AN EMPIRICAL STUDY OF FAMILY LAW UNDERSTANDING

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I. INTRODUCTION

Media headlines recently proclaimed MacKenzie Bezos the richest woman in the world after her divorce, overlooking that, in the community property state of Washington, she already owned half of the marital property during her marriage.[1] Journalists also predicted that she would get half of Amazon.com in the divorce, neglecting the role of judicial discretion in Washington divorces and the oft-used marital settlement agreement.[2]

The Bezos divorce highlights common misconceptions about family law, which academic studies confirm.[3] Our empirical study contributes to this existing literature by showing that people's understanding of creditors' rights does not change to reflect their particular state laws and that when it comes to divorce, experience is no teacher—people have the same understanding of divorce regardless of whether they have been divorced.

The difference between what people *think* is the family law and what it *actually* is has important implications in society. First, people cannot plan their family life effectively if they do not understand the legal defaults.[4] Second, the number of pro se divorces is increasing, as is the trend toward minimizing judicial involvement in family law cases.[5] Without knowing their

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[1] *See, e.g.*, Matt Levine, *Bezos Divorce Won't Be Weird for Amazon*, BLOOMBERG (Jan. 10 2019), https://www.bloomberg.com/opinion/articles/2019-01-10/bezos-divorce-won-t-be-weird-for-amazon (summarizing some of the misconceptions of the press).

[2] *Id.*

[3] *See, e.g.*, Gary Mallet, *Common Myths & Misconceptions about Family Law*, DIVORCEMAGAZINE.COM (May 14, 2019), https://www.divorcemag.com/articles/misconceptions-about-family-law/.

[4] *See, e.g.*, Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 178 (2015) (discussing the difference in legal rights and obligations for married and nonmarried couples in family law).

[5] Margaret Ryznar & Angélique Devaux, *Voilà: Taking the Judge Out of Divorce*, 42 SEATTLE U. L. REV. 161, 174–75 (2018). Many people try to handle their own divorce, raising questions of whether

rights, people cannot stand up for them.[6] For example, non-custodial fathers may not know the full extent of the visitation to which they are entitled.[7]

Not knowing much about family law does not stop people from engaging in milestones in life that trigger a whole set of family law defaults. Each year, more than 2 million people marry in the United States and almost 800,000 divorce.[8] They venture into the realm of romance and have children despite knowing little about the family laws that govern such relationships.

This Article argues, based on original data,[9] that people's family law understanding remains inadequate given the rates of family fragmentation in the United States.[10] Part II presents the literature on legal literacy on which this study builds. Part III examines the relevant legal framework, while Part IV presents original data on people's understanding of creditors' rights upon formation of a marriage, showing that their understanding does not change regardless of their state of residence or whether they have been divorced. Finally, Part V offers ways to educate people about the legal consequences of marriage and divorce.

II. LEGAL UNDERSTANDING

Current academic literature has addressed both family law illiteracy and the reasons for it.[11] No study has found significant amounts of legal

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they receive procedural and substantive justice in the process. Marsha M. Mansfield, *Litigants Without Lawyers: Measuring Success in Family Court*, 67 HASTINGS L.J. 1389, 1391 (2016) (evaluating the success of self-represented litigants in family law court).

[6] *See* Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 L. & SOC'Y REV. 83, 119 (2005) (noting that in order to realize their rights, people need to take the initiative to articulate them, and that "[t]his initiative, in turn, depends on the availability and the relevance of legal schema to people confronting problems").

[7] A few states provide visitation guidelines to set "the minimum time a parent should have to maintain frequent, meaningful, and continuing contact with a child." IND. PARENTING TIME GUIDELINES, pmbl. (2013), https://www.in.gov/judiciary/rules/parenting/.

[8] *US Divorce Statistics and Divorce Rates (2000–2017)*, DIVORCE MAG. (Aug. 19, 2019), https://www.divorcemag.com/articles/us-divorce-statistics-and-divorce-rates-2000-2017 (citing data from the CDC/NCHS National Vital Statistics System).

[9] *See infra* Part IV. To generate the data, the authors administered a voluntary, anonymous survey. *See* Helen Colby & Margaret Ryznar, *Marriage Debt Knowledge* (2019), https://osf.io/2bgvp/?view_only=da069f7fd2354eefab5190b798c2d3ab.

[10] *See* Barbara Glesner Fines, *Fifty Years of Family Law Practice – The Evolving Role of the Family Law Attorney*, 24 J. AM. ACAD. MATRIM. LAW. 391, 403 (2012) ("The past fifty years have seen extraordinary changes in family formation and stability."). Both divorce and out-of-wedlock birth rates have increased over the decades. *Id.* at 392–93.

[11] According to the American Bar Association, Commission on Public Understanding About the Law, legal literacy is, "the ability to make critical judgments about the substance of the law, the legal process, and available legal resources and to effectively utilize the legal system and articulate strategies to improve it." AM. BAR ASS'N, COMM'N ON PUB. UNDERSTANDING ABOUT THE LAW, LEGAL LITERACY

understanding, especially in the field of family law.

A. Current Literature

Over the last few decades, a number of studies have suggested that the public's understanding of the law is subject to a substantial knowledge deficit.[12] One study identified a low level of legal knowledge among United Kingdom residents regarding marriage and cohabitation rights.[13] In another British survey, for example, the majority of people thought that cohabitants had the same legal status as married couples.[14]

Many Americans similarly have erroneous beliefs. One family lawyer has noted several common misconceptions regarding family law in South Carolina.[15] These include the belief that living together for seven years makes couples common law married, that people can get an annulment within thirty days after they are married, and that mothers always receive child custody upon divorce.[16]

These are common misconceptions in other states, as well. For example, there are many misunderstandings of community property and its consequences.[17] People also have difficulty understanding the nuances of the

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SURVEY SUMMARY 5 (1989). Perhaps among the most extreme cases of family law illiteracy was when an observant Catholic mother living in England found herself trapped by her marriage vows, torn between accepting a bad marriage and hoping for a better one. She ended up filing for divorce, but upon becoming single, she did not throw a divorce party or prank her ex. She did something far more unexpected—she sued her lawyers for not telling her that a divorce would end her marriage. *See, e.g.*, Tomas Jivanda, *Woman Claims Lawyers Should Have Told Her Divorce Would End Her Marriage*, INDEPENDENT (Jan. 10, 2014), https://www.independent.co.uk/news/uk/home-news/woman-claims-lawyers-should-have-told-her-divorce-would-end-her-marriage-9051550.html. Legal illiteracy is certainly not only a problem in family law, but also is a problem in criminal law and trusts & estates law. For example, only ten percent of Americans have a will. Linda L. Emanuel & Ezekiel J. Emanuel, *The Medical Directive: A New Comprehensive Advance Care Document*, 261 JAMA 3288, 3288–89 (1989). *See also* Rowland S. Miller, *Confusion and Consternation, Misperceptions and Misconceptions on the Public's Misunderstanding of the Law*, 40 S. TEX. L. REV. 973, 975 (1999) (examining how uninformed people are about criminal law).

