Articles

Family (Proper)ty

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Family (proper)ty law pays remarkably little attention to the ideal of a marital community. Afraid of the gendered contours of nineteenth century status law, contemporary marriage and divorce law has become largely contractual. Aspects of nineteenth century marriage which might prove beneficial, especially to women, have been discarded in the rush to adopt a vision of marriage as an easily terminable relationship between two autonomous souls. In this essay I search for a new status vision of marriage that recovers non-gendered features of traditional family (proper)ty law of value to our present culture.

I. Old Stories of Dependency

There is widespread agreement among historians that property ownership was a defining feature of citizenship in the early decades of the republic. We all know that property ownership was used to limit access to the ballot in the late eighteenth and early nineteenth centuries. While the suffrage limitations arose in part out of a crass effort by the wealthy to control access to the corridors of power, they also reflected some important understandings about the nature of governance, the capacity of individuals to act responsibly, the nature of families, and the role of women.

In a famous letter written to James Sullivan in 1776 as he was attending sessions of the Continental Congress, John Adams rhetorically asked, "Whence arises the right of the majority to govern, and the obligation of the minority to obey? From necessity, you will say, because there can be no other rule. But why exclude women?" His answer was telling, and central to even our modern debates over the meaning of family (proper)ty. Adams continued:

> You will say, because their delicacy renders them unfit for practice and experience in the great businesses of life, and the hardy enterprise of war, as well as the arduous cares of

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> state. Besides, their attention is so much engaged with the necessary nurture of their children, that nature has made them fittest for domestic cares. … True. But will not these reasons apply to others? Is it not equally true, that men in general, in every society, who are wholly destitute of property, are also too little acquainted with public affairs to form a right judgment, and too dependent upon other men to have a will of their own? If this is a fact, if you give to every man who has no property, a vote, will you not make a fine encouraging provision for corruption, by your fundamental law? Such is the frailty of the human heart, that very few men who have no property, have any judgment of their own. They talk and vote as some man of property, who has attached their minds to his interest, directs them.

For Adams, property ownership meant a great deal more than wealth. Those of means were also independent political, economic and social actors. Their wealth meant they were capable of acting in the best interests of both themselves and the larger society. This view was widely shared among those in the founding generation's intelligentsia. Left wing politicos took the position that property should be distributed broadly among the male population in order to enlarge the class of electors. Those on the right were much more interested in protecting their own economic standing. But few quarreled with the underlying nexus between property ownership and the capacity to participate in the exercise of power.

Men of the founding decades could, of course, have taken the position that property should be distributed to women as well as men. Their failure to consider such a possibility makes the circular quality of their property based definition of citizenship quite palpable. Men governed not only the polity, but also the family. Women were dependent because they had to rely on men. And they couldn't have property because they were dependent. But regardless of the circles of thought at play, the cultural linking of property ownership and independence established a perspective of enormous and continuing importance. For if women were economically dependent upon men, then there was no need to "give" them more than a relationship (such as marriage) that would meet their survival needs and affirm their dependency. But if they became independent, then, perhaps, men needed to "give" women nothing at all. This dichotomy left little room for a family (proper)ty law of intimate relationships born of mutual interdependence rather than economic dependence. One either relied upon another person and eschewed the responsibilities of citizenship, or became independent and self-reliant.

While notions of dependency changed some over the ensuing generations, the basic dichotomy established by Adams' rhetoric remained quite influential. The tight links between property, civic responsibility and suffrage gradually loosened over the course of the nineteenth century, but those with property were still thought of as more capable of independent action. By the middle of the nineteenth century, wage earners came to be seen as capable of exercising independent thought and therefore of voting. For a short time after the Civil War, freed slaves were thought capable of contracting for their labor and therefore of exercising suffrage. But both working men and the freed slaves eventually got hung up on the same sort of dilemma that faced women. If you were truly independent citizens, there was no need to ask the government or anyone else in a position of authority for economic assistance. Unions, for example, were surely not necessary for independent wage earners; nor were protective labor laws. And African Americans, after a brief post-Civil War window of political opportunity, were placed below women's pedestal, deemed incapable of political action because they were dependent souls and dependent because they were thought inherently incapable of political action.

