditors and others.” *Id.* at 31. Too bad, because otherwise property rights would provide the ultimate fantasy: a right to alienation that cannot be alienated, not only in the sense that the right to sell cannot be revoked, but also in the sense that no one else can exercise powers of alienation that you have sold them! *See* Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1853 (1987) (discussing one meaning of “inalienable” as “nonforfeitable” or “nonrelinquishable,” and another meaning of “inalienable” as “preventing sale”). Of course, the whole reason one has creditors that may lay claim to property is not because that is a blemish on free alienability, but because of the alienability in the first place. What Thompson's statements expose is a conflict between competing rights of alienability—the original property holder's and the creditor's. How does one balance the absolute freedom of a property holder to dispose of it as she wishes when

Public interest is the primary justification for restricting alienability. Thompson's sweeping statements lie side by side with other statements that, by reference to the public interest, would appear to swallow up the broad sweep of alienability and valuation: "The free alienation of property is an inherent right of the owner thereof, subject only to restraint if against the interest of the public."¹³⁵ Cribbet suggests that "[i]t is wise to harness that which has so deep an appeal to human nature and to concentrate on devising the best possible system of property which will serve the needs of both the individual and the public."¹³⁶ Powell devises a "test of goodness" which "must be some mean between the concept of the complete dominance of the individual and the idea of the all-importance of the state."¹³⁷

The conflict of unbounded freedom with constraint inspired by public interest mirrors the conflict facing jurists during the nineteenth century. Vandeveldelde maintains that, in the nineteenth century, the realization that almost anything could be property led to the increasing use of public policy to determine if and how much property interest existed.¹³⁸ Presumably, if it is possible, for policy reasons, to restrict the alienability of something deemed property, something not alienable may also, for policy reasons, be deemed property.¹³⁹

The treatises typically confront the task of defining property by imagining an individual versus an interfering state and an anonymous public interest. Indeed, property is often distinguished from contract as a right against the world, not against individuals.¹⁴⁰ Thus, the treatises are not likely to provide much help in arriving at a definition of property in circumstances, like those presented by marital property, that require the division of resources between competing individual applicants. Grey notes more generally "that the forceful intuitions behind the moral arguments for simple thing-ownership can no longer be as readily transferred to the legal institutions of the capitalist economy, as they could when private property was a clearly comprehended unitary concept."¹⁴¹

what she wishes is to restrict the absolute freedom of the person to whom she is transferring?

135. THOMPSON, *supra* note 115, at 32.

136. CRIBBET, *supra* note 114, at 7.

137. POWELL & ROHAN, *supra* note 111, § 15, at 37.

138. Vandeveldelde, *supra* note 117, at 362-64.

139. If, as one might find in the professional degree cases, someone's freedom is actually curtailed rather than expanded by finding that the person is the holder of a property interest, the issue is potentially even more complicated.

140. CUNNINGHAM, *supra* note 113, § 1.2, at 4.

141. Grey, *supra* note 121, at 78.

Aside from takings cases, most property disputes, including ones which involve the determination of whether property is involved at all, arise between or among competing applicants.¹⁴² An examination of selected cases in which the “is it property?” question arises reveals that the issue to be resolved is almost never property against the world (even if it is discussed that way), but becomes a question of property as to whom.

1. Nonvested Pension Benefits

The cases in which nonvested pension benefits came to be considered marital or community property provide an interesting contrast to the professional degree cases. These cases pay little attention to the questions of the nature of marriage or achievement found in the professional degree cases because, once the pension is determined to be compensation vis-a-vis the employer, it is assumed to be part of the community or marital pot, just like any compensation earned during marriage. In determining whether nonvested pension benefits are marital property, then, the focus is on the rights the employed spouse has against the employer, in order to determine whether these benefits are property at all.

In California, courts initially held that nonvested pension benefits were not property for distribution upon divorce. The court in *Williamson v. Williamson*, noted that prior cases had established a principle

that pensions become community property subject to division in a divorce, when and to the extent that the party is certain to receive some payment or recovery of funds. To the extent that payment is, at the time of the divorce, subject to conditions which may or may not occur, the pension is an expectancy, not subject to division as community property.¹⁴³

However, *In re Marriage of Brown* overruled these prior cases, basing its finding of marital property on the relationship between employer and employee:

Since pension benefits represent a form of deferred compensation for services rendered, the employee's right to such benefits is a contractual right, derived from the terms of the employment contract. Since a contractual right is not an expectancy but a chose in action, a form of

142. See *id.* at 79 (“Mature capitalist property must be seen as a web of state enforced relations of entitlement and duty *between persons*, some assumed voluntarily and some not.”).

143. *Williamson v. Williamson*, 21 Cal. Rptr. 164, 167 (Ct. App. 1962).

property, . . . an employee acquires a property right to pension benefits when he enters upon the performance of his employment contract.¹⁴⁴

As a result, and because of the nature of the employer and employee relationship, these benefits, which, like a professional degree, are incapable of being exchanged, have been determined to be property.

2. Dead Bodies

The interest in the dead bodies of loved ones is the quintessential example of a property interest based on a particular relationship. When a property interest in a dead body has been recognized, it has been as

a quasi property right to its possession . . . for the limited purpose of determining who shall have its custody for burial. The duty to bury a corpse and to preserve its remains is a legal right which courts of law will recognize and protect; such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin.¹⁴⁵

It is the familial duty which gives rise to the property interest. The interest itself is, of course, not transferable, and derives its value solely from the relationship itself. It is not absolute. There only seem to be two things that can be done with it: bury or cremate the body, and sue if the body is mishandled.

Other courts reject the notion that there is a property right at all in dead bodies:

The basis for recovery of damages is found not in a property right in a dead body but in the personal right of the family of the deceased to bury the body. The mutilating or disturbing of the corpse is held to be an interference with this right and an actionable wrong.¹⁴⁶

In this case, the court was troubled by the absence of physical manifestation and by traditional indicia of economic value and, as a result, found no property interest.¹⁴⁷ The distinction is not nearly as meaningful as if the court had found no recovery; since it found a tort remedy, the question remained one of classification.

144. *In re Marriage of Brown*, 541 P.2d 561, 565 (Cal. 1976).

145. *Cohen v. Groman Mortuary*, 41 Cal. Rptr. 481, 483-84 (Ct. App. 1964).

146. *See Scarpaci v. Milwaukee County*, 292 N.W.2d 816, 820 (Wis. 1980).

147. *Id.* at 820-21.

3. Frozen Embryos

In the case of frozen embryos, the relationship of the parties to each other, as well as to the frozen embryos, plays a key role, as far as one can tell from the limited number of reported decisions on the issue of whether frozen embryos are property. In *York v. Jones*,¹⁴⁸ property in frozen embryos is assumed. *York* involved a conflict between a couple and a clinic where their frozen embryos were stored. The couple wished to transport the embryos to a different clinic for implantation; the original clinic refused to release the embryos. The court assumed that the embryos were property by virtue of language to that effect in the contract between the couple and the clinic.¹⁴⁹ The only question that remained was whether the same agreement created a bailment contract that was breached by the clinic's refusal to release the "property."¹⁵⁰

In contrast, the question of whether the embryos are property is hotly disputed in the case of *Davis v. Davis*.¹⁵¹ There, the court sought to determine if the frozen embryos of a divorcing couple were "children," with the mother seeking "custody" for implantation, or whether they were "property" to be distributed equitably, presumably to the father who wished to dispose of them. The focus for the court in making this determination was on the uniqueness of the embryos: if they are unique, then they are human; if not, then they are property.¹⁵² The court, in support of its finding that the embryos were unique and therefore children, summarized the expert testimony as follows:

Both Dr. Shivers and Professor Robertson cite undifferentiated cells as one basis for their opinions that human embryos are not human beings, but each hedges on the point. . . . Dr. Lejeune, on the other hand, says a man is a man; that upon fertilization, the entire constitution of the man is clearly, unequivocally spelled-out, including arms, legs, nervous systems and the like; that upon inspection via DNA manipulation, one can see the life codes for each of these otherwise unobservable elements of the unique individual.¹⁵³

148. *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989).

149. *See id.* at 424-25.

150. *See id.* at 426-27.

151. *Davis v. Davis*, No. E-14496, 1989 WL 140495 (Tenn. Cir. Sept. 21, 1989).

152. *See id.* at *6.

153. *Id.* at *8. The case which overturned *Davis*, 59 U.S.L.W. 2205 (Tenn. Sept. 13, 1990), focused not at all on the property question, but simply argued that allowing the mother to implant the embryos was impermissible state action which violated the father's right not to procreate.

The nature of the debate, children vs. property, is partly determined by the specific demands of the parties: one party wants to treat them as children by turning them into children; the other wants to treat them as property by disposing of them. The questions, legal analysis, and traditions employed would be different if both parties wanted to somehow treat them as children (the father and another woman hoping to implant them and take them to term also) or as property (as in *York*). The nature of the relationships is significant in the framing of the issues and is thus significant in the outcome of whether the item is property.

4. Body Parts

The focus by the *Davis* court on uniqueness appears to differ from the analysis in *Moore v. Regents of the University of California*.¹⁵⁴ In that case, a patient whose tissue was used to develop a profitable cell line sued his doctors for conversion on the theory that his tissue was property.¹⁵⁵ The court held that while a cause of action for breach of fiduciary duty may lie because the doctors were aware of the commercially exploitable nature of the plaintiff's cells and failed to inform him of their plans, an action for conversion based upon a theory that the cells were property was not available.¹⁵⁶

Unlike the *Davis* court, the majority in *Moore* maintained that the non-uniqueness of the actual spleen cells removed from the plaintiff militated against their being property.¹⁵⁷ The *Moore* court focused rather on the uniqueness of the process for developing the cell line that was created through the ingenuity and effort of the doctor and researchers:

Finally, the subject matter of the Regents' patent—the patented cell line and the products derived from it—cannot be Moore's property. This is because the patented cell line is both factually and legally distinct from the cells taken from Moore's body. . . . It is this *inventive effort* that the patent law rewards, not the discovery of naturally occurring raw materials. Thus Moore's allegations that he owns the cell line and the products derived from it are inconsistent with the patent, which constitutes an authoritative determination that the cell line is the product of invention.¹⁵⁸

154. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990).

155. *See id.* at 479.

156. *See id.* at 486.

157. *See id.* at 490.

158. *Id.* at 492-93.

The uniqueness of the process, however, is not an argument that the cells are not property altogether. It is merely an argument that they are not Moore's property for the purposes of his sharing in their commercial exploitation. As one of the dissents points out, the defendant doctors and researchers would no doubt maintain that their interest in the tissue was property if faced with a patent infringement by other researchers or even if the profitable tissue itself were stolen by a rival research group.¹⁵⁹ Similarly, Moore himself might have had a property interest in a body organ had he, prior to surgery, dictated its eventual disposition and had those instructions been disobeyed.¹⁶⁰

Both the majority and dissenting Justice Broussard focus on the nature of the relationship, the former to argue that no property interest existed, the latter to argue that one did. The majority focuses on Moore's status as a patient, whose rights to control removed body parts are regulated by statute.¹⁶¹ The majority also notes policy arguments in favor of providing researchers with an incentive to exploit biotechnology.¹⁶² Broussard suggests that the facts which formed the basis for the majority's breach of fiduciary duty action (the doctors' deception) could provide a basis for the finding of property instead.¹⁶³ He contrasts the particulars of this doctor/patient relationship with the "typical case in which a patient consented to the use of his removed organ for general research purposes and the patient's doctor had no prior knowledge of the scientific or commercial value of the patient's organ or cells."¹⁶⁴ Under those circumstances, but not the ones found in *Moore*, Broussard "would agree that the patient could not maintain a conversion action."¹⁶⁵

A number of conflicting perspectives on economic valuation appear in *Moore's* several opinions. Concurring Justice Arabian reacts with horror at what he sees as the inherent commodification in giving the plaintiff a property interest:

Plaintiff has asked us to recognize and enforce a right to sell one's own body tissue *for profit*. He entreats us to regard the human vessel—the single most venerated and protected subject in any civilized society—as

159. See *id.* at 501 (Broussard, J., dissenting).

160. See *id.* at 502.

161. See *id.* at 489, 491.

162. See *id.* at 494.

163. See *id.* at 501.

164. *Id.* at 500.

165. *Id.*

equal with the basest commercial commodity. He urges us to commingle the sacred with the profane. He asks much.¹⁶⁶

At the same time, he concurs with a majority opinion that bases its holding in large part on the desirability of economic incentives for the further exploitation by researchers of bodily tissue products.

Dissenting Justice Mosk reacts with equal horror at not allowing the conversion action. He cites with approval from an article:

Research with human cells that results in significant economic gain for the researcher and no gain for the patient . . . tends to treat the human body as a commodity—a means to a profitable end. The dignity and sanctity with which we regard the human whole, body as well as mind and soul, are absent when we allow researchers to further their own interests without the patient's participation by using a patient's cells as the basis for a marketable product.¹⁶⁷

Yet he invokes an economic partnership model much like the joint economic enterprise theme from the professional degree cases:

There is, however, a third party to the biotechnology enterprise—the patient who is the source of the blood or tissue from which all these profits are derived. While he may be a silent partner, his contribution to the venture is absolutely crucial: as pointed out above, but for the cells of Moore's body taken by defendants there would be no Mo cell line at all. Yet defendants deny that Moore is entitled to any share whatever in the proceeds of this cell line.¹⁶⁸

Both Arabian and Mosk feel the human body should be inalienable, meaning inviolable, but also not for sale. However, both outcomes, majority and dissent, are consistent and inconsistent with this position because both would deny one person a property interest and grant it to another. The majority is attracted to the notion of free and unfettered commerce in biotechnological products, the positive side of transferability.¹⁶⁹ Similarly, Mosk evokes the image of the willing, equal business partner. The only difference between the majority and dissent perspectives in this regard is how the benefits are allocated. It is

166. *Id.* at 497 (Arabian, J., concurring).

