

The Wanting of Community Property*

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The community property system was designed by those well versed in the intricacies and imponderables of that unique association known as marriage.

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I. INTRODUCTION

Community property, as an institution of the private legal order, is in a state of grave deficiency. The institution presents a model of family and property that is wanting.

The patrimonial reflections of community property have, in modern law, been understood as the basis of a property holding regime for the family-at-large. Today, the membership of the family unit is no longer co-extensive with husband, wife, and their issue, but often embraces blood and other relatives (generously considered) of the spouses whether outside the family home or under its roof. It also embraces cohabiting same-sex and opposite-sex couples with their children of almost innumerable modalities of filiation.

However, the conceptual framework of community property has not been designed to meet the contemporary (and valid) expectations of citizens that the law reflect their social condition. This deficiency is a product of the lazy lawmaker. Yet, perhaps this lack of legislative vision has been a good thing since society is now calling on the lawmaker to re-

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1. Harriet S. Daggett, *Policy Questions on Marital Property Law in Louisiana*, in Charnatz & Daggett (eds.), *COMPARATIVE STUDIES IN COMMUNITY PROPERTY LAW* 52 (1955).

conceive the family on a basis that is inclusive of a wide variety of same-sex and opposite-sex non-marital relationships and that responds to the wants of same-sex married couples. Same-sex partners, in particular, bring to the institution of community of property different perspectives on jointly-owned property, howsoever that community might be legislatively fashioned.

This Essay is a short discussion of the ideas and notions that underscore community property law with a view to posing a number of questions that are significant for the construction of a new community property regime - one that will form the basis of a socially sound and correct understanding of the new family and its property. Is there a sufficient stuff of ideas and notions that appropriately reflects, for example, the life in the law of homosexual persons in intimate personal relationships?

There are nine community property states in the United States. They are: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin.² Each of these states has a jural configuration for the acquisition, ownership, management and control, and division of property by married spouses that subscribes to the idea that certain marital property is common and certain separate. All of these states accept the proposition that during marriage each spouse will no longer continue to own all of his or her property separately. However, apart from this obvious statement, the nine states do not agree on topics as important as the content of the community, its nature as partnership, patrimony or fund, the extent of the rights, powers, duties, privileges and immunities over community things, its management and control, and its ultimate distribution. Each of the nine states has its own template of community; yet, each considers that there is full justification for its use of the word 'community' to describe its marital property system, if only to distinguish the content of its community from the marital property approach of its common law neighbours.

Community property is a convenient lexical tag for the view that marriage is 'a partnership to which each spouse makes a different but equally important contribution'.³ However, it would be misleading to think of community property, considered as both assets and liabilities, as somehow restricted to the juridical relations between the spouses. Most certainly the children and arguably others have an important part to play

2. Alaska has an elective community property regime.

3. THOMPSON ON REAL PROPERTY, THOMAS EDITION § 37.07(d) (David A. Thomas ed., 1994), referred to in JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 385 (2001).

in determining the scope of community obligations.⁴ A community property system, therefore, has patrimonial concerns that extend beyond spousal property arrangements; accordingly, it is not surprising that the disposition of community things, in certain circumstances, would take into consideration the interests of the family.⁵

The community property system, like marriage as an institution of civil status or as a status-oriented ‘civil’ contract, is today considered as some sort of economic partnership.⁶ Some say that the system ‘conceptualizes marriage as a team effort’.⁷ Nonetheless, the partnership-based paradigm for the system (and, indeed, for marriage), with its subtext of a contractual joint economic venture, may not reflect the underlying rationale for the system. This rationale may simply be that community property is the logical consequence of the common effort, skill or industry of the spouses, and nothing more systemically organized than this logical extension of effort, skill or industry.⁸

The scholarly literature and the case law have not been interested in the idea of community⁹, and the notion of community has been most

4. For example, article 2362 of the Louisiana Civil Code (2003) states: ‘An alimentary obligation imposed by law on a spouse is deemed to be a community obligation.’ Alimentary obligations exist between parent and child (legitimate or illegitimate), former spouses, and ascendants and descendants generally. Moreover, the spouses assume the ‘material direction’ of the family (article 99 La. C.C) and the family ‘in its extensive sense’ includes ‘all individuals who live under the authority of another, and includes the servants of the family’ (article 3506 (12) La. C.C.)

