

Properties of Intimacy

Emily J. Stolzenberg

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PROPERTIES OF INTIMACY

EMILY J. STOLZENBERG*

ABSTRACT

Today, nearly nineteen million U.S. adults are cohabiting with an intimate partner. Yet family law continues to struggle with the question whether these unmarried partners should have relationship-based rights in one another's property. Generally speaking, states answer "no." Because cohabitants are not spouses, they're treated like strangers. As a result, their property rights usually follow title, and richer partners tend to walk away with a large proportion of the property acquired during the relationship.

This Article shows the "cohabitant problem" to be no anomaly, but rather the clearest manifestation of family law's overarching structure. In marital property regimes as well as in cohabitant disputes, states and scholars have taken title as both a starting and a presumptive ending point, which means that assigning property rights in any other way is "redistribution" requiring special justification. This deferential approach to title limits family law's ability to achieve sharing outcomes, not only between cohabitants, but also between spouses.

Rather than bowing to title and then redistributing, family law should reconsider how it assigns property entitlements in the first instance. Non-family property law offers a promising model, for it often weighs intimacy in

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determining entitlements. In relationships marked by dependence, interdependence, and vulnerability—for example, those between neighbors, co-owners, and decedents and heirs—property rights do not always hold with the same force as they might against strangers. Instead, property law acknowledges the social facts of ongoing, hard-to-exit relationships by blunting the sharp edges of owners’ prerogatives. This approach, which I describe as instantiating a “spectrum of intimacy,” allows property law to recognize and support a broad range of close, complex relationships.

Family law should adopt property law’s spectrum of intimacy to reshape marital property regimes and re-situate unmarried partners in the space between spouses and strangers. Just as property law permits multiple forms of joint ownership, family law should offer a menu of family statuses of which marriage is but one. For partners who do not elect a status, family law should apply a property-flavored equitable approach to distribution. By protecting sharing between both cohabitants and spouses, this approach reflects and honors the wide diversity of modern family relationships.

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INTRODUCTION

One of the central questions in modern family law is whether unmarried partners should have rights in one another's property when their relationships end. Consider the following cases:

Michelle cohabited with her nonmarital partner, Lee, for six years. She gave up her lucrative career to serve as a homemaker; all property acquired during the relationship was titled in Lee's name. Does Lee owe Michelle anything when their relationship ends?¹

When Victoria became pregnant, Robert told her that the law now considered them husband and wife, without the need for any formal ceremony. Over fifteen years, Victoria raised the couple's three children and helped Robert to advance his career. Should Robert have to share any of the property he accumulated over the course of the relationship with Victoria when the parties separate?²

Shaniqua and Curtis were together for twelve years. Shaniqua cared for the parties' son, performed other domestic labor, financially supported Curtis while he embarked on his career, and nursed him for five months while he recovered from a near-fatal accident. Is Shaniqua entitled to some of Curtis's assets when the two break up?³

States tend to answer these questions in the negative. In Michelle's case, although the trial court awarded her rehabilitative alimony in an amount based on two years of her former salary, the court of appeals overturned the award as lacking any "basis whatsoever, either in equity or in law."⁴ Victoria discovered that, without a marriage license, she had no property rights.⁵ In Shaniqua's case, the same "statements" that "demonstrate[d]" her "loving devotion and loyalty . . . undermine[d]" her legal claims against her former partner.⁶

1. See *Marvin v. Marvin*, 176 Cal. Rptr. 555, 557 (Cal. Ct. App. 1981).

2. See *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1205 (Ill. 1979); see also *Blumenthal v. Brewer*, 69 N.E.3d 834, 860 (Ill. 2016) (refusing to overturn *Hewitt*).

3. See *Tompkins v. Jackson*, No. 104745/2008, 2009 WL 513858, at *13 (N.Y. Sup. Ct. Feb. 3, 2009). Mr. Jackson is better known by his stage name, 50 Cent. *Id.* at *1.

4. *Marvin*, 176 Cal. Rptr. at 559.

5. *Hewitt*, 394 N.E.2d at 1211.

6. *Tompkins*, 2009 WL 513858, at *13.

These results are not atypical. Because cohabitants are not spouses, they're treated like legal strangers—or worse.⁷ Unless unmarried couples have executed a written contract outlining their mutual responsibilities, their property rights usually follow title.⁸ As a result, the richer partner tends to walk away with a large proportion of the resources accumulated during the relationship when it ends.⁹

Scholars have long debated how, and even whether, family law should intervene in former unmarried partners' property disputes.¹⁰ The American Law Institute's 2002 Principles of the Law of Family Dissolution proposed establishing marriage-like obligations for cohabitants "who for a significant period of time share[d] a primary residence and a life together as a couple," but no jurisdiction has adopted this approach.¹¹ With nearly nineteen million Americans currently cohabitating and states continuing to employ a patchwork of mostly ineffectual approaches,¹² the Uniform Law Commission recently convened a committee to draft model legislation clarifying the economic rights of unmarried cohabitants.¹³

I argue that part of what makes the "cohabitant problem" so intractable is family law's deferential approach to title. States and scholars have taken title as both a starting and a presumptive ending point, which means that assigning property rights in any other way is "redistribution" that requires special justification. This approach entrenches regard for individual property rights, which limits family law's ability to achieve sharing outcomes.

Nor is family law's deference to title limited to the context of cohabitants. Indeed, marital property regimes also revolve to a surprising degree around title. In common-law states, title defines married spouses' property rights, colors equitable distribution awards, and reasserts itself with a vengeance after divorce.¹⁴ Even community property jurisdictions employ management rules that devolve to title.¹⁵ As a result, marital property

7. Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 931 (2019).

8. See *infra* note 49 and accompanying text.

9. See *infra* Part I.A.

10. See *infra* Part III.A.

11. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 6.03(1) & cmt. b (AM. L. INST. 2002) [hereinafter PRINCIPLES OF THE L. OF FAM. DISSOLUTION]; see also Ira Mark Ellman, "Contract Thinking" Was Marvin's Fatal Flaw, 76 NOTRE DAME L. REV. 1365, 1377–79 (2001) (describing ALI approach).

12. See *infra* Part I.A.

13. See generally *Cohabitants Economic Remedies Act Committee*, UNIF. L. COMM'N (2018), <https://www.uniformlaws.org/committees/community-home?CommunityKey=5f044999-b4b3-458a-b6d4-d984885d913b> (last visited June 24, 2021).

14. See *infra* Part I.B.

15. See *infra* Part I.B.

regimes tend to privilege titleholders and breadwinners over caretakers and homemakers, both during marriage and at and after divorce.¹⁶

Connecting property disproportionality between unmarried partners to property inequality between spouses—as this Article is the first to do—reveals the common origin of both problems. Scholars have paid considerable separate attention to economic unfairness in both marital and cohabitant relationships,¹⁷ but there has been little discussion of the two contexts together. The current debate about cohabitant obligations takes marriage as a foil, without simultaneously examining marital property regimes.¹⁸ This uncritical assumption of the marital baseline casts unmarried partners' property rights as a problem separate and distinct from how the law treats spouses. Uncovering marital property regimes' more covert deference to title shows instead that the cohabitant regime is no anomaly, but rather the clearest manifestation of family property law's overarching structure.

Yet family law's approach to ownership is far from inevitable. The current framework begins by assuming that each partner owns individually the property titled in his or her own name, and that assigning entitlements otherwise requires some legal intervention.¹⁹ But while superficially plausible, this conflation of title with ownership gets things backward: Family members own what they do only because the law recognizes some property claims and rejects others.²⁰ Rather than beginning

16. See *infra* note 23.

17. See, e.g., MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991); MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987); ALLEN M. PARKMAN, *NO-FAULT DIVORCE: WHAT WENT WRONG?* (1992); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 *TUL. L. REV.* 953 (1991); Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 *TEMP. L. REV.* 1413 (1996); Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in *DIVORCE REFORM AT THE CROSSROADS* 191–210 (Stephen D. Sugarman & Herma Hill Kay eds., 1990); Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 *FORDHAM L. REV.* 539 (1990); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 *N.C. L. REV.* 1103 (1989); Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 *TEX. L. REV.* 689 (1990).

18. Scholarly discussions of unmarried partners tend to focus on how family law distinguishes between cohabitants and spouses. See, e.g., Albertina Antognini, *The Law of Nonmarriage*, 58 *B.C. L. REV.* 1, 58 (2017) (arguing that “the law polices the boundaries between marriage and nonmarriage,” and “in doing so it actively defines the content of each”); cf. Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 *STAN. L. REV.* 167, 170 (2015) (stating that “the most fundamental divide in family law is between married and unmarried couples”).

19. See *infra* Part I.

20. See *infra* Part I.

with title and then asking whether and how to redistribute between intimate partners, as the law and current scholarly discussions tend to do, we should reconsider how family law establishes property entitlements in the first instance.

For an alternative model of ownership, we need look no further than non-family property law. While family law has adopted an absolutist, individualistic conception of property rights, property law itself often takes a more multifaceted approach.²¹ Property law sometimes deviates from title, or otherwise limits the authority of titular owners, in the service of other values.²² For example, a number of well-known black letter doctrines establish property rights on bases other than title, including labor, use, and reliance.²³ Property law also limits titleholders' prerogatives, either by curtailing the right to exclude others or restricting permissible uses, in recognition of competing considerations.²⁴ Property law draws a distinction between title and ownership that family law often elides, allowing it more flexibility to balance owners' autonomy against other important values and interests.

In particular, I argue that property law often weighs *intimacy* in determining entitlements.²⁵ In relationships defined by dependence and interdependence—for example, those between neighbors, co-owners, and decedents and heirs—property rights do not always hold with the same force as they might against strangers. Instead, property law sometimes responds to the special resource-based vulnerability that these kinds of relationships engender by imposing certain obligations, burdens, or limits on owners. Property law acknowledges the facts of social life by selectively blunting the sharp edges of owners' prerogatives. This approach, which I describe as instantiating a “spectrum of intimacy,” allows property law to recognize, legitimize, and support a broad range of close social relationships.

Property law's approach to intimacy can help us to resituate unmarried partners in the space between spouses and strangers, as well as to rethink the structure of marital property holding.²⁶ On a conceptual level, family law should emulate property law by relaxing its deference to title. Rather than “redistributing” as an exceptional matter, the family property system should

21. See David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES L. 103, 104 (2009) (describing how the “absolute, individualistic view of property” came to be identified with Blackstone); HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS xi (2011) (describing property as “a set of institutions bearing a family resemblance”).

22. See *infra* Part II.

23. See *infra* Part II.A.1.

24. See *infra* Part II.A.2.

25. See *infra* Part II.B.

26. See *infra* Part III.

establish corpuses of shared property, regardless of title, and define appropriate criteria for distribution when relationships end. On a more concrete level, family law should extend property's spectrum of intimacy by offering a menu of family statuses with differing degrees of financial obligations. Intimate partners could choose between forms of family property holding, just as co-owners can elect between different forms of joint ownership. Marriage would anchor one end of the spectrum as the property institution involving the most extensive degree of sharing. Cohabitants would become neither spouses nor strangers, but rather partners in a different kind of cooperative endeavor still worthy of the law's respect and support. These changes would not only produce fairer resource distributions upon family dissolution. They could also help to ameliorate unjustified legal and social inequality between marital and nonmarital families.²⁷

Relaxing the hegemony of title would also promote richer conceptions of both ownership and autonomy in family law. Family law's regard for individual property rights reflects its atomistic approach to family relations, under which freedom inheres in formally consenting to one's family obligations.²⁸ This vision understands property's primary purpose to be safeguarding individual autonomy, a perception that heightens the stakes of conflicts between family members' sometimes competing interests.²⁹ De-emphasizing title would refocus family property law away from individualism and toward norms of mutuality and sharing, emphasizing that

27. See, e.g., Katherine M. Franke, *Longing for Loving*, 76 *FORDHAM L. REV.* 2685, 2686 (2008) (advocating for “[r]esisting the normative and epistemic frame that values nonmarital forms of life in direct proportion to their similarity to marriage”); Suzanne B. Goldberg, *Marriage as Monopoly: History, Tradition, Incrementalism, and the Marriage/Civil Union Distinction*, 41 *CONN. L. REV.* 1397, 1401 (2009) (arguing that the state is complicit in causing “the lesser social value of civil unions vis-a-vis marriage”); Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 *B.U. L. REV.* 425, 430 (2017) (“Marital supremacy continues to pervade the civil law despite the fact that about half of all American adults today live outside of marriage.”); Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 *CALIF. L. REV.* 1207, 1210 (2016) (arguing that under *Obergefell*, “the rationale for marriage equality rests . . . on the fundamental inequality of other relationships and kinship forms”); Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 *FLA. ST. U. L. REV.* 547, 549 (2015) (“*Windsor* . . . implicitly resurrects and reinforces claims that non-marital childrearing—and sexual relationships outside of marriage, more generally—are inherently less worthy of respect than marital relationships.”); cf. Nan D. Hunter, *Interpreting Liberty and Equality Through the Lens of Marriage*, 6 *CALIF. L. REV. CIRCUIT* 107, 110 (2015) (arguing in *Obergefell*'s wake that “[a]n alternative concept of dignity more infused with democratic and pluralist values could encompass respect for variation in kinship, sexuality, and affiliation”).

28. Emily J. Stolzenberg, *The New Family Freedom*, 59 *B.C. L. REV.* 1983, 1997–98 (2018).

29. Cf. Jo Carrillo, *Liberty and Community in Marriage: Expanding on Massey's Proposal for a Community Property Option in New Hampshire*, 15 *U.N.H. L. REV.* 289, 291, 314 (2017) (describing “an economic morality” in family law that “valorizes the needs of the autonomous individual at the cost of obscuring the needs of the community”).

the institution's fundamental purpose is to create conditions that facilitate cooperative collective life.³⁰ With title no longer so determinative, we can finally begin to consider what values beyond a narrow vision of individual autonomy the institutions of family and property should serve.³¹ In these ways, property law's spectrum of intimacy can help to forge a new vision of family property holding, one better equipped to do economic and relational justice between intimates.

This Article proceeds as follows. Part I exposes the outsize role of title in both the marital and nonmarital property systems. Part II uncovers how non-family property law instantiates a "spectrum of intimacy" by selectively deviating from title in disputes between non-strangers and argues that this approach offers an attractive alternative for family law. Part III employs the intimacy approach to sketch a less individualistic alternative to current family property doctrine and explains its theoretical and normative implications. I close by placing family law more closely into conversation with property law, a move that presents intriguing possibilities for both fields.

I. INDIVIDUALISM IN FAMILY LAW

Scholars critiquing family law's individualistic approach to property tend to view the problem through one of two lenses. They either decry unequal economic outcomes in marriage, or they criticize the law's refusal to extend relationship-based property rights to cohabitants.³² Juxtaposing cohabitants and spouses reveals that the inadequacies of both marital and nonmarital property regimes arise from the same structural feature: the dominant role of title in the family property system. Cohabitants clearly occupy a world of separate property,³³ but the marital system also revolves to a surprising degree around title. In common-law states, husbands and wives own individually titled property separately during marriage,³⁴ allowing

30. See, e.g., GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970*, at 1 (1997) (describing a "view" of "property [a]s the material foundation for creating and maintaining the proper social order"); MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* (2010).

31. Cf. Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 *THEORETICAL INQUIRIES L.* 127, 137–38 (2009) (describing "freedom" as only one among many capabilities necessary for "human flourishing" and explaining what flourishing entails); Stolzenberg, *supra* note 28, at 2038 (arguing that "the outsized emphasis currently placed on families' economic functions . . . undermines their ability to fulfill other roles more important to intimate and collective life").

32. See *supra* notes 17–18 and accompanying text.

33. See *infra* Part I.A.

34. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 223 (4th ed. 2010).

spouses who so desire great leeway to exclude one another from their property.³⁵ And when spouses part ways, the laws of equitable distribution and alimony systematically favor titleholding spouses.³⁶ Even community property jurisdictions employ management rules that devolve to title.³⁷ Title's prominent role means that individual, rather than shared, property holding is the baseline of the family property system, and this orientation constructs and perpetuates property disproportionality between intimate partners.

A. Cohabitants and Separate Property

Nearly nineteen million Americans are currently cohabiting with, but not married to, an intimate partner.³⁸ Although states approach cohabitants' property claims in a variety of ways, no state grants unmarried partners any default property protections arising from the fact of their relationship.³⁹ Instead, cohabitants' *inter se* property rights generally follow title. As a result, unless unmarried cohabitants have titled property in joint name or executed a written contract outlining their mutual responsibilities, poorer partners have great difficulty in convincing courts to redistribute property when a relationship ends.⁴⁰

Four states—Georgia, Idaho, Illinois, and Louisiana—bar all claims “arising from” a cohabitant relationship.⁴¹ In Illinois, for example, courts refuse to “enforce mutual property rights where th[e] rights [asserted] are rooted in a marriage-like relationship between the parties.”⁴² Cohabitants may bring common-law claims that “ha[ve] an independent economic basis,” but “individuals acting privately by themselves, without the involvement of

35. See *infra* Part I.B.1.

36. See *infra* Part I.B.2–3.

37. See *infra* notes 90–99 and accompanying text.

38. Table AD-3: *Living Arrangements of Adults 18 and Over, 1967 to Present*, U.S. CENSUS BUREAU (Dec. 2020), <https://www.census.gov/data/tables/time-series/demo/families/adults.html>.

39. See, e.g., *Morone v. Morone*, 413 N.E.2d 1154, 1156 (N.Y. 1980) (stating that “cohabitation without marriage does not give rise to the property and financial rights which normally attend the marital relation”).

40. See June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 56 (2016) (stating that courts “impose[] almost no obligations without either an express agreement or evidence of combined assets”).

41. See *Rehak v. Mathis*, 238 S.E.2d 81, 82 (Ga. 1977); *Gunderson v. Golden*, 360 P.3d 353, 355 (Idaho Ct. App. 2015); *Blumenthal v. Brewer*, 69 N.E.3d 834, 852 (Ill. 2016), *aff'g* *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979); *Schwegmann v. Schwegmann*, 441 So. 2d 316, 326 (La. Ct. App. 1983).

42. *Blumenthal*, 69 N.E.3d at 841; *accord* *Schwegmann*, 441 So. 2d at 323 (stating that cohabitants “have no rights in each other’s property”).

the State,” are not permitted to “create marriage-like benefits.”⁴³ Indeed, Illinois has a stated public policy “disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants.”⁴⁴ Cohabitants in these states lack any sort of relationship-based property protections.