167. *Id.* at 516 (Mosk, J., dissenting) (quotation omitted).

168. *Id.* (footnote omitted).

169. *See supra* note 162 and accompanying text.

impossible to tell from their description which allocation is more efficient or more likely to produce further biotechnological advances.

The majority expresses concern about transferability.¹⁷⁰ However, as with nonvested pension benefits, transferability need not be a *sine qua non* of property. Indeed, one could grant Moore a property interest in his spleen, value it based on the profits garnered by the researchers, and yet not be granting him transferability. Similarly, granting a spouse an interest in a degree does not transfer to her any of its incidents with respect to practicing the profession.

The concept of property is indeterminate. Indeed, it is more indeterminate than the treatise writers acknowledge, depending as it does on the nature of the relationships involved. Sometimes these relationships will support a finding that an item is property; sometimes not. Concepts like uniqueness, exchange value, and alienability also yield conflicting results. Expressions of hostility to economic valuation are equally unhelpful. As in *Moore*, one party is likely to be economically advantaged, the other disadvantaged, whether or not the court finds that an item under contention is property. Finally, there are many interests, like spleens, embryos, or bodies, that will be property for some purposes but not for others.

B. Marriage

The cases discussed in the previous section involved situations that occurred, for the most part, outside of the realm of marriage. When they concerned a property item disputed in a divorce, like the pension, the focus was on relationships other than the marital one in determining if the item was property. It is possible, however, that there is something unique about the marital relationship that affects distribution of the benefits of property or potential property items. Since cases and theories discussing the nature of *property* are indeterminate for resolving the question of whether professional degrees are marital property, it might be more helpful to remove the variable of "is-it-property?" and focus instead on the nature of *marriage* as it relates to items that are unequivocally property.

Just as commentary is available on the nature of property, so is commentary on the nature of marriage. Unlike the property commentators who greeted the developments in property law with excitement, writers of family law treatises express disappointment in the conflicting and increasingly policy driven developments in the field of marriage and look

170. See *Moore*, 793 P.2d at 489. The concern arises from prohibitions on organ selling.

with nostalgia upon earlier, simpler times. For instance, Clark states: "[M]arriage as a legal institution is being transformed from a clearly defined and legally regulated relationship into an imprecisely defined relationship whose incidents are either uncertain or left largely to the control of the parties to the relationship."¹⁷¹ Part of what made marriage such a clearly defined institution in the past was the predictability that came with consolidating power in the hands of one party: the husband.¹⁷² The courts today struggle with defining marriage in the absence of this legally sanctioned male dominance.

An excellent opportunity for an investigation of this struggle presents itself in judicial interpretations of the tenancy by the entireties. In the process of transforming this tenancy and assigning its corresponding property interests to the parties, courts have revealed their views on what is meant by equality for women within marriage.

The traditional form of the tenancy by the entireties provided a method by which husband and wife could hold real property together, but with a distribution of property interests that was openly unequal.¹⁷³ The two spouses were said to both own a united whole interest in the real estate, and each was guaranteed a right of survivorship, or fee simple absolute ownership of the property upon the death of the other, contingent upon surviving, but otherwise indefeasible.¹⁷⁴ However, during their joint lives, only the husband had the right to management, control, and possession. Further, he was able to alienate these rights, as well as his own contingent right of survivorship, subject only to the wife's guaranteed contingent right of survivorship. While this right of survivorship was a property interest the wife retained, she could not alienate it, nor any of her other rights with respect to the property.¹⁷⁵ According to modern courts, part of the rationale behind this form of ownership was the desire to preserve what was at the time considered to be an appropriate distribution of power within the relationship:

The male was assumed competent, and thus was to have full control of the property and returns from it during his lifetime and could alien or lose all his interest in it including his survivorship right. The female

171. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 31 (2d Ed. 1988).

172. *See, e.g.*, *Stiles v. Cain*, 66 P. 231 (Cal. 1901) (at common law the civil existence of the wife was merged into that of her husband); *Miller v. Newton*, 23 Cal. Rptr. 554 (1863) (the effect of marriage at common law is to deprive the wife of all separate legal existence).

173. *See THOMPSON, supra* note 115, § 33.05, at 99.

174. *See id.* § 33.02, at 96.

175. *See id.* § 33.05, at 99.

was thought incompetent, and so was given no rights in the property during her husband's lifetime, and must abide his ideas of proper management, but was protected in her survivorship right against her creditors (and even against her husband and his creditors).¹⁷⁶

As recently as 1966, a court suggested that allowing a wife to upset this balance by demanding an accounting of rents "would disrupt and injure the marriage relationship."¹⁷⁷ It is important to note that this traditional arrangement offers an example, in the wife's interest, of an indisputable property interest that lacks the characteristic of alienability, and that the characteristics of the interests and their distribution are explicitly supported by policy rationales.

In response to the Married Women's Property Acts passed toward the end of the nineteenth century, most states have modified the form of the tenancy by the entirety.¹⁷⁸ Some, however, have not. Massachusetts, for example, only modified the tenancy in 1980, and then only prospectively.¹⁷⁹ Most states maintaining the tenancy by the entirety have attempted to refashion it to make it more equal, or more consistent with the spirit of the Married Women's Property Acts. Although these acts were fairly limited in their literal scope, they were interpreted more broadly to equalize women's property and contractual rights in many areas, including tenancy by the entirety.¹⁸⁰ However, courts have interpreted equality differently.

In *Sawada v. Endo*, the Hawaii Supreme Court sets out the array of choices it faced in adapting the tenancy.¹⁸¹ Aside from those states which at the time preserved the common law form of the tenancy, the court was primarily faced with two choices: follow those states that had expanded the wife's interests to allow her an alienability of management and survivorship interests identical to the power previously held by the husband, or follow those states that reduced the rights of alienation of the husband to match those previously held by the wife.¹⁸² Between the majority and the dissent, the *Sawada* court provides examples of rationales for either choice.

176. *West v. First Agric. Bank*, 419 N.E.2d 262, 267 (Mass. 1981).

177. *In re Guardianship of Plowman*, 398 S.W.2d 721 (Tenn. 1966), *overruled by Robinson v. Trousdale County*, 516 S.W.2d 626 (Tenn. 1974).

178. See CUNNINGHAM, *supra* note 113, § 5.5, at 205. Many states that once had the tenancy by the entirety have eliminated it altogether. See *id.* at 203.

179. See *West*, 419 N.E.2d at 263.

180. See JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 325 (2d ed. 1988).

181. *Sawada v. Endo*, 561 P.2d 1291 (Haw. 1977).

182. See *id.* at 1294.

In adopting the choice of reducing the husband's rights of alienation, the majority emphasizes the need to protect the family home from creditors or other claimants for the purpose of protecting the family unit itself.¹⁸³ The majority maintains that the choice of protection follows from the indivisibility of the estate, which it sees as "an indispensable feature of the tenancy by the entirety."¹⁸⁴ The dissent, on the other hand, favoring rights of alienation in both parties, emphasizes freedom and denigrates the majority's approach as sex-stereotyped protectionism:

One may speculate whether the courts which first chose the path to equality now followed by the majority might have felt an unexpressed aversion to entrusting a wife with as much control over her interest as had previously been granted to the husband with respect to his interest. . . . I feel that the resultant restriction upon the freedom of the spouses to deal independently with their respective interests is both illogical and unnecessarily at odds with present policy trends.¹⁸⁵

The New Jersey Supreme Court, in *King v. Greene*, has taken a view similar to the *Sawada* dissent.¹⁸⁶ Holding that both husband and wife may alienate their separate possessory interests as well as their contingent rights of survivorship, the court reasons: "it follows, that if the wife takes equal rights with the husband in the estate, she must take equal disabilities. Such are the dictates of complete equality."¹⁸⁷ Whereas the majority in *Sawada* finds the protection characteristics of the tenancy by the entireties to be its central feature, the dissent and the *King* majority see the freedom of alienability characteristic to be paramount. In fact, neither is quite right in isolation, since in its original form the tenancy by the entireties actually had both characteristics: the husband had both protection from the wife's creditors or potential vendees and freedom to alienate his interests. It is impossible to replicate that situation for both parties, just as it is impossible to give absolute freedom and absolute protection to more than one party simultaneously.¹⁸⁸ The courts are thus faced with a quandary,

183. *See id.* at 1297.

184. *Id.* at 1296.

185. *Id.* at 1298.

186. *See King v. Greene*, 153 A.2d 49 (N.J. 1959).

187. *Id.* at 60.

188. *See* Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 980 (1983) ("We want freedom to engage in the pursuit of happiness. Yet we also want security from harm. The more freedom of action we allow, the more vulnerable we are to damage inflicted by others.").

and they appear to resolve it by reference to their competing understandings of equality.

The views of feminist litigators and legal theorists may be one source for these understandings. The freedom of alienability approach much resembles the work of early feminist litigators in the equal protection arena who focused on the harm of protectionist legislation founded on stereotypes. These feminists argued that women should be treated like men and given the same advantages and disadvantages.¹⁸⁹ Their position can be, and has been, criticized for ignoring the non-neutral, male character of "the same" that the women were seeking.¹⁹⁰ The freedom position for tenancy by the entirety can be met by a similar critique. Giving women and men the same advantages and disadvantages with respect to alienability will disadvantage women more; because of ongoing discrimination, men are more likely to participate and receive favorable treatment in a market in which the virtues of alienability count.

The feminists who launch such critiques might be seen to favor the protection stance toward tenancy by the entirety, either because it protects women against the real-life power men wield in the marketplace, or because it will give women more secure opportunity to pursue the valuable (but unpaid) activities related to childrearing in which they are far more likely to engage than men.¹⁹¹ This position is likely to be critiqued in turn for perpetuating stereotypes of what is valuable activity for women and for failing to empower women to achieve the level of recognition that men have in the market and elsewhere.¹⁹² The very dilemma presented by these conflicting theories has been criticized by Catherine MacKinnon

189. See Mary Joe Frug, *Sexual Equality and Sexual Difference in American Law*, 26 NEW ENG. L. REV. 665, 667 (1992) (describing a position taken by early feminists that "assumes a sex-blind posture regarding sex differences," and that maintains such differences either do not exist or "should be considered legally irrelevant"); see also Frances Olsen, *Feminism and Critical Legal Theory: An American Perspective*, 18 INT'L J. OF THE SOC. OF L. 199, 202 (1990) (suggesting that an attitude among feminists that "[i]f women can act as rationally and reasonably as men, they should be treated like men," and if they do not so act "they cannot expect to be treated as well" is still "widely held today").

190. See Frug, *supra* note 189, at 669 (describing other feminists who maintain that "conventional equality has not been calibrated on a neutral principle but has been constructed pursuant to a male perspective"); see also CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* 32, 34 (1987) ("under the sameness standard women are measured according to our correspondence with men," and "[g]ender neutrality is thus simply the male standard").

191. See Frug, *supra* note 189, at 669 (describing feminists who "argued that women's needs were noble, significant and worthy concerns which the equality principle should embrace").

192. See FRUG, *supra* note 16, at 48 (arguing that a position that valorizes stereotypically female traits "sentimentalizes and romanticizes self-sacrifice, and inadequately acknowledges the costs and problems of this attitude").

for their unifying suggestion that the standard against which women are judged remains male.¹⁹³

In Massachusetts, where the traditional form of the tenancy by entireties was preserved until recently, courts have attempted to accommodate the appeals of both freedom and protection as aspects of equality. In upholding the old form of the tenancy, both prior to the 1980 legislation and later with respect to tenancies created before the law went into effect, courts have focused upon the element of choice as a primary characteristic of marriage. For instance, in *D'Ercole v. D'Ercole*, a federal case applying Massachusetts law, a court saved the tenancy from challenge where the record revealed no "coercion, ignorance, or misrepresentation" by holding "that tenancy by the entirety, being but one option open to married persons seeking to take title in real estate, is constitutionally permissible."¹⁹⁴ Indeed, the court found that the record before it "[m]akes almost inescapable the conclusion that plaintiff freely entered into a contract along with her husband in 1961, selecting one among several options open to her,"¹⁹⁵ even though the court earlier acknowledges that, before 1973, any conveyance to a married couple was presumed to create a tenancy by the entireties, without any explicit choice.¹⁹⁶ Similarly, the Massachusetts Supreme Judicial Court upheld the constitutionality of tenancies made prior to the 1980 legislation by invoking free choice.¹⁹⁷ The court also points out the advantages that women may find in such tenancies, not only through the indefeasible right to survivorship, which distinguishes a tenancy by the entireties from other forms of concurrent interests, but also in the protection of the wife's interest from her own creditors, though this clearly also protected the husband.¹⁹⁸ The cases offer an ironic dichotomy between freedom to choose, presented as equal and uncoerced, and a choice, freely entered into, that has as its main drawing point an arrangement that is decidedly unequal: the incapacity of the wife to alienate (and thereby be reached by her creditors).

In cases on the tenancy by the entireties, courts present conflicting views on equality in marriage. Such equality can mean either equal freedom or protection that is equal. It is impossible to say which is

193. See MACKINNON, *supra* note 190, at 33.

194. *D'Ercole v. D'Ercole*, 407 F. Supp. 1377, 1382 (D. Mass. 1976).

195. *Id.* at 1380.