5. As is the case in Louisiana where a spouse may be judicially authorized to act without the consent of the other spouse ‘upon showing that such action is in the best interest of the family’ in addition to other factors (article 2355 La. C.C.). Who constitutes the family? Is the family to be understood as limited to father, mother, and children (as the 1979 Revision Comment to article 2355 La C.C. advises)?

6. Jonathan G. Blattmachr, *Tax Planning with Consensual Community Property: Alaska’s New Community Property Law*, 33 REAL PROP. PROB & TR. J. 615, 620 (1999) (stating that many people perceive community property ‘as a fair and rational property ownership system for spouses, partly because it treats them as economic partners during marriage’).

7. Garth R. Backe, *Community Property and the Copyright Act: Rodrigue’s Recognition of a Community Interest in Economic Benefits*, LA. L. REV. 655, 655 (2001) (stating that Louisiana’s matrimonial regime conceptualizes marriage as a team effort).

8. Some consider the community as the very embodiment of time, effort, and skill. See *Lehman v. Lehman*, 18 Cal. 4th 169, 190 (Baxter, J., diss., stating: ‘When contributing its time, effort, and skill to the husband’s work during the marriage, the community contracted for, earned, and expected no less.’)

9. See the comments of Wilbur J. in *Hannah v. Swift*, 61 F.2d 307, 310 (9th Cir. 1932): ‘Appellant’s 72-page brief invites us to a discussion of the theory and concept of the community property law of California, its historical, judicial, and legislative development, and to a comparison of the community property systems of California, Washington, Arizona, and the law relating to estates of entirety. These questions are primarily for the courts of California to determine, and, therefore, an extended discussion by us is unnecessary and would be futile.’ Have the courts of California taken up this 1932 challenge of the federal Circuit Court of Appeals, Ninth Circuit?

often expressed as a simple list of the property excluded or included in the community property fund, without further philosophical enquiry. However, a search for this idea is essential to a correct assessment of whether the community property system can be extended beyond marriage and can encompass, for example, cohabitant property rights.¹⁰ The idea that a community property system and traditional marriage are in perfect, perpetual and exclusive concomitance is a clear non-starter in any modern investigation of the subject. By the same token, the idea that a community property system and non-traditional, for example ‘gay’, marriage are co-extensive is a bad conceit.

II. IDEAS AND NOTIONS OF COMMUNITY PROPERTY

Of the nine states, only Louisiana belongs to the Romanist civil law tradition. Its private legal order is still constructed on a basis not dissimilar to Western European jurisdictions. With some qualifications, its civil code belongs to that family of civil codes inspired by the French *Code civil*. A French-styled code or code *au sens européen* has been dubbed “*une codification (ou recodification) moderne à la française*”.¹¹ The French and Louisiana civil codes present a synthetic view of society formulated and structured on the basis of persons, property and the ways by which things are acquired, transferred and transmitted during the life of the citizen and on death. Thus, a marital property system or regime is part of a larger picture of personhood, civil status, property, and succession, and the principles and rules of a community property regime penetrate the institutions of family, alimentary obligation, gift, inheritance, and ownership. A well-drafted civil code is an organic expression of legislative intent designed both to answer the meta-question: ‘who are we?’ and to facilitate discovery of the content of the law: ‘how do we come to know the law?’

There are, therefore, ontological and epistemic dimensions to civil codes and, indeed, to all legal science of the Romanist civil law tradition. A noted scholar has framed the ideal code as follows: ‘Indeed, a civil

10. See *Lindemann v. Lindemann*, 960 P.2d 966 (Wash. App. 1998), where Washington state’s community property system was extended to cohabitants by ‘analogy’ because, as the court held: ‘There is no dispute that David and Kimi lived in a stable, quasi-marital relationship in which they cohabited knowing a lawful marriage between them did not exist. . . . The Washington Supreme Court [has] held [that] the characterization of property as separate and community will apply by analogy even though in the absence of a marriage there is by definition no true community property.’ *Id.* at 969.

11. PAUL-ANDRÉ CREPEAU, *LA REFORME DU DROIT CIVIL CANADIEN: UNE CERTAINE CONCEPTION DE LA RECODIFICATION 1965-1977*, at 14-15 (Éditions Thémis, 2003) (using this expression to signify contemporary codification).

code should be so well written—not drafted—that even the layman reader should be able to recognize that the legal regime described there conforms to and reinforces an order consistent with a proper understanding of the relation of human beings to each other in the ontological order and consistent with the culture of the people and the physical environment in which they live.’¹² Considered in this perspective, a community property regime is part of the vocation of the people. It is likely, therefore, that the language used to describe the idea of community will be more universal and more abstract in those civil law systems that have civil codes because this same language will also be used to describe a series of other institutions of the law relating to personhood and property.