On the opposite end of the spectrum, only a few states have judicially created family property schemes for cohabitants. In the state of Washington, unmarried partners living in a “committed intimate relationship” are entitled to an equitable distribution of property acquired during the relationship.⁴⁵ Nevada permits cohabitants to “agree to hold property . . . as though it were community property,” while Kansas and Oregon allow relationship-based recovery under an implied joint venture theory.⁴⁶ Ten jurisdictions give couples recourse to the state’s divorce distribution scheme if they can show that they entered into a common-law marriage.⁴⁷ Although these regimes offer marital or marriage-like family property protections for qualifying couples, their scope is limited. For each requires a court to conduct a fact-intensive assessment of the parties’ relationship before recovery becomes available, and relatively few couples pass the bar.⁴⁸

43. *Blumenthal*, 69 N.E.3d at 856, 852; *accord* *Abrams v. Massell*, 586 S.E.2d 435, 441 (Ga. Ct. App. 2003) (enforcing cohabitants’ written contract to make a will because “any romantic or sexual involvement between the parties was . . . incidental to the contract rather than required by it”) (quoting *Crooke v. Gilden*, 414 S.E.2d 646, 646 (Ga. 1992)); *Phillips v. Blankenship*, 554 S.E.2d 231, 233 (Ga. Ct. App. 2001) (authorizing cohabitants to pursue equitable claims not “based on sexual intercourse”); *Schwegmann*, 441 So. 2d at 325 (allowing cohabitants to “assert [their] rights in [a] common endeavor” if it is a “commercial enterprise . . . independent of the illegal cohabitation”).

44. *Blumenthal*, 69 N.E.3d at 858. *But see id.* at 868 (Theis, J., dissenting upon denial of rehearing) (suggesting it may be “irrational and discriminatory to deny the protections of the common law to persons who never could have used the marriage provisions because of their sexual orientation”).

45. *Connell v. Francisco*, 898 P.2d 831, 835–36 (Wash. 1995); *see also id.* at 834 (defining such a relationship as “a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist”).

46. *W. States Constr., Inc. v. Michoff*, 840 P.2d 1220, 1224 (Nev. 1992); *Eaton v. Johnston*, 681 P.2d 606, 610–11 (Kan. 1984); *Beal v. Beal*, 577 P.2d 507, 510 (Or. 1978); *Wilbur v. DeLapp*, 850 P.2d 1151, 1153 (Or. Ct. App. 1993) (“[I]n distributing the property of a domestic relationship, we are not precluded from exercising our equitable powers to reach a fair result based on the circumstances of each case.”); *see also* Gregg Strauss, *Why the State Cannot “Abolish Marriage”*: *A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1280 (2015) (describing schemes).

47. *See* CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 26 (2010) (“Eleven U.S. jurisdictions still recognized common law marriage as of 2009—Alabama, Colorado, the District of Columbia, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas, and Utah.”). *But see* ALA. CODE § 30-1-20(a) (2018) (“No common-law marriage may be entered into in this state on or after January 1, 2017.”).

48. *Cf.* Antognini, *supra* note 18, at 17 (arguing that “courts in [Washington and Nevada] turn to the lack of an actual marriage to deny couples the application of the divorce laws”); Strauss, *supra* note 46, at 1279 (discussing relationship-based doctrines’ limited scope).

Lying between these two poles, most states allow cohabitants to bring general private law claims against a former partner.⁴⁹ Yet contract and equity provide little protection, for these doctrines are not well adapted to the realities of cohabitant relationships.⁵⁰ Not only does establishing these claims require expensive and uncertain litigation, but recovery under them can also be quite circumscribed.

Multiple legal and practical obstacles stand in the way of a successful contract claim. Due to the nature of intimate relationships, most cohabitants do not negotiate explicit contracts with one another, let alone memorialize them in writing.⁵¹ This poses a problem in states that only enforce cohabitant agreements exhibiting high degrees of formality. Florida, Minnesota, New Jersey, and Texas require unmarried partners' contracts to be executed in writing and signed by both parties,⁵² while New York requires cohabitant agreements to be express.⁵³ Even in jurisdictions that will entertain them, implied contract claims are rarely winners. These cases require courts to "inquire into the conduct of the parties to determine whether that conduct demonstrates . . . some . . . tacit understanding between the parties."⁵⁴ But courts struggle to fill in ambiguous or silent contract terms without reliable evidence of shared intent,⁵⁵ while the requirement of bargained-for consideration and the presumption that intimates render services gratuitously fell many cohabitants' claims.⁵⁶ Thus the implied contract "inquiry tends to

49. PRINCIPLES OF THE L. OF FAM. DISSOLUTION, *supra* note 11, § 6.03, reporter's notes, cmt. b (2002).

50. *Cf.* BOWMAN, *supra* note 47, at 3.

51. See Jennifer K. Robbennolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventive and Therapeutic Approach*, 41 ARIZ. L. REV. 417, 436 (1999); see also Strauss, *supra* note 46, at 1293 ("If intimate partners are going to regulate their economic lives by contract, almost all of these agreements will be implied-in-fact contracts for which the court infers the parties' promises from their conduct.").

52. MINN. STAT. §§ 513.075, 513.076 (2018); N.J. STAT. ANN. § 21:1-5(h) (2010) (also requiring "independent advice of counsel for both parties"); TEXAS FAM. CODE ANN. § 1.108 (2018); Posik v. Layton, 695 So. 2d 759, 762 (Fla. Dist. Ct. App. 1997) (applying the Statute of Frauds requirement "that contracts made upon consideration of marriage . . . be in writing . . . to non-marital, nuptial-like agreements"). North Dakota announced, and then retreated from, a similar rule. Compare Kohler v. Flynn, 493 N.W.2d 647, 649 (N.D. 1992) ("If live-in companions intend to share property, they should express that intention in writing."), with McKechnie v. Berg, 667 N.W.2d 628, 632 (N.D. 2003) (stating that "joint bank accounts constitute writings evidencing intent").

53. *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980) (requiring cohabitant agreements to demonstrate "the explicit and structured understanding of an express contract").

54. *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976).

55. See, e.g., *Morone*, 413 N.E.2d at 1157 (describing the high "risk of error" in adjudicating cohabitant contract claims).

56. Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 99 (2021); Strauss, *supra* note 46, at 1279, 1293; see, e.g., *Williams v. Ormsby*, 966 N.E.2d 255, 263-64 (Ohio 2012); *Featherston v. Steinhoff*, 575 N.W.2d 6, 9 (Mich. Ct. App. 1997).

yield an outcome of no recovery,”⁵⁷ even in cases where some kind of recovery seems justified. In *Friedman v. Friedman*, for example, the California Court of Appeal found insufficient evidence to support an implied agreement for the man to provide post-relationship pendente lite financial support to his disabled female partner, despite the parties’ twenty-one years of marriage-like cohabitation.⁵⁸

Equitable remedies provide more relief than contract claims,⁵⁹ but even these are seriously limited. Traditionally, “restitution is not available for . . . voluntary transfers” or “to claimants who reasonably could have negotiated a consensual exchange.”⁶⁰ Some jurisdictions stick to these “two traditional constraints,”⁶¹ which lead to the conclusion that “neither [partner’s] contributions could unjustly enrich the other.”⁶² Moreover, some states allow unjust enrichment claims only when the parties have accumulated assets during their relationship.⁶³ Equitable remedies can also “be very complicated to plead and to prove,” making the results “inconsistent and unpredictable.”⁶⁴ Not only is relief in restitution “hard to obtain,” it can also be “pitifully small.”⁶⁵ In *Gazvoda v. Wright*, for example, the woman received less than twenty-five percent of the assets accumulated during the relationship, despite working side-by-side with her partner to build a successful electric business.⁶⁶

As the above discussion shows, cohabitants’ property rights effectively follow title. Without a written contract, it is very difficult for an untitled

57. HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 170 (2004); *see also* BOWMAN, *supra* note 47, at 51 (questioning efficacy of contract remedies).

58. 24 Cal. Rptr. 2d 892, 899 (Ct. App. 1993); *see also* *Marvin v. Marvin*, 176 Cal. Rptr. 555, 559 (Ct. App. 1981) (vacating rehabilitative award as lacking legal basis).

59. DAGAN, *supra* note 57, at 166–67 (arguing that “[t]he various restitutionary headings,” which include “unjust enrichment, resulting trust, constructive trust, *quantum meruit*,” and quasi- or implied-in-law contract, supply “the main source of” cohabitant recovery).

60. Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 712 (2006); *see* Robert C. Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 MICH. L. REV. 47, 56–57 (1978).

61. Sherwin, *supra* note 60, at 712.

62. Casad, *supra* note 60, at 55; *see, e.g.*, *Jordan v. Mitchell*, 705 So. 2d 453, 457–58 (Ala. Civ. App. 1997); *Arwood v. Sloan*, 560 So. 2d 1251, 1252 (Fla. Dist. Ct. App. 1990).

63. *Waage v. Borer*, 525 N.W.2d 96, 97 (Wis. Ct. App. 1994); *see also* BOWMAN, *supra* note 47, at 42–43 (“[I]f a cohabitant’s contributions . . . have been consumed by the couple and their children during the relationship, she may . . . end up with nothing.”).

64. BOWMAN, *supra* note 47, at 44, 42.

65. *Id.* at 42; *see also* Antognini, *supra* note 18, at 43 (arguing that awards “generally” amount to “much less than half of the assets accumulated during the relationship”); *id.* at 44–45 (2017) (describing cases).

66. *Gazvoda v. Wright*, No. 07A01–0607–CV–288, 2007 WL 2284722, at *3 (Ind. Ct. App. Aug. 10, 2007); *see also* Antognini, *supra* note 18, at 41–42, 44–45 (describing cases and noting unequal distributions of property accumulated during cohabitation).

partner to claim a portion of the assets accumulated during the relationship when the couple parts ways. But as the Wisconsin Supreme Court has observed, “allowing no relief at all to one party in a . . . relationship effectively provides total relief to the other, by leaving that party owner of all the assets acquired through the efforts of both.”⁶⁷ Without default rules requiring distribution in derogation of title as a matter of course, richer partners tend to walk away with a large proportion of an unmarried couple’s resources when these relationships end.⁶⁸

B. Spouses and the Hidden Hegemony of Title

Courts and scholars tend to use marriage as a foil in analyzing unmarried partners’ property disputes, with many conclusions turning on the observation that cohabitants are not spouses.⁶⁹ And spouses do differ from cohabitants in one very important way: By getting married, they formally consented to the state applying its myriad rules governing spousal rights, responsibilities, and obligations.⁷⁰ Through marriage, spouses are immediately eligible for default property protections, without any inquiry into the character of their intimate relationship.

Although these protections are in many ways quite generous, deference to title works to undermine sharing even in marital property regimes. During intact marriages, the common law permits spouses to exclude one another from any resources titled individually. Divorce law limits this ability when a marriage ends, but assumptions of individual ownership color the equitable distribution process, and the structure of alimony similarly asserts that each spouse owns solely his or her post-divorce income. Even community property states employ management and distribution rules that defer to title. Because marital property regimes unduly privilege formal ownership and control, pre- and post-divorce asset distributions tend to favor titleholders and income earners over more economically vulnerable spouses.⁷¹ Just as cohabitants live under a regime in which their default property rights follow title, marital property regimes similarly revolve to a surprising degree around title.

67. *Watts v. Watts*, 405 N.W.2d 303, 314 (Wis. 1987).

68. See Antognini, *supra* note 18, at 8 (arguing that the law of nonmarriage denies or minimizes redistribution to poorer cohabitants, who are usually women); Carbone & Cahn, *supra* note 40, at 63 (observing that *Marvin* and its progeny fail to “address[]” the dynamic “that typically gives more power to the person with the greater income”).

69. See *supra* note 18.

70. See Emily J. Stolzenberg, Nonconsensual Family Obligations 12–13 (Mar. 16, 2021) (unpublished manuscript) (on file with the *Maryland Law Review*).

71. This Article leaves aside the separate but related question of spouses’ ability to opt out of sharing defaults through contract.

Uncovering marital regimes' more covert deference to title shows that the cohabitant regime is no anomaly. Instead, it presents the clearest illustration of the family property system's overarching individualistic structure: Title governs unless there are "special" legal grounds for redistributing, and even then, its logic shapes that redistribution. This title-based structure makes it difficult for family property law to fully recognize, let alone vindicate, relationship-based claims to shared resources.

1. Separate Property During Marriage

Although it is commonly presumed that spouses share during marriage, domestic relations law does too little to require it.⁷² Married spouses' property rights follow title in common-law states, while community property management rules allow spouses great leeway to control individually titled assets. Nor will courts interfere in property disputes during an intact marriage. These default rules have important conceptual and practical implications, both during marriage and upon divorce.

There are two kinds of marital property regimes in the United States, whose main difference lies in the nature of spouses' property rights during marriage.⁷³ In the forty-one common-law states, married spouses own and control assets titled in their individual names separately.⁷⁴ In other words, both ownership and control of property follow title during marriage. In the nine community property states, married spouses each own a present, undivided, one-half interest in property acquired through either spouse's efforts since the date of marriage, regardless of title.⁷⁵ In these jurisdictions, although ownership does not follow title, control rights may.⁷⁶ Thus title matters during marriage in both kinds of jurisdictions, though to differing degrees. Because title's influence is clearest in common-law regimes, the following discussion focuses mainly on this majority approach to spousal ownership.⁷⁷

In common-law states, title determines spouses' property rights during marriage. Under this approach, called "title theory," marriage is a period of

72. "Domestic relations law" refers narrowly to the rules governing married couples. "Family law" is a much broader term, encompassing all rules that govern families.

73. As I discuss in Parts I.B.2–3, common-law and community property states employ similar divorce distribution and alimony schemes.

74. WEISBERG & APPLETON, *supra* note 34, at 223.

75. *Id.* at 223. The community property states are Arizona, California, Indiana, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. *Id.* at 224 n.7.

76. *See infra* notes 90–99 and accompanying text.

77. The majority approach also shares property law's common-law origin, making it the most analogous comparator.

default separate property holding.⁷⁸ The law requires only as much marital sharing as is necessary to satisfy the common-law duty of spousal support.⁷⁹ These default rules burden spouses who wish to share and embolden those who do not.

First, title theory imposes costs on spouses who seek to share property. Many married couples maintain joint bank accounts and title large assets jointly, but creating these forms of co-ownership requires intentional action in common-law states.⁸⁰ Moreover, it is difficult or impossible to title some increasingly important sources of marital wealth, such as employer-based retirement benefits, in joint name, even should spouses wish to do so.⁸¹ As a result, background separate-property rules can create titular “property inequality in a marriage over time,” as a “wage-earning spouse, by default, becomes richer relative to [a] spouse who labors at home.”⁸²

More importantly, these default rules mean that title governs when married couples disagree about financial issues, for the law affords spouses little recourse against one another during marriage. Courts generally decline to involve themselves in married couples’ property disputes, relying instead on third parties to ensure that spouses provide one another with a certain level of material support. In the case of *McGuire v. McGuire*, for example, the Nebraska Supreme Court overturned an order requiring a husband to pay for home improvements, furniture, household appliances, and clothing, explaining that the wife could not maintain such an action unless the parties were separated.⁸³ Although critical of the husband’s tightfistedness, the court insisted that “[t]he living standards of a family are a matter of concern to the

78. WEISBERG & APPLETON, *supra* note 34, at 223; *id.* at 564 (stating that “equitable distribution laws in common law states create a ‘deferred community property’ system, with the concept of marital property becoming effective upon divorce.”); Elizabeth R. Carter, *The Illusion of Equality: The Failure of the Community Property Reform to Achieve Management Equality*, 48 IND. L. REV. 853, 860 (2015); *see also* Laura W. Morgan & Edward S. Snyder, *When Title Matters: Transmutation and the Joint Title Gift Presumption*, 18 J. AM. ACAD. MATRIM. LAW. 335, 336–38 (2003).

79. *See, e.g.*, Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 84 (1998). To be sure, what constitutes an adequate level of support depends upon the wealth of the household. *See* Elizabeth Katz, *Marital Financial Duties* ch. 1 (May 17, 2019) (unpublished dissertation chapter) (on file with the Maryland Law Review). But as support is set on the level of merchant and judicial discretion, it is hard to conceive of as a poorer spouse’s property right.

80. *See* Carter, *supra* note 78, at 862 (2015) (noting that because “separate property states do not contemplate the automatic concurrent ownership of property during marriage,” “spouses must take some affirmative step to cause title to property to be in both of their names”).

81. *Id.* at 887; Paula A. Monopoli, *Marriage, Property and [In]Equality: Remediating ERISA’s Disparate Impact on Spousal Wealth*, 119 YALE L.J. ONLINE 61, 62–64 (2009).

82. Carrillo, *supra* note 29, at 314.

83. *McGuire v. McGuire*, 59 N.W.2d 336, 336, 342 (Neb. 1953) (refusing to enforce marital obligations between still-cohabiting spouses).

household, and not for the courts to determine.”⁸⁴ The longstanding doctrine of necessities, which requires spouses to supply one another with the “necessaries” of life, bypasses courts in the first instance by enabling one spouse to pledge another’s credit to purchase such goods as food, clothing, shelter, and medical care.⁸⁵ But this doctrine imposes only an amorphous and indirect duty of support, for it works only to the extent that a third party is willing to extend credit to a poorer spouse, and only in an amount sufficient to meet the spouse’s basic needs.⁸⁶ Although there are good reasons for the state to stay out of midgame property relations,⁸⁷ family law’s deference to title, combined with courts’ refusal to intervene before divorce, means that spouses effectively hold and use property beyond state supervision.⁸⁸ In common-law states, there is no default marital property during marriage.⁸⁹ Although most spouses share resources as a factual matter, if they do not, the poorer spouse has limited property rights unless and until a couple divorces.

Although spouses in community property jurisdictions own community property jointly during marriage, title still matters, for community property management rules permit titleholders great leeway to unilaterally control community assets.⁹⁰ Historically, husbands enjoyed the sole right to manage community property, and although this privilege has been abolished on gender-equality grounds, the most common replacement management rules do not require joint action.⁹¹ Eight community property jurisdictions employ “equal management” as a default rule,⁹² but “[n]early every valuable asset is

84. *Id.* at 342.