196. See *id.* The conclusion also ignores the role of power within the marital relationship. See *infra* Part III.B.3.

197. See *West v. First Agric. Bank*, 419 N.E.2d 262, 269 (Mass. 1981).

198. See *id.*

preferable, since each has a rigid uniformity that belies the complex nature of marriage. The Massachusetts courts combine the two positions, acknowledging at least that the appeal of equality lies both in freedom and in protection, but they do so in a manner that is internally contradictory.

Some parallels between the tenancy by the entirety positions and the professional degree positions may be apparent. The choice of acknowledging the degrees as property may correspond to the protection stance in the tenancy by the entirety cases because of its connection with the themes of sharing and family enterprise. The opposite approach may correspond to the freedom stance because of its emphasis on the individual. Indeed, it is interesting to note that there is no predictability within jurisdictions when comparing tenancy by the entirety approaches with professional degree approaches. For example, New York, home of *O'Brien* where the degree was found to be property, follows the freedom approach when it comes to tenancy by the entirety.¹⁹⁹

The discussion of tenancy by the entirety further demonstrates that courts have found no set answer for determining what equality in marriage means. It is therefore impossible to use any set meaning to help determine how to allocate rights upon divorce in other settings like the professional degree cases.

III. THE USES AND EFFECTS OF LEGAL RHETORIC IN PROFESSIONAL DEGREE CASES

So far, I have attempted to show that the doctrinal choices courts make in this area, although from a limited repertoire, are not in fact compelled by a set of background or related doctrinal categories. Based on doctrine, it cannot be said that one set of decisions is rightly and the other wrongly decided. In each of the situations discussed, this indeterminacy is to a large degree attributable to competing policy arguments. These policy arguments are similar to the rhetorical patterns identified earlier in the professional degree cases, and are similarly intertwined with the doctrinal issues to which they pertain.

199. See *Sawada v. Endo*, 561 P.2d 1291, 1294 (Haw. 1977) (grouping New York among states that give both husband and wife alienability); see also *White v. Smith*, 68 N.Y.S.2d 303 (App. Div. 1947) (holding that contract to sell property owned as tenancy by the entirety but signed by only one party was enforceable).

A. Matched Sets

These policy arguments or patterns do not represent alternative worldviews²⁰⁰ or competing ways of thinking about the world in the sense that they would allow us to choose the perspective with which we feel aligned, and from that starting point (doctrinal consistency having failed us), determine appropriate outcomes to the range of issues presented. Instead, the rhetorical choices, as a set of choices, structure the way judges, lawyers, and other audience members for legal opinions think about these issues.

Duncan Kennedy has argued in his phenomenology of judging that policy, like doctrine, provides a limited but diverse set of choices: "The arguer can pick and choose from a truly enormous repertoire of typical policy arguments and modify what he finds to fit the case at hand. The arguments come in matched contrary pairs, like certainty vs. flexibility, security vs. freedom of action" ²⁰¹ What's more, he argues, the process of legal reasoning does not mandate consistency from situation to situation as to which side of the matched pair is asserted:

In a sense, then, the process of legal arguers (lawyers, judges, treatise writers) is endlessly contradictory. I assert my policy as "valid" and as "requiring" an outcome, and then blithely reject it and in the next case, endorse its exactly matching opposite without giving any meta-level explanation of what keys me into one side or the other.²⁰²

Kennedy further argues that this process is neither carelessly contradictory nor cynically hypocritical: "there is a sense in which both policies are valid at the same time, in every case. The question is which one turns out to be 'stronger,' or to weigh more in a 'balancing test' applied to these particular facts, rather than which is correct in the abstract."²⁰³ It may make more sense, then, to consider conflicting rhetorical themes not for the purpose of choosing between them, but for the purpose of analyzing

200. See TOELKEN, *supra* note 12, at 226 (describing worldview as "culturally provided sets of ideas and premises" through which "the members of any given culture perceive reality").

201. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 534 (1986); see also Jeremy Paul, *The Politics of Legal Semiotics*, 69 TEX. L. REV. 1779, 1786 (1991) ("[M]any familiar legal arguments are coherent largely in terms of equally familiar opposing arguments that recur in case after case across a wide spectrum of legal controversies.").

202. Kennedy, *supra* note 201, at 534.

203. *Id.* at 535.

how these themes, as matched sets, shape (and are shaped by) the field of inquiry.

In the area of professional degrees, two pairs of conflicting rhetorical themes emerge: sharing vs. individualism, pairing theme number 1—marriage as sharing and theme number 2—*independent achiever*;²⁰⁴ and economic valuation vs. anti-commodification, pairing theme number 3—marriage as joint economic enterprise and theme number 4—hostility to economic valuation.²⁰⁵ One way to examine the themes might be to see them as representative of the market/family dichotomy, identified by Frances Olsen as a significant structuring feature of social and legal ideology.²⁰⁶ Although Milton Regan suggests that the ideology animating financial allocations upon divorce has moved historically from a family ideology to a market ideology,²⁰⁷ one finds instead themes representing both aspects of the dichotomy appearing simultaneously in the professional degree cases. The marriage as sharing theme (partaking of family ideology) coexists with the joint economic enterprise theme (market). Similarly, the *independent achiever*, who so resembles the autonomous market actor,²⁰⁸ appears in opinions that display the hostility to economic valuation more frequently associated with the family.²⁰⁹

However, when the themes are squared off against each other, as matched sets in opposing cases, one can see how the two sets of themes represent two different aspects of market/family tension. The personal attributes associated with the separate spheres are represented in sharing vs. individualism, while more explicit arguments about valuation are represented in the matched set of joint economic enterprise and hostility to economic valuation. Like the market/family dichotomy, these matched sets also reinforce or ignore gender stereotypes and gendered power dynamics.

The competing policy arguments that emerged from the tenancy by the entireties cases offer a good place to start in demonstrating the manner in which matched sets structure thinking. The conflict of freedom vs. protection seen in the tenancy by entireties cases has a history within property law at least as old as the maxims *damnum absque injuria* (harm

204. See *supra* Part I.B.1-2 and accompanying text.

205. See *supra* Part I.B.3-4 and accompanying text.

206. See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498-99 (1983).

207. See Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2306-07 (1994).

208. See *id.* at 2310 (connecting images of autonomy with market rhetoric).

209. See Olsen, *supra* note 206, at 1499 (describing traditional view of home and family as refuge from commerce).

without legal injury) and *sic utere tuo ut alienum non laedas* (so use your own as not to harm another).²¹⁰ The ultimate fantasy of property ownership would be to have both the freedom to do whatever one wants with one's property, and at the same time protection from the actions of everyone else. Normally, this fantasy is difficult to realize because, once all property owners get freedom, they no longer are protected from the exercises of freedom by others; once all receive protection, the freedom of all is curtailed in order to give effect to the protection. The only way to achieve the fantasy of both is through unequal distributions, as in the traditional form of tenancy by the entirety, in which the husband had both freedom of alienability and protection from his wife's potential alienability. Although the blatant inequality of this arrangement is no longer acceptable, the concepts of freedom and protection continue to structure the thinking about tenancy by the entirety cases. As indicated in the previous section, judicial opinions have championed either freedom or protection as the overriding hallmark of the traditional arrangement. Similarly, in Massachusetts, courts saved the traditional tenancy from attack by emphasizing the wife's freedom to choose an arrangement that offered her protection.²¹¹ As the previous section demonstrated, the adherence to this matched set, either by ignoring one side or attempting to combine the two, led to results that ignored the complexity of the tenancy, its history, its appeals, and also its role in gendered power distributions.

B. *Sharing vs. Independence*

The conflict between sharing and independence has a similarly venerable history. It resembles the conflict between community and individualism that Duncan Kennedy has identified as the "fundamental contradiction" in the American legal system.²¹² He argues that, although these two ideals are presented as mutually exclusive alternatives, the choice between them actually represents an internal conflict that continually reasserts itself.²¹³ Because of the role the community must play if individual freedom is to be recognized, "individual freedom is at the same time dependent on and incompatible with the communal coercive

210. See Singer, *supra* note 188, at 1011-12 (discussing the interrelationship of these maxims, and criticizing their coherence and explanatory power).

211. See *supra* note 194 and accompanying text.

212. See Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 211 (1979).

213. See *id.* at 211-12.

action."²¹⁴ Again, this understanding suggests that the arguments and counterarguments with respect to these ideals are matched sets rather than mutually exclusive alternatives. What follows is an examination of this conflict in the context of professional degrees and marital property. I argue that, as a set, these themes reinforce gender stereotypes, prevent the realization of either philosophic or redistributive goals for women, and obscure the role of power in these relationships.

1. Reinforcing Gender Roles

Stereotypes, it has been noted, can be harmful both in the constraints they place on acceptable behavior and in their inaccurate oversimplification of the way people actually behave.²¹⁵ One interesting aspect about the matched set of arguments in this context is that each side of the pair emphasizes a different activity. Sharing emphasizes the activities and decisions within the marriage. Independence focuses on activities that appear to occur outside of the marital sphere. But this division of labor is not uncommon to matched arguments. A certainty vs. flexibility argument might involve an emphasis on courtroom activity and lawyerly decisions (in the sense that a clear rule with predictable application would stem litigation) contrasted with an emphasis on those activities outside of that sphere (whatever human activities might be taken into account under a less rigid fairness standard). In the case of sharing and individualism, the split in area of emphasis has significant meaning.

By associating marriage with sharing, and achievement with independence, this split connects two sets of opposing gender stereotypes: (1) the association of women with marriage and men with achievement, and (2) the association of women with sharing behavior and men with independent behavior. On the one hand, marriage traditionally has been viewed as the sphere associated with women in opposition to the world of work and achievement associated with men. Perhaps the most vivid example in the legal literature of this set of stereotypes is Justice Bradley's concurrence in *Bradwell v. Illinois*:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman.

214. *Id.* at 211.

215. See brief for amicus curiae American Psychological Association in *Price Waterhouse v. Hopkins*, 485 U.S. 933 (1988), reprinted in MARY JOE FRUG, *WOMEN AND THE LAW* 258, 260 (1992). According to this brief, stereotypes can be both normative (instructing individuals on how they should behave) and descriptive (providing a set of traits that individuals are presumed to have). See *id.*

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.²¹⁶

On the other hand, the behavioral traits of sharing and independence traditionally have been attributed, respectively, to women and to men.²¹⁷ Indeed, modern feminists have made similar connections. The gender differences in moral reasoning identified by Carol Gilligan in her influential work *In a Different Voice* resemble the differences between sharing behavior and independent action.²¹⁸ Gilligan's critique of earlier moral reasoning studies based on male subjects alone suggests that girls and women tend to view morality in terms of relationships and a network of connection, whereas boys and men focus more on abstract principles of justice.²¹⁹ Although Mary Joe Frug suggests that Gilligan's work is open to different interpretations, one interpretation links the differences Gilligan cites in the area of moral development to traits like sharing and independence: "Pursuant to this reading of Gilligan, her book constitutes evidence that women are contextually focused, relationship-oriented, and care-giving, whereas men are abstract, individualistic, and dominating."²²⁰

Some feminist theorists have noted this distinction between female and male attitudes with favor, seeing promise for change in the practice of law through the influx of more women, asserting that women's propensity to seek shared solutions and compromises will mollify the more competitive, adversarial aspects of the law associated with men.²²¹ Others, like Frug, have worried about the ease with which Gilligan's critique can collapse into disabling gender stereotypes. Frug's concern is that a reading of

216. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring). The Court upheld the right of the state of Illinois to deny Myra Bradwell a license to practice law. *See id.* at 139.

217. *See Olsen, supra* note 189, at 199-200 (women traditionally associated with terms like "emotion," "contextualized," and "personalized," while men are traditionally associated with terms like "reason," "abstract," and "principled").

218. *See* CAROL GILLIGAN, *IN A DIFFERENT VOICE* 32 (1982).

219. *See id.* at 32; *see also id.* at 35 (noting differences in emphasis on themes of separation and connection in the interview responses of a girl and boy).

220. FRUG, *supra* note 16, at 39.

221. *See, e.g.,* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 *BERKELEY WOMEN'S L.J.* 39, 62 (1985) (suggesting that "an increasing number of women's voices could or will alter our legal sensibilities and values").

Gilligan that transplants the differences from Gilligan's context of a critique of moral development theory to a more generalized and static view of gender differences "artificially valorizes domestic roles traditionally assumed by white middle-class women. It sentimentalizes and romanticizes self-sacrifice, and inadequately acknowledges the costs and problems of this attitude."²²² Like Frug, Joan Williams argues that the static association of women and men with traits like sharing and independence is linked to a similar separation of spheres between marriage or domesticity, and achievement or autonomy.²²³

It seems immediately apparent that the rigid gendering of the arenas of marriage and achievement and of sharing behavior and independence is not absolutely empirical. First, marriage and achievement are not as gender segregated as the stereotype suggests. Marriage is not, in fact, exclusively women's sphere: for every legally sanctioned heterosexual marriage there is a male as well as a female participant. Similarly, achievement is not exclusively male: even under circumstances of extreme sex discrimination, women play significant support roles in most arenas of male achievement.²²⁴ What's more, the gendered associations with marriage and achievement may be particularly inapplicable to those who are not white or middle class, both on the level of experience as well as stereotype.²²⁵ But the distinction does tap into common understandings, albeit class-based and racialized as well as heterosexist, of who bears—or who should bear—responsibility for each sphere.