[12] *See, e.g.*, Pascoe Pleasence & Nigel J. Balmer, *Ignorance in Bliss: Modeling Knowledge of Rights in Marriage and Cohabitation*, 46 L. & SOC'Y REV. 297, 297 (2012) (citing several studies showing lack of family law knowledge); Anna-Maria Marshall & Scott Barclay, *In Their Own Words: How Ordinary People Construct the Legal World*, 28 L. & SOC. INQUIRY 617, 621 (2003) ("[P]eople may rely on legal authority when they know little or nothing about the formal rules."); Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035, 1082 (2013) ("In some circumstances, people reasonably look to social cues to understand what the law requires of them.").

[13] Pleasence & Balmer, *supra* note 12, at 321–23.

[14] SONIA HARRIS-SHORT & JOANNA MILES, FAMILY LAW: TEXT, CASES, AND MATERIALS 109 (2d ed. 2011).

[15] Joanne Hughes Burkett, *Myths About Marriage & Divorce in South Carolina*, S.C. LAW., Sept. 2005, at 14, 14–17.

[16] *Id.*

[17] Inna Pullin, *An Illinois Lawyer's Guide to Community Property*, 97 ILL. B.J. 360, 361–63 (2009).

laws relating to the ownership of property and do not always understand the differences between owning property in joint tenancy, tenancy in common, or trust.[18]

In sum, the average American is underinformed of the family law.[19] As a result, the general population does not have an accurate understanding of it.[20]

B. Barriers to Understanding

There are several possible reasons for the general lack of understanding of family law. These range from the complexity of the law to human optimism.

1. Legal Complexity

Without a doubt, the law is complex. Although the rule of law is rather hazy, it is a central idea promoted all around the world.[21] Yet people lack knowledge and legal counsel. Lawyers are perceived as experts in all legal issues and jurisdictions, monopolizing law and discouraging others from learning the law that is relevant to their lives.[22] The result is that many people are uninformed of their rights.[23]

The volume of law in the United States has also "produced a complex, pervasive, and . . . difficult to navigate" legal system.[24] It is common for individuals to lack sufficient legal knowledge to accomplish the many ordinary tasks now governed by this complex legal system. Although there have been calls for "simplification of law and reduction of regulation, political inertia" does not allow the system to change easily.[25]

One scholar maintains that the solution is a minimally invasive, new theory of law reform—the advisory function of law:

> Under the advisory function, the law would seek to (1) identify transactions

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[18] ROBERT S. HUNTER, 19 ILLINOIS PRACTICE SERIES, ESTATE PLANNING & ADMINISTRATION IN ILLINOIS § 183:18 (4th ed. 2007).

[19] *See* Ritchie Eppink, *Are We Missing Something? Public Legal Health*, ADVOCATE, Mar.–Apr. 2009, at 28, 28.

[20] *See* Miller, *supra* note 11, at 973–74.

[21] *See* Bridgette Dunlap, *Anyone Can "Think Like A Lawyer": How the Lawyers' Monopoly on Legal Understanding Undermines Democracy and the Rule of Law in the United States*, 82 FORDHAM L. REV. 2817, 2817–2819 (2014).

[22] *Id.* at 2822.

[23] *Id.* at 2817.

[24] Reid Kress Weisbord, *The Advisory Function of Law*, 90 TUL. L. REV. 129, 129 (2015).

[25] *Id.*

> and activities in which legal errors and information deficits frequently cause harm to the actor himself or third parties and (2) supply advice in the form of guidance through innovative channels of legal information, bridge rules, and technology-enhanced processes to help people complete legally complex tasks.[26]

These new processes would help the majority of people who lack sufficient legal knowledge to complete law-related tasks, but are also unaware of the need to acquire legal knowledge in the first place.[27] The vastly complex legal environment in the United States makes obtaining and understanding legal information incredibly difficult, which results in a general misunderstanding of family law.[28]

2. Mismatch from Expectations

Another possible reason for insufficient family law understanding among the general population may be the fundamental mismatch between people's expectations and family law.[29] This may result from the unique function of family law—to protect the parties to marriage and divorce.[30] Without family law, some people would not be compelled to support their children.[31] Others would leave their marriage with all of the marital assets.[32] Ultimately, the weakest members of the family would go unprotected. The role of family law is to protect the individual family members.

Unlike family law's protective functions, other areas of the law are intended to represent people's expectations and preferences.[33] For example, in trusts & estates, state legislators often craft probate law to reflect what people would want in their estate plans.[34] Much of probate law seeks to honor

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[26] *Id.*

[27] *Id.* at 135.

[28] *Id.* at 143.

[29] *See, e.g.*, Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 CARDOZO. L. REV. 2133, 2150 (2007) ("Functional approaches to defining family and legal parenthood, adopted by courts and legislatures, have facilitated the separation of reproduction and parenthood from marriage, and of legal parenthood itself from sexual reproduction and genetic ties.").

[30] *See* Lynn D. Wardle, *Reflections on Equality in Family Law*, 2013 MICH. ST. L. REV. 1385, 1402 (2013).

[31] Jacquelyn L. Boggess, *Low-Income and Never-Married Families: Service and Support at the Intersection of Family Court and Child Support Agency Systems*, 55 FAM. CT. REV. 107, 111–12 (2017).

[32] *See* Linda D. Elrod & Robert G. Spector, *Review of the Year 2015-2016 in Family Law: Domestic Dockets Stay Busy*, 50 FAM. L.Q. 501, 516–17 (2017).

[33] *See, e.g.*, Michael D. Knobler, Note, *A Dual Approach to Contact Remedies*, 30 YALE L. & POL'Y REV. 415, 418 (2012) (arguing that "a law of contracts that ignores [people's] understandings violates the fundamental requirement that contracts be consensual").

[34] 23 AM. JUR. 2D *Descent and Distribution* § 3 (2019).

people's probable intent.[35]

Family law is also unique because it is rooted in society's perceptions of morality, common sense, and prevailing cultural norms, which might not be consistent with those of individuals.[36] Indeed, "[p]erhaps nowhere is the connection and the tension between the individual and the collective more prominent than in family law."[37] At the same time, however, family law has a very practical function, being "generally viewed as a dispute, conflict, and lawsuit practice."[38] "For all its shortcomings, family law provides an institution to help divorcing couples restructure their families following the end of relationships."[39]

A mismatch between people's expectations and family law is also possible because family law has not kept up with technological changes. However, technology has made inroads in many fields, and family law has been no exception.[40] Indeed, technology has a history of changing families.[41] Thus far, technology has expanded how people add children to their families. The definition of "parent" has been expanding with technology.[42]

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[35] *See, e.g.*, Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341, 345 (2017) ("The predominant goal of intestacy statutes is to carry out the probable intent of most decedents in the disposition of their property.").

[36] *See* Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 231 (2018).

[37] Rebecca Hollander-Blumoff, *Social Value Orientation and the Law*, 59 WM. & MARY L. REV. 475, 510 (2017).

[38] Forrest S. Mosten & Lara Traum, *The Family Lawyer's Role in Preventive Legal and Conflict Wellness*, 55 FAM. CT. REV. 26, 26 (2017).

[39] Clare Huntington, *Nonmarital Families and the Legal System's Institutional Failures*, 50 FAM. L.Q. 247, 247 (2016).