85. See HOMER CLARK, *THE LAW OF DOMESTIC RELATIONS* 189–92 (1968); Margaret M. Mahoney, *Economic Sharing During Marriage: Equal Protection, Spousal Support and the Doctrine of Necessaries*, 22 J. FAM. L. 221, 231 (1983).

86. Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 UTAH L. REV. 537, 560 (1996).

87. See Strauss, *supra* note 46, at 1264 (describing marital duties as “imperfect” and arguing that legal enforcement thereof “displac[es] spouses’ discretion and commitment”). But see Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 835 (1985).

88. See Carter, *supra* note 78, at 854 (“The practical and predictable consequence of” common-law states’ “hands-off approach” to marital property management “is that existing gender economic inequities are simply brought home.”).

89. Cf. WEISBERG & APPLETON, *supra* note 34, at 564 (stating that “equitable distribution laws in common law states create a ‘deferred community property’ system, with the concept of marital property becoming effective upon divorce”).

90. Carter, *supra* note 78, at 854.

91. *Kirchberg v. Feenstra*, 450 U.S. 455, 456 (1981); WEISBERG & APPLETON, *supra* note 34, at 225–26 (describing history of husband’s managerial privileges); Susan Westerberg Prager, *The Persistence of Separate Property Concepts in California’s Community Property System, 1849–1975*, 24 UCLA L. REV. 1, 70–71 (1976).

92. Carter, *supra* note 78, at 878 (“Equal management is the default rule of management in every state except Texas.”). Under this rule, “either spouse, acting alone,” may “manage any aspect of the community property without the consent of the other spouse.” *Id.* at 877. This rule rests on

governed by” an “exception[.]”⁹³ Although joinder, or the consent of both spouses, is required to manage community real property,⁹⁴ as a practical matter each spouse enjoys “exclusive management over virtually every item of valuable personal property that is associated with his or her name.”⁹⁵ Not only do “[v]ehicles and business equity . . . typically . . . fall under the exclusive management” of the titleholding spouse, but so do checking and savings accounts, money market accounts, and retirement accounts.⁹⁶ And since “financial institutions operate according to . . . federal and state laws and internal procedures that rarely . . . consider . . . community property rights,”⁹⁷ individually titling a financial account can effectively preclude a spouse from accessing community funds.⁹⁸ Even in community property jurisdictions, spouses remain free to control most property titled in their names as they see fit—and to title property individually in the first instance.⁹⁹ Because community property management rules frequently devolve to title, richer spouses who so desire can individually control the lion’s share of family resources, even in these more egalitarian jurisdictions.

Because the forty-one common-law jurisdictions do little to require sharing during marriage, married spouses living in these states are situated similarly to cohabitants. And although spouses in the other nine states own community property jointly, equal enjoyment of these resources is by no means assured. Thus the conjugal period is one in which the incidents of ownership follow title, a state of affairs that can tend to the detriment of the less propertied spouse.¹⁰⁰ Not only does this baseline approach incentivize

an egalitarian but flawed premise: that spouses will consult and come to agreement before managing property. *Id.*

93. *Id.* at 882.

94. *Id.* at 878 (“The joinder requirements that exist today . . . do not reflect any attempt by legislatures to increase the wife’s participation in a couple’s financial decisions,” but rather “seem to contradict the assumption of consultation and agreement upon which the equal management rule was premised because they assume that joinder is needed to ensure that both spouses have a voice in particular financial decisions.”).

95. *Id.* at 881; *see also id.* (“[I]t is apparent that ‘equal management’ in the sense of equal and separate power in each spouse to alienate, encumber, or lease any community asset independently will exist as a matter of law in relatively few instances.”) (quoting Robert A. Pascal, *Louisiana’s 1978 Matrimonial Regimes Legislation*, 53 TUL. L. REV. 105 (1978))).

96. *Id.* at 882–83.

97. *Id.* at 884.

98. *See id.* at 885–86 (“A spouse whose name is not on an individual [financial] account simply has no right to access the funds in that account short of a court order.”) (citing 12 C.F.R. § 330.6 (2015))).

99. *Id.* at 884 (“Spouses are free to deposit their earnings and other community funds into any combination of joint accounts and individual accounts that they see fit and research shows that they most often do so in a manner that is detrimental to the wife.”).

100. *Id.* at 854–55 (“Today, wives in community property states have no better rights than wives in separate property states. In some cases, their economic position may even be worse.”); *see also*

individual property holding during marriage, but it also limits family law's ability to achieve sharing outcomes on divorce.

2. *The Separate Property Logic of Equitable Distribution*

While cohabitants and spouses are similarly situated during marriage, especially in common-law jurisdictions, the law treats them dramatically differently at the moment of divorce, when spouses' consent to marriage provides the special justification needed for family law to distribute property regardless of title. Courts in common-law states are instructed to construct a shared "marital estate," value it, and distribute it between spouses after considering a number of equitable criteria. Courts in community property states begin with the community estate, but also distribute it equitably.¹⁰¹ Although equitable distribution establishes former spouses' entitlements in derogation of title, it does so through a process that incorporates separate property assumptions. As a result, divorce distributions tend to favor titular owners and income earners, reinscribing rather than remedying property inequalities between spouses.¹⁰² In this way, divorce distribution is the exception that proves the rule of title-based ownership.

Today's equitable distribution schemes had their origins in the divorce reforms of the 1960s and 1970s.¹⁰³ Under the common-law title system, each spouse left the marriage with the assets titled in his or her own name, which in practice allowed breadwinning husbands to claim the majority of marital

Jeffrey Dew, Sonya Britt & Sandra Huston, *Examining the Relationship Between Financial Issues and Divorce*, 61 FAM. RELATIONS 615, 617 (2012) ("Regardless of how money is earned outside the home, only a minority of households manage money within the home in ways that equitably benefit both women and men.") (emphasis omitted).

101. Community property is jointly owned during marriage, but in most states divided equitably upon divorce. See Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 628 n.22, 632, 632 n.38 (1991) [hereinafter Garrison, *Good Intentions Gone Awry*]; J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage*, 56 L. & CONTEMP. PROBS. 99, 99 (1993). Thus, the infirmities of equitable distribution infect divorce distributions in both common law and community property jurisdictions.

102. See, e.g., FINEMAN, *supra* note 17 (arguing that marital property regimes enshrine formal equality at the cost of substantive equality); WEITZMAN, *supra* note 17, at 365–66 (arguing that no-fault divorce law fails to adequately account for inequality between husbands and wives during marriage); Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 309 (1987) (calling for reforms "to prevent financial and emotional harm to spouses whose choices were made . . . in light of more traditional expectations about the roles of women and men"); Joan Williams, *Do Wives Own Half? Winning for Wives After Wendt*, 32 CONN. L. REV. 249, 253 (1999) [hereinafter Williams, *Do Wives Own Half?*] (describing a family property "system that is inconsistent with our commitment to gender equality[] and leads to the widespread impoverishment of mothers and the children who depend on them").

103. Garrison, *Good Intentions Gone Awry*, *supra* note 101, at 629–31.

resources.¹⁰⁴ Equitable distribution enabled courts to allocate property without regard to title, and thus provided “a means of achieving economic equity between divorcing spouses.”¹⁰⁵

Common-law jurisdictions’ equitable distribution schemes work by constructing a jointly owned marital estate to be distributed upon divorce.¹⁰⁶ Equitable distribution generally requires a judge to (1) identify the marital assets and liabilities subject to division; (2) value them; and (3) distribute them between the spouses after considering a set of criteria enumerated by statute or articulated through case law.¹⁰⁷ Reflecting the labor-based “partnership theory” of marriage,¹⁰⁸ equitable distribution schemes were meant to recognize and reward homemakers’ nonmonetary contributions to the family.¹⁰⁹ But because title-based conceptions of ownership permeate both the identification and distribution steps, these schemes are limited in their ability to deviate from market distributions.

Separate property logic is most obvious in the first step of equitable distribution, in which courts identify which assets and liabilities are marital property subject to distribution. Under partnership theory, only “the fruits of spouses’ labor during . . . marriage” are subject to marital sharing; all other assets remain the separate property of the individual spouse.¹¹⁰ This means that in most states, property acquired either before marriage or during marriage by gift or bequest is “separate” and excluded from the marital estate or community.¹¹¹

104. See, e.g., WEISBERG & APPLETON, *supra* note 34, at 563–64; see also *Ferguson v. Ferguson*, 639 So. 2d 921, 926 (Miss. 1994) (en banc) (“Our separate property system at times resulted in unjust distributions, especially involving cases of a traditional family where most property was titled in the husband, leaving a traditional housewife and mother with nothing but a claim for alimony, which often proved unenforceable.”).

105. Garrison, *Good Intentions Gone Awry*, *supra* note 101, at 631; see also *Ferguson*, 639 So. 2d at 927 n.4 (stating that equitable distribution “refers to the authority of the courts to award property legally owned by one spouse to the other spouse”).

106. WEISBERG & APPLETON, *supra* note 34, at 564 (stating that “equitable distribution laws in common law states create a ‘deferred community property’ system, with the concept of marital property becoming effective upon divorce”).

107. See, e.g., UNIF. MARRIAGE & DIVORCE ACT § 307 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1974).

108. See Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 130 (Stephen D. Sugarman & Herman Hill Kay eds., 1990) (analogizing no-fault divorce to partnership law).

109. See, e.g., *Ferguson*, 639 So. 2d at 927 n.4 (“Under the equitable distribution system, the marriage is viewed as a partnership with both spouses contributing to the marital estate in the manner which they have chosen.”).

110. Shari Motro, *Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property*, 102 NW. U. L. REV. 1623, 1636 (2008).

111. *Id.* at 1631–37 (describing rules governing marital and separate property). The so-called “hotchpot” states, which empower courts to divide all assets owned by either spouse, regardless of

The identification step is both practically and conceptually fundamental to the divorce distribution scheme. Identification is a high-stakes inquiry, for it determines what property is subject to distribution. At the same time, classifying property as separate or marital can be complicated.¹¹² The “marital” or “coverture” period can be difficult to define,¹¹³ while separate property can become marital through “commingling” with marital assets,¹¹⁴ active management during marriage,¹¹⁵ or a pattern of family use.¹¹⁶ Although most states presume that property is marital unless proven otherwise,¹¹⁷ separate property’s payoff can be so great that wealthier couples often devote extensive efforts to drawing the lines between “yours,” “mine,” and “ours.”

As a conceptual matter, the identification step exposes important limitations of the marital property construct. Because partnership theory revolves around labor, only certain kinds of property are subject to sharing.¹¹⁸ Wages accrue to the marital estate, but capital, including human or social capital, often does not.¹¹⁹ Yet capital assets tend to be disproportionately

when or how they were acquired, are an important exception. See WEISBERG & APPLETON, *supra* note 34, at 565. But, as one commentator has noted, “even [these] states seem . . . inclined to award ‘separate’ property to the owning spouse.” J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 FAM. L.Q. 219, 220 (1989).

112. See, e.g., Joan M. Krauskopf, *A Theory for “Just” Division of Marital Property in Missouri*, 41 MO. L. REV. 165, 173–74 (1976) (“The ABA Family Law Section . . . feared the necessity of using complex . . . principles to distinguish between marital and separate property.”).

113. See, e.g., Antognini, *supra* note 18, at 8–9; Joslin, *supra* note 27, at 974–76 (discussing “interstitial marriage cases”); Allison Anna Tait, *Divorce Equality*, 90 WASH. L. REV. 1245, 1254 (2015). Compare *Estate of Mortner v. Thompson*, 182 A.3d 1260 (N.H. 2018), with *Estate of Albrecht v. Albrecht*, 908 N.W.2d 135 (N.D. 2018) (two recent death-during-divorce-proceeding cases with opposed outcomes).

114. See, e.g., *Araya v. Keleta*, 65 A.3d 40, 53 (D.C. 2013) (stating that “property may be changed or transformed such that it loses its character as ‘property acquired prior to the marriage’”); see generally Oldham, *supra* note 111.

115. See generally Suzanne Reynolds, *Increases in Separate Property and the Evolving Marital Partnership*, 24 WAKE FOREST L. REV. 239, 241 (1989).

116. See *Allgood v. Allgood*, 62 So. 3d 443, 447 (Miss. Ct. App. 2011); *Rhodes v. Rhodes*, 52 So. 3d 430, 438 (Miss. Ct. App. 2011); *Hankins v. Hankins*, 866 So. 2d 508, 511 (Miss. Ct. App. 2004).

117. See, e.g., KY. REV. STAT. ANN. § 403.190(3) (2019); MO. REV. STAT. § 452.330(3) (2019); see also UNIF. MARITAL PROP. ACT § 4(b) (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1983) (“All property of spouses is presumed to be marital property.”).

118. See, e.g., Motro, *supra* note 110, at 1636 (“Because *property acquired prior to marriage* and *gifts and bequests received during marriage* do not result from the fruits of spouses’ labor during the marriage, partnership theory classifies them as external to the marriage.”) (emphasis added).

119. See *id.* at 1625 (“Many gifts and inheritances are not the result of pure altruism, but rather reflect . . . an unarticulated exchange Most often, earnings reflect a combination of past and current labor, as well as . . . [a]n individual’s education, cultural fluency, and professional contacts accessed through social and familial networks.”); Alicia Brokars Kelly, *The Marital Partnership*

valuable and disproportionately owned by husbands.¹²⁰ Rightly or wrongly,¹²¹ the identification step insulates a potentially significant body of resources from the marital corpus. Although intended to consider property regardless of title, the identification step can be highly protective of individual property rights.

Regard for separate property also shapes the third and final step of property division, distribution, through that stage's focus on contribution. Although a few states mandate an equal distribution of marital property, most states—including community property jurisdictions—instruct courts to weigh a variety of factors and arrive at “just” or “equitable” results.¹²² These criteria reflect a number of concerns, including the spouses' respective economic circumstances, but the dominant principle is one of contribution.¹²³

Although intended to “take account of a spouse's non-financial contribution[s]” to a marriage, which “are often considerable,”¹²⁴ contribution-based reasoning tends to incorporate the conjugal period's separate property approach. By crediting spouses with “their” contributions, equitable distribution schemes assume that each spouse held discrete and pre-existing entitlements in “his” or “her” income and household labor.¹²⁵ This is hardly surprising, given that throughout the marriage ownership followed title.¹²⁶ But this assumption is faulty at the time of divorce, because against

Pretense and Career Assets: The Ascendancy of Self over the Marital Community, 81 B.U. L. REV. 59, 62 (2001) (“Overwhelmingly . . . , courts have rejected the notion that a career asset can be jointly acquired and jointly owned. Instead, the spouse who possesses the enhanced career . . . is treated as the separate owner of the asset.”).

120. See, e.g., Kelly, *supra* note 119, at 77, 93–94.

121. Some argue that, in the absence of separate property, wealthy individuals would forgo marriage and simply cohabit. On this account, protecting separate property is justified as an incentive to marriage. On the other hand, wealthier individuals are currently more likely to marry than poorer individuals—and to marry other wealthy individuals. See generally JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2014).

122. See Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1853, 1872 (2012); Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1234–36. But even in the case of equitable distribution, some scholars argue that the baseline presumption is equal ownership of marital property. See, e.g., Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401 (1996). But see Williams, *Do Wives Own Half?*, *supra* note 102, at 250 (describing an exception in cases with large marital estates); *Lester v. Lester*, 547 So. 2d 1241, 1242 (Fla. Dist. Ct. App. 1989) (taking “husband's genius” into account in distribution).

123. See FINEMAN, *supra* note 17, at 40–42.

124. *Ferguson v. Ferguson*, 639 So. 2d 921, 926 (Miss. 1994).

125. Consider the revealing language of one court in describing the net value of a business developed over a twenty-three-year marriage: “[P]lacing the husband's marital estate at \$10,100,000 and the entire marital estate at \$13,600,000 does not automatically mean that the wife is entitled to half that total sum.” *Lester*, 547 So. 2d at 1242.

126. See *supra* notes 74, 78–79 and accompanying text.

the backdrop of an ostensibly joint property moment, neither spouse had individualized rights in marital property prior to its distribution.¹²⁷ Rather than committing fully to the idea of shared marital property, the distribution stage continues to rely upon title-based conceptions of property ownership. By presupposing the answer to the very question it is supposed to consider, contribution-based reasoning injects separate property logic into the distribution process.¹²⁸

The results of this subtler form of property individualism, an example of what Reva Siegel has called “preservation-through-transformation,”¹²⁹ can be economically significant. Contribution-based reasoning tends to favor those who generated financial assets, for market forces shape both the substance and the value of spouses’ “inputs” into a marriage. Because women’s employment opportunities are limited and their earnings are depressed in comparison to men’s, women are more likely to perform caretaking and household labor than men are.¹³⁰ These “in-kind” contributions are not only difficult to value because they occur “outside” the marketplace, but are also devalued because they were traditionally women’s work.¹³¹ As a result, marital property division continues to advantage titleholders and breadwinners over caretakers, who may receive less than fifty percent of the (potentially already circumscribed) marital estate.¹³²

127. Cf. WEISBERG & APPLETON, *supra* note 34, at 564 (stating that “in common law states . . . the concept of marital property becom[es] effective upon divorce”); Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 12–13 (1989) (stating that “any theory of property division would have to generate principles for balancing claims based on title against claims based on equity, as well as a basis for allocating title in the first place”).

128. See Ellman, *supra* note 127, at 12 (“In actual operation, most divisions of property in ‘equitable distribution’ states today probably involve an unarticulated blend of title and equity principles.”); *id.* at 12 n.26 (stating that “even in their division of marital property, the common law states often consider traditional title or ownership principles in deciding what division is ‘equitable’”).

129. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178–87 (1996); see also Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119 (1997) (“[T]he effort to disestablish a body of status law can produce changes that modernize its rule structure and justificatory rhetoric. . . . [B]ut they will also enhance the legal system’s capacity to justify regulation that perpetuates inequalities among status-differentiated groups.”).

130. Allison Daminger, *The Cognitive Dimension of Household Labor*, 84 AM. SOC. REV. 609, 609 (2019) (suggesting that division of “cognitive labor” is a “source of gender inequality at the household level”); Elizabeth F. Emens, *Admin*, 103 GEO. L.J. 1409, 1414, 1422, 1437–38 (2015) (highlighting the disparity between men’s and women’s contributions to household labor); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 3, 8 (1996) (noting that women “spend significantly more time on housework than do men”).