While the worldview of Adams and others of his generation encompassed a tight fit be-

tween property ownership, independence, thoughtful exercise of civic responsibility, control of families and political participation, it also nurtured two sorts of understandings about shared goals, one among men, and the other between men and women. Those men with property, at least to some extent, would work together to protect their common interests. Though the constitutional framework was designed to reduce the likelihood that any particular interest group would dominate governmental decision making, there was still a widely held assumption that the civic responsibility accompanying ownership of property and the right to exercise political and familial authority would further a common, male enterprise.

Marriage was also a pivotal common enterprise. While middle and upper class women were dependent and therefore incapable of independent participation in the government or economy, they had important political and social roles. Politically they took charge of civic education, preparing boy children for participation in the body politic and girl children to marry and educate their children. Socially they were the intimate partners of men. As the nineteenth century passed, and many men went off to work outside the home, middle and upper class women came to serve additional social functions – taking care of the kids and maintaining a household. Though defined in a seriously imbalanced way, the dependency of women involved an exchange of economic support in return for their unpaid work in the home and the legitimization of an intimate relationship.

Without the help of women at home, middle and upper class men could not have worked in the burgeoning commercial and industrial economy that grew on these shores in the last century. There was a cultural mythology, if not an economic reality, that married women were guaranteed economic security and cultural respect in return for their acceptance of dependent roles. Part of that economic security and cultural respect was buried in alimony rules, which provided access to funds after divorce to women who "behaved" over the course of a long marriage with moneyed "gentlemen." As the centrality of this dependency arrangement to American culture declined in this century, so too did the idea alimony was due to women who fulfilled their marital obligations in traditional ways.

Altering this structure of dependency relationships between married men and women has been a slow and often painful process. Beginning about one hundred and sixty years ago with the adoption of the first married women's property acts, women gradually obtained the same legal rights to ownership of property as men. Wage ownership of a limited sort arrived in most jurisdictions after the Civil War. Women obtained suffrage after World War I. Marital property rules emerged with divorce reform during the last twenty-five years.

While claims by radical women for rights to property ownership and control were certainly heard during each era of reform, legislators usually acted for quite conservative and traditional reasons. Radical women often made claims for rights with rhetoric of autonomy, in essence accepting the independent/dependent dichotomy established by John Adams and his peers during the founding decades of the republic. Such radical claims rarely carried the day. Married women's property acts arrived not as a recognition of the right of wives to own and control property and therefore to become independent economic and political actors, but as debtor protection devices to allow property held by married women to escape the clutches of husbandly creditors. Increasing family stability was the goal, not wifely independence. Wage statutes adopted after the Civil War accepted the right of women to sue for their wages, but did so in recognition of the need of many women to enter the work force to

support their families. And the statutes did little to alter the right of husbands to control the family accounts after their wives' wages were brought home. These statues, like the married women's property acts, were thought to solidify the home economy, not recognize the independent status of women outside the family. Even suffrage, that touchstone of early republican notions of civic responsibility, was granted with an understanding that women's higher moral antennae could control the excesses of men, especially drinking men, thereby preserving the sanctity of the home.

Despite the conservative political rhetoric surrounding each burst of reform, many women actually used the changes to enlarge their own realms of economic and, eventually, political power. Though change arrived amid traditional talk about dependent women serving the needs of their families by holding property, earning wages and voting for temperance, it created openings for women to lay claim to spheres of independent economic and political action. Women owned more property in 1900 than in 1800; certain sorts of employment opportunities, including limited access to the legal profession, began to open after the Civil War; women began to appear as writers, educators, athletes, legislators, judges, and doctors. These events did not go unnoticed by pre-New Deal conservatives on the Supreme Court. In a remarkable opinion full of puffing about the new found independence of women created by law reform and the arrival of suffrage, the Court, in *Adkins v. Children's Hospital*, struck down minimum wage laws for women. They theorized that women were just as capable of independently agreeing to contracts for their labor as their male peers in *Lochner v. New York* and that minimum wage laws must therefore fall as a violation of freedom of contract. The case is a perfect example of how women's claim for independence was used to refuse them benefits previously granted under traditional theories rooted in notions of dependency.