The Anglo-American common law tradition is not scientific. Its concern, *pace* the authors of the Restatements, is not to imagine a legal order such as that contemplated by a civil code, that is to say, a code of laws characterized by simplicity and plain redaction; certainty, justice and modernity; comprehensiveness, internal coherence, and gaplessness; systematization; rationalization, pedagogy, and utopia; continuity and stability; and popularization of knowledge of the law.¹³ Accordingly, where the idea of community is discussed in judicial and scholarly materials, even in common law states where the community property system is derived from a movable mix of French, Spanish and Mexican law, it is generally considered as a self-standing institution.¹⁴

A review of American community property jurisdictions provides evidence sufficient to conclude that there is no well-developed idea of community. Indeed, it is said that community property is usually defined in the negative, that is to say, property is community property ‘absent’ a matrimonial agreement, acquisition of property prior to the marriage or through inheritance, acquisition of property in a non-community state (to a greater or lesser degree), or other factors.¹⁵

12. Robert Anthony Pascal, *Of the Civil Code and Us*, 59 LA. L. REV. 301, 302 (1998).

13. See Michael McAuley, *Proposal for a Theory and Method of Recodification*, 49 LOY. L. REV. 261, 265-66 (2003).

14. It is interesting, however, to note that modern property law textbooks in the United States often have a chapter on marital property. For example, see SINGER, *supra* note 3. See also Ralph C. Bashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. 84, 180 (1994), for an exceptional understanding of the relationship between community property and succession.

15. David W. Reinecke, *Community Property Issues for Noncommunity Property Practitioners*, SGO94 ALI-ABA 193, 198. Reinecke also states that community property refers more to a concept of property interests rather than to any individual state’s application through property law. *Id.* at 199. What, therefore, is this ‘concept’? Reinecke does not provide the answer.

The best-known idea of community is that married couples acquire property in economic partnership in community property states.¹⁶ Here is one expression of the nature of this partnership: 'Public policy promotes the marital relationship. The ideal to which marriage aspires is a fifty-fifty partnership with both partners sharing resources and responsibilities. Resources, whether they be money, talents, time or services, are pooled so that the economic partnership can prosper through the acquisition of assets.'¹⁷ This idea of economic partnership has its roots in Spanish community property law.¹⁸ However, it would be wrong to think that this economic partnership requires that there must be an equal (or indeed any) pooling of assets by both parties. It is a partnership of contributions each spouse contributing in their own way¹⁹; sometimes the contributions are direct financial contributions and sometimes they are indirect contributions, such as housekeeping duties. Economic partnership is seen as promoting 'the ideal of marital sharing' and the economic partners are 'expected to sacrifice their individual rights in order to promote the best interests of the partnership'.²⁰ In this way, community property is considered, from a modern common law perspective, as a surrender of subjective rights and as an abandonment of individuality.

The notion of an economic partnership is often the sole idea that published scholarship suggests is the factor distinguishing the marital property system of community property states from the system prevalent elsewhere in the United States. There are other ideas, however, and they are more closely related to the intrinsic qualities of marriage. In Arizona, for example, community property is an expression of a 'union of wills'²¹ sometimes expressed as a 'will to union'.²² This state derived its marital property system from Spanish customary law. In this law the community property system was premised on 'the mutual loyalty, the mutual sharing

16. Leslie Fields, *Alabama's Elective Share: It's Time to Adopt the Partnership Theory of Marriage*, 46 ALA. L. REV. 797, 797 (1995).

17. *Id.* at 812-13; see also Bashier, *supra* note 14, at 180: 'If marriage is viewed as an economic partnership, then the community property system is preferable to the common law system. Because the community property system recognizes the contributions of each spouse during the marriage itself, no special provisions are required to protect a spouse from disinheritance.'

18. *Portillo v. Shappie*, 636 P. 2d 878, 882 (N.M. 1981).

19. See Hon. K. Edward Greene, *A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?*, 18 CAMPBELL L. REV. 203, 214 (1996), referring to Nanette K. Laughrey, *Uniform Marital Property Act: A Renewed Commitment to the American Family*, NEB. L. REV. 120 n.32 (1986).

20. Laughrey, *supra* note 19, at 221.

21. *Lynch v. Lynch*, 164 Ariz. 127, 130 (Ariz. Ct. App. 1990).