Second, women and men are not as segregated in the distribution of traits as the stereotype suggests. Both Frug and Williams use Gilligan's own work to offer critiques of the rigid assignment of gender traits. Frug argues that a "progressive reading" of Gilligan is context-based and focuses on the uses of sex differences in language as part of a specific critique of moral development models.²²⁶ From this perspective, which suggests that sex differences are dynamic, Gilligan's studies can be seen as a source for challenging the rigidity of gender difference as well as the

222. FRUG, *supra* note 16, at 48.

223. See Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1566-1567 (1991).

224. Consider, e.g., the stereotype of the super-efficient secretary without whom the business would collapse.

225. See Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481, 2488 (1994) (arguing that Black women constitute "a group that has historically defied the norm that defines motherhood as incompatible with wage labor").

226. See FRUG, *supra* note 16, at 40.

hierarchy that places male traits over female ones.²²⁷ Williams examines Gilligan's own data to discover that, instead of a rigid gender separation between ideals of domesticity and pursuit of self interest, the interviews reveal the conflict between these ideals reasserted within the decisionmaking process of the individual women interviewed.²²⁸

Not only are women and men more complicated in their traits and ideals, and the human activity arenas of marriage and achievement more complicated in their gender associations, but the arenas of marriage and achievement are also more complicated than the schematic association of them with sharing and independence would suggest. Leaving aside for now the important issues of power discussed below, it is clear to anyone who has been even within shouting distance of a marriage that the "sharing" model is hopelessly overgeneralized and totalizing. The model can be nothing more than a normative ideal. Each relationship will be different, but will no doubt reflect some complicated combination of sharing and individual struggle, love and manipulation, sacrifice and exploitation. What has just been said is still not nearly complicated enough, because each relationship will be further permuted by differing and shifting combinations of the perceptions of each of the parties as to the balance among these different elements. But again, as a prescriptive ideal, the sharing model is not without meaning; it reflects and shapes perceptions about marital success and failure.

Similarly, educational achievement cannot realistically be seen as an activity of isolation. As one finds in a range of experiences from study group dynamics to disputes over family expectations, the lengthy process of acquiring a degree must also be recognized as an arena of complicated combinations of sharing and individual struggle, love and manipulation, sacrifice and exploitation. When we imagine how complicated it gets when these two arenas come together, as they do in each one of the professional degree cases, it is easy to understand the temptation to view the chaotic field with the aid of a simple scheme of opposing ideals.²²⁹

227. *See id.*; but *see also id.* at 41-45 (demonstrating that Gilligan's own language lends itself both to this reading and to a "conservative reading" that suggests inherent, static gender roles).

228. *See Williams, supra* note 223, at 1569.

229. *See Dan Danielsen, Representing Identities: Legal Treatment of Pregnancy and Homosexuality*, 26 *NEW ENG. L. REV.* 1453, 1498 (1992) (explaining the process by which courts in pregnancy and sexual orientation discrimination cases distill experience into prototypes that do not necessarily comport with the more complex character of people's lives).

2. The Set Does Not Represent a Meaningful Choice

Furthermore, the set does not represent a meaningful choice of alternatives, one of which will yield salient advantages for women—either philosophic or strategic. It is possible at this point in the analysis that someone might exclaim, “Wait a minute, it looks as if women win when women’s values [meaning Gilliganesque traits like sharing] are promoted,” because courts deploying the sharing in marriage pattern find the degree to be property. If this is meant as a philosophical claim, an attempt to validate the promotion of women’s values, the answer is not so clear, because these arguments, and their attendant associations, come in matched sets. For every validation of the sharing principle that might result from its use in a finding that degrees are property, there will be an attendant grumble, whether in the form of formalized dissent or commentary, that values associated with independent achievement have been overlooked.

The concurrence in *O’Brien* provides a good example of the fear that awarding a wife the present value of the enhanced future earning capacity may severely restrict the husband’s independence. Noting that, by law, property distributions cannot be modified by changed circumstances, concurring Judge Meyer worries:

Yet a professional in training who is not finally committed to a career choice when the distributive award is made may be locked into a particular kind of practice simply because the monetary obligations imposed by the distributive award made on the basis of the trial judge’s conclusion (prophecy may be a better word) as to what the career choice will be leaves him or her no alternative.²³⁰

With even greater expression of horror, the court in *Severs v. Severs* stated:

The wife’s claim to a vested interest in the husband’s education and professional productivity, past and future, is unsupported Indeed, such an award by the trial court would transmute the bonds of marriage into the bonds of involuntary servitude contrary to Amendment XIII of the United States Constitution.²³¹

230. *O’Brien v. O’Brien*, 489 N.E.2d 712, 720 (N.Y. 1985) (Meyer, J., concurring); *see also In re Marriage of Goldstein*, 423 N.E.2d 1201, 1204 (Ill. Ct. App. 1981) (distinguishing assets such as pensions as more appropriate for distribution because they are “not contingent on future events such as continuation of employment”).

231. *Severs v. Severs*, 426 So. 2d 992, 994 (Fla. Dist. Ct. App. 1983).

Stewart Sterk notes that this argument's "emotional power relies on images of trapped people, forced by circumstances beyond their control to work in jobs they despise."²³² It is true, as Sterk points out, that the involuntary servitude argument ignores the extent to which most people in non-elite professions are already severely restricted in their career choices by economic concerns.²³³ Nonetheless, it is an argument that is bound to have enormous appeal to the elite audience for legal opinions.²³⁴ Precisely because the divisions between marriage and achievement are not so rigidly gendered, this sympathetic audience is likely to contain many women, who are engaged in what might be considered independent achievement. By the same token, the argument may resonate on some level even for the wife who won the decision, who, after all, is in court because she believes her own career goals have been constrained. The stance of the potential wife/victor in these cases is quite complicated. Under a regime that contrasts marital sharing and independent achievement, the wife who would win is in the awkward position of having to assert a claim based on both the mutual expectations of the marriage as well as evidence of her own associations with independent achievement; either in the sense that she has been so successful in the world of work that she has supported two (or more) people while paying tuition, or in the sense that she asserts that her own career ambitions for independent achievement have been thwarted.²³⁵

232. Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 444 (1993). The court in *DeWitt v. DeWitt*, 296 N.W.2d 761 (Wis. Ct. App. 1980), conjures up the equally unpleasant alternative: "The potential for inequity to the failed professional or one who changes careers is at once apparent; his or her spouse will have been awarded a share of something which never existed in any real sense" *Id.* at 768.

233. *See id.* at 446. Sterk maintains that only those who have sufficient financial means as well as opportunities for self-fulfilling work would view an option to reduce income as attractive and rue its unavailability. *See id.*

234. Most lawyers will have had some experience with the feeling of having their career choices constrained, either by economics, family expectations, inculcation at law school, firm recruitment procedure, or by any number of circumstances. There is diversity to this experience, however. Law students at elite law schools may feel themselves uncomfortably driven toward a corporate firm existence and corresponding life style by a recruitment process that students at less prestigious schools can only dream about. Students at less prestigious schools may look with incredulity at their more hierarchically endowed instructors who claim, with relief, to have "escaped" from a range of opportunities and salaries that through sheer elitism are unavailable to their students. Yet these same students may experience a range of restrictions on their career choices from economic concerns and family pressures, which might seem piddling to those without the opportunities the law degree affords. This is not to say that these concerns are equivalent, or that the negative effects of hierarchy should be ignored. But it does recognize the importance of perspective in assessing the receptivity of the audience.

235. *See* Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 14 WOMEN'S RTS. L. REP. 213, 229 (1992) (suggesting a similar dilemma in the area of battered women's self-defense: "Indeed if the testimony is limited to the issue of why the woman does not leave, it highlights a contradiction implicit in the message of

If the claim that asserting sharing values promotes women's needs is a strategic one, for which the goal is redistributive effects rather than affirmation of gendered traits, it is also problematic. The assigning of gender roles is not just arbitrary, but has spin. The sharing side of the dichotomy associated with women is devalued. It is worth noting that the sharing in marriage perspective, while important in defining the matched set of arguments, does not frequently prevail.²³⁶ I am not certain that advocating it more forcefully will produce concrete benefits.

It is also worth noting Twila Perry's caution on the limited and perhaps problematic effects of redistribution in the divorces of privileged women. She argues, in the context of alimony, that support of greater awards for the privileged women who are likely to receive alimony may help only some women while hurting others. According to Perry, focus on these divorces "reinforces society's unfortunate tendency to divide women into categories of those who are deserving of economic support and those who are not,"²³⁷ both on a conceptual level and by diverting attention from issues of economic justice across race and class lines. Furthermore, any reinforcement of prescriptive stereotypes, performed in concert here by the matched set, may well have negative consequences for those who fail to meet the prescription.²³⁸ For those who are the victims of descriptive stereotypes that would violate the prescriptive stereotype—for example, women not white, middle class or heterosexual who would be less likely to be associated with norms of marriage and sharing—the cumulative consequences might well be worse.²³⁹

battered woman syndrome—if the battered woman was so helpless and passive, why did she kill the batterer?").

236. Who knows if it is just a coincidence of rhetorical taste, but it is interesting to note that in the one significant instance in which the full blown degree-is-property argument unambiguously managed the transition from dissent to majority at a state supreme court level (*O'Brien*), the opinion carefully avoids the marriage as sharing theme, sticking firmly to the marriage as joint economic enterprise argument. See generally *O'Brien v. O'Brien*, 489 N.E.2d 712, 746-51 (N.Y. 1985).

237. Perry, *supra* note 225, at 2500; see also *id.* at 2497 (arguing that such decisions may reinforce hierarchies between women that favor those "attached to affluent men" and noting that "Black women, who are the most unlikely to be attached to affluent mates, will always occupy the bottom rung of the ladder").

238. As I pointed out above, these would include the very women, workers all, who bring these lawsuits.

239. See Perry, *supra* note 225, at 2488 (addressing the incompatibility of norms of women's domesticity to Black women); see also Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1271 (1991) (discussing the harmful effects when racial stereotypes about Black women's sexuality "intersect with norms of women's sexuality," arguing that "Black women are essentially prepackaged as bad women within cultural narratives about good women who can be raped and bad women who cannot").

3. Power Obscured

The rhetorical structure of these cases would present problems even if property recognition were a successful and unproblematic strategy for redistribution of income. Both sides of the matched set reinforce gender roles and the power dynamic that accompanies these roles, not only by associating the patterns with stereotypes but also by obscuring power.

The tenancy by the entirety cases again provide an introductory example. In these cases, the role of power is ignored. When choosing between freedom and protection, each side proceeds as if it has found the only true characteristic of tenancy by the entirety. Indeed, the one characteristic of the traditional tenancy that these opinions ignore is power. To the extent that it is paid any attention at all in the protectionist position, these opinions tend to gloss over women's disempowerment by focusing on the fact that both men and women are protected under the new approach. However, both freedom and protection have elements of power; it takes power to exercise freedom effectively, and protection is the safeguard the powerless have against those with power. The Massachusetts courts' attempts to justify modern recognition of the traditional tenancy by championing the wife's free choice²⁴⁰ obfuscate power. The opinions ignore the differences in the appeals of freedom and protection, and the impact of these differences on the marital relationship. The wife may be powerless to choose power, and therefore "chooses" powerlessness, or protection, which under the circumstances may seem like an attractive option.

In the professional degree cases, the opinions similarly obscure the role of power within the marital relationship through their doctrinal and thematic choices. Unequal power relationships are absent in the image of equal sharing and considered irrelevant in the focus on independent achievement. Yet any marriage, and particularly ones that involve one spouse bypassing opportunities in order to enhance the opportunities of another, is bound to involve power dynamics on some level. The vectors of power may point in conflicting directions (e.g., the student husband may also feel coerced into pursuing an aspect of his career that he does not care for), but they are likely to be an important factor for understanding the relationship.²⁴¹ Because of the rhetorical structure of sharing vs. individual achievement, however, power plays no role in these cases. This

240. See, e.g., *D'Ercole v. D'Ercole*, 407 F. Supp. 1377, 1382 (D. Mass. 1976).

241. For a helpful model for understanding these complexities, see Michael Hunter Schwartz, *Power Outage: Amplifying the Analysis of Power in Legal Relations (With Special Application to Unconscionability and Arbitration)*, 33 WILLAMETTE L. REV. (forthcoming 1997).

is not to say that the writers of these opinions purposely seek to hide the role of power; because of their access to these traditional themes, it is likely that they do not even contemplate the role of power.

C. *Economic Rhetoric*

In some respects, the question of whether a degree should be subject to valuation is simply a conclusion that follows from the pursuit of the competing themes already discussed. An emphasis on marriage as sharing leads to a conclusion that the degree should be subject to valuation, and an emphasis on independent achievement leads to a conclusion that it should not be. However, the route between these themes and the conclusion requires the intervention of the second set of opposing themes: marriage as joint economic enterprise (number 3) and hostility to economic valuation (number 4). This second set of opposing patterns can also be seen as a matched set of arguments. Like the sharing vs. independent achievement matched set, the arguments about the appropriate role of economics reinforce gender stereotypes, fail to offer a meaningful or determinate choice, and obscure power.

1. Reinforcing Gender Roles

It is again possible to view this matched set as representative of more general opposing perspectives. Joint economic enterprise embraces the metaphor of economics and business as well as the economic tools of analysis for other arenas of human activity, like marriage, while the hostility theme rejects the metaphor and the results of valuation as improper commodification of the activities to which the analysis is applied.