[40] *See* F. Patrick Hubbard, *"Sophisticated Robots": Balancing Liability, Regulation, and Innovation*, 66 FLA. L. REV. 1803, 1803 (2014) ("Our lives are being transformed by large, mobile, 'sophisticated robots' with increasingly higher levels of autonomy, intelligence, and interconnectivity among themselves."). Much scholarship and thought has focused on the replacement of the worker with a robot and the increasing role of technology. Intellectual property law is often devoted to technology. Big data and electronic software has changed the way law is practiced. E-mediation is taking over in divorce proceedings. But, a quiet displacement can happen in the home, as well. *See, e.g.*, Dafna Lavi, *No More Click? Click in Here: E-Mediation in Divorce Disputes—The Reality and the Desirable*, 16 CARDOZO J. CONFLICT RESOL. 479, 487 (2015) (observing that Online Dispute Resolution "is gaining momentum" in "the area of divorce disputes").

[41] Alternative reproductive techniques are a good example of this. *See* Deborah Zalesne, *The Intersection of Contract Law, Reproductive Technology, and the Market: Families in the Age of Art*, 51 U. RICH. L. REV. 419, 424 (2017).

[42] Professor Joslin writes, for example, that

> In contemporary discussions of family law, it is often claimed that parentage law seeks merely to identify and recognize biological parents. NeJaime shows that this claim is, at best, incomplete; the law has long recognized some nonbiological parents. However, the law's recognition of nonbiological parentage has been "partial and incomplete." Specifically, NeJaime demonstrates how the law recognizes nonbiological parenthood in asymmetrical

Professor NeJaime adds, "Today, the law increasingly accommodates families formed through [assisted reproductive technologies] and, in doing so, recognizes parents on not only biological but also social grounds."[43] Technology has also revolutionized whom people marry, with many being comfortable marrying those with whom online dating services have matched them.[44]

Family law can still fall behind the development of technology[45] for reasons that may range from society's philosophy of marriage to the slowness with which families change.[46] Yet, technology evolves quickly,[47] and "[a] new technology can expose the cracks in legal doctrine."[48] The law eventually may catch up to reality.[49]

The mismatch between people's expectations of family law and reality may also be because family law has not kept up with societal trends. Marriage has been the protagonist in recent U.S. Supreme Court cases, protected in many such cases as a fundamental right.[50] Yet, marriage has slowed while cohabitation has increased.[51] Even though marriage has been central in recent

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Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J. F. 589, 590 (2018) (referencing Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017)).

[43] Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2263 (2017).

[44] Phyllis Coleman, *Online Dating: When "Mr. (or Ms.) Right" Turns Out All Wrong, Sue the Service!*, 36 OKLA. CITY U. L. REV. 139, 143 (2011).

[45] *See, e.g.*, Andrew Guthrie Ferguson, *Illuminating Black Data Policing*, 15 OHIO ST. J. CRIM. L. 503, 523 (2018).

[46] *See, e.g.*, Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice, and Shared Parenting*, 52 FAM. CT. REV. 152, 153 (2014).

[47] *See, e.g.*, Michael Guihot et al., *Nudging Robots: Innovative Solutions to Regulate Artificial Intelligence*, 20 VAND. J. ENT. & TECH. L. 385, 385 (2017) ("Advances in artificial intelligence (AI) technology are developing at an extremely rapid rate as computational power continues to grow exponentially.").

[48] Margot E. Kaminski, *Robots in the Home: What Will We Have Agreed To?*, 51 IDAHO L. REV. 661, 661 (2015).

[49] There have already been major changes in family law:

> The values which informed the law back then were also very different. Marriage as an institution for the raising of children has largely been replaced by a notion of marriage as an agreement which is terminable at will. Many in the population forgo the need for any formal agreement or exchange of promises at all. While the significance of marriage in the law has declined, legislatures and courts are increasingly concerned to affirm the rights and obligations that flow from parenthood. It is a matter of conjecture what the next 40 years will bring.

Patrick Parkinson, *Forty Years of Family Law: A Retrospective*, 46 VICTORIA U. WELLINGTON L. REV. 611, 625 (2015).

[50] *See, e.g.*, Toni M. Massaro & Ellen Elizabeth Brooks, *Flint of Outrage*, 93 NOTRE DAME L. REV. 155, 175 (2017) (noting that marriage is among the "'penumbral' liberty rights, which have been deemed so fundamental to an American sense of liberty that the courts will closely scrutinize government interference with them").

[51] *See, e.g.*, Courtney G. Joslin, *Discrimination In and Out of Marriage*, 98 B.U. L. REV. 1, 3 (2018)

judicial cases,[52] in reality, marriage has become "a hallmark of privilege."[53] Many people continue to look to different structures for their intimate lives despite family law's emphasis on marriage.[54]

3. Optimism

In addition, people may be neglecting family law because of their optimism about marriage. For better or worse, the human spirit is optimistic. University of Chicago Professor Richard Thaler found that on the first day of his class at the business school, all of the students said that they expected to get an above-average grade.[55] This result is impossible, by definition, for half of the students. In addition to this optimism, Professor Thaler notes, "people believe that they are better forecasters than they are."[56]

Business school grades are one thing, but marriage is another. The traditional family is becoming less common: only one out of five American households has a wife, husband, and shared children.[57] Worldwide divorce rates are high, and American divorce rates are among the highest—not far from fifty percent.[58] People noticed a dip in divorce rates in 2009 and 2010, but it turned out that the dip resulted from a decrease in marriages in the first

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("The number of adults living outside of marriage is large and growing. . . . The rate of increase of nonmarital cohabitation shows no sign of stopping."); Lawrence W. Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, if Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 FAM. L.Q. 215, 215 (2016) ("Between 2000 and 2010, the population grew by 9.71%, but the husband-and-wife households only grew by 3.7%, while the unmarried-couple households grew by 41.4%.").

[52] *See, e.g.*, Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 2, 3 (2017) ("Marriage is the unmistakable protagonist of *Obergefell v. Hodges*, the Supreme Court's long-awaited decision recognizing the right of same-sex couples to marry.").

[53] JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 19 (2014). *See also id.* at 20 ("For the majority of Americans who haven't graduated from college, marriage rates are low, divorce rates are high, and a first child is more likely to be born to parents who are single than to parents who are married.").

[54] *See, e.g.*, Katharine Silbaugh, *Distinguishing Households from Families*, 43 FORDHAM URB. L.J. 1071, 1074 (2016) ("We are not a marriage population predominantly in practice, and children are not predominantly raised for 18 years by their two parents in a common household.").

[55] Richard H. Thaler, *From Homo Economicus to Homo Sapiens*, J. ECON. PERSP., Winter 2000, at 133, 133.

[56] *Id.*

[57] DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010, 5 (2012), https://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf.