22. *In re Marriage of Fong*, 121 Ariz. 298, 304 (Ariz. Ct. App. 1978).

of the burdens of marriage, the joint industry and labor of the spouses to further and advance the success and well-being of the marriage and of the family...²³ It is this mutual consent and union of wills that sustains the community. This union of wills is also an expression that the community interest of husband and wife is often perceived, as in California²⁴, as excluding the interests of others. Finally, the nature of this interest is that it is a 'true' interest as the courts of the state of Washington have noted when stating that that state's community of property system would be extended to cohabitants²⁵ notwithstanding that no 'true' community existed. A community interest that is not an interest of husband and wife is qualified as a 'pseudo' or 'quasi' community property right.

Perhaps the most useful method for determining the content of community is to examine meretricious relationships (as they are archaically designated). Cohabitants are still generally excluded from community property rights (and obligations) although there have been developments, notably in the state of Washington, to extend the community property system to them.²⁶ In *Connell v. Francisco* the supreme court of the state of Washington held that statutory definitions of separate and community property should, by analogy, apply to intimate cohabitant relationships. The resulting property would be known as 'pseudo-community' property and is the property acquired in a 'stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist'.²⁷ This is, as the court held, a 'meretricious relationship' the relevant defining factors for which include: 'continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and

23. W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 57 (2d ed. 1971), referred to in *In re Marriage of Fong*, 121 Ariz. at 303. Funiak & Vaughn use 'the partnership', 'the union of wills' and 'mutual consent' to describe the community. *Id.* at 303. Is the concept of community nothing else than its mere definition? See Shelly D. Merritt, *Planning for Community Property in Colorado*, 31-Jun COLO. LAW. 79, 79 (2002) (stating that the concept of community property closely resembles the definition of marital property under the Colorado Uniform Dissolution of Marriage Act).

24. *Hannah v. Swift*, 61 F.2d 307, 309 (9th Cir. 1932) (Wilbur, J., disagreeing with appellant's brief stating: 'By definition, community property ownership is that of "community interest of husband and wife" It is not "of husband and the wife's successors," or "of husband's creditors and his wife," or of any persons but "husband and wife" and noting that community debts must be satisfied by community property).'

25. *Supra* note 10.

26. See Gavin M. Parr, *What Is a "Meretricious Relationship"?: An Analysis of Cohabitant Property Rights Under Connell v. Francisco*, 74 WASH. L. REV. 1243 (1999).

27. *Connell v. Francisco*, 127 Wash. 2d 339, 346 (Wash. 1995).

services for joint projects, and the intent of the parties.’²⁸ The court further stated that the relationship need not be long-term (in apparent recognition of the reality of traditional marriage).²⁹ The objective of the recognition of the meretricious relationship in *Connell* was the just and equitable disposition of property and liabilities of the cohabitants.

In critically appraising the value of *Connell*, Gavin Parr examines various factors used by the *Connell* court and other Washington courts to assess whether the relationship is stable and ‘marital-like’.³⁰ Parr looks at the court’s definition of a meretricious relationship as ‘a stable, marital-like relationship’ and states:

‘To be meretricious, the parties’ relationship must be marital-like. Four of the five *Connell* factors appear to serve as proxies for determining whether a relationship is marital-like. “Cohabitation” distinguishes a meretricious relationship from situations where romantically involved parties do not live together at the same residence and from non-intimate living arrangements. “Intent of the parties” provides evidence as to whether the parties intend their relationship to be committed and enduring. “Purpose of the relationship” evidences whether the parties have undertaken the duties and responsibilities that normally attach to a husband and wife. Finally, “pooling of resources and services to accomplish common goals and projects” serves to determine whether the parties’ relationship is economically similar to marriage’.³¹

The *Connell* factors for a marital-like relationship generally reflect the legislative perception of marriage. For example, the degree of intimacy and romance of cohabitants meets legislative expectations for the married couple. Sexual intimacy, in particular, is an important factor in the mind of the lawmaker.³² Thus, it might be said that a community property system has a discrete message of sexual complementarity.

28. *Id.*

29. *Id.*

30. See Parr, *supra* note 26, at 1254-63.

31. *Id.* at 1258.