Those most fully supporting an economic perspective seek to achieve a desired outcome based on policy goals. They are more likely to be commentators rather than courts. Judges typically display both eagerness for the metaphor and some timidity with applying the analysis, yet their invocation of the metaphor brings with it the perspective of the more developed economic treatments. The commentators ask what efficient or desirable policy goals will most likely be reached by what outcome. Their arguments can be called utilitarian arguments because of the focus on ends and the means, through economic incentive, necessary to achieve them. The ends they typically seek to promote can be connected to the gender-based stereotypes discussed previously.²⁴²

242. See *supra* notes 212-29 and accompanying discussion.

Joan Krauskopf, writing after *Graham* but before *O'Brien*, urged that an economic model of marriage be accepted, and that the spouse who has supported her partner in pursuing a degree, the "marital investor," be granted "a fair return on her investment" upon dissolution.²⁴³ The legal vehicle Krauskopf prefers for guaranteeing this return is a gross maintenance award that includes expectation damages, not just reimbursement.²⁴⁴ The ends she seeks to promote by this strategy are clear: the spousal support for education as described in the cases is to be encouraged. She criticizes decisions that have not offered the awards she recommends because they "discourage spousal investment in the partner's education, although societal and family benefits from this form of investment in human capital warrant encouragement as a matter of public policy."²⁴⁵ She acknowledges the gendered nature of the arrangement she seeks to encourage,²⁴⁶ yet finds it to be a socially desirable arrangement:

First, the source of funds from one spouse provides incentive for the other spouse to acquire human skill and knowledge, which are increasingly essential to the economic productivity of society. Second, because of the demands for skilled human time, one spouse's investment in the other's skill and knowledge ordinarily maximizes the welfare of the most fundamental unit of our society, the family.²⁴⁷

This is how she connects her means and ends: "Thus, the working spouse predicates her sacrifice of income and personal educational advancement on the expectation of future returns to her from sharing in her husband's enhanced earning capacity."²⁴⁸

243. Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379, 381 (1980).

244. *See id.* at 401. At the time of her writing, Krauskopf rejected the property approach as unrealistic. *See infra* notes 258-59 and accompanying text.

245. *Id.* at 380.

246. Krauskopf states:

Traditionally, many young women contemplate dropping out of the labor market when children are young, which means a large decrease in the woman's earning capacity because of the period of time in which she is not in the labor force. Consequently, when a husband and a wife, even though they have equal abilities and ambitions, realize that they can afford only the costs of further education for one of them, the probabilities are that they will choose to invest in the husband's earning ability.

Id. at 387 (citation omitted).

247. *Id.* at 395.

248. *Id.* at 380.

More recently, Daniel Polsby and Martin Zelder have proposed a modified version of *O'Brien's* remedy in order to encourage the arrangement found there:

If a winding-up rule were to treat investments by one spouse in the education of the other as gratuitous, that would make them riskier for the NDS [non-degreed spouse], and so on the margin a number of intramarital investments would become unattractive. The marital community would thus be poorer, and so would the larger community, because one of its eminent sources of venture capital—interspousal investment—would be diminished to some extent.²⁴⁹

In a similar but broader vein, Ira Ellman proposes an augmented version of traditional alimony in order “to encourage socially beneficial sharing behavior in marriage by requiring compensation for lost earning capacity arising from that behavior.”²⁵⁰ This is what he means by sharing behavior:

In the end, marital “specialization” makes sense for most couples, with one spouse concentrating more heavily on the market while the other focuses more heavily on domestic matters. If the spouses view their marriage as a sharing enterprise, they will usually conclude that they are both better off if the lower earning spouse spends more on their joint domestic needs and allows the higher earning spouse to maximize his or her income. A problem arises only if their mutual commitment to share breaks down, in which case the spouse who has specialized in domestic aspects of the marriage—who has invested in the marriage rather than the market—suffers disproportionate loss.²⁵¹

According to Ellman, those dispositions that either inadequately or excessively address this disproportionate loss distort the incentives for marital specialization and can lead to less optimal arrangements, such as those in which both parties invest in their own human capital. These he considers less optimal because men, who are typically the higher earning spouse, will be deterred from entering such marriages, and because these marriages are more likely to end in divorce.²⁵² “Unless society wants to

249. Daniel Polsby & Martin Zelder, *Risk-Adjusted Valuation of Professional Degrees in Divorce*, 23 J. LEGAL STUD. 273, 277 (1994).

250. Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 12 (1989).

251. *Id.* at 48.

252. *See id.* at 47.

discourage sharing behavior in marriage, its law cannot penalize the spouse who shares.”²⁵³

This set of conflicting cases that reward women for sharing behavior and reward men for independent behavior may also, as a set, reinforce both traits, with the same potential negative consequences suggested in the previous section. In the economic analysis, sharing represents less of a moralistic goal and more a description of efficient behavior. Yet the use of the term “sharing” evokes the images of appropriate female behavior. It is worth noting that Ellman’s perhaps unintentional use of the verb “to share” refers to only one party: “the spouse who shares.” The gender neutral use of the verb in these contexts often seems intended to mean that both partners share. Yet that neutrality also seems to mask an association of sharing behavior, the behavior the economists wish to encourage, with only one of the spouses, the wife.

In addition, Milton Regan suggests that the deployment of investment rhetoric (the sort of rhetoric associated with joint economic enterprise) serves to further privilege the realm of the market, a realm associated with men.²⁵⁴ Despite its apparent redistributive benefit, he argues, reliance on this rhetoric ultimately enforces values to which men historically have had easier access and, among women, to which only economically privileged women have had access.²⁵⁵

At the same time, an attitude that fails to ascribe economic value to the efforts of the wife may reinforce negative attitudes about the social value of her contributions. For instance, Carol Rose argues that the failure to engage in human capital analysis could allow gendered power arrangements to remain masked.²⁵⁶ As Regan and Rose both suggest, both positions fail to capture the complex interconnections between family life and finances that exist in real marriages.²⁵⁷

253. *Id.* at 51.

254. See Regan, *supra* note 207, at 2309-10. In his article, Regan uses the term “property rhetoric” to refer to evaluations based on market and human capital analysis. See *id.* at 2307 (a person deploying property rhetoric “tends to describe herself as someone who is entitled to a return on her investment, who has labored to produce something of economic value, who has not been fully compensated . . . or who is an economic partner”). Like Carol Rose, what I consider to be “property rhetoric” encompasses both eagerness and aversion for market language, both marriage as sharing and marriage as joint economic enterprise. See Carol M. Rose, *Rhetoric and Romance: A Comment on Spouses and Strangers*, 82 GEO. L.J. 2409, 2410 (1994) (arguing for a more expanded concept of “property rhetoric”).

255. See Regan, *supra* note 207, at 2378.

256. See Rose, *supra* note 254, at 2416-17.

257. See Regan, *supra* note 207, at 2310; see also Rose, *supra* note 254, at 2413.

2. Indeterminacy

There are a number of ways in which the arguments regarding the appropriate use of economic analysis turn out to be indeterminate. For one, economic analysis does not produce a single, unambiguous outcome. Nor do debates over economic analysis offer a single “best” strategy. Finally, arguments about the appropriate role of market rhetoric fail to consider the unavoidability of such rhetoric about marriage and other areas of social life.

a. Economic Analysis

Among the utilitarian arguments, there is disagreement about what remedy or lack of remedy will achieve a desired outcome, just as there is potential disagreement about the desired state of affairs to be encouraged through economic incentive. Krauskopf and Ellman both support remedies that are somewhat different from that endorsed in *O'Brien*, while Polsby and Zelder endorse an adjusted version of the *O'Brien* remedy. Krauskopf finds the property vehicle lacking because, at the time she was writing, no court had used a finding of the degree as property to award more than the supporting wife’s out of pocket expenses.²⁵⁸ Instead, she argues that in gross maintenance could be used to realize the wife’s expectation damages.²⁵⁹ Polsby and Zelder would support a property award adjusted by a premium to reflect the risk that the degreed spouse might earn less than average.²⁶⁰

The means Ellman chooses to reach the end of appropriate marital behavior are alimony awards that compensate for lost earning capacity. The spouse who has lost earning capacity would be allowed to recover the amount her own earning capacity has been reduced because of the marriage.²⁶¹ Application of this principle in the professional degree cases

258. See Krauskopf, *supra* note 243, at 413-14.

259. See *id.* at 415. Krauskopf also argues that the precedential ramifications of a property finding, which in her view would not allow for considerations of context the way a maintenance award would, could have the effect of either preventing states from adopting community property regimes, or of encouraging courts to offer low awards. See *id.* at 415-16.

260. See Polsby & Zelder, *supra* note 249, at 279. They also suggest that reimbursement alimony if adjusted in the other direction to reflect the risks of the contributing spouse might end up being an equally generous remedy. See *id.* at 281.

261. See Ellman, *supra* note 250, at 65. There are several limitations on this in Ellman’s proposal. The loss in earning capacity must arise from behavior that is financially rational for the couple. See *id.* at 58. Also, if the loss in earning capacity resulted in no commensurate increase in marital income, the claim is denied. See *id.* at 65. Losses arising from caring for the couple’s children would be compensated despite both these provisions. See *id.* at 71.

results not in expectation damages but in compensation to the supporting spouse for the loss, if any, she experienced in her own earning capacity because of the early support she provided.²⁶² He rejects an expectation measure because of the incentive it might provide for divorce in a regime like no-fault divorce in which there is no penalty for "breach."²⁶³

However, it is also possible to argue, in a utilitarian vein, that a generous award of enhanced future earning capacity will discourage the sort of sharing behavior that the commentators seek to encourage. While Ellman rejects the approach of expectation damages, it is not for this reason. Rather, he takes pains to assure the reader that the remedy he proposes is sufficiently generous to encourage the sharing behavior he describes. In contrast, if one follows the assumptions made by each of these theorists that people structure their marriages in at least partial response to expected divorce outcomes, one could argue that husbands will be less inclined to rely upon their wives for support in education if they realize that they will not be able to leave the marriages with the excess value of their degrees. They may prefer to finance their education and their share of the family's support by relying on parents or loans, or by attending part time programs while continuing to work. Although these alternatives might involve greater costs in the short run, they may seem less costly in the long run, depending, as do all these theories, on how large the risk of divorce looms at the time these decisions are made. Another option, along these lines, might be to forego the degree altogether. Indeed, even if divorce seemed a remote and unlikely possibility, a man in this type of situation, if informed about the state of the law, might feel uncomfortable with the notion that his spouse, through her efforts, was acquiring an interest in the anticipated degree.

262. See *id.* at 70; see also Allen Parkman, *The Recognition of Human Capital as Property in Divorce Settlements*, 40 ARK. L. REV. 439, 455-56 (1987) (proposing a reimbursement remedy).

263. See Ellman, *supra* note 250, at 66. Steward Sterk, in contrast to Ellman, suggests that the award should be a property interest that potentially exceeds what has been typically accepted as the best measure of expectation damages. See Sterk, *supra* note 232, at 438. O'Brien, following the lead of most commentators, awarded a share of the present value of the projected future earning capacity. See *supra* note 67 and accompanying discussion. Sterk suggests that the award would more closely mirror traditional property if the spouse "had a continuing lien against the educated spouse's future income," because "she would have a right that she might keep or sell depending on her evaluation of the educated spouse's prospects." Sterk, *supra* note 232, at 438. Although Sterk discusses the issues in economic terms, he does not specifically talk about encouraging certain behavior. His goal appears to be one of redistribution, since he attacks rules limiting alienability of human capital for their distributional consequences: "By protecting those well-endowed with human capital against claims by spouses, creditors and employers, existing doctrinal rules exacerbate inequality: those endowed with human capital may escape their commitments while continuing to benefit from their earning capacity." *Id.* at 460.

This perspective contrasts with that of Krauskopf and Ellman, who focus not on the man's decision to rely on the wife's support but on the woman's decision to offer it. Which perspective makes more sense will depend a lot on who one believes is more responsible for these types of decisions. How decisions get made in a relationship may depend on who has more power. Of course, it is most likely that the future outcome of a possible divorce bears only a tenuous relationship to the decisions married couples make about structuring their relationships.²⁶⁴

Another difficulty in evaluating the efficiency or optimality of the outcome sought by economic theorists is determining what role psychological factors like satisfaction, fulfillment, and stress should play in the equation. Of course, these types of factors could be assigned economic value and included in determining optimum arrangements.²⁶⁵ However, difficulties arise because of the lack of precision in both discovering and quantifying such subjective factors, and because of the arbitrariness necessary in deciding which among all the myriad of psychological and sociological factors existing in any human interaction count and which do not.²⁶⁶ For instance, in the professional degree situation, should the impact of the couple's decision on the wife's sense of fulfillment be included? If so, should the impact of the decision on the couple's children, in terms of role modeling, be taken into account; and should the impact of these scenarios as a larger sociological phenomenon be quantified as an externality?²⁶⁷

When individual psychological factors are taken into account, conclusions about what arrangement is efficient will vary from couple to

264. *But see* Polsby & Zelder, *supra* note 249, at 276. According to Polsby and Zelder, [t]he legal rules that govern the winding up of failed marriages will influence the behavior of the parties within marriage because everyone who stands at the altar is contingently subject to the rules of property division in marital dissolution. Every marriage has some *ex ante* probability of failure. Presuming rational behavior within marriage, different patterns of earnings, accumulation, and consumption should result depending on how people expect these to be accounted for by a family court judge in the event of a divorce.

Id.

265. *See* Radin, *supra* note 134, at 1865 (describing a similar process of assigning value to moral and political beliefs).

266. *See id.* (arguing that market rhetoric prevents analysts from recognizing these types of costs); *see also* June Carbone, *Economics, Feminism and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1467, 1485 (1990) (suggesting that Ellman's conclusions depend on consideration of some benefits but not others).