This background is crucial to understanding the contemporary debate about the meaning and proper scope of marital property law. Though women are frequently dependent on their husbands in ways much like their sisters a century ago, the widespread claims for marital autonomy in modern culture have reduced, if not eliminated, the sway of nineteenth century visions of marriage. Indeed, the old vision of marriage is now viewed as so thoroughly discredited by its ideal of female dependency that many insist it may not be used as a solid basis for thoughtful analysis. We have even tossed out the old labels, calling alimony spousal support and reviling the word "status" as a wholly inappropriate label for the state of marriage. As marital autonomy has risen, the ability to rely upon marriage as a source of economic, social and cultural security has eroded.

It is time to think anew about the values and meanings of nineteenth century marriage. I suggest that the nineteenth century vision of marriage should not be completely discarded. While the harshly gendered quality of traditional marital property rules and the jarring dependence of married women in the last century is now unacceptable, three of traditional marriage's basic components – the expectation of marital longevity, the idea of an exchange of valuable assets, and the importance of intimacy – must be retained if marriage is to have meaning and stable environments for children are to flourish.

II. New Stories of In(Dependency)

Treating people as economically independent after they divorce does not always mesh with the reality of dependence that continues to exist in many marriages. One day it may come to pass that women do not expend part of their economic potential on their husbands and families. But at least for now, it is clear that

many more wives than husbands do not work, work fewer hours, postpone their careers or make other decisions which lower their long term income earning potential. There is still a web of inter-dependency (perhaps not quite so one-sided as a century ago) that makes both marriage and divorce a much more serious economic step for women than for men, even making the unwarranted assumption that the culture of work no longer discriminates against women. To the extent that we refuse to use these ongoing indicia of marital reliance as a basis for allocating resources, we exacerbate the impoverishment of women, and not surprisingly, of the children they are likely to keep.

In the future, it may be that gender will become an unimportant sign of dependence in marriage. Men may sometimes be as dependent upon women as women now are upon men. Many marriages may not be economically unbalanced. Each partner may rely upon their mate in a variety of ways that are impossible to untangle. The lessening of gender's significance, however, should not lead us to ignore the reality that even in a gender-neutral family law world, interdependencies will always develop between partners in intimate relationships. Our tendency to describe marriage as a "union" of two autonomous actors and divorce as a claim for independence and a clean break, undermines our willingness to rely on interconnections between spouses. Our refusal to take seriously the entwined intimacy of marital relationships also makes it easy to ignore new forms of reliance emerging between unmarried cohabitants.

Marital property law largely ignores both the continuing presence of (often gendered) dependencies analogous to those of a century ago, and the importance of the entwined intimacy that always exists in families that function well. Though contemporary marital property law often invokes words like "partnership" or "community," the discussion is more like that accompanying analysis of business deals than family arrangements. There is little partnership or property talk that links people together in ways that connote longevity, economic exchange and intimacy. Marital and community property schemes allow parties to sign pre-nuptial contracts that alter or destroy expectations of sharing during or after marriage. Those not signing contracts may retain the separate property they owned before marriage by declining to share it with their spouses. And divorce law calls for dividing the capital account of a marriage at divorce, leaving the spouses largely independent of one another after the divorce is complete.

The language of partnership and community is therefore quite different from the notion of marital partnership that was used a century ago. That old and discredited partnership of dependency involved connotations of marital longevity, economic exchanges and obligations extending beyond the marriage that are now seriously contested, if not reviled. Putting aside the issue of children, marriage is now thought of as a relationship between two autonomous persons and divorce as a clean break rather than a gradual dissolution of a community. Alimony is a road to independence rather than an indicia of long term entwined intimacy. Modern marital and community property law therefore legitimates claims of independence as marriage begins, endures and ends, rather than affirming the marital community as a basis for discussing the nature of intimacy, interdependence and family. As far as property law is concerned, marriage is a financial arrangement pure and simple, not an important cultural institution. Adams' vision of independent actors has moved from the world of politics to the still gendered realm of the family.