131. See, e.g., Rosemary Hunter, *Afterword: A Feminist Response to the Gender Gap in Compensation Symposium*, 82 GEO. L.J. 147, 151–52 (1993).

132. See Williams, *Do Wives Own Half?*, *supra* note 102, at 250 (arguing that the bigger the marital pot, the lesser the percentage that the wife receives); see also Joni Hersch & Jennifer Bennett

For an illustration, consider the case of *Wendt v. Wendt*.¹³³ The spouses, the CEO of General Electric Capital Services and a homemaker, were married for thirty-one years.¹³⁴ The husband, who valued the marital estate at \$30–40 million, offered the wife \$8.3 million in property plus \$250,000 per year in alimony.¹³⁵ The wife, who valued the estate at \$90 million, demanded half.¹³⁶ Although rejecting the principle that “enough is enough,”¹³⁷ the court declared that Connecticut law does not require a presumption of equal division on its way to awarding the wife much less than half of the marital estate.¹³⁸ A recent empirical study finding that respondents “consistently favor” a working husband over a stay-at-home wife “in distributing” such a “couple’s assets” suggests that the *Wendt* judges’ approach is no outlier.¹³⁹ Although the legal construct of contribution has cemented homemakers’ claims to some marital assets, Lockean notions of individual desert continue to color property distributions upon divorce.

Because marital property regimes hew so closely to formal title, their ability to achieve distributions in derogation thereof is limited. The identification step can exclude significant individually titled assets from the marital corpus, while contribution-based reasoning makes assumptions about ownership that predetermine the answers to the very questions the distribution process sets out to ask. In these ways, divorce distribution is the exception that proves the rule of separate property. And because equitable distribution incorporates rather than challenges individualistic conceptions of property ownership, divorce awards are influenced by and reflect broader socioeconomic patterns. As a result, those who are structurally disadvantaged in the market are doubly disadvantaged under marital property regimes. Because equitable distribution law’s ability to deviate from title-based principles of ownership is limited, its approach to sharing is importantly circumscribed.

Shinall, *When Equitable Is Not Equal: Experimental Evidence on the Division of Marital Assets in Divorce*, 18 REV. ECON. HOUSEHOLD 655, 658 (2020) (finding that survey respondents consistently favor breadwinners over caretakers).

133. No. FA96 0149562 S., 1998 WL 161165 (Conn. Super. Ct. Mar. 31, 1998), *aff’d*, 757 A.2d 1225 (Conn. App. Ct. 2000).

134. *Id.* at *1.

135. *Id.* at *43.

136. *Id.* at *42.

137. *Id.* at *42–50; *see also* Mary Moers Wenig, *The Marital Property Law of Connecticut: Past, Present and Future*, 1990 WIS. L. REV. 807, 873, 873 n.289 (1990) (suggesting based upon a series of interviews with Connecticut divorce attorneys that “the more there is, the smaller the percentage the non-propertied spouse receives”).

138. *Wendt*, 1998 WL 161165, at *52.

139. Hersch & Shinall, *supra* note 132, at 658.

3. Clean-Break Norms and Alimony

Like the law of intact marriages and divorce distribution, modern alimony law reflects and reinscribes the premise that family law's distributions in derogation of title are exceptional and limited. The clean-break norms of no-fault divorce insist that former spouses' financial ties are to be severed as soon as possible after they separate. Recent state statutory reforms further emphasize that each spouse has the strong default right to exclude the other from his or her post-dissolution earnings. The 2017 rescission of alimony's tax-deductible status likewise underscores the individual nature of post-divorce property ownership. With modern spousal support regimes so limited, title reasserts itself with a vengeance after divorce. Marital sharing is thus restricted in duration, as well as in scope, even though the economic effects of marriage are not so neatly limited to the conjugal period.

Alimony, or a "court-ordered allowance that one spouse pays to the other . . . for maintenance and support" during separation or after divorce, originated as the wife's sole remedy upon legal separation.¹⁴⁰ Since such ecclesiastical divorces "from bed and board" did not sever marital bonds, the husband retained the couple's property and was required to support the wife from it.¹⁴¹ As civil divorce "from the 'chains of matrimony'" became more common, English courts ceased to distinguish between legal separations and absolute divorces and began to award alimony in both causes of action.¹⁴² U.S. states followed suit when they passed absolute divorce statutes in the nineteenth century.¹⁴³

Since the divorce reforms of the 1960s and 1970s, alimony has become increasingly disfavored.¹⁴⁴ Modern domestic relations doctrine attempts to provide for economically vulnerable ex-spouses through marital property division, rather than ongoing post-divorce transfer payments.¹⁴⁵ When courts do order spousal support, these awards tend to take some form of short-term alimony, whether aimed at economically rehabilitating a former spouse,

140. *Alimony*, BLACK'S LAW DICTIONARY (11th ed. 2019); see also Garrison, *Good Intentions Gone Awry*, *supra* note 101, at 623 (describing alimony as "the traditional entitlement of a divorced wife").

141. Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23, 28–29 (2001); see also Garrison, *Good Intentions Gone Awry*, *supra* note 101, at 623 (describing alimony as "the traditional entitlement of a divorced wife").

142. Collins, *supra* note 141, at 28, 30.

143. Garrison, *Good Intentions Gone Awry*, *supra* note 101, at 626.

144. *Id.* at 628–32.

145. See, e.g., D.C. CODE § 16-910(b)(4) (2016) (requiring courts to consider "whether the [property] distribution is in lieu of or in addition to alimony").

providing restitution for relationship-specific investment, or easing the financial transition to post-divorce life.¹⁴⁶ Some states have also imposed durational limits on long-term or “permanent” alimony.¹⁴⁷ These changes all reflect the “clean break” norms of no-fault divorce, which emphasize severing former family members’ financial ties.¹⁴⁸

The strong presumption against shifting post-marital income marks an individual’s resources as “his” or “her” own after divorce, reinstating the title-based separate property regime that existed before (and in most states during) marriage. Although it seems natural to consider post-divorce income as belonging to the ex-spouse to whom it is paid,¹⁴⁹ this perception is a construction of modern spousal support law, which is making a particular policy choice: to elevate the logic of individual contribution over norms of spousal cooperation and sharing.¹⁵⁰ The post-divorce reassertion of what Joan Williams has called the “‘he who earns it, owns it’ rule” further demonstrates family law’s individualistic approach to property.¹⁵¹ As a practical matter, the decreased availability of spousal support means that wage-earners keep the lion’s share of their post-divorce income, while caretaker spouses tend to bear a disproportionate share of the lifelong career costs associated with parenting and household maintenance.

146. Stolzenberg, *supra* note 28, at 2034–35 (“Since the no-fault divorce revolution, states have moved toward alimony regimes in which judges choose between different kinds of time-limited awards, all of which are meant to assist a poorer spouse in attaining post-divorce financial independence.”); *see also, e.g.*, N.J. STAT. ANN. § 2A:34-23(b) (2018) (allowing courts to award permanent, rehabilitative, limited duration, or reimbursement alimony); *In re Marriage of Becker*, 756 N.W.2d 822, 826 (Iowa 2008) (describing purposes of various kinds of alimony).

147. *See, e.g.*, MASS. GEN. LAWS ch. 208, § 49(b), (f) (2018); N.J. STAT. ANN. § 2A:34-23(c) (2018); TEX. FAM. CODE ANN. § 8.054 (2019). Some states also have presumptions against alimony. *See, e.g.*, TEX. FAM. CODE ANN. § 8.053 (2019).

148. Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 L. & CONTEMP. PROBS. 25, 35 (2015) (“The law of divorce . . . has come to privilege . . . a ‘clean break,’ with each party returning to the marketplace to make his way.”); Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 UTAH L. REV. 687, 704 (1994) (describing no-fault divorce law’s “‘clean break’ policy”).

149. The president of the advocacy group Massachusetts Alimony Reform, for example, likens alimony to “indentured servitude.” Christian M. Wade, *Advocates Want Lawmakers to Revisit Alimony Law*, MASS. ALIMONY REFORM BLOG (July 3, 2017), <https://www.massalimonyreform.org/blog/2017/7/3/advocates-want-lawmakers-to-revisit-alimony-law>.

150. *Cf.* Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2257–58 (1994) (arguing that a husband’s earnings should be considered a family wage rather than his individual income); *supra* notes 118–121 and accompanying text; *see also* Margaret F. Brinig, *Property Distribution Physics: The Talisman of Time and Middle Class Law*, 31 FAM. L.Q. 93, 95 (1997) (“As the economist sees it, alimony ‘frozen’ in time . . . is simply another form of property.”).

151. Williams, *Do Wives Own Half?*, *supra* note 102, at 249.

The Tax Cuts and Jobs Act of 2017's repeal of the alimony deduction makes the clean-break norms of modern divorce law especially clear.¹⁵² Previously, alimony was tax-deductible for the payer and taxable to the recipient, meaning that it was usually taxed at a lower income bracket.¹⁵³ This rule approximated the treatment of income in an intact marriage, in which the total income of spouses electing to file jointly was treated as a family wage, spread across both spouses as a single earning unit, which could result in a lower rate of taxation.¹⁵⁴ But the Act eliminates the tax deductibility of alimony payments made according to divorce decrees entered or separation agreements executed after December 31, 2018.¹⁵⁵ By treating alimony as income to the earner and not to the ex-spouse, the law conceptualizes alimony as a gift between unrelated parties,¹⁵⁶ rather than as income shared between former family members—thereby emphasizing that divorce reasserts a title-based regime of separate property. The Act's practical effect, of course, is to further disincentivize generous alimony payments by decreasing the amount of income available for transfer.

* * *

As this Part has shown, the family property system revolves around title for cohabitants and spouses alike. Cohabitants live the entire course of their relationships under a default separate property regime, while common-law marital property regimes are likewise built upon a foundation of separate property rights. Family law's repeated attention to title reveals the marital and nonmarital property systems to be structurally similar, with their differences being of degree, rather than kind. Individualism drives the laws of both marital and nonmarital property and produces predictable distortions in both.

If we seek to decrease the degree of property asymmetry between spouses and at least some cohabitants, then we need to interrogate family law's approach to property. At first blush, family law's protective stance toward individual property rights might seem consistent with foundational

152. Tax Cuts and Jobs Act of 2017, Pub. L. 115–97, § 11051, 131 Stat. 2054, 2089–90.

153. INTERNAL REVENUE SERV., PUBL'N 504, DIVORCED OR SEPARATED INDIVIDUALS 13 (Feb. 5, 2019), <https://www.irs.gov/pub/irs-prior/p504—2018.pdf>.

154. *See, e.g., id.* at 4 (advising dual-income married couples to calculate their “tax on both a joint return and separate returns . . . to see which” filing status yields “the lower combined tax”).

155. Tax Cuts and Jobs Act of 2017, Pub. L. 115–97, § 11051, 131 Stat. 2054, 2089–90 (“Repeal of Deduction for Alimony Payments”); *id.* § 11051(c)(1); *see also id.* § 11051(c)(2) (providing that the Act also applies to pre-existing agreements and decrees modified after December 31, 2018 “if the modification expressly provides that the amendments . . . apply”).

156. Gifts in amounts up to the annual exclusion rate of \$15,000 are taxable to the donor, not the recipient. *See Frequently Asked Questions on Gift Taxes*, IRS.GOV, <https://www.irs.gov/businesses/small-businesses-self-employed/frequently-asked-questions-on-gift-taxes> (last visited May 23, 2021).

notions of private property.¹⁵⁷ But as the next Part explains, nothing in non-family property law requires family law's absolutist, individualistic approach to property. Instead, property law sometimes conducts a more nuanced consideration of intimate relationships' distributional consequences than family law doctrine currently undertakes.

II. INTIMACY IN PROPERTY LAW

In non-family property disputes, title is the beginning, but not always the end, of the inquiry. Property law sometimes looks beyond title by granting entitlements on other bases, including labor, use, and reliance.¹⁵⁸ Property law also frequently limits titleholders' prerogatives by constraining their ability to exclude others from, as well as by limiting the ways in which they can use, their property.¹⁵⁹ This flexible approach to title allows property law to balance promoting owners' autonomy with furthering other important values and interests.¹⁶⁰

Scholars recognize that property law sometimes looks beyond title and curbs titleholder discretion, but they disagree about the frequency and meaning of these limits. "Essentialist" theorists, who identify the owner's right to exclude as the core of property, consider these limits to be exceptional.¹⁶¹ In contrast, "progressive" theorists argue that these limits reveal property law's defining characteristic, its use to structure social relationships.¹⁶² This lively debate about property's meaning and purposes reflects the multifaceted nature of property law, which comprises a multiplicity of institutions structured to pursue diverse and incommensurable values.¹⁶³

In conversation with these theories, I argue that one of the values that property law recognizes and pursues is *intimacy*. An examination of property doctrine shows that the right to exclude from a given resource varies across relationships. A right that is good against a stranger may not always hold with the same strength against a neighbor, a co-owner, or an heir. These

157. Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743 (2009) (describing the "common conception of property as protection of individual control over valuable resources" as "both intuitively and legally powerful" and "extremely influential in discussions of property rights in the United States"); see generally ALEXANDER, *supra* note 30; LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* (2003).

158. See *infra* Part II.A.1.

159. See *infra* Part II.A.2.

160. See *infra* notes 164–166 and accompanying text.

161. See *infra* notes 231–234 and accompanying text.

162. See *infra* notes 235–242 and accompanying text.

163. See DAGAN, *supra* note 21, at xi.

relationships are marked by mutual dependence, interdependence, and vulnerability—in other words, intimacy. Property law responds to the social facts of close, complex relationships by adjusting the incidents of ownership accordingly. Under this approach, which I describe as instantiating a “spectrum of intimacy,” an owner’s prerogatives may depend in part upon his or her relationship with a particular property claimant. Property’s occasional willingness to blunt the hard edges of owners’ prerogatives in the service of other values, including social ones, demonstrates forcefully that absolutist individualism is not the only model of property rights available to family property law.

A. *Limits in Property Law*

Even a brief examination of property law reveals a far more qualified approach to title than that employed by family law. Title is relative in property law,¹⁶⁴ an approach that allows for greater flexibility in resolving disputes over resources.¹⁶⁵ This flexibility is necessary because property law is used to distribute access to a wide range of valuable goods, many of which are required for the continuation of biological and social life.¹⁶⁶ Property law employs two main strategies to mediate the inevitable, varied, and often high-stakes conflicts between competing interests: (1) assigning rights to titular non-owners on grounds other than title, and (2) leaving title intact but limiting the uses to which owners may put their property. Through these mechanisms, entitlements can be adjusted in light of other important social values and interests.

1. *Rights in Derogation of Title*

Although ownership generally follows title in property law, the two concepts sometimes diverge. A number of doctrines establish property rights in titular non-owners to reward labor, protect use, or recognize reliance—even at the expense of the formal titleholder. These doctrines’ flexible approach to title allows property law to balance owners’ autonomy against both systemic concerns, such as encouraging productive use of resources and quieting old claims, as well as moral considerations, including desert, reliance, personhood, and vulnerability.

164. JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 164 (4th ed. 2018) (stating that “title to property is *relative*, not absolute”).

165. Cf. Nestor M. Davidson, *Property’s Morale*, 110 MICH. L. REV. 437, 476 (2011) (calling “flexibility . . . a dynamic that any supposed Blackstonian may have every reason to value”).

166. Alexander, Peñalver, Singer & Underkuffler, *supra* note 157, at 744 (“Property . . . allocates scarce resources that are necessary for human life, development, and dignity.”)

The most notable example of property law deviating from title to reward labor is the doctrine of accession, but easements by estoppel and adverse possession also take labor into consideration. Reasoning that individuals should be entitled to enjoy the fruits of their efforts, these bodies of law vindicate a Lockean theory of desert.¹⁶⁷ By protecting labor, these doctrines also encourage the productive use of resources.

Under the doctrine of accession, a good faith occupant of another's property gains title to that property by substantially transforming it.¹⁶⁸ Labor not only provides the test for substantial transformation, but also dictates the original owner's remedy. First, the kind or extent of an occupant's labor determines who takes title to the improved chattel. In his discussion of accession, Blackstone cites approvingly the Roman law examples of "chang[ing]" a thing "into a different species"—specifically, the "making wine, oil, or bread" from "another's grapes, olives, or wheat"—via manufacturing processes that involved significant human effort in preindustrial times.¹⁶⁹ In modern times, the degree to which labor has increased an article's market value decides between the original owner's and improving occupant's claims. In *Wetherbee v. Green*, for example, the Michigan Supreme Court declared that

the question, how much the property or labor of each has contributed to make it what it is, must always be one of first importance. The owner of a beam built into the house of another loses his property in it, because the beam is insignificant in value . . . as compared to that to which it has become attached, and the musical instrument belongs to the maker . . . because in bringing it to its present condition the value of the labor has swallowed up and rendered insignificant the value of the original materials.¹⁷⁰

And because sufficiently transformational labor legally extinguishes the original thing, it limits the original owner's remedy to money damages for

167. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT, §§ 25-511, at 285-302 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (arguing that because we own our bodies and labor, we can come to own unowned things by mixing our labor with them); see also Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1226-29 (1979).

168. See *Wetherbee v. Green*, 22 Mich. 311, 313-14, 321 (1871); see also *Silbury v. McCoon*, 3 N.Y. 379, 385-86 (1850) (stating that "if the chattel wrongfully taken, afterwards come into the hands of an innocent holder who believing himself to be the owner, converts the chattel into a thing of different species so that its identity is destroyed, the original owner cannot reclaim it").

169. 2 WILLIAM BLACKSTONE, COMMENTARIES *404.

170. *Wetherbee*, 22 Mich. at 320; see also *id.* at 313, 321 (concluding that the defendant, whose labor transformed timber allegedly worth \$25 into barrel hoops worth close to \$700, "appear[ed] to have given the timber in its present condition nearly all of its value" and was therefore entitled to a new trial to prove good faith conversion).

the value of the unimproved property.¹⁷¹ In this way, the doctrine of accession rewards the right kind of labor by effecting a transfer of title to the laborer.

Labor also does secondary explanatory work in doctrines that rest more recognizably on other principles. Cases in which courts declare easements by estoppel often rest not only on claimants' reliance upon a right-of-way, but also on their efforts to improve it.¹⁷² Similarly, while adverse possession follows from a period of hostile use of another's land, that use must be productive to be qualifying.¹⁷³ Here, too, labor plays a role in cementing property rights, even in derogation of title.