[58] It is difficult to get an exact divorce rate because we only know how many marriages and divorces there are in a particular year, and the couples divorcing in a particular year are not the same as the ones marrying that year, so it is inaccurate to divide these two numbers. However, researchers estimate that between 40% and 50% of first marriages end in divorce. *See, e.g.*, *Marriage & Divorce*, AM. PSYCHOL. ASS'N, https://www.apa.org/topics/divorce/ (last visited Dec. 9, 2019).

place (a fifty percent decline in the last forty years).[59] The 2007 Great Recession also made divorce unaffordable, as it had been during the Great Depression.[60] After the economy started to recover, the divorce rate bounced back.[61]

Even two decades ago, in a U.S. Supreme Court case dealing with grandparents' rights, Justice O'Connor observed that there is no traditional family anymore.[62] This has been accentuated by the increase of non-marital births and the opioid crisis.[63] While the divorce rate has stabilized, it is only because fewer people are getting married in the first place.[64] For those who do marry, marriage is no longer devoid of the possibility of divorce.[65]

Yet, given human optimism, people often do not want to deal with the unpleasant things that might happen in their family life.[66] Indeed, family law events, such as divorce, can be painful for people and they avoid thinking about the relevant family law.

4. Romanticism

Somewhat related to optimism is people's romanticism of love. Today, people often marry for love.[67] It is difficult, then, for them to imagine their love ending.[68]

The premarital agreement, which permits prospective spouses to plan for

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[59] NAT'L MARRIAGE PROJECT, THE STATE OF OUR UNIONS: MARRIAGE IN AMERICA 2010, 66 (W. Bradford Wilcox ed., 2010), http://nationalmarriageproject.org/wp-content/uploads/2012/06/Union_11_12_10.pdf.

[60] D'Vera Cohn, *Divorce and the Great Recession*, PEW RES. CTR. (May 2, 2012), http://www.pewsocialtrends.org/2012/05/02/divorce-and-the-great-recession/.

[61] *Id.*

[62] *See* Troxel v. Granville, 530 U.S. 57, 63–64 (2000). *See also* Silbaugh, *supra* note 54.

[63] *See, e.g.*, Margaret F. Brinig & Marsha Garrison, *Getting Blood from Stones: Results and Policy Implications of an Empirical Investigation of Child Support Practice in St. Joseph County, Indiana Paternity Actions*, 56 FAM. CT. REV. 521, 523 (2018); Wendy Bach, Suzanne Weise & Barry Staubus, *Responding to the Impacts of the Opioid Epidemic on Families*, 13 TENN. J. L. & POL'Y 347 (2018).

[64] *See* NAT'L MARRIAGE PROJECT, *supra* note 59, at 66.

[65] *See* Allison Anna Tait, *Divorce Equality*, 90 WASH. L. REV. 1245, 1246 (2015) ("First comes marriage; then comes divorce.").

[66] For example, "Some people put off making a will to avoid the unpleasantness of confronting mortality." JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 64 (10th ed. 2017). *See also* Margaret Ryznar & Angelique Devaux, *Au Revoir, Will Contests: Comparative Lessons for Preventing Will Contests*, 14 NEV. L.J. 1, 9 (2013) ("Like Americans, the French avoid contemplating their own deaths by procrastinating in writing their wills.").

[67] *See* Margaret Ryznar, *Robot Love*, 49 SETON HALL L. REV. 353, 355 n.15 (2019) ("In one survey of people engaged to be married, forty-two percent said they were marrying for love, thirteen percent said they saw it as a sign of commitment, and nine percent saw it as progress in their relationship. Three percent did not know why they were getting married." (citing JONATHAN HERRING, FAMILY LAW 44 (5th ed. 2011))).

[68] *See, e.g.*, AZIZ ANSARI WITH ERIC KLINENBERG, MODERN ROMANCE (2016).

divorce, suffers the most as a result of the romanticism of marriage because of its reputation as an unromantic document.[69] Envisioning the end of a marriage not yet begun, prospective couples must divide property not yet acquired.[70] They must select a legal framework governing their marriage and divorce. Lawyers are often invited to participate in the negotiations, fueling prospective spouses in their demands. Unsurprisingly, therefore, many people prefer to avoid requesting a premarital agreement, despite judicial and social gains in the acceptance of such agreements.[71]

While premarital agreements are known for dividing property upon divorce, the simplicity of this popular understanding belies the complexity of premarital agreements. Through premarital and postmarital agreements, couples can contract into any property consequences they want between themselves during marriage and divorce, so long as they are not unconscionable,[72] such as leaving one spouse on public assistance after the divorce.[73]

> In essence, the premarital agreement permits a circumvention of the statutory defaults governing spouses' rights and responsibilities not only during divorce or death, but also during marriage. Furthermore, when legislation or case law alters these rights and responsibilities, premarital agreements protect spouses from being governed by the unexpected changes in the law.[74]

Thus, premarital agreements have a role to play in all marriage planning.

Nonetheless, only five to ten percent of the population enters into premarital agreements.[75] While debt is one reason for entering into a premarital agreement, other reasons include the protection of assets, the existence of a family business, and the support of prior born children.[76]

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[69] *See* Cory Adams, *Premarital Agreements*, 11 J. CONTEMP. LEGAL ISSUES 121, 122 (2000).

[70] *See id.* at 124.

[71] *See* M. Neil Browne & Katherine S. Fister, *The Intriguing Potential of Postnuptial Contract Modifications*, 23 HASTINGS WOMEN'S L.J. 187, 203–04 (2012) ("As Paul McCartney said when defending his decision to forgo a prenuptial agreement with his now ex-wife Heather Mills, asking for a prenuptial agreement was 'unromantic.'").

[72] *See, e.g.*, IND. CODE § 31-11-3-8 (LEXIS through the end of the First Reg. Sess. of the 121st Gen. Assemb.).

[73] *See, e.g.*, Rider v. Rider, 669 N.E.2d 160 (Ind. 1996).

[74] Margaret Ryznar & Anna Stepien-Sporek, *To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context*, 13 CHAP. L. REV. 27, 28 (2009).

[75] Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statuses in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 47, 70 (2014).

[76] Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 890–93 (1997) (suggesting that premarital agreements are often useful when dealing with large assets, a family business, or a two-income couple wishing to keep their assets separate).

There are many reasons that so many couples do not enter into premarital agreements—chiefly among them are that "people are too optimistic to consider their need for one, and engaged couples are concerned that bringing up the idea of a postnuptial agreement will send a distrustful and damaging signal to their prospective spouse."[77] Reasons attributed to the avoidance of the premarital agreement also include romanticism, religion, economic status, and enforceability concerns.[78]

Regarding enforceability concerns, states did not enforce premarital agreements for most of history. Florida was the first state in the United States to enforce a premarital agreement in 1970.[79] In England, a premarital agreement was not enforceable until 2010.[80] Even today, premarital agreements are not automatically enforceable. States have various requirements for premarital agreements, but most come down to voluntariness and disclosure.[81] The enforceability of premarital agreements, despite the enactment of the Uniform Premarital Agreement Act in many states, might still be an issue and could explain decreased reliance on such contracts.[82]

One researcher sought to understand why there are so few premarital

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[77] Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 766 (2009).