The courts most often confront marriage when it ends. Without thinking about why parties marry or why they divorce, judges are

asked to wind up the financial affairs of a broken family. They draw a sharp line between the capital account of a marriage, representing the accumulations of the community about to be terminated, and the future income earning potential of the spouses. This division flies in the face of much that was once traditional about marriage. Women were dependent upon their husbands' income streams during marriage, and, most importantly for our purposes, husbands relied upon their wives' home labor to make their careers possible. Divorce was unusual. There was therefore legitimacy to the claim made by married women that they should be able to rely upon their husbands' income stream. Even after divorce, alimony was sometimes awarded in recognition of the right of women to rely upon their mates' stream of income during their adult lives. After all, wives had made that income stream possible. As acceptance of the idea that women make men's income possible has waned, so has our willingness to reassign future income from a wealthier ex-spouse to a less wealthy ex-spouse. Claims of independence and the clean break associated with divorce now overwhelm any thought that the entwined intimacy of marriage should have economic consequences or that the presence of marital economic dependency by members of either gender justifies the need for an ongoing financial relationship between ex-spouses.

The notions that marriage is a contract between autonomous individuals and that divorce is a clean break requiring the termination of economic connections between spouses has made marriage a secondary social institution. Oxymoronic claims of "marital autonomy" and judicial affirmations of the clean break syndrome have rendered marriage less interesting, attractive, and important. If one can contract around its primary property constraints, why take it seriously? If it can be easily ended, why begin it? If it has no property connotations that bind people together in special ways, why respect it? Integral to the discredited nineteenth century marriage was the notion that entry into the marital state was a big step, a very big step indeed. It was a life change of major import. In the process of rejecting old status concepts of marriage we have discarded the cultural expectations that made the institution important. We have thrown away the baby with the bath water. We have not only cut the links between inter(dependency) and marriage, but also the interconnections between the contours of divorce law and social conceptions about the importance of entry into marriage. We can no longer afford to treat these two inquiries – the law of marriage and the law of divorce – as disconnected enterprises.

All of this makes quite questionable the bright lines we presently tend to draw at divorce between separate and marital or community property, and between future income and marital capital. It also undercuts the validity of the old dichotomy we tend to draw between dependent spouses and independent, unmarried, divorced people, as well as the newer dichotomy between married and unmarried couples. These issues all involve aspects of the same questions. To what extent should the existence of economic interdependence and of entwined intimacy that is so much a part of marriage be used as a basis for meshing the financial affairs of intimate couples? Should the property connections that exist between spouses or other intimate couples have life after the relationships end? If our theory of partnership or community as a basis for marriage means anything, why should it be waivable by contract and terminable at the drop of a divorce hat? Why not think of marriage, divorce and the property relationships they entail as part of a process of changing the lives of two people, much as we now think of both birth and death as gradual events that require rules to change over time as events

unfold. And why should unmarried people who have relationships that are indistinguishable from married couples be treated any differently?

Thinking about marriage and divorce as a process that occurs over time would dramatically alter our present understanding of many marital property cases now commonly used in first year property courses in law schools and bandied about in the literature of the practicing family law bar. Rather than posing questions about the division of capital and income, they become inquiries into the appropriate ways to entangle and then disentangle people in a relationship. The graduate degree as property cases that so dominate discussion of the lines to be drawn between marital capital and future income are actually symbolic of much larger questions. They are not about investment, capital and income in a particular project so much as they are about the appropriate ways to entangle people in marriage and disentangle them after divorce. That more general inquiry means that any source of past, present or future income, not just that produced by one spouse's investment in the graduate degree of another, should become a subject of inquiry in the law of marriage and divorce. In short, there is nothing special about a degree. What is important is not the degree but the search for a basis for allocating the potential economic value – past, present and future – of those in a marital partnership. Indeed, it may, in the modern sense, be civically responsible to consider ways to forge links between married people, rather than to affirm their quick access to independence.