267. An externality is a social cost that will not be taken into account by the parties who are bargaining to a particular result (because it affects neither of them directly) but which might affect an evaluation from the outside of whether the parties' decision is of overall benefit or harm to society. *See* JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 330 (1993).

couple. Just as additional information about the power dynamic within the relationship will affect conclusions about means (in terms of which spouse is likely to be making decisions, which determines how incentives are likely to operate), power distributions will likely affect the distribution of psychological well-being. Such distributions will also have impact on the external sociological evaluation of the situation: an arrangement that reinforces gender-associated power dynamics may impose social costs that outweigh the benefits of the arrangement.²⁶⁸

Further, the debate between Milton Regan and Carol Rose over the use of property concepts in divorce law²⁶⁹ suggests that neither a position that embraces economic analysis of marriage nor one that eschews it is likely to produce material benefits for women at a level desired by those seeking to equalize economic disparities between post-divorce women and men. Regan maintains that one reason that market rhetoric has had limited success in redistributing income is the extent to which it constrains recognition of only those contributions women make that can be cast in market terms.²⁷⁰ Meanwhile, Rose argues that a failure to recognize a wife's contributions in market terms may cause them to be ignored entirely.²⁷¹

b. Market Rhetoric

Those who oppose the use of economic valuation generally oppose the use of both the analysis and the rhetoric of the market. Thus, an opinion deploying the hostility to economic valuation theme is likely to oppose both the actual valuation of the degree and also the economic metaphor of the joint economic enterprise theme. Margaret Radin argues that the rhetoric chosen for solving a problem can have profound implications for the problem's resolution and for how it is perceived.²⁷² In the case of market rhetoric she argues that the choice of rhetoric matters for three

268. Twila Perry suggests an additional externality that would complicate any analysis: she argues that supporting any arrangement that encourages privileged women to work outside the home may encourage further exploitation of underpaid domestic workers, who are often women of color. See Perry, *supra* note 225, at 2509-10; see also Carbone, *supra* note 266, at 1465-66 (discussing the interplay between the role specializations of husband and wife on the one hand, and specialization among women on the other).

269. See *supra* note 254.

270. See Regan, *supra* note 207, at 2370 (marital "investments" must compete conceptually with more obvious material investments); see also *id.* at 2379 (courts are more likely to reward market labor than domestic labor).

271. See Rose, *supra* note 254, at 2416-17.

272. See Radin, *supra* note 134, at 1878-79.

reasons: (1) the risk that important psychological and social costs will not be quantified, (2) the "injury to personhood" by "systematically conceiving of personal attributes as fungible objects," and (3) through this devaluation of personhood, its role in transforming the "texture of the human world" by changing the way we think of things.²⁷³ This third objection is in accord with the position that legal as well as other forms of rhetoric structures thinking and helps obscure important aspects of human relationships such as power.²⁷⁴ However, this observation pertains not just to one side of the matched set, the position in favor of commodification, but to both sides in combination.

Those expressing hostility to economic valuation reject the economic metaphor both for the degree acquiring process and for the marriage itself:

The Court's holding today will only further exasperate an at times already very volatile and emotional union with the requirement that prospective spouses not only keep a strict accounting of finances during the marriage, but view "marriage" as an investment that requires the investor to continually monitor his or her "investment portfolio."²⁷⁵

Such quotations suggest horror at the anti-romantic quality of the economic model. However, a perspective that seeks to separate market rhetoric from what is seen as a more pure and authentic view of social life fails to recognize the complexity with which market rhetoric is already deployed in everyday life. Language describing romantic life, for instance, is already deeply infused with market rhetoric. This is apparent in everything from popular songs like "Shop Around"²⁷⁶ to self-help advice on relationships.²⁷⁷ Radin suggests that commodification of part of one

273. *See id.* at 1878, 1881, 1884-85 ("Market rhetoric, the rhetoric of alienability of all 'goods' is also the rhetoric of alienation of ourselves from what we can be as persons.").

274. *See* Regan, *supra* note 207, at 2361 (arguing that a market-style "[p]roperty rhetoric tends to evoke particular images and metaphors that in turn seem naturally to lead to certain legal conclusions").

275. *Bold v. Bold*, 574 A.2d 552, 557 (Pa. 1990) (Zappala, J., dissenting); *see also* DeWitt v. DeWitt, 296 N.W.2d 761, 767 (Wis. Ct. App. 1980) (decrying economic metaphor for "treat[ing] the parties as though they were strictly business partners").

276. *See* THE MIRACLES, *Shop Around*, on THE MOTOWN STORY, THE FIRST 25 YEARS (Motown Record Corp. 1983) ("Don't try to get yourself a bargain, son/ Don't be sold on the very first one/ Pretty girls come a dime a dozen/ Try to find one that's gonna give you true lovin'/ . . . My mama told me, you'd better shop around.").

277. *See, e.g.*, SUSAN PAGE, IF I'M SO WONDERFUL, WHY AM I STILL SINGLE 39 (1988) ("When you are mate shopping, operate out of a sense of abundance, not scarcity. Deliberately increase the flow of people through your life."); KALYN WOLF GIBBENS, MARRYING SMART: A PRACTICAL GUIDE FOR ATTRACTING YOUR MATE 37 (1994) ("What are the personality traits that make you the package you are. . . . Do you think you are a 'good deal?'"); LARRY GLANZ & ROBERT H.

area of human relationship (like sexual interactions) may, under a "domino theory," infect the thinking of all other parts of that area of interaction.²⁷⁸ Accordingly, the infusion of market rhetoric into popular culture and other areas may reflect the domino theory in operation.

However, it is important to recognize that market rhetoric, like the other forms of rhetoric previously examined, does not spring up newly formed in the market apart from the rest of culture. Rather, rhetoric in this area is itself complexly connected to the rest of culture. The flowery language of corporate strategy ("white knight," "poison pill") is an obvious example of the importation into the market from romance, folklore and fiction. But even commonplace market terms like "goods" and "value" are likely to have had origin in non-economic social interaction before being imported into market rhetoric. The term "partner," which has its origin as a term of property inheritance,²⁷⁹ continues to have both business and lay meanings (like dance partner).²⁸⁰

An interestingly complicated example of the relationship between the rhetoric of the market and of romance is one familiar to many legal academicians. The annual Faculty Recruitment Conference sponsored by the American Association of Law Schools is, like such conferences in other professions, widely referred to as the "Meat Market."²⁸¹ As a means of seeking employment and employees, the event is in the realm of the market. But the mocking metaphor used is not imported directly from the slaughterhouse, another market venue, but clearly via the singles bar, an at least arguably romantic venue. The metaphor of flirtation continues in other aspects of the proceedings. Indeed, I have had the experience of being asked by representatives of appointment committees when scheduling interviews if I had room on my "dance card" for an interview with the particular school.²⁸²

Examples of the importation of the rhetoric of romance into the market can also be found in case law. In *Robinson v. Diamond Housing*

PHILLIPS, HOW TO START A ROMANTIC ENCOUNTER: WHERE TO GO TO FIND THE LOVE AND WHAT TO SAY WHEN YOU FIND IT 15 (1994) ("You'll need to quickly break the ice, get a conversation started, then 'close the deal.'"). Video dating services intertwine romance and the market both explicitly (by charging for their services) and through language. See e.g. direct mail advertisement from "Great Expectations" (stating that busy individuals seeking relationships are "just not exposed to enough of the right kind of fine quality singles").

278. See Radin, *supra* note 134, at 1912-13.

279. See WEBSTER'S NEW COLLEGIATE DICTIONARY 829 (1979) ("partner" derives from a term meaning "joint heir").

280. See *id.*

281. See Don Zillman et al., *Uncloaking Law School Hiring: A Recruit's guide to the AALS Faculty Recruitment Conference*, 38 J. LEGAL EDUC. 345 (1988).

282. Indirect expressions of interest in a candidate are also referred to as "flirting behavior."

the court employs an extended metaphor of marriage to explain the landlord's view of its relationship to a tenant:

Diamond fears that its shotgun marriage to Mrs. Robinson will last till death do them part. Moreover, Diamond points out, it is not trying to evict Mrs. Robinson so that it may rent the premises to someone else. It does not want a quickie divorce in order to permit a hasty remarriage. Rather, if freed from Mrs. Robinson, Diamond promises to beat a strategic retreat to a monastery where it will go and sin no more.²⁸³

A reason for this rhetorical cross-fertilization may be offered by Jeanne Schroeder's analysis of the relationship between property and community. Schroeder criticizes Radin for her failure to recognize that, rather than degrading intimacy,

market alienation may encourage human flourishing in three related ways. First, market relations enable us to interrelate with other people and thereby become persons. Second, commodification frees us from over-dependence on any specific objects. Third, market relations force us to become dependent on other persons. That is, the market not only makes community *possible*, it makes it *necessary*.²⁸⁴

Relying on both Hegel's theory of property and Lacan's theory of sexuality, Schroeder argues that, in both areas, "it is precisely the exchange of properly externalized objects among persons that leads to the creation of subjectivity and intimacy."²⁸⁵ In sexuality, argues Schroeder using Lacan, as in property, the fullness and completeness of this intimacy is inevitably frustrated.²⁸⁶ According to Schroeder, gendered power imbalances are best addressed through efforts to mediate the complexities of separation and dependency in both arenas.²⁸⁷ In the professional degree cases, the sharp separation of market-favorable and anti-market rhetoric may serve to reinforce gender roles and obscure power.

283. *Robinson v. Diamond Housing*, 463 F.2d 853, 864 (D.C. Cir. 1972).

284. Jeanne Lorraine Schroeder, *Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolable Feminine Body*, 79 MINN. L. REV. 55, 101-02 (1994).

285. *Id.* at 102.

286. *See id.* at 163-64.

287. *See id.* at 170; *see also* Olsen, *supra* note 206, at 1568-69 (arguing that intrapsychic and interpersonal conflicts can be addressed more effectively if market/family dichotomy is transcended).

3. Power Obscured

Both the position in favor and the position against the use of economic analysis obscure the role of power. On the one hand, if the joint economic enterprise theme is used to justify a situation in which women, who are devalued in the market, are given an incentive to further devalue themselves by putting off or giving up their own careers for the sake of their husband's more socially rewarded career, then this outcome may reinforce a gendered power relationship.²⁸⁸ Further, the use of the theme, with its image of equal business partners, obscures this result. On the other hand, a hostility to valuation that fails to take into account the wife's contributions, essentially taking them for granted, and that ignores the importance of economic redistributive effects on power relationships, may also reinforce a gendered power relationship.²⁸⁹

In addition, the debate over market rhetoric, which can empower as well as disempower, prevents a full analysis of the actual dynamics of the situation. For example, surrogate motherhood is another area in which the role of the market and market rhetoric has been criticized.²⁹⁰ However, Kathryn Abrams offers a review of recent writing on the subject to explore the possibility that allowing women to be paid for reproductive services could be empowering as well as disempowering, depending on a variety of factors and on perspective.²⁹¹ One possibility she describes is that the very connection of pregnancy to wage labor, and its disconnection from parenting may have subversive potential.²⁹² She also notes that "surrogacy . . . is a practice with the potential to exploit individual surrogates, as well as to reinforce negative social images of women as natural mothers or as commodities."²⁹³ Abrams' consideration of the complexities of this example suggest that questions of power, while interconnected with market issues, cannot be addressed fully by a position either in favor of or against the use of market rhetoric and economic analysis.

288. See Abel, *A Critique of American Tort Law*, 8 BRIT. J.L. & SOC'Y 199, 201-02 (1981) (arguing that a no fault tort system should deny compensation for property and earning damages because of that compensation's effect on maintaining inequality).

289. See Rose, *supra* note 254, at 2415-16 (suggesting the potential of both resistance to economic analysis and economic analysis itself to inadequately address issues of power).

290. See Radin, *supra* note 134, at 1928-36.

291. Abrams, *supra* note 22, at 358-59.

292. See *id.* at 359.

293. *Id.* at 358-59. She cites the work of NOAH ZATZ, *REWORKING MOTHERHOOD: SURROGACY, LABOR AND THE FAMILY 197-199* (1994) (unpublished manuscript on file with Columbia Law Review).

Finally, a failure to recognize that the request made in this situation is for incomplete commodification overlooks the many ways in which relationships and the power dynamics that accompany them structure the allocation of property rights. While the pro-economic and anti-economic debate suggests an all or nothing set of choices about commodifying the professional degree and the marriage, the question of alienability in this circumstance, as in many, is not a question of complete freedom of alienability, but only partial freedom. A determination of property in a particular relationship will not necessarily mean that the item is property universally.²⁹⁴ Because no one is suggesting that the holder of a juris doctor degree be able to sell it and the privileges it confers to someone who has not met the educational requirements for the degree, the question is not whether the degree is property in the abstract, but whether it is property with respect to this relationship.²⁹⁵

In *Moore*, dissenting Justice Broussard notes that the relationship between the parties will determine under what limited circumstances a body part might be property.²⁹⁶ He suggests, for instance, that no one would question a determination that the tissue was property if the doctor who removed Moore's profitable spleen had sought a conversion action against a thief who had removed the organ from the lab.²⁹⁷ Similarly, it is likely that a professional degree already confers some property interests with respect to relationships apart from the marital one. If a university guaranteed commencement seats to all degree holders, yet denied admittance to a particular degree holder, she could no doubt sue on the basis of something very much like a property right. If a professional degree were revoked by a university that had granted it, surely a property interest could be raised in defense. The university/student relationship, however, cannot automatically convert such a degree into community or marital property the way the employer/employee relationship does with pension rights²⁹⁸ because degrees do not automatically convert into compensation the way pension benefits do. Whether these degrees should be considered marital property or not depends, then, upon an additional relationship, that between husband and wife. Just as Justice Broussard's analysis depends on the power dynamics of the doctor/patient relationship,

294. See generally *supra* Part II.A.

295. See *Wisner v. Wisner*, 631 P.2d 115, 122 (Ariz. 1981).

296. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 501 (Cal. 1990) (Broussard, J., dissenting).