Property law also sometimes deviates from title to protect non-titleholders' use of resources. The doctrines of adverse possession, prescriptive easements, and easements implied from prior use all transfer entitlements from record owners to non-titled property users. The doctrine of customary right, on the other hand, prevents titleholders from interfering with certain customary uses of their unimproved property by others. These doctrines simultaneously encourage the productive use of resources and stabilize longstanding uses, both important goals of the common-law property system.

The doctrine of adverse possession, which establishes a new chain of title in the adverse possessor, provides the strongest example of how use can ground property rights.¹⁷⁴ A finding of adverse possession requires use that is appropriate to the nature of the property possessed. "As a general rule, either actual or constructive occupation, cultivation or residence or use is necessary," but "such occupancy and use is not as rigidly or literally required in order to establish a claim . . . for land which does not lend itself to permanent, useful improvement."¹⁷⁵ Although the law is sensitive to the

171. *Id.* at 316; *see also id.* at 313, 316 (explaining that granting replevin would permit the original owner to "appropriat[e] . . . the labor and skill of the innocent occupant who wrought the change").

172. *See, e.g.,* *Holbrook v. Taylor*, 532 S.W.2d 763, 766 (Ky. 1976) (describing successful appellees' efforts to improve and maintain the disputed roadway).

173. *See infra* notes 174–177 and accompanying text.

174. Under this doctrine, a claimant may wrest title to property from a record owner by showing that his possession was "actual, exclusive, open and notorious, continuous, and adverse under a claim of right" for a time period whose length varies by jurisdiction. THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 170 n.2 (3d ed. 2017); *id.* at 170 n.1 ("The time for bringing an action to recover possession of real property varies widely from state to state, from a low of five years to a high of 40 years.") (citing JOSEPH WILLIAM SINGER, *INTRODUCTION TO PROPERTY* § 4.2.6 (2001)).

175. *Kayser v. Dixon*, 309 So. 2d 526, 528–29 (Miss. 1975); *see also* *Apperson v. White*, 950 So. 2d 1113, 1117 (Miss. Ct. App. 2007) ("Possessory acts necessary to establish a claim of adverse possession may vary with the characteristics of the land," and "adverse possession of "wild" or unimproved lands may be established by evidence of acts that would be wholly insufficient in the

character of the disputed resource, courts have held that mere recreational use is not sufficient.¹⁷⁶ This requirement for a minimum level of use reflects the doctrine's "underlying philosophy . . . that land use has historically been favored over disuse, and that therefore he who uses land is preferred in the law to he who does not, even though the latter is the rightful owner."¹⁷⁷ Under adverse possession, productive use is so important that it trumps the idle titleholder's entitlement.

The doctrine of prescriptive easements also centers around and rewards use. "The elements necessary to establish a prescriptive easement are" nearly "identical with those required to prove . . . adverse possession."¹⁷⁸ If a party demonstrates that his or her use of another's property was "open, notorious, continuous and adverse" for the required statutory period,¹⁷⁹ then that use will give rise to "a title by prescription."¹⁸⁰ The Supreme Court of California has described the "doctrine of prescription," like that of adverse possession, as "aimed at 'protecting' and 'stabilizing' a long and continuous use . . . as against the claims of an alleged 'owner' of the property."¹⁸¹ Use can also play an evidentiary role in the transfer of title. In California, "continuous use of an easement over a long period of time without the landowner's interference is presumptive evidence of its existence . . ."¹⁸² Again, a longstanding pattern of use can engender property rights.

Use also gives rise to entitlement when courts imply easements from prior use. These easements

arise[] when there has been a 'separation of title, a use before separation took place which continued so long and was so obvious or manifest as to show that it was meant to be permanent, and . . . the easement is necessary to the beneficial enjoyment of the land granted or retained.'¹⁸³

case of improved or developed lands.'") (quoting *Walker v. Murphree*, 722 So. 2d 1277, 1281 (Miss. Ct. App. 1998)).

176. *See, e.g., Moore v. Stills*, 307 S.W.3d 71, 76, 83 (Ky. 2010) (finding activities such as hunting, fishing, and driving over land in all-terrain vehicles insufficient to support jury verdict of adverse possession).

177. *Warsaw v. Chi. Metallic Ceilings, Inc.*, 676 P.2d 584, 590 (Cal. 1984) (quoting *Finley v. Yuba Cnty. Water Dist.*, 160 Cal. Rptr. 423, 427 (Cal. Ct. App. 1979)).

178. *Taormino v. Denny*, 463 P.2d 711, 716 (Cal. 1970).

179. *Warsaw*, 676 P.2d at 587; MERRILL & SMITH, *supra* note 174, at 170 n.1.

180. *Taormino*, 463 P.2d at 716.

181. *Warsaw*, 676 P.2d at 590.

182. *Id.* at 588.

183. *Schwab v. Timmons*, 589 N.W.2d 1, 6 (Wis. 1999) (quoting *Bullis v. Schmidt*, 93 N.W.2d 476, 478-79 (Wis. 1958)); *see also* RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.12 (AM. L. INST. 2000); *id.* § 2.11 cmt. d.

Although this kind of easement relies on contractual reasoning, inferring the parties' intent to convey an easement from a pattern of use, its stated goal and effect is to protect a usage upon which enjoyment of the dominant estate depends.¹⁸⁴

While adverse possession and easements tend to protect use by discrete individuals,¹⁸⁵ the doctrine of customary right protects any person engaged in certain longstanding uses of land. Protection for hunting provides one example. In 1818, the Constitutional Court of Appeals of South Carolina declared the "right to hunt on unenclosed and uncultivated lands" to be "clearly established."¹⁸⁶ Not only was the right described as "universally exercised from the first settlement of the country up to the present time," the court also defended the usage as necessary to both subsistence and the militia's readiness.¹⁸⁷ Over one hundred years later, the United States Supreme Court similarly concluded that a "license may be implied from" the "common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts . . . of this country . . . [o]ver [which] it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it."¹⁸⁸ Although the usage holds less sway in modern times, its influence is clear in states with so-called "posting laws."¹⁸⁹ Rural landowners in these jurisdictions can exclude hunters if they choose, but doing so requires them to take the affirmative step of "prominently" displaying "'No Hunting' or 'No Trespassing' signs" on their property.¹⁹⁰ Public access to beaches and the European "right to roam" are similarly founded on principles of customary use.¹⁹¹

184. See RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.11 cmt. e (AM. L. INST. 2000) ("The inference is based on the conclusion that, under the circumstances, it is reasonable to infer that the parties intended to create a servitude but failed to give full expression to their intent.").

185. MERRILL & SMITH, *supra* note 174, at 983 ("Very roughly speaking, an easement is functionally like a contract in which an owner agrees to waive his or her right to exclude certain kinds of intrusions by another and give the other a right to use . . ."); *id.* at 986 ("An easement . . . is regarded as an irrevocable conveyance of the right to engage in a particular use of land.").

186. *McConico v. Singleton*, 9 S.C.L. 244, 351–52 (S.C. Const. Ct. App. 1818).

187. *Id.*

188. *McKee v. Gratz*, 260 U.S. 127, 136 (1922) (Holmes, J.).

189. MERRILL & SMITH, *supra* note 174, at 371 n.1; Richard M. Hynes, *Posted: Notice and the Right to Exclude*, 45 ARIZ. ST. L.J. 949, 951 (2013); Mark R. Sigmon, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549, 584 (2004) ("Twenty-nine states currently require private landowners to post their land to exclude hunters . . .").

190. MERRILL & SMITH, *supra* note 174, at 371–72 ("These laws impose an affirmative burden of notification on the possessor of land in order to assert the right to exclude. If the owner does not make the required notification, then the right to exclude is subordinated to the customary right to hunt on unenclosed and uncultivated land owned by another.").

191. *Oregon ex rel. Thompson v. Hay*, 462 P.2d 671, 673–75 (Or. 1969) (longstanding public use of beaches limited owners' rights to exclude); David A. Dana & Nadav Shoked, *Property's Edges*, 60 B.C. L. REV. 753, 771 n.86 (2019) ("[T]he law in Scotland and Sweden . . . allows public

Finally, property law also deviates from title to protect non-owners' reliance interests vis-à-vis a particular resource.¹⁹² The most obvious example is the doctrine of easements by estoppel, but adverse possession has also been justified in these terms. Because of their nature, reliance-based entitlements present the clearest illustration of the role that moral intuitions can play in property law.

An easement by estoppel arises from a user's reliance on an owner's "permission" for or "acquiescence" to a use of his or her property.¹⁹³ In Kentucky, for example, reliance on "a license . . . to erect structures" gives rise to "an interest . . . in the nature of an easement,"¹⁹⁴ "a grant through estoppel."¹⁹⁵ So strong is the reliance interest that the time period for adverse possession need not have passed for a license to become irrevocable.¹⁹⁶ Rather, the Kentucky Supreme Court has reasoned that, once permission is given and relied upon, "[i]t would be unconscionable to permit the owner[] . . . to revoke the license by obstructing and preventing its use."¹⁹⁷ The language of unconscionability reflects a moral judgment that, at least in cases where the user's reliance interest is great as compared to the owner's loss,¹⁹⁸ individuals should be able to depend on and order their lives around certain kinds of representations made by others.¹⁹⁹

Although as a doctrinal matter adverse possession turns mainly on use,²⁰⁰ it is commonly justified in terms of protecting "the reliance interests that the possessor may have developed through longstanding possession of

access on unimproved, private land for 'roaming' while making actionable any intrusion into cultivated areas and the area around a home, which the Swedish label the 'tomt.');" *see also* Heidi Gorovitz Robertson, *Public Access to Private Land for Walking: Environmental and Individual Responsibility as Rationale for Limiting the Right to Exclude*, 23 GEO. INT'L ENV'T. L. REV. 211, 215 (2011); Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 684–88 (2011).

192. Davidson, *supra* note 165, at 452 ("[P]roperty law does recognize expectations, albeit sometimes with barely a nod before trampling reliance and at other times by providing very strong protection.")

193. MERRILL & SMITH, *supra* note 174, at 1002 n.3.

194. *Holbrook v. Taylor*, 532 S.W.2d 763, 764 (Ky. 1976) (quoting *Lashley Telephone Co. v. Durbin*, 228 S.W. 423, 423 (Ky. Ct. App. 1921)).

195. *Id.* at 765 (quoting *McCoy v. Hoffman*, 295 S.W.2d 560, 561 (Ky. Ct. App. 1956)).

196. *Id.*

197. *Id.* (quoting *Akers v. Moore*, 309 S.W.2d 758, 759 (Ky. 1958)) (internal quotation marks omitted).

198. *Id.* (describing the land to which access was disputed as a "strip . . . of trivial value") (internal quotation marks omitted).

199. *Cf., e.g., Davidson, supra* note 165, at 476 ("As the discourse on expectation makes clear, moral intuitions are indeed important to how people decide to approach property."); *id.* at 487 ("Reliance is a normative value worth weighing[.]").

200. *See supra* notes 174–177 and accompanying text.

the property.”²⁰¹ In discussing the doctrine, Holmes observed that “man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown up to a certain size, can’t be displaced without cutting at his life.”²⁰² More recent commentators have described the doctrine as recognizing an adverse possessor’s greater personhood interests in the property or “plac[ing] the loss on the person who will suffer it least—the person whose roots are less vitally embedded in the land.”²⁰³

Joseph Singer has developed the most expansive account of reliance-based property entitlements.²⁰⁴ For Singer, not just adverse possession and prescriptive easements, but also “rules about . . . public rights of access to private property, tenants’ rights, equitable division of property on divorce, [and] welfare rights” all vindicate a vulnerable party’s “[l]egitimate reliance” on access to property.²⁰⁵ These doctrines further “the security of the weaker party” in “relations of mutual dependence” by limiting “the freedom of the stronger party to do whatever she wants with ‘her’ property.”²⁰⁶ Singer argues that the law’s “choice” to deviate from titular ownership under these circumstances reflects the “moral principle” that it is “fair” to readjust entitlements “to protect each of the competing interests to some extent.”²⁰⁷

Although doctrines protecting reliance provide the clearest example of the role of moral judgments in property law, doctrines rewarding labor and protecting use also implicate moral principles.²⁰⁸ This is so because, on a fundamental level, property law is always making hard choices about whose

201. See MERRILL & SMITH, *supra* note 174, at 172; see also Thomas J. Miceli & C.F. Sirmans, *An Economic Theory of Adverse Possession*, 15 INT’L REV. L. & ECON. 161, 166 (1995) (examining the economic effects of protecting adverse possessors’ reliance interests).

202. Letter from Oliver Wendell Holmes to William James (Apr. 1, 1907), in THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS 417–18 (Max Lerner ed., 1943).

203. Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 745, 748–49 (1986) [hereinafter Radin, *Time, Possession, and Alienation*] (arguing from personhood theory); Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2420 (2001) (arguing from empirical psychology).

204. See generally Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988); see also Davidson, *supra* note 165, at 476–77 (describing Singer’s “moral account” as “an explication of how interdependence might be worthy of legal recognition in property despite classic liberal conceptions of the isolated and exclusive owner”).

205. Singer, *supra* note 204, at 622.

206. *Id.* at 622–23.

207. *Id.* at 622–23, 663; see also Radin, *Time, Possession, and Alienation*, *supra* note 203, at 749 (describing the question when “the titleholder” is “detached enough and the adverse possessor attached enough” to warrant transferring title as a “moral judgment”).

208. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007) (arguing that “[p]roperty can function as property only if the vast preponderance of persons recognize that property is a moral right”).

interests to prioritize and which goals to pursue.²⁰⁹ Indeed, such value judgments are inevitable in a system that governs access to the resources necessary for biological and social life.²¹⁰ By considering the labor, use, and reliance interests of non-owners in assigning entitlements, property law can balance owners' prerogatives with other systemic concerns and moral values, allowing it to pursue a range of purposes beyond titleholder autonomy.

2. *Curbs on Owners' Authority*

Assigning nonowners rights to property titled in others' name is the exception in property law, rather than the rule. More frequently, property law balances owners' autonomy with competing considerations by following title but refusing to allow owners to exercise Blackstonian exclusive dominion over their property.²¹¹ In these cases, property law either constrains owners' ability to exclude others from, or limits the ways in which they can use, their property.

For an example of the first balancing strategy, consider two exceptions to the law of trespass: the defenses of necessity and public policy. Under the common law, "an entry upon the land of another may be justified by necessity," and this principle "applies with special force to the preservation of human life."²¹² And in New Jersey, an owner's right to exclude is weighed against other social interests at stake in a given dispute.²¹³ These doctrines reflect a balancing of "individualism" with "the social interest."²¹⁴ Public accommodation laws and antidiscrimination laws similarly limit owners' ability to exclude others from private property open to the public in order to protect access to the spaces of collective life.²¹⁵ These constraints on owners'

209. Alexander, Peñalver, Singer & Underkuffler, *supra* note 157, at 743–44 (noting "the inevitable impacts of one person's property rights on others" and arguing that "[c]hoices about property entitlements are unavoidable").

210. *Id.* at 744 ("Property . . . allocates scarce resources that are necessary for human life, development, and dignity.")

211. See, e.g., Rashmi Dyal-Chand, *Sharing the Cathedral*, 46 CONN. L. REV. 647, 655 (2013); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1382–85 (1993) (describing some such limits); Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 55 (1987) ("In a number of instances, . . . [t]he private preferences of individual landowners . . . are not permitted to govern."); see also Schorr, *supra* note 21, at 104 (describing how the "absolute, individualistic view of property" came to be identified with Blackstone).

212. *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908).

213. *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971) ("Property rights serve human values. They are recognized to that end, and are limited by it.")

214. *Id.* at 373 (quoting 5 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 745, at 493–94 (Patrick J. Rohan ed., 1970)).

215. See MERRILL & SMITH, *supra* note 174, at 373–76, 391–92; see also Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1464–

prerogatives reflect the judgment that other values can at times outweigh individual autonomy. When owners' use of their resources conflicts with maintaining human life or ensuring the equal dignity of all members of society, property law prioritizes the latter.

Examples of the second balancing strategy, constraining the uses to which owners can put their property, include the doctrine of nuisance and zoning regimes.²¹⁶ These bodies of law share the same purpose: to prevent land use that "injures the rights of others."²¹⁷

Nuisance law attempts this end by forbidding "unreasonable" uses of property that prevent others from enjoying their own property.²¹⁸ The *Restatement (Second) of Torts* declares a use "unreasonable if . . . the gravity of the harm outweighs the utility of the actor's conduct."²¹⁹ Although some courts have glossed nuisance law as involving "a balancing of the landowners' interests,"²²⁰ the Restatement's balancing test sweeps more broadly, calling for a comparison of the competing uses' value to society writ large.²²¹ The crux of the inquiry is the extent to which a property use "generally advances or protects the public good."²²² Although recognizing

65 (1996) (explaining that property rights have always been "contextual, changing over time, and dependent on the effects their exercise has on others").

216. Zoning and nuisance can be functional equivalents. MERRILL & SMITH, *supra* note 174, at 1079 n.6 (describing other public tools of land-use control); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 682 (1973) (arguing "that conflicts among neighboring landowners are generally better resolved by systems less centralized than master planning and zoning").

217. *Prah v. Maretti*, 321 N.W.2d 182, 187 (Wis. 1982); *see also id.* at 189 (noting that American "society has increasingly regulated the use of land by the landowner for the general welfare").

218. RESTATEMENT (SECOND) OF TORTS § 826(a) (AM. L. INST. 1979); *see also id.* § 821D (defining a private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land"); *Hendricks v. Stalnaker*, 380 S.E.2d 198, 200 (W. Va. 1989) (describing a nuisance as "a substantial and unreasonable interference with the private use and enjoyment of another's land").

219. RESTATEMENT (SECOND) OF TORTS § 826(a) (AM. L. INST. 1979); *see also id.* § 827 ("gravity of harm" factors include the "extent" and "character of the harm involved," the "social value that the law attaches to the type of use or enjoyment invaded," the invaded use's "suitability . . . to the character of the locality," and the "the burden on the person harmed of avoiding the harm"); *id.* § 828 ("utility of conduct" factors include "the social value that the law attaches to the primary purpose of the conduct," its "suitability . . . to the character of the locality," and "the impracticability of preventing or avoiding the invasion"). These factors "[are] not intended to be exhaustive." *Id.* § 827 cmt. b.