III. Status and Marital Property

Property thinkers, schooled on economic theories and principles of rational acting, reliant upon autonomy as the backbone of their intellectual culture, unconcerned about the way the legal culture of marital property has helped create the clean break, and totally unaware of the possibility that the cultural qualities of marriage might change if the property rules at divorce shifted, don't like to think about the way property law and status law interact. It would be useful if everyone who writes about or teaches property taught family law for a few years. The romantic idea of marriage as something more than a sum of its two parts, if taken with just a smidgen of seriousness, makes our present laws of marital property woefully inadequate. And the need to talk about children quickly reduces the relevance of autonomy, rational acting and independence as driving forces for legal norms.

What would it mean for family (proper)ty law if we took seriously the central nongendered aspects of nineteenth century marriage – the expectation of marital longevity, the exchange of assets, and the value of entwined intimacy? First, fault divorce should not be re-instituted. Second, the rules of marriage should be altered so that many more intimate relationships are treated as marital. Family formation and marriage, now thought of separately, ought to be treated as closely related events. Third, the law of marriage and the law of divorce should not be thought of as separate inquiries. As a result, the economic interdependence of married people ought to be significantly enlarged by eliminating the concept of separate property, doing away with the differences between marital and community property regimes, and requiring post-marital sharing of income after divorce for a significant period of time. Fourth, children ought to be considered as economic parties to a marriage, entitled at divorce to shares of the marital or community property along with their parents. In combination these steps would dramatically increase the number of intimate settings in which marriage would occur while significantly increasing the economic consequences of marriage. Over the course of

time, the result would be to persuade people to more carefully and maturely consider the initiation, maintenance and termination of intimate relationships.

At first glance you might assume that reinvigorating portions of a nineteenth century vision of marriage would require the repeal of no-fault divorce. That is wrong. Fault divorce law was heavily laden with currents of religious thought from English traditions and designed to enforce the dependent/independent dichotomy of the last century. Recognition of a need in present day society for family stability does not mean that it should be sought in the same ways that were used a century ago. Indeed, the main thesis of this essay is that family (proper)ty law may be structured to foster such stability without returning to the gendered dependent/independent dichotomy of the past.

Furthermore, divorce law is a terribly inefficient way to deal with marital instability. The fault divorce structure was an after-the-fact system designed to punish and deter marital wrongdoing by refusing to allow parties to sever their family ties. The sheer perversity of using continuation of a broken marriage as a device to punish misbehavior created unfairness and generated enormous disrespect for legal institutions. It led to false pleading, feigned cases, migratory divorce, and nasty litigation. Society would be much better served by creating incentives for appropriate behavior from the day marriages begin rather than punishing malefactors after the fact. Though the horrors of the fault divorce system, together with strong customs constraining divorce, probably did mean that many nineteenth century couples attempted to carefully select their mates and acted with care before divorcing, similar thoughtfulness can be encouraged without returning to perverse divorce principles. Longevity of marriage may be encouraged by dramatically increasing the number of relationships we label as marital, requiring substantial exchanges of wealth between parties upon marriage, holding people to economic obligations after divorce, and introducing the idea that children are part of the economic community of marriage.

The law of marriage ought to be changed to pronounce many more people married than it does today. The idea is to make the establishment of an intimate relationship much closer to a decision to marry than at present. If the legal consequences attached to the initiation of intimacy were significant and broad in scope, people would be more likely to exercise some care in initiating such a relationship. In addition to continuing to validate standard consensual marriages, marriage should be deemed to occur automatically whenever a child is born to a couple and whenever an intimate relationship lasts for more than two years without the birth of a child. The goal is to make sure that the entwined economic and emotional expectations of relationships are always treated as legally important. Two years is an arbitrary construct. If you prefer one year, that's fine. (This is not an essay on sexual orientation. I do not care about the gender of the parties coupling up. Nor is this an essay about new birthing technology. For purposes of this essay, I also do not care about how a child is created. And finally, this is not an essay about defining parent. Though I usually prefer to think in terms of psychological parenting in settings involving new reproductive techniques, that conclusion is not central to the themes of this essay.) You could think of this proposal as a new form of "common law" marriage.