32. See 1987 Revision Committee comment (b) to article 98 La. C.C. (A.N. Yiannopoulos ed., West 2003): ‘As used in this Article, the term “fidelity” refers not only to the spouses’ duty to refrain from adultery, but also to their mutual obligation to submit to each other’s reasonable and normal sexual desires.’ Is sex necessary? See [1999] 2 S.C.R. 3 (Supreme Court of Canada) (Cory, J., commenting on *Molodowich v. Penttinen* [(1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.)], a decision of the Ontario District Court setting out the characteristics of a conjugal relationship). ‘[That case sets out] the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal. While it is true that there may not be any consensus as to the societal perception of same-sex couples, there is agreement that same-sex couples share many

Beyond intimacy, community property systems are systems of bundles of rights and duties. The idea of community embraces ‘the vision of community...of honest property owners, engaged jointly in recognizing and defending their property in common’ and the vision of ‘partners . . . in a joint enterprise of legal perfection . . . a partnership dedicated to emulating the perfect legal person’.³³ This mutuality of rights and duties gives rise not only to notions of mutual benefits but also to mutual obligations. There is a mutual dependence. Dependence is a negative phenomenon in a society, such as American society, premised on individual zeal and achievement. However, dependence is part of the idea of community and, traditionally, part of the family dynamic where the husband and wife mutually perfect each other. Yet, if this is manifestly true of a ‘true’ community, it does not follow and should not be presumed that cohabitants and others to whom a community property system might extend, in a ‘pseudo’ or ‘quasi’-like manner, desire the same mutual perfection of right and duty and the same dependence that are acknowledged to characterize Western marriage in the Christian tradition.

In Louisiana, the community property system is strongly tied to marriage defined as ‘a legal relationship between a man and a woman’³⁴ and a same-sex relationship purportedly ‘violates a strong public policy of the state of Louisiana’³⁵ and produces no civil effects. The features of marriage are the mutual obligation of fidelity, support, and assistance and the mutual assumption of the moral and material direction of the family and the resulting obligations.³⁶ It is this marriage and these duties and obligations that condition the definition of a matrimonial regime as ‘a system of principles and rules governing the ownership and management of the property of married persons as between themselves and toward third persons’³⁷ The codal provisions on husband and wife must be read together with the provisions on matrimonial regimes in order to obtain a complete picture and a correct understanding of the idea of community.

Like Louisiana, Quebec has a private law of the Romanist civil law tradition. Its civil code is also a French-styled code *au sens européen*

other “conjugal” characteristics. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is “conjugal.” *Id.* para. 59.

33. See Arthur J. Jacobson, *The Informal Economy: The Other Path of the Law*, 103 YALE L.J. 2213, 2226 (1994) (describing the jurisprudence of right and the jurisprudence of duty).

34. Article 98 La. C.C. (2003)

35. Article 3519 La. C.C. (2003)

36. Articles 98 and 99 La. C.C. (2003)

37. Article 2325 La. C.C.

although its general architecture is more modern than the structure of the 1804 French *Code civil*. Recently the Quebec legislator created a new civil status called ‘the civil union’ the attributes of which are identical to marriage. In Quebec, marriage and divorce are constitutional prerogatives of the Canadian federal authority; accordingly, the Quebec legislator was required to investigate the nature of opposite-sex and same-sex cohabitation and non marital relationships, within the context of the civil code, as it had also previously done for extra-codal statutory enactments.

The 2002 amendments to the civil code use manifestly ‘marital’ language to describe the union. The civil union is described as a commitment of persons who express their free and enlightened consent to live together, to uphold the rights and obligations related to that status, to have an equality of rights and obligations, to owe each other respect, fidelity, succour and assistance, and to live together. The effects of the civil union relating to the direction of the family, the exercise of parental authority, the contribution to expenses, the family residence, the civil union and family patrimonial regimes ‘are the same as the effects of marriage, with the necessary modifications’.³⁸ Moreover, ‘a civil union creates a family connection between each spouse and the relatives of his or her spouse’.³⁹ On the topic of a property sharing system, the civil code provides that civil union ‘spouses’ (‘conjoints’ (consorts) in the French text) are subject to the same rules as are applicable to matrimonial regimes *mutatis mutandis*.⁴⁰ The institutions of marriage and civil union are coequal. It is, as one might surmise, entirely unclear what greater rights and duties have now been embraced by the recent Canadian federal ‘gay marriage’ legislation defining marriage ‘for civil purposes’ as ‘the lawful union of two persons to the exclusion of all others.’⁴¹ (other than, perhaps, criminal law provisions and other non-private law matters coming under the federal constitutional power).