220. *See, e.g., Hendricks v. Stalnaker*, 380 S.E.2d 198, 202 (W. Va. 1989).

221. "Social value" appears on both sides of the nuisance balancing test. Compare RESTATEMENT (SECOND) OF TORTS § 827 (AM. L. INST. 1979) ("gravity of harm" factors include the "social value that the law attaches to the type of use or enjoyment invaded"), with *id.* § 828 ("utility of conduct" factors include "the social value that the law attaches to the primary purpose of the conduct").

222. *Id.* § 828 cmt. f.

that “there is often no uniformly acceptable scale or standard of social values to which courts can refer,” the Restatement suggests that judges deciding nuisance suits “consider . . . community standards,” as well as “the relative social value of various types of human activity.”²²³ Thus the Restatement recognizes that individual “freedom of conduct has some social value,”²²⁴ but limits that freedom when conduct results in severe externalities. By rendering “[t]he rights of neighboring landowners . . . relative,” the law of nuisance balances owners’ autonomy with its potentially negative effects upon others.²²⁵

More wide-ranging than nuisance law, zoning and other land-use regulations limit the uses to which owners may put their property in order to spatially separate incompatible uses.²²⁶ Zoning “segregat[es] . . . land uses into different districts” by “defin[ing] classes of activities . . . that are permitted in each geographic area” and prescribing “structural” details ranging from “building and lot dimensions” to “matters like minimum parking space and the use of signs.”²²⁷ Prospective compliance with these restrictions is mandatory for landowners.²²⁸ Although commentators have questioned the extent to which zoning regulations further the “public interest” rather than a subset of private interests,²²⁹ it is unquestionable that zoning represents a significant community-minded limit on individual property rights. The prevalence of this form of regulation in the United States

223. *Id.* § 828 cmt. b; *id.* § 828 cmt. f. (“On the whole, . . . activities that are customary and usual in the community have relatively greater social value than those that are not, and those that produce a direct public benefit have more than those carried on primarily for the benefit of the individual.”).

224. *Id.* § 828 cmt. e; *see also id.* (“[I]t is in the general public interest to permit the free play of individual initiative *within limits*.”) (emphasis added).

225. *Prah v. Maretti*, 321 N.W.2d 182, 187 (Wis. 1982); *see also Dyal-Chand, supra* note 211, at 687 (stating that “rights are relatively less hard-edged in nuisance law, resulting in more rhetorical and doctrinal recognition of the need for accommodation among ‘neighbors’”) (emphasis omitted); Singer, *supra* note 215, at 1464 (“*Nuisance* doctrine expressly qualifies property rights by reference to their effects on other property owners and on the public at large.”).

226. *See Ellickson, supra* note 216, at 692.

227. *Id.* at 692, 766.

228. *Id.* at 691 (“Zoning relies . . . on . . . the imposition of mandatory standards on permitted activities.”); *id.* at 692 (stating that “due to the harshness of retroactive application[,] [n]onconforming uses and, to a greater degree, nonconforming structures that preexist zoning restrictions are generally allowed to continue”).

229. *Id.* at 699 (“As it is usually operated, . . . zoning is an inequitable system . . . that . . . does not correct the changes in wealth distribution it causes.”); *id.* at 696 (“In most communities, . . . zoning ordinances are designed to promote the interests of single-family homeowners, often a majority of the voting population.”).

underlines the extent to which title is not the sole arbiter of entitlements in property law.²³⁰

* * *

In property law, title is the beginning, but not necessarily the end, of the question who enjoys entitlements in a given resource. Property law sometimes limits owners' prerogatives in the service of other ends, whether to uphold values such as equality and dignity or to protect others' ability to enjoy their own property. Whether viewed as exceptions to title or inherent curbs on owners' property rights, these limits allow property law greater flexibility to balance the competing interests and ends that invariably attend conflicts over valuable resources.

B. Property's Spectrum of Intimacy

Scholars recognize that property law sometimes looks beyond title or curbs titleholder discretion, but they disagree about the frequency and meaning of these limits. Two schools of property theorists, the "essentialists" and the progressives, analyze these doctrines in terms of the right to exclude or social relations, respectively. Building upon these theories, I argue that *intimacy* also plays an important role in property law, for an owner's rights in a given resource may depend in part upon his degree of closeness with the person making claims against him. In particular, property law instantiates a spectrum of intimacy under which rights generally "good against the world" are sometimes limited when owners attempt to exercise them against individuals with whom they are particularly close. This insight holds great promise for property and family law alike.

"Essentialist" theorists contend that the core of property is the owner's right to exclude.²³¹ For essentialists, property functions mainly by delegating

230. See *id.* at 692 (describing zoning as "virtually universal in the metropolitan areas of the United States").

231. Thomas Merrill and Henry Smith are the lead proponents of the "essentialist" approach to property law. See, e.g., Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 68–70 (2000); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 360–83 (2001) [hereinafter Merrill & Smith, *What Happened to Property in Law and Economics?*]; Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998) (arguing that "the right to exclude others is a necessary and sufficient condition of identifying the existence of property"); see also J. E. PENNER, *THE IDEA OF PROPERTY IN LAW* 71 (1997) ("[T]he right to property is a right to exclude others from things which is grounded by the interest we have in the use of things.") (emphasis omitted); Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1193 (1999) ("While the modern bundle-of-legal relations metaphor reflects well the possibility of complex relational fragmentation, it gives a weak sense of the 'thingness' of private property."); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 439 (2003) (describing "the right to exclude as the essential hallmark of the concept

power to gatekeeper owners, who are free to include or exclude others as they wish to further their interests in using their resources.²³² Although these theorists admit that property law at times employs “governance” strategies to manage resource disputes,²³³ generally speaking they conceptualize an owner’s rights as good against the world.²³⁴

While essentialist theorists view limits on owners’ authority as exceptional, progressive theorists take these limits to demonstrate the core attribute of property law.²³⁵ Also described as “realists-progressives,”²³⁶ progressive theorists understand property’s defining characteristic to be its role in structuring social relationships.²³⁷ Progressive theorists argue that property law shapes and furthers a society’s broader institutions and values.²³⁸ For progressive theorists—who include scholars advocating

of ‘property’). For a discussion of the essentialists, see generally Katrina M. Wyman, *The New Essentialism in Property*, 9 J. LEGAL ANALYSIS 183 (2017).

232. See Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1709–10 (2012).

233. See Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S454 (2002) (arguing that property “rights fall on a spectrum between the poles of exclusion and governance,” depending upon how decisions about resource use are made); *id.* at S455 (describing “a wide range of rules, from contractual provisions, to norms of proper use, to nuisance law and public environmental regulation . . . as reflecting the governance strategy”); see also Wyman, *supra* note 231, at 201–03 (discussing essentialist scholars’ accounts of when owners’ authority may be limited).

234. Smith, *supra* note 232, at 1691 (describing property as “availing against persons generally”); *id.* at 1709 (defining “the in rem aspect of property” as a “basic feature[.]”); see also Merrill & Smith, *What Happened to Property in Law and Economics?*, *supra* note 231, at 359 (arguing that “the in rem character of property and its consequences are vital to an understanding of property as a legal and economic institution”).

235. See Dana & Shoked, *supra* note 191, at 766; *id.* at 766–67 (“The essentialist-pluralist debate . . . revolves around the determination of which doctrines form the heart of property law.”); Wyman, *supra* note 231, at 193 n.30 (“[I]nterpret[ing] the emphasis on the right to exclude as a means of emphasizing that owners have authority.”).

236. Dana & Shoked, *supra* note 191, at 767 n.64; see also RESTATEMENT (FIRST) OF PROPERTY ch. 1, intro. note (AM. L. INST. 1936) (“The word ‘property’ . . . denote[s] legal relations between persons with respect to a thing.”); *id.* §§ 1–4 (defining, respectively, “right,” “privilege,” “power,” and “immunity”); Heller, *supra* note 239, at 1191 (describing Wesley Hohfeld’s “now standard idea that property comprises a complex aggregate of social and legal relationships made up of rights, privileges, powers, and immunities”).

237. JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 6 (2000) (“[P]roperty rights describe relations among people and not just relations between people and things.”); see also Dana & Shoked, *supra* note 191, at 766 (“For these scholars and their followers, property . . . is about the social relationships—the overall structure of society—that property establishes.”).

238. See, e.g., Alexander, Peñalver, Singer & Underkuffler, *supra* note 157, at 743 (“Property implicates plural and incommensurable values.”); see also DAGAN, *supra* note 21, at xi–xii (2011) (arguing that “property can, and should, serve a pluralistic set of liberal values,” “includ[ing] . . . utility and autonomy . . . , as well as labor, personhood, community, and distributive justice”); Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist*

approaches to property based, inter alia, in human capabilities,²³⁹ human flourishing,²⁴⁰ and democratic values and processes²⁴¹—owners have responsibilities toward, not just rights against, others. Because property “allocates scarce resources that are necessary for human life, development, and dignity,” progressive theorists argue that “property laws” should recognize “the equal value of each human being” by “promot[ing] the ability of each person to obtain the material resources necessary for full social and political participation.”²⁴² For these theorists, limits on owners’ authority arise from, and should be imposed in light of, property law’s role in positioning individuals within an interpersonal system of reciprocal rights and obligations.

The differing foci of essentialist and progressive theories reflect the wide variety of property institutions and the challenge of imposing conceptual order on such a diverse area of law. To these rich theoretical resources, I add another complementary account, one based on what I call *intimacy*. As I will show, property law sometimes limits owners’ authority in response to the very real effects of close social relationships. This approach, which I describe as instantiating a “spectrum of intimacy,” offers some protection to parties who are especially vulnerable, by reason of their

Interpretation, 91 CORNELL L. REV. 653, 654 (2006) (“From a pluralist perspective, property regimes, like other legal and social institutions, reflect a number of different values.”).

239. MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 70–86 (2000); AMARTYA SEN, COMMODITIES AND CAPABILITIES 1–7 (1999); Alexander & Peñalver, *supra* note 31, at 134–38.

240. GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 80–101 (2012); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1851 (1987) (arguing that “the characteristic rhetoric of economic analysis is morally wrong when it is put forward as the sole discourse of human life” and that “we should evaluate inalienabilities in connection with our best current understanding of the concept of human flourishing”).

241. For the intersection between property and democratic values, see SINGER, *supra* note 237; Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1304 (2014) (“Property law establishes a baseline for social relations compatible with democracy, both as a political system and [as] a form of social life. . . . Basic democratic values limit the kinds of property rights that the law will recognize, and they define particular bundles of rights that cannot be created.”) (emphasis omitted); Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1045–47, 1059 (2009). For property and democratic participation, see generally Anna di Robilant, *Populist Property Law*, 49 CONN. L. REV. 933 (2017); Anna di Robilant, *Property and Democratic Deliberation: The Numerus Clausus Principle and Democratic Experimentalism in Property Law*, 62 AM. J. COMPAR. L. 367 (2014); Avihay Dorfman, *Property and Collective Undertaking: The Principle of Numerus Clausus*, 61 U. TORONTO L.J. 467 (2011).

242. Alexander, Peñalver, Singer & Underkuffler, *supra* note 157, at 744; see also *id.* (“Property confers power.”); Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1046 (1996) (“Property rights are, by nature, social rights; they embody how we, as a society, have chosen to reward the claims of some people to finite and critical goods, and to deny the claims to the same goods by others.”) (emphasis omitted) (citation omitted).

connections to an owner or the owner's resources, to the wielding of Blackstonian "despotic dominion" over property.²⁴³

Although intimacy analysis clearly falls under the umbrella of progressive property theory, the approach also sits comfortably with essentialist approaches to property. Consistent with progressive theories, my account proposes intimacy to be an additional value in furtherance of which property law might tailor an owner's prerogatives to reflect the reality of social relations. Consistent with essentialist theories, my account recognizes the general importance of an owner's authority over resources,²⁴⁴ but suggests one potential self-limiting principle for a subset of circumstances in which the right to exclude may be predictably abridged.²⁴⁵ Highlighting a possible point of intersection between essentialist and progressive approaches, intimacy analysis offers a complementary theoretical resource for analyzing property conflicts between non-strangers.

* * *

The claim that property law recognizes intimacy presupposes a property-specific account of intimacy. The intimacy of property is broader than common perceptions of intimacy, which focus on warm relationships between friends, family members, and sexual partners,²⁴⁶ or the kinds of intimacy recognized by family law, which focuses on formal markers of relationship status.²⁴⁷ The intimacy of property need be neither cooperative nor sexual (though of course it could be either or both),²⁴⁸ and it inheres in a wide range of relationships, both with and without formal legal recognition. The intimacy to which property reacts is more closely suggested by tertiary dictionary definitions that describe intimacy as involving "very close association, contact, or familiarity."²⁴⁹ The intimacy of property is not necessarily a chosen and cultivated emotional closeness, but rather arises from the parties' interactions with one another around—and is mediated by their connections to—valuable resources. And despite often resulting from circumstances beyond individual control, the intimate relationships of

243. 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

244. See *supra* notes 232–235 and accompanying text.

245. See *infra* note 293 and accompanying text.

246. See, e.g., *Intimate*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/intimate> (last visited May 24, 2021) (defining "intimate" as (1)(a) "marked by a warm friendship developing through long association;" (1)(b) "suggesting informal warmth or privacy;" and (1)(c) "engaged in, involving, or marked by sex or sexual relations").

247. Cf. Joslin, *supra* note 7, at 915.

248. And just as intimacy may exist without sex, sex may occur without intimacy. See generally Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809 (2010).

249. See *Intimate*, MERRIAM-WEBSTER.COM DICTIONARY, *supra* note 246.

property remain “of a very personal or private nature,”²⁵⁰ for they implicate some of our deepest human needs.

For a more concrete illustration, consider the nature of relationships between neighbors, between co-owners, and between decedents and their heirs.²⁵¹ These relationships are defined by property. Neighbors are constituted through their legal connections to adjacent parcels of land; co-owners are created when individuals take joint title to property; and heirs are proclaimed by operation of intestacy law. But these legal relationships also exist alongside social relationships, both thicker and thinner, the facts and norms of which may change the way that parties embedded in these relations act and experience each other’s actions.

Unlike interactions between strangers, which may comprise one-off transactions, the kinds of relationships in which property attends to intimacy are ongoing and costly to exit. Neighbors and co-owners can sever their relations by alienating their property interests, but these courses of action can be extremely expensive, disruptive to one’s life plans, and detrimental to one’s personhood.²⁵² The kinds of individuals that intestacy statutes turn into a decedent’s heirs—spouses, children, parents, siblings, aunts, and uncles—are even more closely connected.²⁵³ Not only does inheritance law employ a set of previously defined family relationships to distribute resources, thereby further cementing through property entitlements the importance of socio-legal ties that are already vital to many individuals’ wellbeing. Intestacy also layers new co-ownership relationships over family relationships when descendants, ancestors, or collaterals inherit property as a class. Thus, whether by virtue of ongoing proximity, legal and blood connections, or all three, neighbors, co-owners, and decedents and their heirs share relationships of especial closeness—and this closeness, in turn, creates predictable forms of vulnerability in interactions around resources. This vulnerability to others, engendered through and around resources, is the form of intimacy to which property reacts.

Because property law focuses on resource-related vulnerability, its conception of intimacy encompasses more than just warm, other-regarding relationships between family members, romantic partners, and friends. It also includes antagonistic relationships between parties who detest, but

250. *Id.* (noting its second definition).

251. For a doctrinal discussion of these examples, see *infra* notes 257–279 and accompanying text.

252. *Cf.* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 958 (1982) (“[C]larify[ing] a . . . strand of liberal property theory that focuses on personal embodiment or self-constitution in terms of ‘things.’”).

253. *See, e.g.*, UNIF. PROB. CODE §§ 2-101, 2-102, 2-103 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L., amended 2019).

cannot avoid, one another. By way of example, consider Jean-Paul Sartre's play, *No Exit*, in which three characters are locked in a small room together.²⁵⁴ In the dawning certainty that they will be confined this way for all of eternity, they confess to each other their darkest secrets—and that knowledge, combined with their inability to escape, renders them uniquely capable of making each other miserable. “Hell is . . . other people” only if one is forced to share space, perhaps our most fundamental resource, with those whom one loathes.²⁵⁵ Similarly, because neighbors, co-owners, and family members cannot easily escape one another, one's uncooperative behavior can impose especially serious costs on the other. Neighbors might hate each other with a passion, but their enforced proximity, and resulting dependence upon one another's good behavior, makes them intimates in the eyes of property law.

Defined in this way, intimacy takes many forms—precisely why I describe property's approach to intimacy as a “spectrum.” But in all cases in which property law reacts to intimacy, it is acknowledging the facts of social life. Because we actively choose and simultaneously have no choice but to live together, owners do not exercise their prerogatives in a vacuum, and property rights' sharp edges are most likely to cut those who are closest. Thus, property law limits owners' authority in recognition of the intimacy that arises from being closely enmeshed with others in a shared social and physical world.²⁵⁶

To see how property law reacts to intimacy, consider how a right that is good against a stranger does not always hold with the same force against a neighbor, a co-owner, or an heir. Many scholars have observed that American land law does not always permit owners to exclude neighbors from their property.²⁵⁷ Instead, various black-letter doctrines, including those establishing easements, adjusting record boundaries, and enjoining spite fences, limit landowners' authority vis-à-vis adjacent landowners. One of these scholars, Stewart Sterk, argues that these doctrines arise from and enforce “norms of neighborliness.”²⁵⁸ Reflecting the fact that we live in “a society whose members do not treat relations with neighbors in the same way they treat relations with strangers,”²⁵⁹ land law too “treat[s] neighbors and

254. JEAN-PAUL SARTRE, *NO EXIT AND THREE OTHER PLAYS* (Vintage International ed. 1989); see *id.* at 10.

255. *Id.* at 45.

256. For an argument that the fact of vulnerability can require a broad state response, see, e.g., Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 255–56 (2010).