In addition to dramatically increasing the number of relationships that we call marital, the economic consequences of marriage must be substantially increased. The concept of separate property ought be abolished. All property belonging to persons on the date they marry, regardless of its source, should be treated as marital or community property,

subject to division at divorce, unless it is bound by the constraints of a prior divorce decree. We should rid ourselves of the widely accepted rules that property owned prior to marriage or received during marriage by way of gift or inheritance is separate property. Such a change would dramatically increase the financial stakes of marriage. Combined with the new "common law" marriage rules, people with money would be compelled to carefully consider the consequences of having a child or initiating and maintaining a long-term relationship. Those without money would also be effected, though in different ways. To whatever degree the significant changes in marriage law discussed here would alter general cultural understandings about the nature of intimacy, all social groups would eventually be influenced.

In order for this system to have the intended effect, ante-nuptial contracts and other devices used to place significant limitations on the sharing of marital assets must be abolished. Increasing the economic consequences of divorce as recommended here would make ante-nuptial contracts even more attractive to the well-off. The need to alter cultural understandings about the meaning and seriousness of marriage, however, suggests that persons should not be allowed to avoid the consequences of marriage by protecting themselves from the economic consequences of divorce. The present trend to think of marriage as contractual, along with the clean break syndrome now governing operation of the divorce system, means that the economically less well off spouse (usually a woman) has little leverage at any stage of a marital relationship. That outcome reduces the meaning of marriage as an interdependent partnership and legitimates an unequal balance of power in marriage. Second marriages ought to be completely subject to the economic allocations made after a prior divorce.

Similarly, post-divorce income streams, now excluded from consideration at divorce except when payment of spousal support is ordered, also should be treated as marital or community property for a substantial period of time after the divorce. Income splitting between the marital partners should continue for one year for each two years of marriage. (Children, as the second paragraph below argues, also should be included in the sharing, though on a different time frame.) This proposal, like the proposal to declare two-year intimate relationships as marital, is arbitrary. If you prefer a different time structure, I would not be strongly opposed.

The recommendations to rid ourselves of the concept of separate property, ban ante-nuptial contracts, and institute serious post-marital income sharing require a substantial restructuring of marital property law. Their adoption would undermine any reason, assuming there is one, to maintain both common law and community property regimes. The most important area of difference between the two systems arises at death. With some exceptions, disposition at death follows title in common law property states, while community property is split between the spouses at the death of one. This difference should disappear if serious marital sharing, including mandatory non-waivable sharing of the estates of married people, is instituted. If sharing becomes the norm, the two regimes would, for all practical purposes, become one.

Finally, children should be treated as economic parties to the marital community. Upon divorce they should be entitled to a proportionate share of both the marital economic community and the parents' future income streams until they reach the age of 22, or if students, complete college. The goal is to integrate children into the legal and cultural concept of a family until they are capable of supporting themselves. Integrating children into the marital community would also remove the need to draft ante-nuptial contracts

to protect the children of first marriages when their parents remarry. The present structure, which considers children as entitled to support, but not as equal interdependent partners in the economic community of marriage, is symptomatic of our present family (proper)ty law malaise. Though the recent arrival of child support guidelines is a significant improvement over prior practice, children are still conceptualized as individuals entitled to money, not as integral parts of a family entitled to a full share of the marital economic community. There is no reason to continue along that path.

In sum, the recommendations outlined here create a new system of marriage that dramatically increases the proportion of intimate relationships deemed marital and significantly enlarges the economic entanglements of marriage partners. They demonstrate the potential for both reshaping marital communities without recourse to the gendered assumptions of nineteenth century family (proper)ty law and creating strong incentives for carefully considering the initiation of intimate relationships. In the long run, society would be better off if we were all asked to think of marriage as a significant event designed to create stable environments for adults and children. We can no longer afford to countenance childbirth as a largely inconsequential family (proper)ty law event and marriage as a contractual scheme with few if any mandatory, long term consequences. Our grandchildren deserve better.