[78] *See, e.g.*, Mary Cushing Doherty, *Romantic Premarital Agreements: Solving the Planning Issues Without "The D Word"*, 29 J. AM. ACAD. MATRIM. LAW. 35, 40–44 (2016) (discussing the impact that religion can have on the decision whether to enter into a premarital agreement and the restrictions it may place on the drafting process); Cheryl I. Foster, *When a Prenup & Religious Principles Collide*, FAM. LAW. MAG. (Nov. 26, 2011), https://familylawyermagazine.com/articles/when-a-prenup-and-religious-principles-collide/ (discussing premarital agreements from the viewpoint of Catholicism, Judaism, and Islam, and the various impact that these religious views have on the creation of premarital agreements; some religions favor these agreements, while others require very careful drafting so as not to violate religious tenets); Jerome H. Poliacoff, *What Does Love Have to Do with It? A Prenuptial Agreement Should Not Kill the Romance, but Should Quell Your Clients' Fears About Marriage and Divorce*, 33 FAM. ADVOC. 12 (2011) (discussing the reasons people identify for not utilizing a premarital agreement, such as the thought that the agreements are only for the rich and famous, and the belief that premarital agreements are unromantic); Elizabeth R. Carter, *Rethinking Premarital Agreements: A Collaborative Approach*, 46 N.M. L. REV. 354 (2016) (arguing that premarital agreements are unfairly characterized as coercive, unfair, sexist, unromantic, and even predictors of future divorce). *But see id.* at 355 ("Perhaps more importantly, premarital agreements may actually prevent divorce by prompting a couple to better define and communicate their expectations at the outset of the marriage."); Linda J. Ravdin, *Premarital Agreements and the Young Couple*, FAM. L. REV., Winter 2009, at 1, https://www.ksfamilylaw.com/pdf/winter09FLRweb.pdf (discussing the reasons why people enter into premarital agreements).

[79] *See* Posner v. Posner, 233 So. 2d 381, 384–86 (Fla. 1970).

[80] *See* Radmacher v. Granatino [2010] UKSC 42.

[81] *See* Robin Fretwell Wilson, *The Overlooked Costs of Religious Deference*, 64 WASH. & LEE L. REV. 1363, 1380 (2007).

[82] *See* Chelsea Biemiller, *The Uncertain Enforceability of Prenuptial Agreements: Why the "Extreme" Approach in Pennsylvania Is the Right Approach for Review*, 6 DREXEL L. REV. 133, 133 (2013).

agreements, despite their potential value.[83] She confirms that "there is no legal obstacle that prevents prenuptial agreements[, which] are usually enforced by the courts."[84] There are then two major explanations for the scarcity of these agreements in practice: (1) underestimation of their value due to overconfidence in the relationship and (2) the belief that discussion of such an agreement shows uncertainty.[85] First, couples simply do not understand the value of the premarital agreement in the event of divorce.[86] Even if couples understood its value, they still may underestimate the likelihood of divorce due to optimism bias.[87] The more optimistic a person is regarding divorce, the less likely he or she is to request a premarital agreement.[88] Second, someone who believes that the premarital agreement sends a negative signal will be less likely to ask for the agreement.[89]

In sum, there are many reasons people decide to forego premarital agreements, and they mimic more broadly why people do not become more aware of family law implications. Such reasons range from the complexity of the law to romanticism.

III. LEGAL BACKGROUND

Much of family law is regulated by state law, making it difficult to speak in terms of broad generalizations.[90] Although federal law has encroached on

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[83] Heather Mahar, *Why Are There So Few Prenuptial Agreements?* (Harv. L. Sch. John M. Olin Ctr. for L., Econ. & Bus. Discussion Paper Series, Paper No. 436, 2003), https://pdfs.semanticscholar.org/f9d4/a7b31e93ee06577697058be3fcd5da376a49.pdf.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 7.

[87] *Id.* at 2.

[88] *Id.* at 18.

[89] *Id.* at 3.

[90] *See, e.g.*, *Common Myths About Family Law*, IOWA LEGAL AID, https://www.iowalegalaid.org/resource/common-myths-about-family-law?ref=3lwed (last visited Jan. 24, 2020); Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1860 (2005) (noting that family law is currently in the domain of the states, but that, historically, the federal government was not limited in this way); Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787, 789 (2015) (explaining that "[a] narrower version of family law localism acknowledges some federal involvement in the family law arena but posits that there remains a realm of core family law matters that are within the exclusive authority of the states"). *But see* Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 199 (1999) (arguing that there is no foundation for the view that family law belongs in the state domain). Justice Antonin Scalia has expressed concern about the increasing federalization of family law:

> I think it obvious . . . that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being

certain family law topics,[91] family law remains in the state domain.

Currently, "[m]ost marriages are governed by the terms of the state-supplied marriage contract."[92] Marriage is "[t]he central dividing line in family law"[93] and triggers legal consequences.

Many of the legal consequences of marriage stem from whether the state by default is either: (1) separate property or (2) community property.[94] Spouses may enter into a premarital or postnuptial agreement that changes this default.[95]

The majority of states are separate property states that use the common law property system adopted from the laws of England.[96] In these states, property belongs to the spouse who earned it.[97] There is no automatic sharing of earnings on account of the marriage.[98] Thus, during marriage, the spouses own their property separately. Although the spouses might agree to share, legally speaking, the spouse who earned the money is the one who owns it and everything that it buys.[99] There are some exceptions, like commingling, but the general principle is separate property.[100]

Meanwhile, in a community property state, each spouse's earnings during the marriage and the property bought with those earnings are owned equally, excluding property received by either spouse by gift, devise, or descent.[101] In the community property regime, marriage is treated as a partnership in which property and debts acquired during the marriage belong

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removable by the people.

Troxel v. Granville, 530 U.S. 57, 93 (2000) (Scalia, J., dissenting).

[91] *See, e.g.*, D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 634 (6th ed. 2016) ("The fiscal burdens of providing subsidies for needy children also prompted federal concern.").

[92] Martha M. Ertman, *Marital Contracting in a Post-Windsor World*, 42 FLA. ST. U. L. REV. 479, 496 (2015).

[93] Clare Huntington, *Family Law and Nonmarital Families*, 53 FAM. CT. REV. 233, 235 (2015).

[94] James L. Musselman, *Rights of Creditors to Collect Marital Debts after Divorce in Community Property Jurisdictions*, 39 PACE L. REV. 309, 310 (2018).

[95] Thomas M. Featherston, Jr. & Amy E. Douthitt, *Changing the Rules by Agreement: The New Era in Characterization, Management, and Liability of Marital Property*, 49 BAYLOR L. REV. 271, 307 (1997). *See also* Andrea B. Carroll, *The Superior Position of the Creditor in the Community Property Regime: Has the Community Become a Mere Creditor Collection Device?*, 47 SANTA CLARA L. REV. 1, 43 (2007).

[96] Merle H. Weiner, *Caregiver Payments and the Obligation to Give Care or Share*, 59 VILL. L. REV. 135, 213 n.393 (2014). *See also* Musselman, *supra* note 94, at 310.

[97] Teri Dobbins Baxter, *Marriage on Our Own Terms*, 41 N.Y.U. REV. L. & SOC. CHANGE 1, 31 (2017).