The Quebec marital property regime is a deferred community of acquests where property is, essentially, separately owned and managed during marriage or civil union and shared on dissolution of the marital or civil union bond. There is also a compulsory and forced community of the value of certain assets (‘the family patrimony’). The Quebec idea of community, therefore, embodies the same ideas of economic partnership,

38. See articles 521.1, 521.6, and 521.7 C.C.Q.

39. Article 521.7 C.C.Q.

40. Article 521.8 C.C.Q.

41. See An Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes (Civil Marriage Act) (Bill C-38), S.C. 2005, ch. 33, § 2.

mutuality, intimate cohabitation, duration, and reciprocal intent as are evidenced in the nine states for traditional marriage and, at least in Washington state, for cohabitation.

It is, however, noteworthy that in the debate surrounding the civil union, there does not seem to have been much discussion (or interest) in determining whether opposite-sex and same-sex cohabitants want the same rights and duties as married couples or whether their image of life together differs, in property and other fields of law, from the statutory and judicial idea of the traditional community property regime for husband and wife. It is incorrect to assume, as the Quebec legislator has done, that gay men and women (or, indeed, opposite-sex cohabiting couples) desire the same sort of property arrangements as married couples. For example, there is no evidence that they were consulted on whether the deferred community property regime and the rich history of community property law in Quebec legal history were of appropriate application. Perhaps another regime would more accurately reflect how gay men and women live together and how they imagine their economic community. Thus, when the Quebec civil code, for reasons of economy, extended the rights and duties of married spouses to civil union spouses, what was intended by the phrase ‘with the necessary modifications’ (*compte tenu des adaptations nécessaires*)?⁴² Moreover, in the mind of the Quebec lawmaker, marriage and civil union are not only identical in substance but share much of the same festive environment.⁴³

The fact that marriage is traditionally festively celebrated and that this celebration has a strict social protocol is an important, if unspoken, message in the interstices of a community property regime. The exchange of marriage vows in a ceremonial setting is juridically reiterated in the notion of mutual legal rights and duties. It may well be that the reluctance of lawmakers to consider the extension of community property to non-traditional couples has more to do with the marriage and the initial commencement of the community than with property sharing and partnership. Yet, the timeline of community property has everything to do with joint property. If a community of property system can be divorced from the initial juridical act of status or contract, then its provisions can be more carefully tailored to every citizen who would like a durable union of property interests.

42. See articles 521.6 and 521.8 C.C.Q.

43. The French text uses the word ‘célébrer’. The English text uses ‘solemnize’. On the nature of this solemn celebration, see the outstanding article of Nicholas Kasirer, *Convoler en justes noces*, in Pierre-Claude Lafond & Brigitte Lefebvre (eds.), *L’UNION CIVILE: NOUVEAUX MODELES DE CONJUGALITE AU XXI^E SIECLE* (Cowansville, Les Éditions Yvon Blais 2003).

Are there other ideas of community in the Western legal tradition? Contemporary continental views of community indicate additional and complementary aspects of the ‘idea of community’.

It is stated that in France the community property regime best reflects the ‘idea of conjugal association’ (*l’idée d’association conjugale*)⁴⁴ and that this idea is conform with the Christian conception of marriage⁴⁵; indeed, no other matrimonial regime so perfectly conforms to the intimate union and to the unity of interests that constitutes the fundamental basis of family harmony, says Cambacérés.⁴⁶ The community is a collaboration (*collaboration*)⁴⁷. This collaboration responds, as is the case with all matrimonial regimes, to the budgetary issues (*problème budgétaire*) of the household arising from the discharge of common expenses relating to the spouses’ and the children’s needs.⁴⁸

The community is also an association of interests (*association d’intérêts*)⁴⁹. This association is of the nature of an economic partnership, but is more often expressed as a union of financial interests (*union des intérêts pécuniaires*).⁵⁰ The idea of partnership is either avoided or dismissed as an appropriate paradigm because, first, there is no *affectio societatis*, second, the regime is not *created* with a view to *profit*, and third, the regime ordinarily starts with a zero-sum balance sheet.⁵¹

The idea of community in France reflects both the *vie commune* and the *solidarité d’intérêts*. Living together (*habitation commune*) implies, in contemporary thought, more of a physical and emotional *entente* that is present in the bed and at the table than the hierarchical relations of married couples at the time of the 1804 *Code civil*.⁵² These

44. The French civil code provides, in the opening article to the general provisions on matrimonial regimes, that the law will provide for the property of the *association conjugale* absent contractual arrangements. See article 1387 C.C.