257. See *supra* note 211.

258. Sterk, *supra* note 211, at 96.

259. *Id.* at 90.

strangers differently”²⁶⁰ by “promot[ing] and indeed requir[ing] limited cooperation between neighboring landowners.”²⁶¹ Per Sterk, property law “subordinate[s] individualist norms . . . between neighbors” because our “conception” of that relationship “includes continuing mutual dependence[,] rather than a pattern of discrete and unrelated transactions.”²⁶² Sterk explicitly locates neighbors’ cooperative obligations on a spectrum, with parties who are closer by virtue of their repeated interactions or mutual impact owing one another more than those who merely occupy adjacent land.²⁶³ In a similar vein, Rashmi Dyal-Chand describes land law as effecting “sharing”—which she defines as “outcomes that represent compromises of some sort between the parties’ varying interests”—rather than reflexively confirming title owners’ rights to exclude.²⁶⁴ Dyal-Chand praises these sharing outcomes as better resolutions of the “many . . . situations” in which “parties other than the formal owner have legitimate interests” in a piece of property,²⁶⁵ situations that often arise from “the commonplace behavior of property owners and non-owners vis-à-vis each other.”²⁶⁶ James Smith also describes “rules that forge special rights and obligations of neighbors” as reflecting “the ‘friend model’” of neighborly relations.²⁶⁷ Under these scholarly readings, American land law recognizes the closeness of relationships between neighbors by sometimes deviating from the exclusion model in disputes between them.

260. *Id.* at 96.

261. *Id.* at 95; *see also id.* at 59–63.

262. *Id.* at 93, 95.

263. *Id.* at 95–96 (describing “the scope of the landowner’s . . . duty to cooperate” as “var[ying] . . . with the nature of the relationship between the neighboring landowners”); *see also id.* at 100 (noting that “some obligations exist merely by virtue of proximity, others depend on the passage of time[,]” and the greatest “obligation to cooperate exists between neighbors who have established a course of dealing”); *id.* (describing the “neighborly obligations a landowner assumes merely by purchasing land,” including respecting “unrecorded easement rights” and refraining from creating nuisances); *id.* at 99 (stating that “even anonymous neighbors owe each other some obligation, albeit more limited, when problems arise”); *id.* at 98 (“Once a landowner has dealt with his neighbor, he is obliged to resolve any ambiguities in their dealings that might put the neighbor in a serious predicament.”).

264. Dyal-Chand, *supra* note 211, at 679; *see also id.* at 698 (describing sharing outcomes as blunting “the hard edges of ownership rights”); *id.* at 684 (describing “remedies in cases recognizing implied easements,” which “allocat[e] rights to use,” as the property-law doctrine “most reflective of the sharing impulse”).

265. *Id.* at 706.

266. *Id.* at 698.

267. James Charles Smith, *Some Preliminary Thoughts on the Law of Neighbors*, 39 GA. J. INT’L & COMP. L. 757, 762 (2011); *id.* at 767–71 (describing variation in adverse possession’s requirements of adversity, permission, intent, and openness); *id.* at 775–76 (arguing that the spite fence doctrine reflects neighbors’ special relation).

Property law also limits the prerogatives of joint owners against one another. First, property law does not permit one co-owner to exclude another from their shared property. Because each co-owner enjoys “an equal right to” use and “possess the whole” of the joint property,²⁶⁸ a co-owner who physically excludes another or whose use of the property completely precludes the other’s use has “ousted” his co-owner and is liable for rent payments reflecting the value of his possession.²⁶⁹ And because co-owners may not exclude one another from the benefits of ownership, the law also acts to spread its burdens, allowing a co-owner who incurs expenses to maintain joint property to seek contribution or an accounting from her co-owners.²⁷⁰ Co-owners are also subject to the law of waste, which requires each to refrain from using the common property “in a manner that unreasonably interferes with the [others’] expectations.”²⁷¹ Finally, the common law’s stated preference for partition in kind allows dissolution of the joint ownership relationship without necessarily severing each co-owner’s connection to (at least a portion of) the previously shared property.²⁷²

Although these limits could be described as necessary corollaries to sharing title, they can also be understood as reflecting and protecting co-owners’ close relationships. While all co-owners are related to one another through their legal connections to a common piece of property, many co-owners are also bound through social relationships that predate holding joint title.²⁷³ In recognition of this fact, property law recognizes a number of joint property relationships: the tenancy in common, the joint tenancy, and, in some states, the tenancy by the entirety. Under the default form of co-ownership, the tenancy in common, each co-tenant’s “separate but undivided interests in the property” can be conveyed by deed or will or descend through intestacy.²⁷⁴ Even this least restrictive form of co-ownership occurs frequently between closely related individuals, a fact that the phenomenon of heirs property, in which intestate succession creates co-tenancies between

268. MERRILL & SMITH, *supra* note 174, at 598.

269. *Id.* at 612; *see also* Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 WIS. L. REV. 331, 340 (1994).

270. MERRILL & SMITH, *supra* note 174, at 613.

271. JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL & LIOR JACOB STRAHILEVITZ, *PROPERTY* 280 (9th ed. 2018) (emphasis omitted).

272. *See, e.g.*, *Delfino v. Vealencis*, 436 A.2d 27, 30 (Conn. 1980) (stating “policy . . . favor[ing] a partition in kind over a partition by sale”).

273. *See infra* notes 274–276 and accompanying text; *see also supra* note 253 and accompanying text.

274. DUKEMINIER, KRIER, ALEXANDER, SCHILL & STRAHILEVITZ, *supra* note 271, at 388.

family members, amply demonstrates.²⁷⁵ Because the joint tenancy also includes a right of survivorship, it has been described as “only appropriate for” co-owners in “an intimate relationship such as a committed relationship or family business.”²⁷⁶ And the tenancy by the entirety, which combines a right of survivorship with protection against a co-tenant’s unilateral conveyances and debts, is available only to married couples.²⁷⁷ By offering several forms of joint ownership appropriate to differing degrees of closeness between co-owners, the law of concurrent interests itself represents a spectrum of intimacy.

Probate law also limits decedents’ ability to exclude certain family members from their resources. Although the predominant goal of inheritance law is to effectuate a testator’s intent, this freedom of disposition is limited by the surviving spouse’s elective share, as well as set-asides of personal and homestead property and family allowances for surviving spouses and dependent children.²⁷⁸ And if a person dies without a will, the state’s intestacy statute will distribute his or her estate to family members, without any inquiry into the decedent’s subjective intent.²⁷⁹ These quite expansive limits on titleholder authority reflect the extremely close nature of family relationships.

Property law limits an owner’s authority in the ways described above because relationships between neighbors, co-owners, and family members are qualitatively different from interactions between strangers. As Sterk argues in the context of neighbors, under “circumstances” in which “parties expect to maintain continuing relationships,” “a social and legal model that depicts” individuals “simply as economic actors seeking . . . to maximize personal material advantage and personal autonomy” proves “inadequa[te].”²⁸⁰ Relationships between co-owners and family members are

275. See, e.g., Phyllis Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH. U. L. REV. Q. 737 (2000); T.W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Ownership, Political Independence, and Community through Partition Sales of Tenancy in Common Property*, 95 NW. U. L. REV. 505 (2001); Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs’ Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1 (2007); see also UNIF. PARTITION OF HEIRS PROP. ACT 3–4 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2010).

276. MERRILL & SMITH, *supra* note 174, at 599.

277. See, e.g., *Sawada v. Endo*, 561 P.2d 1291, 1294–95 (Haw. 1977); see also MERRILL & SMITH, *supra* note 174, at 599 (describing tenancy by the entirety, which requires co-owners to be joined by the intimate relationship of marriage).

278. JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 476–77 (8th ed. 2009); Richard F. Storrow, *Family Protection in the Law of Succession: The Policy Puzzle*, 11 NE. U. L. REV. 98, 116–22 (2019).

279. See, e.g., UNIF. PROB. CODE §§ 2-101 to -103 (UNIF. L. COMM’N, amended 2019).

280. Sterk, *supra* note 211, at 92, 95; see also *id.* at 58–59 (“The cross-boundary allocations in American land law are generally efficient only if one assumes a societal norm that . . . constrains

characterized by even higher degrees of dependence and interdependence and similarly elude description by rational-actor models. It matters little whether these relations of intimacy arise from or predate interactions around resources, for the interactions themselves can create new human vulnerabilities, not just deepen existing ones. For this reason, property's spectrum of intimacy reflects and facilitates the wide variety of close human relationships that play out against the backdrop of, and depend upon access to, resources.²⁸¹

Of course, property's approach is not perfect. Property reacts to intimacy, but its reaction is currently more of an "impulse" than a fully realized principle.²⁸² But even in its nascent form, the spectrum of intimacy offers an important tool for recognizing and supporting a range of close human relationships—relationships that cannot exist apart from property, and that are inevitably shaped by the property rules we choose.

* * *

Not only does property law construct social relationships,²⁸³ but it also reflects a particular vision of how those relationships should be conducted. Thus intimacy plays an important role in property law, as it does in collective life. Owners' authority over their resources may depend upon how close they are with the persons against whom they exercise it. Rights described as "good against the world" may not always be good against one's neighbors, co-owners, or family members, reflecting the fact that the world expects us to treat these individuals differently than we do strangers. For relationships marked by high degrees of interconnection, the law of property employs a more cooperative, protective model. Property's tailoring of an owner's rights and responsibilities to his relationship with a particular property claimant reflects a functional approach to resource conflicts, one that better serves the institution's varied normative goals.

Understanding how intimacy shapes property law is of great moment for scholars of property and family law alike. The account of intimacy developed here not only illuminates a potential point of tangency between

pursuit of self-interest and personal autonomy by expecting limited cooperation and interdependence between neighboring landowners.").

281. See Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 TEX. L. REV. 2015, 2015 (2013) (describing property as "necessary for human life" and "an essential part of human achievement, security, and lifetime satisfaction"); Dana & Shoked, *supra* note 191, at 787 ("[A]most all social interactions occur against the background of some asset."); see also Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 798 (2009) (arguing that "interdependency" should "give[] rise" to "obligations"); Fineman, *supra* note 256, at 255–56 (arguing that the fact of vulnerability should require a state response).

282. Dyal-Chand, *supra* note 211, at 653.

283. See SINGER, *supra* note 237, at 70.

essentialist and progressive property theories, but also provides a helpful framework for analyzing resource disputes between non-strangers.²⁸⁴ For family law scholars, property law's spectrum of intimacy provides a model not only for internally reorganizing family law, but also for resituating it vis-à-vis property law.

III. RE-CENTERING INTIMACY IN FAMILY PROPERTY LAW

Property law's approach to intimacy has important normative and doctrinal implications for family law. Normatively, it denaturalizes family law's title-driven orientation to ownership, opening up the conceptual space to criticize that approach as a bad fit for intimate property disputes and to explore more suitable alternatives. Property law's recognition of a variety of forms of intimacy also calls into question the stark distinction that family law currently draws between marital and nonmarital relationships.

Two doctrinal arguments follow from this normative analysis. First, family property law should relax its formalistic adherence to title in both marital and cohabitant property regimes by strengthening and expanding forms of joint family ownership. Rather than "redistributing" as an exceptional matter, the family property system should establish corpuses of shared property, regardless of title, and define appropriate criteria for distribution when relationships end. Doing so would give family law more flexibility to consider how intimacy should shape former partners' respective property entitlements in shared resources. Second, family law should extend property's spectrum of intimacy to unmarried partners by offering a menu of family statuses with differing degrees of financial obligations. In this way, property's approach can help us to re-situate unmarried partners in the space between spouses and strangers, as well as to rethink the structure of marital property holding.

A. *Property and Intimacy*

Property law begins from the premise that title is relative,²⁸⁵ an orientation that allows it greater flexibility to further a plurality of important values. Family law, on the other hand, clings reflexively to title, an approach that tends to perpetuate property inequality between spouses and property disproportionality between cohabitants. To better protect intimates—ideally the field's *raison d'être*—family law should follow property's example by relaxing the hegemony of title.

284. I elaborate some implications of the intimacy framework in concluding this piece and intend to explore its applications further in future work.

285. SPRANKLING & COLETTA, *supra* note 164, at 164.

Taking a more relative approach to title would promote richer conceptions of both ownership and autonomy in family law. Family law's current absolutist conception of property reflects its atomistic approach to family relations, under which family freedom inheres, in part, in formally consenting to one's family obligations.²⁸⁶ This vision understands property's primary purpose to be safeguarding individual autonomy. But property law and theory offer a number of different conceptions of property and its purposes, including some that emphasize the law's role in facilitating cooperative collective life.²⁸⁷ Family law need not, and should not, continue to employ an overly simplified conception of property that is particularly inapposite as applied between intimates.²⁸⁸

Concern for individual property rights drives family property law,²⁸⁹ but that orientation is ill-suited to promoting the other important values which families further.²⁹⁰ In addition to their economic functions, families, both marital and nonmarital, provide their members with caretaking, emotional support, and a sense of belonging and identity.²⁹¹ Indeed, our society both encourages and relies upon the dependence and interdependence—the intimacy—inherent in family life.²⁹² Strong deference to title might make sense in market-based property relations, where easily determined property rights decrease the costs of economic activity,²⁹³ but it makes less sense between family members, whose interactions around resources are more

286. Stolzenberg, *supra* note at 28, at 1997–98.

287. *See, e.g.*, Alexander & Peñalver, *supra* note 31, at 128 (“Property stands . . . squarely at the intersection between the individual and community [W]henver we discuss property, we are unavoidably discussing the architecture of community and of the individual's place within it.”).

288. *Cf.* Thomas W. Joo, *The Discourse of “Contract” and the Law of Marriage*, in 24 RESEARCH IN LAW AND ECONOMICS: A JOURNAL OF POLICY 161, 162 (Dana L. Gold ed., 2009) (“Both supporters and opponents of a ‘contractual’ approach to marriage law tend to use ‘contract’ to signify a market-libertarian normative view about the role of bargaining rather than to refer to the actual, more complex nature of contract law.”).

289. *See supra* Part I.

290. *Cf.* Stolzenberg, *supra* note 28, at 2038 (arguing that “the outsized emphasis currently placed on families’ economic functions . . . undermines their ability to fulfill other roles more important to intimate and collective life”). Indeed, family law’s commitment to separate property principles limits its ability to incorporate other considerations in determining family members’ respective property rights. *See supra* Part I.

291. *Cf.* Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 228 (1997) (describing a “new morality” of family law that is “focused on connection, care, and commitment to other family members”).

292. *Cf.* Williams, *supra* note 150, at 2229 (describing how our socio-economic structures are built around “an ideal worker with no significant daytime child care responsibilities, supported by a flow of domestic services from a spouse”).

293. *Cf.* Smith, *supra* note 232, at 1693–94 (offering an information costs-based account of property law).

frequently directed at promoting other worthy objectives and social purposes.²⁹⁴

Property law's spectrum of intimacy offers a better vision of property for family law. Accepting the invitation to de-emphasize title in disputes between close social relations, reflecting the parties' degree of closeness, would refocus family property law away from individualism and toward norms of mutuality and sharing. This reorientation would not only yield normatively desirable distributive results, but also help to support intimate social relationships.

As property law reminds us, communities arise around and are comprised through property. Intimacy cannot be separated from property holding and use, for social closeness affects individuals' interactions around resources in qualitatively significant ways. Neighbors' close relationships are forged through owning and occupying adjacent or proximate land, while co-tenants are brought together at least in part through the fact of their common ownership.²⁹⁵ Even the family relationships that we think of as predating property are created and reinforced through the sharing of resources.²⁹⁶ The communities that grow up around property are marked by dependence and interdependence, and they should be governed by legal rules that encourage cooperative behavior both practically and expressively.²⁹⁷ In the face of resource-related vulnerability, property institutions must adopt appropriately tailored sharing defaults to help both individuals and groups survive and thrive.

As the intimate property institution par excellence, the family property system needs to adopt a less individualistic approach to ownership. Recognizing intimacy and protecting interdependence in families requires

294. Cf. Dana & Shoked, *supra* note 191, at 759–60 (describing the “questions[.] . . . what values . . . title . . . is supposed to protect—and, in accordance, what legal powers should be available to the title holder” as “much more important” than “the question of who holds formal title”).

295. See, e.g., Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 838 (2009) (stating that “ownership of property in a particular community creates and reinforces social ties among neighbors”).

296. See Peter K. Jonason, Jeanne F. Cetrulo, Janice M. Madrid & Catherine Morrison, *Gift-Giving as a Courtship or Mate-Retention Tactic?: Insights from Non-Human Models*, 7 EVOLUTIONARY PSYCH. 89, 90 (2009) (describing studies of human gift-giving behavior, including to initiate and deepen romantic relationships); Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 249, 281 n.206 (2006) (“Love-infused households are sites of staggering amounts of . . . gift-giving, especially between spouses, from parents to minor children, and from adult children to elderly parents. . . . Many long-term cohabiting couples also end up making gifts that pool their financial assets.”).

297. Ellickson, *supra* note 296, at 304–08 (describing intimates' cooperative behavior); Smith, *supra* note 232, at 1726 (stating that “very important equitable safety valves . . . allow the baselines of property to be simple without being vulnerable to opportunists”).

some degree of sharing, even in derogation of title—although, as the idea of intimacy as a spectrum makes clear, how much sharing is necessary depends on the nature of the relationship in question.

I begin from the normative premises that the marital relationship should be understood as an egalitarian community and that spousal property rules should reflect egalitarian norms.²⁹⁸ But because common-law marital property regimes revolve around title and emphasize contribution, they elevate individualistic over egalitarian and communitarian concerns. The current system's circumscribed approach toward marital sharing reflects the enduring legacy of coverture, and partnership theory-based domestic relations law cannot fully eradicate its traces. For against the backdrop of gendered market and family structures, formal equality of opportunity only rarely results in substantive equality of resources and bargaining power. To truly recognize the equal dignity of spouses, marital property regimes must fully commit to joint spousal ownership. Doing so would help to equalize spouses' positions during marriage and narrow the potential gap between their economic futures upon divorce.²⁹⁹

I do not take a strong position on what property norms should govern unmarried partnerships because these relationships are both under-institutionalized and vary greatly in their degree of commitment and sharing.³⁰⁰ Indeed, the lens through which scholars view these relationships influences what kind of property arrangements they think most suitable. Scholars who favor the status quo reason from autonomy, arguing that cohabitants should be free to arrange their own financial affairs and that general private law principles are sufficient to fairly disentangle former partners.³⁰¹ Other scholars, concerned for economically vulnerable partners,

298. Cf. Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 77 (2004) (describing “marriage as an egalitarian liberal community”); Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1230 (noting the “commonly acknowledged . . . conception of marriage as a partnership of two equals”).