297. See *id.*

298. See *supra* note 144 and accompanying text.

so might a marital property analysis focus on the power dynamics in the husband/wife relationship.

D. "Sacrifice"

In articulating all four of the rhetorical themes, judicial opinions frequently use the word "sacrifice." The ambiguity of the term's meaning, as used in these opinions, provides one of the mechanisms by which gender roles are ignored and reinforced and power is obscured. The ambiguity also explains how similar facts can suggest such different patterns and may explain cases that seem internally contradictory, like *Mahoney*.

"Sacrifice" can mean different things in different contexts. For instance, the emphasis on sacrifice as well as sharing behavior in the articles employing economic analysis is different from that emphasized by opinions following the marriage is sharing theme. Krauskopf states: "Thus, the working spouse predicates her *sacrifice* of income and personal educational advancement on the expectation of future returns to her from *sharing* in her husband's enhanced earning capacity."²⁹⁹ "Sharing" in this context seems to have more of the flavor of investment, as in shares of stock, and "sacrifice" seems to be meant more in the exchange sense, as in sacrificing short term gains for long range profits.

In common parlance, "sacrifice" can connote either unfair hardship, laudatory altruism, or adjustments calculated on the basis of a cost/benefit analysis. In each one of these meanings, it should be noted, the element of exchange remains important in order to make an action involving some loss a "sacrifice." Thus, throwing a one hundred dollar bill into a river is foolishness, not sacrifice, unless some positive result is anticipated. Yet, the nature of the anticipated benefit differs according to connotation. The word is used with the sense of unfair hardship when it is believed that the benefit will fall to someone other than the person sacrificing or being sacrificed. The religious origins of the word are significant: sacr- is the same Latin root as in "sacred."³⁰⁰ A primary definition is "an act of offering to deity something precious; *esp*: the killing of a victim on an altar."³⁰¹ Although members of the particular religion might disagree, an outside observer might very well view the action as providing only harm and no benefit to the victim (a significant word choice itself) and perceived benefit only to others. This particular image and the outside observer's

299. Krauskopf, *supra* note 243, at 380 (emphasis added).

300. See WEBSTER'S NEW COLLEGIATE DICTIONARY 1009 (1979).

301. *Id.*

viewpoint inform many uses of the word "sacrifice," as in a description of a wartime tragedy in which "many lives were sacrificed."

The term has a different meaning in those circumstances in which it is believed that the person suffering harm, while receiving no material benefit, benefits nonetheless through the satisfaction of helping another, what I have called laudatory altruism. Another dictionary definition reads, "something given up or lost," as if no gain at all results, yet is followed by the usage example of "the [sacrifices] made by parents."³⁰² It is often thought that the sacrifices parents make are rewarded through the corresponding benefit they receive from watching their children flourish.

Finally, the term has more material uses as well. In baseball, the batter who executes a sacrifice bunt (a lightly tapped hit that causes the batter to be thrown out yet allows a runner to advance) is acting not out of altruism directed at the base runner, but as part of a calculated effort that is hoped to ultimately benefit everyone on the team including the batter.³⁰³ The term, as already indicated, has market uses as well. The dictionary offers as its usage example for the definition of "loss" the phrase "goods sold at a [sacrifice]."³⁰⁴ Such a transaction is rarely made altruistically, but because of some calculation of financial benefit; for example, it is likely to be made either to encourage future business or to avoid worse losses in an economic downturn.

Of course, the same action can have all three of these different meanings depending on how it is perceived. Someone whose life is lost in war may be seen as an altruistic hero rather than as a victim, while a chess-like perception of the event may cast the loss of life into the same light as the loss of goods. Sacrificing parents may be seen as victims of unfairness if their children are ungrateful, or as making a calculated investment if they expect their sacrifices to pay off in the form of material support later on. The distinctions are nonetheless significant, depending as they do on perception and context.

"Sacrifice" evokes all three of these different meanings in the professional degree cases, but to a different extent and in different ways depending on the viewpoint of the case. Those opinions holding that the degree is not property use the term more in the sense of laudatory altruism. The court in *Hodge v. Hodge* states:

302. *Id.*

303. Notably, in this situation the batter is not charged with making an out when statistics on each player are compiled. See ALBERT B. CHANDLER, OFFICIAL BASEBALL RULES COMPLETELY REVISED 1950, Rule 10.09 (1950); see also GLEN WAGGONE ET AL., BASEBALL BY THE RULES 234-35 (1987).

304. WEBSTER'S NEW COLLEGIATE DICTIONARY 1009 (1979).

There is no question that in cases such as the one now before this Court, one spouse very often struggles to support the other spouse and the family while the non-working spouse is completing his education and post-education training. However, we must not forget that others, including the student-spouse have made *sacrifices* to aid him in achieving his advanced degree and increased earned income.³⁰⁵

This quotation suggests that it would be unseemly for the wife to expect anything but an altruistic return for her efforts, and equates her contributions with those of other family members like parents. Similarly, another court suggests through its usage and tone that "sacrifice" is simply an intense form of emotional support:

[W]e are not prepared to hold as a matter of law that a law degree earned by one after marriage, with the encouragement (even *sacrifice*), and financial assistance of the marriage partner, must be assessed a value and a portion of such value ordered paid to the assisting partner at the time of the divorce.³⁰⁶

Those opinions that recognize the degree as potential marital property, or those that seek to justify a generous maintenance award, use "sacrifice" in the cost/benefit sense explained above: "Where [the attainment of an advanced degree] is pursued as part of a concerted family effort, both spouses expect to be compensated for their respective *sacrifices*, efforts, and contributions by eventually sharing in the fruits of the degree."³⁰⁷ Describing the wife's efforts, the court in *DeLa Rosa* offers a similar quid pro quo view of the term: "Typically, this sacrifice is made with the expectation that the parties will enjoy a higher standard of living in the future."³⁰⁸

The cost/benefit meaning, however, is often connected in these cases to the unfair hardship meaning. The opinions suggest that if the sacrifice is not treated as an exchange, it will amount to an unfair hardship. For example, in the *Graham* dissent: "The case presents the not unfamiliar pattern of the wife who, willing to *sacrifice* for a more secure family

305. *Hodge v. Hodge*, 520 A.2d 15, 17 (Pa. 1986) (emphasis added).

306. *Jones v. Jones*, 454 So. 2d 1006, 1009 (Ala. Civ. App. 1984) (emphasis added).

307. *Postema v. Postema*, 471 N.W.2d 912, 915 (Mich. Ct. App. 1991) (emphasis added).

308. *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755, 758 (Minn. 1981). The court ordered reimbursement only, but distinguished the case at bar from cases holding degrees as property by noting that Mr. DeLa Rosa had not yet earned the degree at the time of dissolution. *See id.* at 759; *see also* *Hubbard v. Hubbard*, 603 P.2d 747, 751 (Okla. 1979) ("Ms. Hubbard's sacrifices . . . were made with the anticipation that she and the family would ultimately benefit from the increased earning potential that would accompany her husband's license to practice.").

financial future, works to educate her husband, only to be awarded a divorce decree shortly after he is awarded his degree."³⁰⁹ These opinions differ in emphasis from those that find no property in the degree by their view that the benefits attendant upon the sacrifice do not redound to the benefit of the sacrificer unless she is compensated: "Equity demands a recognition of the sacrifices and contributions made by plaintiff in support of defendant's medical education."³¹⁰ The term suggests both the joint economic enterprise pattern through its cost/benefit meaning, and also the marriage as sharing pattern through the unfair hardship meaning: the interruption, the dissolution, the unfairness have prevented the marriage from living up to the sharing ideal.

Not only does the meaning of the word "sacrifice" differ according to use, but the ambiguity of the term also provides a connection across these diverse opinions. This connection may help explain the contradictions in a case like *Mahoney* in which the court embraced all four of the patterns, and appeared to both reject and accept an economic view of marriage.³¹¹ There, the court noted: "The supporting spouse's sacrifices would have been rewarded had the marriage endured and the mutual expectations of both of them been fulfilled."³¹² Sacrifice in this context may suggest both laudatory altruism or a cost/benefit approach.

Through the ambiguity of the term they use, writers of court opinions allow themselves to overlook a gendered power distribution that the term can either hide or expose. While the cost/benefit approach of "sacrifice" seems gender-neutral and not particularly disempowering, "sacrifice" in its unfair burden or laudatory altruism meaning is connected both to gender and to power. Like sharing behavior, self-sacrificing behavior historically has been associated with women. Whether sacrifice will be thought to represent disempowerment or fulfillment depends on perspective. From a laudatory altruism viewpoint, it may be thought to be fulfilling; from an unfair hardship perspective, disempowering.

309. *In re Marriage of Graham*, 574 P.2d 75, 78 (Colo. 1978) (Carrigan, J., dissenting) (emphasis added); cf. *In re Marriage of Olar*, 747 P.2d 676, 678 (Colo. 1987) (declining to overrule *Graham* but supporting maintenance award because of the "potential for injustice" that might result if the couple's "collective sacrifices" are not recognized); see also *Downs v. Downs*, 154 Vt. 161, 163, 574 A.2d 156, 157 (1990) (noting importance of remedy for spouse who "sacrifices career opportunities"); *Lovett v. Lovett*, 688 S.W.2d 329, 334 (Ky. 1985) (Stephenson, J., concurring) ("Divorce, shortly after obtaining the professional license, nullifies the prospect of the future mutual benefit from the shared sacrifices of the past.").

310. *Martinez v. Martinez*, 754 P.2d 69, 76 (Utah Ct. App. 1988).

311. See *supra* notes 95-109 and accompanying discussion.

312. *Mahoney v. Mahoney*, 453 A.2d 527, 534 (N.J. 1982).

Indeed, the power dynamics of the situation might be quite complex, and might cause meaning to shift as the events occur over time. For instance, what began as sacrifice motivated by altruism may seem later like unfair hardship depending on the perceived worthiness of the person for whom the sacrifice was made.³¹³ Even more muddying is the notion that the person sacrificing will also sometimes gain power over the person for whom the sacrifice is made by virtue of her sacrifice (like the parent who is able to use guilt to exercise control over a child who has received many benefits). By using the same term for its many meanings, and for the complex set of phenomena it covers, courts fail to engage the issues of power and gender that arise in these situations.

IV. BRICOLAGE

Through the process of picking and choosing among rhetorical themes and policy rationales, judges act like *bricoleurs*, the figures, discussed by Levi-Strauss, who make their way by scavenging and retrofitting previous constructions.³¹⁴ *Bricoleurs* will not use everything they find, but re-discard or save what does not appear immediately useful. It is instructive for the observer, or perhaps for another *bricoleur*, to examine what is not used as well as what is used; not only might the neglected item itself prove useful, but the manner of its discard might prove suggestive. Where one *bricoleur* scavenges an electric fan for its motor housing, another trailing *bricoleur* might notice something new about the manner in which the fan blades are discarded, arcing through the air, perhaps, in a suggestion of flight.

I have attempted to play the role of one trailing the judge-*bricoleurs*, examining, through their use of rhetorical pattern, what scavenged treasures they have included, which ones they have discarded, and the manner of the discard. With an armload of such material, I can now suggest some means for reshaping their discussions of these cases. As with the *bricoleur*, the reconfigurations will not require the invention of new forms, new policies, or new rhetoric. Rather, the tools and materials

313. Cf. *Bold v. Bold*, 574 A.2d 552, 556 (Pa. 1990) ("Supporting spouses in these cases feel entitled to reimbursement, we believe, not because they have sacrificed to support the other spouse, but because they are, to use a strong word, 'jettisoned' as soon as the need for their sacrifices . . . comes to an end.").

314. See *supra* notes 24-26 and accompanying discussion.

for such reconfiguration will lie among the assemblages that have already been made, and among the discards.³¹⁵

Throughout I have argued that the opinions in the professional degree cases have ignored the role that power might play in the relationships under consideration, and that they have failed to contemplate whether power dynamics in the relationship might affect the determination of the cases. However, considerations of power and the complexity of gender roles are available both for retrieval from the discard pile and through investigation of what has already been picked up.

For example, Joseph Singer argues that not only should the law recognize property interests based on relationships between individuals that have developed reliance, but that the law already does so in many instances.³¹⁶ Often, what justifies the reliance as reasonable is a relationship in which the one who relies has less power than the one upon whom she relies. "The legal system sometimes protects the more vulnerable party to the relationship by recognizing and protecting her reliance interest in property and limiting protection of the stronger party's interests."³¹⁷ For example, the dissenting opinions in *Moore*, the case of the patient whose body tissue produced a profitable cell line, argue that a reliance-inducing power relationship justifies a finding of property. Justice Broussard suggests that the nature of the doctor/patient relationship, and in particular the deception that was facilitated by the power in that relationship, was relevant in determining whether the tissue was property for the purpose of a conversion action:

If defendants had informed plaintiff, prior to removal, of the possible uses to which his body part could be put and plaintiff had authorized one particular use, it is clear . . . that defendants would be liable for conversion if they disregarded plaintiff's decision. . . . If [the allegations that the defendants failed to disclose information that would have allowed such a choice] are true, defendants clearly improperly interfered with plaintiff's right in his body part at a time when he had the authority to determine the future use of such part, thereby misappropriating plaintiff's right of control for their own advantage.³¹⁸

315. See Michael Hunter Schwartz, *From Star to Supernova to Dark, Cold Neutron Star: The Early Life, the Explosion and the Collapse of Arbitration*, 22 W. ST. U. L. REV. 1, 35-36 (1994) (using metaphor of "re-engineering" to describe a similar process).