[98] *Id.*

[99] *See, e.g.*, Stefania Boscarolli, *Characterization of Separate Property Within the Community Property Systems of the United States and Italy: An Ideal Approach?*, GONZ. J. INT'L L., Fall 2015, at 31, 49 n.82.

[100] J. Mark Weiss, *Community Property Interests in Separate Property Businesses in Washington*, 40 GONZ. L. REV. 205, 209 (2004–2005).

[101] Angela Gi, *Marriage, Divorce, and Dissolution*, 4 GEO. J. GENDER & L. 229, 251 (2002).

to both spouses in equal, undivided shares.[102]

The community property approach is the default approach in only a minority of states, which includes Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.[103] Approximately one quarter of the American population lives in a community property state.[104]

Whether a state is separate property or community property has implications for property management during marriage, debt payment, taxation, divorce, and death.[105] The characterization of property is especially important in terms of determining which property one spouse's creditors may collect against.[106] For purposes of testing people's family law understanding, our study focused on creditors' rights.[107] Specifically, the surveys composing our empirical study asked people about their perceptions of creditors' rights upon the formation of a marriage.[108]

In a separate property state, given that spouses own property separately during a marriage as they did before the marriage, a debtor's marriage has no impact on creditors.[109] A limited exception includes debt incurred to buy household necessities, in which case a creditor can collect against the non-

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[102] WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 127 (2d ed. 1971). For background on community property, see Elizabeth De Armond, *It Takes Two: Remodeling the Management and Control Provisions of Community Property Law*, 30 GONZ. L. REV. 235 (1994–1995).

[103] Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. ST. L. REV. 359, 367 n.34 (2005–2006). *See also* CAL. FAM. CODE §§ 2550–2556 (LEXIS through all 870 Chapters of the 2019 Reg. Sess.).

[104] Robert A. Esperti & Renno L. Peterson, *Joint Trusts Are A Good Planning Tool for A Married Couple*, 20 EST. PLAN., May/June 1993, at 148, 152.

[105] For the taxation implications, see I.R.S. Pub. No. 555 (2019). In terms of divorce consequences, the judge in a separate property state typically divides the assets and debts between the spouses in a fair and equitable manner, regardless of whose they are. Yitshak Cohen, *Extramarital Relationships and the Theoretical Rationales for the Joint Property Rules—A New Model*, 80 MO. L. REV. 131, 134–35 (2015). Meanwhile, when it comes to property division at divorce in a community property state, "[a]lthough California, Louisiana, and New Mexico require an equal distribution of the community assets, other community property jurisdictions, using various terms, call for equitable distribution of the community assets." James R. Ratner, *Distribution of Marital Assets in Community Property Jurisdictions: Equitable Doesn't Equal Equal*, 72 LA. L. REV. 21, 21 (2011). And as to the death of a spouse, "in community property states . . . the surviving spouse retains his or her fifty percent stake in the couple's community property." *Marriage As Contract and Marriage As Partnership: The Future of Antenuptial Agreement Law*, 116 HARV. L. REV. 2075, 2092 n.118 (2003).

[106] *See generally* Erik Paul Smith, Comment, *The Uncertainty of Community Property for the Tortious Liabilities of One of the Spouses: Where the Law Is Uncertain, There Is No Law*, 30 IDAHO L. REV. 799 (1994).

[107] *See* Colby & Ryznar, *supra* note 9.

[108] *Id.*

[109] Musselman, *supra* note 94, at 310–11. *See also* James R. Ratner, *Creditor and Debtor Windfalls from Divorce*, 3 EST. PLAN. & COMMUNITY PROP. L.J. 211, 211 (2011) ("One relatively ancient form of protection offered to the non-debtor spouse, however, is the concept of separate property.").

debtor spouse.[110] Otherwise, creditors can generally reach only the debtor's separate property in a separate property state.[111]

In contrast, in a community property state, creditors' rights can expand as a result of the debtor's marriage.[112] A premarital agreement may be able to keep debts separate in a community property state.[113]

Within the group of community property states, there are two approaches to creditors' rights. These are (1) the managerial system and (2) the community debt system.[114]

In the community property states of California, Idaho, Louisiana, Nevada, and Texas, creditors can reach only the community property managed by the debtor, although the exact details differ by state.[115] The rationale "is that any property that the debtor-spouse could, under the applicable management rules, have used voluntarily to pay his debt should be available to be seized by the creditor."[116] Separate property of the spouses cannot be reached under this rule.[117]

The community property states of Arizona, New Mexico, Washington, and Wisconsin adhere to the community debt system.[118] In this "community

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[110] *See* Sarah L. Swan, *Conjugal Liability*, 64 UCLA L. REV. 968, 973 (2017) ("Within debt law, creditors can use community property rules, family necessaries doctrine, or marital agency principles to create conjugal liability for a spouse's debts."); Connor v. Sw. Fla. Reg'l Med. Ctr., Inc., 668 So. 2d 175, 175 (Fla. 1995) ("Under the doctrine [of necessaries], a husband was liable to a third party for any necessaries that the third party provided to his wife."). The courts look to the couple's standard of living to determine what qualifies as a necessity. *See* WEISBERG & APPLETON, *supra* note 91, at 234; Sheryl L. Scheible, *Defining "Support" Under Bankruptcy Law: Revitalization of the "Necessaries" Doctrine*, 41 VAND. L. REV. 1, 8–9 (1988). The duty to support a spouse is similar, compelling one spouse to support the other. *See* Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 12–14 (2003).

[111] *See* Ratner, *supra* note 105, at 211–12.

[112] For background on when and how creditors can reach community property to satisfy the debts of one of the spouses in community property states, see *id.*; Sarah Ann Smith, *The Unique Agreements: Premarital and Marital Agreements, Their Impact Upon Estate Planning, and Proposed Solutions to Problems Arising at Death*, 28 IDAHO L. REV. 833 (1992); Andrea B. Carroll, *The Superior Position of the Creditor in the Community Property Regime: Has the Community Become A Mere Creditor Collection Device?*, 47 SANTA CLARA L. REV. 1, 3 (2007) ("Modern creditors in community property regimes have access to a mass of spousal property almost inconceivable in non-community property states. Of course, they may access their debtor's property. But much more may be available as well.").

[113] *See, e.g.*, Christine Davis, *'Til Debt Do Us Part: Premarital Contracting Around Community Property Law—An Evaluation of Schlaefer v. Financial Management Service, Inc.*, 32 ARIZ. ST. L.J. 1051, 1055 (2000) (noting that in Arizona third-party creditors are bound by the terms of a premarital agreement).

[114] Musselman, *supra* note 94, at 314.

[115] *Id.*

[116] WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES, 313 n.1 (7th ed. 2009).

[117] Eric L. Olsen, *How Can A Creditor Reach the Separate Property of a Nondebtor-Spouse?*, 28 IDAHO L. REV. 1100, 1100 n.1 (1991–1992).