45. Juris-classeur civil (2001) ‘Communauté légale’, fasc. 10, ‘Historique du régime de communauté’, para. 6

46. The community is described as ‘le mode le plus conforme à cette union intime, à cette unité d’intérêts, fondement inaltérable du bonheur des familles’, attributed to Cambacérés in MARCEL GARAUD, *LA REVOLUTION FRANÇAISE ET LA FAMILLE* 52 (Paris, Presses universitaires de France, 1978).

47. *Id.* paras. 12, 16.

48. ALEX WEILL, *DROIT CIVIL—TOME 1*, at 521-22 (Paris, Dalloz, 1968).

49. DOMINIQUE CAIZERGUES, *GUIDE JURIDIQUE DES REGIMES MATRIMONIAUX* 7 (Paris, Éditions de Vecchi S.A.).

50. JACQUES FLOUR & GERARD CHAMPENOIS, *LES REGIMES MATRIMONIAUX* 6 (Paris, Dalloz, 2001).

51. ANDRE COLOMER, *DROIT CIVIL—REGIMES MATRIMONIAUX* 195 (12 ed., Éditions du Juris-Classeur, 1994). For a general discussion of the nature of community, see *id.* at 193-96.

52. FRANÇOIS BOULANGER, *DROIT CIVIL DE LA FAMILLE—TOME 1*, at 261 (Paris, Economica (1990). Boulanger reports Carbonnier as stating: ‘Le logis étant commun, la présomption est que la table et le lit le sont également’. *Id.*

ideas have recently (but only in part) been extended to cohabitants in the context of the refreshed institution of concubinage.

Unlike the Quebec civil union that associated the content of the union with that of marriage, the French legislator has differently defined the rights and duties of both institutions. Marriage entails mutual fidelity, support, and assistance (*fidélité, secours, assistance*)⁵³ and joint moral and material direction of the family.⁵⁴ The spouses are mutually obligated to ‘*une communauté de vie*’⁵⁵ Concubinage, on the other hand, is a *de facto* union that is characterized by a *vie commune* of *stabilité* (stability) and *continuité* (continuity).⁵⁶ Where the parties wish to organize their concubinage in a more formal matter, they can contract (under the terms of a *pacte civil de solidarité*) and conventionally structure the scope of their mutual and material assistance.⁵⁷

The language of both the contractual union and the *de facto* concubinage is borrowed from both French codal and doctrinal sources. The general excitement surrounding the 1999 amendments to the French civil code may have encouraged some commentators to see too intimate of a relationship between marriage, on the one hand, and contractual union and *de facto* concubinage, on the other hand⁵⁸. On the topic of property, the code considers property interests to be nothing more than variations of undivided ownership (if contractually provided)⁵⁹ and there is no obvious legislative intent to fashion a connection to the codal provisions on community property. Whatever the connection, the French legislature did not wish to follow the ‘with-the-necessary-modifications’ approach of Quebec.

On the whole, the French idea of community property and marriage is not strikingly different from the American approach except to the extent that the economic partnership theory has no currency in the literature. The reason for this is undoubtedly that the French have a highly-developed notion of patrimonial interests and are reluctant to employ the word ‘partnership’ lest notions of the nominate contract of

53. Article 212 C.C. The French text of article 121 of the 1825 Louisiana civil code is identical.

54. Article 213 C.C.

55. Article 215 C.C.

56. Article 515-8 C.C.

57. The cohabitants contract a *pacte civil de solidarité* under the terms of article 515-1 *et seq.* C.C.

58. See note 2 *bis* to article 515-8 C.C. (Paris, Dalloz, 2003) (referring to the *communauté de vie* and the *communauté d'intérêts* as subjacent to the idea of notorious concubinage (*concubinage notoire*))

59. Article 515-5 C.C.

société (partnership), more appropriate to commercial ventures, infiltrate the community property system.