316. See Joseph Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 664 (1988).

317. *Id.*

318. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 502 (Cal. 1990) (Broussard, J., dissenting).

He distinguishes this situation from "a typical case in which a patient consented to the use of his removed organ for general research purposes and the patient's doctor had no prior knowledge of the scientific or commercial value of the patient's organ or cells."³¹⁹ Arguably, in this "typical case" the power differential would be less acute because of the lack of special advance knowledge on the doctor's part. In agreeing with Justice Broussard, Justice Mosk emphasizes that the parties lacked equal bargaining power.³²⁰

It would be possible to unpack the meaning of "sacrifice" to similarly distinguish those situations in which the exercise of power played a significant role from those in which it did not. There are some limited instances in which this possibility is already recognized. For example, the court in *Bold* rejects the suggestion that it is a spouse's sacrifices that must be reimbursed, arguing instead: "In retrospect, perhaps unintentionally, the supporting spouse . . . can be said to have been 'used.' At least this is the perception of the supporting spouse, and we believe this perception is not totally without foundation in all cases."³²¹

More generally, there is already some recognition of power and its gender associations by the very common use of the word "sacrifice," and its attendant meanings. Every time "sacrifice" is used, it carries with it the range of possible meanings. In *Mahoney*, for example, the court's recognition of "sacrifice" suggests that it is aware of a set of potential negotiations under power that have not been explicated for the court.³²² The term may be desirable because it obscures this issue. But the barrier that the term presents is a closed gate (that can be opened) rather than a fence. If courts would take the opportunity to examine what they really mean when they use the term "sacrifice," the answer might reveal what lies beyond the gate.

There is also another implicit recognition of the complex dynamics of these relationships despite, indeed through, the seemingly rigid and formulaic use of the rhetorical patterns. I have already suggested that most of the opinions carry on the conflict between market and family within their own four corners, by combining marriage as sharing with the

319. *Id.* at 500.

320. *See id.* at 516 (Mosk, J., dissenting). Even the majority recognizes that abuse of power occurred in the case; however, they conclude that it did not justify the conversion action but only the action for lack of informed consent. *See id.* at 483, 493.

321. *Bold v. Bold*, 574 A.2d 552, 556 (Pa. 1990). The court found that part of the spouse's sacrifice is a "legally imposed obligation of support," yet based on the issues of fairness it perceived, it also found that the spouse was entitled to "equitable reimbursement to the extent that his or her contribution . . . exceeds the bare minimum legally obligated support." *Id.*

322. *See supra* notes 105-09 and accompanying text.

market oriented joint economic enterprise, and independent achievement (with its connotation of market autonomy) with hostility to economic rhetoric.³²³ This conflict continues on the level of style.

In her analysis of the contract doctrine of impossibility, Mary Joe Frug suggests that different writers in that doctrinal area use respectively male and female styles in developing their analyses.³²⁴ Similar observations may be made about judicial opinions. I have already pointed out the gendered associations with the patterns of marriage as sharing (associated with women) and independent achievement (associated with men). Frug argues that dichotomies found in legal discourse "are often unconsciously but sometimes consciously molded by their authors to resonate with stereotypical sex differences."³²⁵ In her analysis, it is not just the subject matter but the style that partakes of the stereotypes. She argues that there is a strong "cultural compulsion to maintain the gendered identity of one's text."³²⁶ I will argue that the professional degree cases implicitly recognize an androgynous distribution of gender roles and power in these circumstances through the "cross-dressing" of rhetorical styles in which the opinions often engage.

The tenancy by the entirety cases provide an example of judges following this "cultural compulsion" and maintaining consistency between perspective and voice. The you-want-equality-take-your-lumps perspective of the freedom proponents has the hard edge that would characterize a stereotypically male analysis. The analyses in these cases proceed in a linear, syllogistic manner, from the characteristics of the old estate to the dual freedom approach: "If, as we have previously concluded, the husband could alienate his right of survivorship at common law, the wife, by virtue of the [Married Women's] act, can alienate her right of survivorship."³²⁷ By contrast, those that go the protection route are more contextual and policy oriented. In *Sawada*, the court is particularly concerned about preserving the family unit, and even about having the equity in the family home available to provide funds for educating the children.³²⁸ This concern with fairness and the family might be seen to be stereotypically female, or even celebrated as female, depending on one's perspective.³²⁹

323. See *supra* notes 206-08 and accompanying text.

324. See MARY JOE FRUG, *supra* note 220, at 112.

325. *Id.* at 113.

326. *Id.* at 114.

327. *King v. Greene*, 153 A.2d 49, 60 (N.J. 1959).

328. See *Sawada v. Endo*, 561 P.2d 1291, 1297 (Haw. 1977).

329. See FRUG, *supra* note 220, at 116-117 (similarly analyzing an article with these same characteristics).

In addition to suggesting that analyses fall along gendered lines, Frug also suggests that, in pursuing uniformity of the gendered perspective, analyses will produce "critical ruptures," or "a point where analytical cogency is sacrificed to the gendered integrity of the authors' position."³³⁰ In the cases on tenancy by the entireties, the opinion writers on either side maintain that they have found the true meaning of the traditional tenancy, when in fact the traditional tenancy contained a complex mixture of both.

A similar point can be made about the professional degree cases: by adhering to a view of marriage or a view of achievement that is connected to the rhetorical patterns selected, the opinions ignore the greater complexity of each of these arenas. Yet, these cases go further: in their typical selection of the rhetorical pattern that reflects their view of economics, the opinions cross gender lines.

The marriage as sharing pattern can be associated with stereotypically feminine style, not just because of the values it advocates but because of the tone with which it is presented. These opinions focus on relationships and fairness, such as the emphasis the Michigan cases place on the "concerted family effort." On the other hand, the cases deploying the individual achievement model follow a stereotypically male style by discounting the importance of relationships and maintaining a hard edge: "On the whole, a degree of any kind results primarily from the efforts of the student who earns it. Financial and emotional support are important, as are homemaker services, but they bear no logical relation to the value of the resulting degree."³³¹

However, the opinions that follow the marriage as sharing pattern also typically adopt the marriage as joint economic enterprise theme, changing tone. Martha Fineman's analysis of the economic partnership model of divorce suggests there might be a crucial difference between the tone of these two ways of thinking about marriage.³³² She associates the economic partnership model with a pursuit of gender neutral "rule equality"³³³ that may not be consistent with a more woman-centered approach. It is possible, thus, to think of the economic partnership model as having a stereotypically male tone. The metaphor is, after all, from the world of business, an arena (like achievement generally) associated with men, and the tone of the discussion when it turns to this model is linear and, in Mary Joe Frug's words (used to describe a similar style), "singular,

330. *Id.* at 118.

331. *Hoak v. Hoak*, 370 S.E.2d 473, 477 (W. Va. 1988).

332. See Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789 (1983).

333. See *id.* at 820-21.

daunting, rigid, and cocksure."³³⁴ For example: "[n]o prudent business partner would expend, time, effort and money without the promise of a return on his or her personal investment."³³⁵

In a similar stylistic maneuver, those opinions that begin with a focus on individual achievement soften in a stereotypically feminine manner when they turn to the theme of hostility to economic valuation. They reject the coldness of the economic approach to marriage, suggesting deeper meanings in the relationship; they react negatively to the abstraction of treating the degree as property rather than focusing on the human process.³³⁶ In a typical example, the court in *Hoak* asserts "[m]arriage is not a business arrangement, and this court would be loathe to promote any more tallying of respective debits and credits than already occurs in the average household."³³⁷

This change in tone may be necessary because, otherwise, the associations among the themes would produce conceptual confusion. These associations suggest marriage is an arena not just of sharing but of economic activity, and the pursuit of a degree is a realm not just of independent work but one where economics do not intrude. Of course, this association would represent a turnaround of the typical image: marriage and hearth as an oasis from the economic tumult of the world of achievement.

It is not surprising that the opinions would "cross-dress" in this way,³³⁸ reflecting a more complex view of male/female interaction than the stereotypes suggest. The "common situation" the courts encounter is one in which the parties themselves are already crossing expected gender roles. On the one hand, the wife is already very much engaged in the world of achievement; she is sufficiently successful that she is able to support both herself and her partner (and even, perhaps, their children). At the same

334. FRUG, *supra* note 220, at 116.

335. *Hodge v. Hodge*, 520 A.2d 15, 25 (Pa. 1986) (Larsen, J., dissenting).

336. *See DeWitt v. DeWitt*, 296 N.W.2d 761, 767 (Wis. Ct. App. 1980) ("We do not think that most marital planning is so coldly undertaken.")

337. *Hoak v. Hoak*, 370 S.E.2d 473, 478 (W. Va. 1988); *see also Bold v. Bold*, 574 A.2d 552, 557 (Pa. 1990) (Zappala, J., dissenting) (arguing that treating marriage as a business partnership "will only further exasperate an at times already very volatile and emotional union").

338. I use the term "cross-dress" both with delight and with caution. The caution arises from a concern that it will be assumed that the opinions, like a drag queen, will have a "true" gender that is then undermined by the assumed gender of the performance. Judith Butler, however, argues that we are always effectively in drag, always engaging in gender performance, whether we are conforming at the moment to our socially assigned gender or not. I use the term "cross-dress" to suggest that these opinions engage in a double gender performance, which comports with Butler's understanding of the drag queen's performance as well: "In imitating gender, drag implicitly reveals the imitative structure of gender itself." BUTLER, *supra* note 13, at 137.

time, however, she is deferring (or “sacrificing”) her own career for the sake of her husband’s. On the other hand, the husband is not entirely the stereotyped male achiever; he is not the family “breadwinner” and is, or was, dependent on his wife in a way that might mirror female stereotypes. That these relationships have androgynous aspects does not mean they are without troubling aspects, and more significantly, without power. But it does mean that the distribution of power in the relationship is likely to be complicated.

In the movie “Not as a Stranger,” the 1950s characters confront the gender ambiguities of their situation with nothing but chagrin.³³⁹ When Robert Mitchum’s character is told by his friend, played by the young Frank Sinatra, “You’re letting yourself be kept,” Mitchum reacts violently, pinning Sinatra to the wall. When Olivia de Havilland’s character later realizes that certain nice compliments her husband has paid her refer to her excellent medical skills and not to her qualities as wife and potential mother, her face fills with grief. At the end of the twentieth century, these issues are likely to be even more complex. The rhetorical patterns seem poorly suited to unpacking and addressing them. However, the contradictions exposed by examining the gendered voices of the opinions provide a starting place. It may be that seemingly contradictory opinions like *Mahoney* are in fact closest in recognizing the difficulties raised by these circumstances. However, almost every opinion implicitly recognizes the simultaneous contradictions between market and family concepts, between stereotypically male and female styles through the interplay of the themes. The realization that these conflicts already exist is not necessarily good news, for contradictory styles, like matched sets, can reinforce rather than undermine gendered power structures.³⁴⁰ Nonetheless, if it is not good news, perhaps it is useful news, because an explicit recognition of these internal contradictions could be an impetus not for reconciling them but for appreciating the intricacies of the relationships the court is potentially unpacking: the relationship between work and home as well as the marital relationship of the divorcing couple.

What of the material that has been neglected by the opinions, or that has been used in one way but can yet be used in a different way? I have suggested that the pursuit of rigid rhetorical formulations is unsatisfactory because these matched sets—both sharing and individualism and pro and

339. NOT AS A STRANGER (Metro-Goldwyn-Mayor/United Artists Home Video 1955).

340. See EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 10 (1990) (identifying contradictory ideological structures is not sufficient to undermine them, because they function largely through “precisely the mechanisms of self-contradictory definitions or, more succinctly, the double bind”).

con arguments on economics—reinforce gender roles and obscure power, when in fact the role of power and gender in these situations is quite complex. However, this complexity is at least partly revealed by examining the contradictions, tone and word choice (like “sacrifice”) in the opinions themselves. Since there is no determinate background constraint in terms of property or equality in marriage, and since power is available as a consideration in determining limited property rights based on relationships, courts should feel relatively free to examine the actual power dynamics of the situation before them in order to arrive at a result. Of course, it is unlikely that very many of these cases will present the blatant exploitation found in “Not as a Stranger,” yet power in more subtle forms may nonetheless play an important role.

Similarly, courts need not focus solely on the arena of achievement or on the arena of marriage, as the rhetorical formulations encourage, because these cases inevitably present an interconnection between the two. At the movie’s intense climax, Mitchum’s character, now a doctor, commits an act of arrogant and tragic malpractice. In the closing scene, Mitchum subsequently wanders back to his marital home—from which he has been kicked out for his infidelity and for his general lack of regard—to utter a tortured “help me,” and be accepted back into his wife’s arms. These scenes suggest a flight from the arena of solitary achievement to the arena of marital union and mutuality, as if they were exclusive realms. Courts, however, must find a method to accommodate simultaneously the difficult issues of both arenas and the ways in which they overlap.

How these considerations play out doctrinally can be a more difficult question. Courts in jurisdictions that allow great flexibility in assigning reimbursement or rehabilitative maintenance will be most free to fashion remedies in accord with complex power dynamics.³⁴¹ They will do this not outside of rhetoric, but again through rhetoric, perhaps through a reconfiguration of current rhetoric in the manner I have argued is available. However, jurisdictions that lack this flexibility, most notably community property states, will still have to make a fairly stark doctrinal choice. But it may nonetheless be more helpful to justify this choice not by reference to the current formulations, but by reference to more nuanced reformulations that take power and gender into account.

341. See *In re Marriage of Weinstein*, 470 N.E.2d 551, 559 (Ill. App. Ct. 1984) (suggesting that the availability of such flexibility might obviate the need for property awards).