[118] Musselman, *supra* note 94, at 318.

debt" approach, "the creditor's claim is characterized as either separate or community, and the assets available to satisfy the debt follow accordingly."[119] This approach "follows the proposition that all debts incurred for the benefit of the community, subject community property to execution and attachment for collection of the debt."[120] Generally, all debts incurred during marriage are presumed to be community obligations unless there is clear and convincing evidence to the contrary.[121]

A divorce may not end the creditors' claims to the non-debtor spouse's property. In some community property states, the creditor can reach any "formerly community property" that was received in the divorce.[122] Meanwhile, in some separate property states, "the courts [may] reallocate . . . debts between the spouses."[123]

Therefore, there are nuances in creditors' rights depending on whether a married couple lives in a separate property or community property state. Even the community property states differ among themselves in approaching creditors' rights, as do separate property states. One would expect, then, that people would differ in their understanding of family law depending on their state. However, that is not the case in our study.

IV. STUDY RESULTS

In this Part, we share data from anonymous surveys on people's understanding of creditors' rights upon a couple's marriage.[124] The data show that people's responses do not differ based on their state of residence, and going through a divorce does not improve their understanding of the relevant laws.

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[119] Calvin Massey, *Why New Hampshire Should Permit Married Couples to Choose Community Property*, 13 U. N.H. L. REV. 35, 41 (2014).

[120] Lamont C. Loo, *Contractual Creditor Rights Upon Dissolution of Marriage: Revisiting* Twin Falls Bank & Trust v. Holley, *Proposal: A Tripartite Analysis*, 30 IDAHO L. REV. 777, 778 (1994).

[121] *See, e.g.*, Schlaefer v. Fin. Mgt. Serv., Inc., 996 P.2d 745 (Ariz. Ct. App. 2000); Beneficial Fin. Co. v. Alarcon, 816 P.2d 489 (N.M. 1991); Thomson v. Thomson, 978 So. 2d 509 (La. Ct. App. 2008); In re Marriage of Flower, 225 P.3d 588 (Ariz. Ct. App. 2010); Arab Monetary Fund v. Hashim, 193 P.3d 802 (Ariz. Ct. App. 2008); Cardinal & Stachel, P.C. v. Curtiss, 238 P.3d 649 (Ariz. Ct. App. 2010).

[122] *See, e.g.*, Sonja A. Soehnel, *Spouse's Liability, After Divorce, For Community Debt Contracted by Other Spouse During Marriage*, 20 A.L.R. 4th 211 (1983) ("The courts in [some] cases involving a divorced wife's liability for a community debt based on a promissory note for a loan or a guaranty executed by the husband during marriage, held that all, or all the nonexempt, community property partitioned to the wife was subject to a judgment for the debt."). *See also* Loo, *supra* note 120. *But see* Twin Falls Bank & Trust v. Holley, 723 P.2d 893, 897–98 (Idaho 1986) (holding that creditors are precluded from pursuing the community property distributed to a non-debtor spouse in a settlement agreement).

[123] Margaret M. Mahoney, *The Equitable Distribution of Marital Debts*, 79 UMKC L. REV. 445 (2010).

[124] *See* Colby & Ryznar, *supra* note 9. Future studies can track individual responses to the particular state's family law to determine the exact extent of family law understanding.

A. Research Design

The data for this study were collected via Amazon Mechanical Turk from 194 individuals over the age of 18 in the United States (mean age = 38.05, 51.8% female). Of these participants, 61.7% reported being currently married or having been married in the past, with 19.9% reporting having undergone a divorce. The sample was relatively well-educated, with 45.6% reporting having completed a four-year degree or higher. As expected for a paid survey, income varied, with 34.5% indicating a personal income of $25,000 per year or less, and 6.1% indicating an annual personal income of $76,000 or more. Participants were asked about personal income,[125] so their household income may be significantly higher than the personal income information provided. Of the individuals who participated, 20.6% were residents of community property states.

Survey participants completed a series of questions about their perceptions of the legal ramifications of marriage and divorce on debt and assets, on premarital agreements, and on the importance of various factors in choosing marriage timing.[126] They also answered questions about their confidence that their answers were correct in these domains.[127]

B. Data Analysis

There was no difference between individuals residing in community property and separate property states in their perceptions of whether a spouse's income and assets can be seized after marriage to satisfy the other spouse's debt, $p>.8$, with 62% of individuals in separate property states and 60% of those in community property states believing that such assets and income could be seized. There was no difference in knowledge by gender, $p>.2$. Interestingly, reporting having been married did not create differences in understanding, $p>.1$, nor did having been divorced, $p>.2$, suggesting that even those individuals for whom the question is most relevant are not knowledgeable of the law governing marital assets in their state.

The participants were generally more likely to believe debtors could reach the non-debtor spouse's assets during all phases of marriage, including during the marriage (76%) and after dissolution (74.1%). Beliefs about these phases of marriage did not differ between individuals in community property and separate property states, $p>.9$ and $p>.6$ respectively. Beliefs about debtor access to assets did not significantly differ by whether the participant had

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[125] *See id.* at Question 13.
[126] *See id.*
[127] *Id.* at Questions 5, 22, 24.

ever been married or was divorced.

Knowledge of the relevant law around debt collection is especially important because the individuals in the survey reported debt as a significant factor in choosing the timing of a marriage, rating it as more important than job status, degree completion, and age. Individuals who believed (regardless of the law in their state) that debtors could reach one spouse's income and assets for the other spouse's debts rated their debt as significantly more important to marriage timing (M=3.201) than individuals who did not believe debtors could reach the other spouse's income and assets (M=2.77), t(191)=2.55, p=.01. They also rated their potential spouse's debt as more important to timing (M=3.20 vs. M=2.77), t(192)=2.56, p=.011. This suggests that many individuals are making the significant decision of marriage timing using their beliefs about the laws in their states, which are not necessarily correct.

Another marital decision, interest in a premarital agreement, was also affected by participants' beliefs about creditor access to the non-debtor spouse's assets. Participants were asked to consider a scenario in which they had little or no debt but were contemplating marrying someone who had a lot of debt.[128] Individuals who believed that a debtor could access a non-debtor spouse's assets and income upon marriage rated their interest in a premarital agreement as significantly higher (M=3.28) than individuals who believed that debtors could not access the non-debtor spouse's assets and income (M=2.77), t(191)=2.81, p=.006. A similar pattern emerged for beliefs about creditor access to the non-debtor spouse's income and assets for debt incurred during the marriage (M=3.19 vs. 2.65), t(193)=2.60, p=.010 and beliefs about the division of debt upon divorce (M=3.19 vs. M=2.74), t(194)=2.21, p=.028.

People in the sample were generally optimistic. In uncertain times, they usually expected the best (M=3.47, SD=1.18). Additional questions illustrated this: "I am always optimistic about my future"[129] (M=3.62, SD=1.17), as well as "Overall I expect more good things to happen to me than bad"[130] (M=3.84, SD=1.05).

C. Empirical Findings

By measuring no significant differences across states in people's understanding of creditors' rights, this study concludes that people do not fully understand the consequences of marriage on their assets and debts. In fact, people's responses suggest one uniform family law across the country,

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[128] *Id.* at Question 20.

[129] *Id.* at Question 18.

[130] *Id.*

but nothing could be further from the truth.[131]

Importantly, this study also demonstrates that decisions about marriage timing and entrance into a premarital agreement are significantly impacted by beliefs about creditor access to marital property, suggesting that a non-trivial portion of the population may be making significant life decisions using incorrect beliefs about the legal status of their property upon entering into, during, and after the dissolution of marriage. Furthermore, there were no significant differences in responses based on whether the person had been divorced. These findings have implications for law and policymakers.