Other civil law jurisdictions, such as Argentina, have entirely similar notions of community. In the soul of the Argentine judge, community is a *unión efectiva* (an actual (not a theoretical) union) of the spouses where there is both a *comunidad de esfuerzos* (a community of efforts) and a *convivencia* (cohabitation). There is a *unión efectiva y real* (a true and real union) that is of the very essence of the community—a community that is intimately related (*intimamente ligada*) to the personal relations of the spouses arising from marriage.⁶⁰

Fifty years ago when the rules of community property were differently formulated in Louisiana, Harriett Daggett said:

‘The purpose of this discussion is to emphasize the confusion, inequities, and maladjustments to social and economic realities presently existing in the marital property law of Louisiana, The belief of the writer in the community system is strong because its basic pattern is designed to stabilize and protect the family. . . . Re-examination of the community property system has been thought necessary for quite some time because its adherents fear that, without adjustment to present conditions, dissatisfactions may become sufficiently acute to result in its abandonment.’⁶¹

This observation of Daggett is as true today as it was in 1955. However, today and in modern law, we are more interested in the following question. If there is an intimate indissociable relation between marriage and community property, is it useful to extend this property system of mutuality, solidarity, union and partnership to non-traditional couples and their families? A discussion of this question follows by way of conclusion.

III. CONCLUSION

It is impossible to configure today’s family. A child may have two fathers (as in Louisiana) and three mothers (thanks to bioengineering). Children may be filiated naturally, by adoption, by acknowledgement, by legal process, or by contract, or children may remain unfiliated. Cohabitants may be several in number all of whom form part of the family project. These cohabitants might be related by blood and live

60. See, in particular, DIGESTO JURÍDICO (TOMO I—DERECHO CIVIL) (PARTE GENERAL, DERECHO DE FAMILIA—DERECHO SUCESORIO) 984 (La Ley, Buenos Aires, 1965). Argentine scholarship is interested in (and respectful of) French notions of community. See also ENCICLOPEDIA JURÍDICA OMEBA (TOMO XXIV) 410 *et seq.* (Driskill S.A., Buenos Aires, 1977).

61. Daggett, *supra* note 1, at 50.

together in a non-intimate but financially dependent relationship. Spouses may be of the same, different, or mixed sexual orientations whether naturally or by election. Then, there are the transgendered, transsexuals, and intersexuals.

A community property system might be able to accommodate same-sex and opposite-sex couples who live in a marital-like relationship; however, it is unlikely that this system will be appropriate for many non-traditional couples and families. For these citizens, the legislator will only be able to provide benefits and assign duties by way of specific statutory enactments on topics such as entitlement to retirement pensions and alimentary obligations.

The immediate legislative challenge is to enquire whether same-sex and opposite-sex cohabitants should be subject to a legal regime of community property or whether they should be invited to privately arrange their property by contract. This will depend on whether the institution of marriage is open to same-sex couples or whether a separate para-marital institution (like Quebec's civil union) is provided to regulate their property interests. Even where a separate institution is created in the law, the further question arises as to whether the property interests of the cohabitants will subscribe to all or part of the community property or other marital property system.

The answer to these questions does not rest with the courts who should not be invited to extend the community property system by analogy. It is the legislator's responsibility to examine these issues. That being said, will the legislator be invited to reformulate the community property system but once or constantly, say every ten years, as the idea of the non-traditional family stabilizes? Should there be but one community property regime (or multiple community regimes)? Finally, should each of the nine states review the content of its community law for all citizens and perhaps change the present nature of the community and the composition of its assets and liabilities?

Marital property systems are of no initial interest to future spouses. The focus of their attention is clearly the wedding ceremony, the initial or continued intimacy, social status, legal standing and, in most cases, their participation in procreation. The legal language of marriage confirms this focus. Gay men and women also want a celebration, intimacy, and social status. Some gay men and women want children. Some also want legal standing before the government for purposes of tax and other benefits. It is doubtful, however, whether future spouses or gay cohabitants have a clear idea of the property consequences of their union.

For gay citizens, a community property system of immediate, present undivided interests in a pool of assets and liabilities may not be the answer. A deferred community might be best where they are able to separately own and manage their property.⁶² This type of community confirms the independence of administration, enjoyment and free disposal of their property that mirrors the ways in which gay citizens have held property in the past. It does no violence to gay cultural traditions. However, a community property system, such as Louisiana's, with a present undivided interest in acquests, equal management, and equal distribution of property on dissolution, may be an inappropriately abrupt departure from their current notions of living together and all the attendant consequences of *vie commune*.

When legislators in the nine states next convene, they should ask themselves whether economic partnership, union of will, mutual assistance, intimacy and other ideas and notions of community are good for the new spouses and the new family whom they must greet, as inevitably they will, and introduce to the law of community property.

62. There are a number of models of deferred community. Quebec's 'partnership of acquests' regime is but one. See articles 448 *et seq.* C.C.Q.