V. IMPLICATIONS

The data are clear that people make decisions based on their understanding of the law, so their understanding of creditors' rights should be clear and correct, but it is often not. In fact, their understanding does not change regardless of their state or whether they have been divorced. In a high-divorce society, such misunderstandings are a problem.[132] There are several approaches to addressing it.

State law and policymakers should promote family law knowledge because people do not seem to appreciate the reasons to acquire family law knowledge, even when they are divorcing.[133] This would explain why getting divorced does not increase people's knowledge of family law.

Policymakers can increase education, counseling, and information about the consequences of marriage.[134] For example, public legal education could be improved. Basic family law can be offered alongside health and civics classes. There has not been such an opportunity historically because high divorce rates are a relatively new phenomenon, enabled by various modern factors, such as no-fault divorce, unilateral divorce, and women's entry into the workforce.[135] While divorce was certainly possible as early as the colonial period, notable divorce numbers were not reached until recently.[136]

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[131] *See supra* Part III.

[132] *See supra* Parts I, II.B.

[133] Weisbord, *supra* note 24, at 135 (suggesting that "[m]ost individuals . . . not only lack sufficient legal knowledge to accomplish law-related tasks but . . . also do not see the need to acquire relevant legal knowledge in the first place"). *See also* Margaret Dee McGarity, *Community Property in Bankruptcy: Laws of Unintended Consequences*, 72 LA. L. REV. 143, 143 (2011) ("For most people, the law is seemingly irrelevant to their personal lives.").

[134] *See, e.g.*, Dunlap, *supra* note 21, at 2839 (considering different methods of teaching legal basics to the public); Janet R. Decker, *Legal Literacy in Education: An Ideal Time to Increase Research, Advocacy, and Action*, 304 WEST'S ED. L. REP. 679 (2014).

[135] *See, e.g.*, Jennifer Roff, *Cleaning in the Shadow of the Law? Bargaining, Marital Investment, and the Impact of Divorce Law on Husbands' Intrahousehold Work*, 60 J. L. & ECON. 115 (2017).

[136] *See* Ryznar & Devaux, *supra* note 5.

The media might also play a role in this education. For example, public service announcements could be run.[137] Journalists covering family law could familiarize themselves with the legal consequences of marriage given the number of stories in the press relating to marriage and divorce.[138] Law programs aimed at such journalists could include family law basics.[139]

The most direct, targeted approach would aim at engaged couples themselves, who can change the legal defaults before getting married. The couple's first contact with the state is seeking a marriage license. Information on family law consequences could be included as part of these procedural requirements for getting married.[140] Currently, procedural formalities are not particularly meaningful, having been turned into a "$51 billion wedding industry that employs nearly 800,000 people" even before the increase from same-sex engaged couples.[141] A lot of time and attention is spent on weddings today,[142] some of which can be re-directed to the consequences of marriage.

A low-cost way would be to disseminate information on family law and marriage consequences through pamphlets provided along with a marriage license, which would describe property consequences and what a premarital agreement can do. To modernize information delivery, information can be posted online and made accessible. One possible method of dissemination would be the state's judicial website or the secretary of state's website. Already, many state courts post helpful resources on their websites, including forms that can be used in a divorce. Alternatively, marriage license clerks can email a link to couples with a short video outlining the legal defaults to marriage in that state and alternatives possible through a premarital agreement.

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[137] *See, e.g., Prosecutors Portrayed as "Doing the Right Thing" in NDAA's New Public Service Announcements*, 36-APR PROSECUTOR, March/April, 2002, at 7 (describing public service announcements that "portray prosecutors as everyone's neighbors and active members of our communities").

[138] *See supra* note 1 and accompanying text.

[139] *See, e.g.*, Journalist Law School, LOY. L. SCH., https://www.lls.edu/newsroom/journalistlawschool (last visited Dec. 1, 2019).

[140] *See* Alison Lorenzo, Note, *The Right of Same-Sex Marriage Is Not Fundamental, Prohibiting Same-Sex Marriage Does Not Constitute Gender-Based Discrimination, and Restrictions on the Right of Marriage are Rationally Related to the State's Interest in Regulation of Marriage*, 39 RUTGERS L.J. 1003, 1012 n.43 (2008) ("Procedural requirements include the receipt of a marriage license and solemnization by an authorized official.").

[141] Neo Khuu, Comment, *Obergefell v. Hodges: Kinship Formation, Interest Convergence, and the Future of LGBTQ Rights*, 64 UCLA L. REV. 184, 221 (2017).

[142] The average American wedding in 2013 cost about $30,000: the venue and catering at $13,385, engagement rings at $5,598, reception bands at $3,469, flowers and other decor at $2,069, and wedding photos at $2,440. Melanie Hicken, *Average Wedding Bill Hits $30,000*, CNN MONEY (Mar. 28, 2014), https://money.cnn.com/2014/03/28/pf/average-wedding-cost/. Weddings in Manhattan are the most expensive, averaging nearly $87,000, while weddings in Utah and Idaho are least expensive, with average spending in both states falling below $17,000. *Id.*

This has been done in the context of covenant marriage, which is a stricter form of marriage that is more difficult to leave.[143] A small number of states have introduced covenant marriage as an option.[144] Giving people a decision between two types of marriages required informing them of the differences between each, leading to more information becoming available to couples. For example, Louisiana "state employees would simply give the couple a pamphlet at the courthouse outlining covenant marriage's [stricter] terms for divorce."[145]

Lawyers can also have a role in marketing premarital agreements better. Right now, people do not enter into premarital agreements because they are seen as unromantic.[146] However, they have an important function and there are many reasons to enter into them, such as allowing the parties to learn the defaults and accept or reject them proactively. The average couple likely is unaware of the implications of a premarital agreement and, problematically, the legal defaults governing without it.

VI. CONCLUSION

Our data, composed of surveys, reveal no significant differences in people's understanding of creditors' rights regardless of their state of residence and whether they have been divorced. While it does not seem that people understand the full legal consequences of marriage, the data show that they make decisions that are impacted by their limited understanding.

These original findings have important implications for law and policymakers, who can work to improve public legal education. For example, couples about to marry can be counseled and informed of their state's family laws. Such efforts to improve people's family law understanding are especially important given the relevance of family law to people's lives.

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[143] *See, e.g.*, Cynthia M. VanSickle, *A Return to the Anti-Feminist Past of Divorce Law: The Implications of the Covenant or Marriage Law as Applied to Women*, 6 J. L. SOC'Y 154, 155 (2005).

[144] *See* Kristina E. Zurcher, Note, *"I Do" or "I Don't"? Covenant Marriage After Six Years*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 273, 274 (2004).

[145] Cynthia DeSimone, Comment, *Covenant Marriage Legislation: How the Absence of Interfaith Religious Discourse Has Stifled the Effort to Strengthen Marriage*, 52 CATH. U. L. REV. 391, 409 (2003).

[146] *See supra* Part II.B.4.