299. I outline the doctrinal implications of such a commitment in Part III.B.

300. Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 848 (2004) (describing cohabitation as “an incomplete institution”); Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1025–39 (2018) (describing axes along which nonmarital couples vary); Brian J. Willoughby, Jason S. Carroll & Dean M. Busby, *The Different Effects of “Living Together”: Determining and Comparing Types of Cohabiting Couples*, 29 J. SOC. & PERS. RELATIONSHIPS 397, 400–01 (2011) (describing five different types of cohabiting couples).

301. Carbone & Cahn, *supra* note 40, at 102 (arguing that courts should “treat [cohabitants] as two independent units who have not assumed responsibility for each other after a break-up”); Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 884–97 (2005) (arguing against conscripting cohabiting couples into marital property regimes) [hereinafter Garrison, *Is Consent Necessary?*]; Howard O. Hunter, *An Essay on Contract and Status: Race, Marriage, and the Meretricious Spouse*, 64 VA. L. REV.

support imposing relationship-based obligations of various stripes.³⁰² As I describe below, attending to intimacy can help family law to balance between furthering autonomy when partners remained relatively resource-independent and offering protection when cooperative behavior results in interdependence.

In addition to improving distributive results at relationship dissolution, the intimacy approach can also help to ameliorate unjustified legal and social inequality between marital and nonmarital families. The current family property system helps to entrench a hierarchy of favored and disfavored family relationships, a hierarchy that scholars refer to as “marital primacy.” Because family property protections are available only within marriage, cohabitants must transact at arm’s length if they wish to protect their economic interests. By totally exempting cohabitants from expectations of sharing and consigning them to a legal regime constructed for more distant relationships, family law treats cohabitants as strangers.³⁰³ But unmarried partners are intimates,³⁰⁴ and cohabitant relationships can and do perform some of the same important social functions that marriage does.³⁰⁵ If property’s spectrum of intimacy teaches us anything, it is that we denigrate cohabitant relationships as a form of intimacy by subjecting them to a default regime of separate property. Indeed, condemnation of nonmarital relationships often travels hand-in-hand with denial of family-based property protections.³⁰⁶ But traditional morality is slim justification for limiting any

1039, 1095 (1978) (arguing that the contract approach best captures cohabitants’ intent); David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute’s Principles of Family Dissolution*, 76 NOTRE DAME L. REV. 1467, 1467 (2001) (criticizing status-based treatment of cohabitant relationships as “reflect[ing] a profound distrust for individuals’ efforts to set the terms for intimate relationships to meet their own needs”).

302. BOWMAN, *supra* note 47, at 223–39 (proposing that couples should be treated as married after two years of cohabitation or birth of a common child, unless they contract out of marriage-like obligations); Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1166–67 (1981) (arguing that cohabitation longer than two years or resulting in a child’s birth should be treated as lawful marriage unless the couple has agreed otherwise); Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 259 (2004) (proposing that the law integrate cohabitants into the divorce property regime when relationships last longer than five years); 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, 246 (2016); *see also* Garrison, *Is Consent Necessary?*, *supra* note 301, at 885 (proposing that “a revived common law marriage doctrine” govern those “couples who express marital commitments privately”).

303. Indeed, former unmarried partners tend to be situated worse than strangers under general private law. *See* Joslin, *supra* note 7, at 920–21.

304. *See supra* notes 246–249 and accompanying text; *cf.* Ellickson, *supra* note 296, at 248–49 (arguing that householders tend to be intimates).

305. *See* Matsumura, *supra* note 300, at 1021.

306. States that bar all recovery for cohabitants condemn these relationships explicitly, usually with the avowed purpose of encouraging marriage. *Blumenthal v. Brewer*, 69 N.E.3d 834, 861 (Ill.

family-based property rights to marriage alone.³⁰⁷ Rather than seeking to root out sharing norms between cohabitants, which is impossible in any case,³⁰⁸ family law should provide appropriately tailored protection for their cooperative behavior. Defining cohabitant-specific sharing norms would protect unmarried partners' autonomy by insulating them (when appropriate) from the more comprehensive sharing of marriage, while also dignifying their relationships as a worthy form of intimacy in the eyes of family property law. Situating the obligations of marital and nonmarital families along a continuum in this way would allow the law to recognize and support a range of adult intimate relationships that all further a variety of valuable individual and social purposes.

B. Constructing a Continuum in Family Property Law

Property law's spectrum of intimacy can help us both to re-situate unmarried partners in the space between spouses and strangers, as well as to rethink the structure of marital property holding.³⁰⁹ On a conceptual level, family law should emulate property by relaxing its deference to title. Rather than "redistributing" as an exceptional matter, the family property system should establish corpuses of shared property, regardless of title, and define appropriate criteria for distribution when relationships end. On a more concrete level, family law should extend property's spectrum of intimacy by offering a menu of family statuses with differing degrees of financial obligations. Intimate partners could choose between forms of family property holding, just as co-owners can elect between different forms of joint ownership. Marriage would anchor one end of the spectrum as the property institution involving the most extensive degree of sharing. Cohabitants would become neither spouses nor strangers, but rather partners in a

2016) (Theis, J., concurring in part and dissenting in part) (criticizing the majority's "oddly myopic and moralistic view of cohabitation"); *Schwegmann v. Schwegmann*, 441 So. 2d 316, 326 (La. Ct. App. 1983) ("[D]iscouraging the establishment of a sexual relationship without ceremonial marriage . . . protect[s] the moral fabric of society . . ."); *Abrams v. Massell*, 586 S.E.2d 435, 441 (Ga. Ct. App. 2003) (stating that "binding precedent . . . continues to define sexual relationships between unmarried consenting adults as immoral") (emphasis omitted); *see also* Stolzenberg, *supra* note 28, at 2021 ("To encourage marriage, these states impose what could be considered penalty default rules.").

307. *But see* Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1280 (2015) (arguing that, in the illegitimacy cases, the Supreme "Court found nothing unconstitutional about discouraging illicit sex and promoting traditional marriage").

308. *Cf.* Strauss, *supra* note 46, at 1261–62 (arguing that private law cannot avoid considering the relationship between parties); *see also supra* Part II.B (arguing that property law takes intimacy into account).

309. I focus here on distribution between former partners when relationships break down, leaving aside for now the questions of inheritance and of cohabitants' rights and obligations vis-à-vis third parties.

cooperative endeavor that, while different from marriage, is still worthy of family law's respect and support. These changes would produce fairer resource distributions upon family dissolution, help to ameliorate unjustified legal and social inequality between marital and nonmarital families, and refocus family property law toward norms of mutuality and sharing.

1. Equal Joint Ownership for Spouses

For spouses, marriage should entail stronger forms of joint ownership, which would have implications both during marriage and upon divorce. In particular, this would mean strengthening community ownership and management of resources in intact marriages, limiting the scope of separate property, rethinking the principle of divorce distribution, and increasing the availability of post-divorce spousal support.

DURING MARRIAGE. Allowing one spouse to exclude the other from individually titled property during an intact marriage does not appropriately reflect the institution's normative values or social meaning.³¹⁰ Common-law jurisdictions should replace separate-property holding during marriage with community property regimes, under which each spouse holds a present, undivided, one-half interest in all property acquired during marriage.³¹¹ By declaring title irrelevant, the law would emphasize that marriage is an egalitarian and communitarian-minded property institution.

All jurisdictions should also implement more egalitarian rules regarding control of conjugal property.³¹² I begin with the caveat that designing such rules involves difficult policy trade-offs. Depending on the strategy chosen, the results could make management of conjugal property unduly cumbersome, invite invasive state scrutiny of ongoing marital relationships, or both, while also risking unintended consequences (for example, enabling financial control by an abusive partner). To minimize these very real downside risks, I offer only two more circumscribed proposals.

One less-invasive way to balance egalitarianism against marital privacy is to make spouses one another's fiduciaries during marriage. In a surprising number of jurisdictions, marriage does not automatically give rise to a fiduciary relationship between spouses, meaning that their management of conjugal property may be subject to a lower standard of care than that

310. *Cf.* Frantz & Dagan, *supra* note 298, at 124–32.

311. WEISBERG & APPLETON, *supra* note 34, at 223.

312. Under the reforms I propose, the distinction between marital and community property would become less relevant. I therefore use the term “conjugal property” to refer to the corpus subject to distribution upon divorce.

required of business partners.³¹³ In California, in contrast, the marital relationship does impose “a duty of the highest good faith and fair dealing on each spouse,” such that “neither shall take any unfair advantage of the other.”³¹⁴ This duty applies by statute to “the management and control of the community assets and liabilities.”³¹⁵ Making spouses fiduciaries as a matter of course gives married couples the flexibility to manage assets relatively freely, while also providing some legal recourse when one spouse acts to the detriment of the other spouse.

Retirement benefits are another promising area in which reforms could encourage equal management, in part by explicitly establishing joint ownership. One best practice, which could be enacted through an amendment to the Employee Retirement Income Security Act of 1974 (“ERISA”),³¹⁶ would be to require employers to open a new jointly titled retirement account for an employee and his or her spouse beginning immediately in the pay period after the marriage.³¹⁷ Not only would this reform emphasize that retirement benefits are jointly owned, it would have the added benefit of clearly segregating premarital and marital retirement assets, thereby decreasing expensive and complicated litigation in the case of divorce. In the alternative, revisions to the Internal Revenue Code could remove the tax penalties that currently burden those spouses who want to equalize retirement assets of their own accord.³¹⁸ Taken together, these reforms would prevent titled spouses who so desire from individually controlling the lion’s share of family resources, without making everyday transactions overly burdensome.

ON DIVORCE. Revised divorce distribution schemes should maintain the marital period’s commitment to joint property ownership. Following the now-familiar three step process, courts should: (1) identify the conjugal

313. *See, e.g.,* *Lasater v. Guttman*, 5 A.3d 79, 94, 194 Md. App. 431, 456–57 (Md. Ct. Spec. App. 2010) (stating that “a husband and wife are not true fiduciaries, as a matter of law, absent an agreement establishing that relationship,” nor are they “presumed . . . to occupy a confidential relationship”); *see also* *Nessler v. Nessler*, 902 N.E.2d 701, 708 (Ill. App. Ct. 2008) (noting that “a marital relationship alone may not establish a fiduciary relationship”).

314. CAL. FAM. CODE § 721(b) (2020).

315. *Id.* § 1100(e); *see also id.* (“This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, upon request.”).

316. In particular, ERISA’s “spendthrift” provision prohibits an employee from assigning or alienating his interest in a defined contribution plan. *See* 26 U.S.C. § 401(a)(13).

317. *See* *Monopoli*, *supra* note 81, at 64.

318. *See id.* at 63–65 (describing tax penalties and how to remove them). Of course, the transaction costs of shifting retirement assets in this way would remain high; qualified domestic relations orders (“QDROs”) are notoriously hard to draft and expensive to process.

property subject to distribution, (2) value it, and (3) distribute it, beginning from a presumption of equality.

Assuming that the spouses do not live in a hotchpot state,³¹⁹ the identification step begins by distinguishing between separate and conjugal property. The conjugal estate should be comprised of all conjugal property—i.e., property acquired by either spouse’s efforts during marriage—plus a sliding-scale percentage of the parties’ separate property, based upon the length of the marriage. Converting a portion of separate assets into conjugal property subject to distribution would reflect the fact that “propertied spouses tend to share more and more of their individual assets as marriage progresses, . . . as their relationship grows and deepens.”³²⁰ Many scholars have offered specific proposals for conversion formulae, including the ALI, Carolyn Frantz and Hanoach Dagan, Shari Motro, and Joan Williams.³²¹ States could either adopt one of these proposals or develop alternative methods for calculating how much separate property to make subject to divorce distribution.

Once the conjugal corpus is identified and valued, that property should be distributed with a strong presumption of equal division. This presumption reflects the nature of marriage as an egalitarian property institution of deep sharing.³²² Considerations of financial fault—for example, extravagant spending on an extra-marital affair or dissipation of family funds through gambling or extremely risky investments—might justify deviation from an equal division, as might one spouse’s extreme financial need due to a serious medical condition or disability.³²³

THE POST-MARITAL PERIOD. Under family law’s current individualistic approach to property, spousal support is seen as intrusive and exceptional. Yet the effects of sharing behavior—economic dependence and

319. See *supra* note 111.

320. Motro, *supra* note 110, at 1625; see also PRINCIPLES OF THE L. OF FAM. DISSOLUTION, *supra* note 11, § 4.12(a) cmt. a (“After many years of marriage, spouses typically do not think of their separate-property assets as separate Both spouses are likely to believe, for example, that such assets will be available to provide for their joint retirement, for a medical crisis of either spouse, or for other personal emergencies. The longer the marriage the more likely it is that the spouses will have made decisions about their employment or the use of their marital assets that are premised in part on such expectations about the separate property of both spouses.”).

321. PRINCIPLES OF THE L. OF FAM. DISSOLUTION, *supra* note 11, § 4.12; Frantz & Dagan, *supra* note 298, at 106–19; Motro, *supra* note 110, at 1650 (proposing a “theory of marriage as a merger of risk and reward”); *id.* at 1652–58 (working out implications); Williams, *Do Wives Own Half?*, *supra* note 102, at 265–66.

322. See *supra* notes 296–299 and accompanying text.

323. Cf. Motro, *supra* note 110, at 1658 (“[P]resumption in favor of equal division” reflects “the central premise of the system,” which “is attributing equal freedom and risk to both parties during marriage.”); see also FINEMAN, *supra* note 17 (arguing that divorce law should be less focused on contribution and more attentive to financial need).

interdependence—often transcend the durational limits of marriage.³²⁴ The reality is that an ideal worker’s wage continues to be the product of both partners’ work, and mothers continue to transfer earning power to their husbands.³²⁵ Conceiving of ex-spouses’ post-marital incomes as a combined family wage recognizes the reality that former intimates, having once knit their lives together, cannot immediately be resituated as legal strangers.³²⁶

Under a joint-property approach to marriage, post-divorce transfer payments would be routinely available, even if for a potentially limited duration. Continuing a more constrained degree of resource-sharing for a period after marriage, especially in the case of long unions involving children, can help to ensure that former spouses do not face grossly unequal economic futures after divorce. Post-divorce transfer payments are also a less complicated and normatively preferable way to spread marital costs and benefits than is valuing human capital for inclusion in the conjugal estate, a difficult undertaking that can raise commodification concerns.³²⁷

2. A Menu of Statuses and Equitable Recovery for Cohabitants

Property’s spectrum of intimacy also suggests a novel approach to the problem of cohabitant obligations. Under the current regulatory approach, family law analogizes unmarried partners to either spouses or strangers. Taking the first route, a small number of jurisdictions ask how closely an unmarried couple’s relationship approximated an idealized vision of marriage—a standard that even many married couples may not meet.³²⁸ If

324. Sally F. Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, 27 J. FAM. L. 351, 359 (1989) (describing marriage as effecting a “transfer of earning power from wife to husband”); see also Motro, *supra* note 110, at 1629 n.13 (describing her vision of marriage as “merger of risk and reward” as “not inconsistent with a more robust system of alimony”).

325. See Williams, *supra* note 150, at 2257–66 (arguing that family members’ wages should be understood as jointly owned and that post-divorce incomes should therefore be equalized); Claire Cain Miller, *Women Did Everything Right. Then Work Got ‘Greedy.’ How America’s obsession with long hours has widened the gender gap*, N.Y. TIMES (Apr. 26, 2019), <https://www.nytimes.com/2019/04/26/upshot/women-long-hours-greedy-professions.html>; see also Goldfarb, *supra* note 324, at 363 (“While the marital partnership itself does not survive divorce, the effects of differing earning powers do. If no allowance is made for this fact at divorce, the husband reaps a windfall at the wife’s expense. Therefore, a central goal of alimony should be to avoid undue disparity between the former spouses’ standards of living.”).

326. Cf. Milton C. Regan, *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2310 (1994).

327. See, e.g., Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 1062 (1995); Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1885 (1987); Regan, *supra* note 326, at 2309–10; Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1631 (1996).

328. See, e.g., Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 IND. L.J. 517, 517 (1998) (“The salient fact about marriage . . . is that one size does not fit all.”).

the relationship passes this high threshold, then marriage-like recovery, which implicates all assets acquired by the efforts of either cohabitant over the course of the relationship, might be available.³²⁹ In most jurisdictions, courts treat cohabitants as parties at arm's length, applying general private law theories of recovery based in contract or equity, which only rarely yield recovery.³³⁰ Neither approach is a good fit for unmarried partners, because most cohabitant relationships tend to fall somewhere in between the spousal and strangers paradigms. Recognizing a spectrum of intimacy would allow family law to develop legal rules and sharing norms more appropriate to the levels of intimacy that inhere in a range of cohabitant relationships. In particular, the law of cohabitants should comprise a menu of family statuses whose default property implications are more limited than marriage, supplemented by a set of equitable remedies for protecting cooperation upon the dissolution of informal relationships. In the alternative, if such gap-filling measures prove impracticable to implement, cohabitants should at least have recourse to a reformed private law of intimates.

The best way to extend the spectrum of intimacy into family law is to develop a moderately extensive menu of family forms with differing degrees of property sharing, just as property law offers multiple forms of joint ownership.³³¹ What these statuses might look like will vary from state to

329. See *supra* notes 45–48 and accompanying text (discussing doctrines of committed intimate relationships, common-law marriage, community property by agreement, and implied joint venture).

330. See *supra* notes 50–66 and accompanying text (discussing implied contracts and restitution).

331. See *supra* notes 273–277 and accompanying text; cf. HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* (2017) (arguing that to promote freedom, the state should supply a menu of form contracts between which individuals may choose); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 46–62 (2008); Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 64–66 (2012) (arguing that legal benefits currently attached to marriage should be disaggregated and redistributed either directly to individuals or based on other, nonmarital relationships); Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J.L. & GENDER 317, 366 (2016) (“[F]amily law ought to adopt a pluralistic version that is bounded by core values of substantive autonomy and equality.”); David L. Chambers, *The “Legalization” of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REFORM 805, 813–18 (1985) (arguing that the government should regulate families according to a principle of “supportive neutrality”); William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1886 (2012) (arguing that family law’s “new normative foundation supports regulation through guided choice rather than . . . mandatory rules”); Joslin, *supra* note 27, at 432 (arguing that the “family law . . . system needs to include, but not be limited to, marriage”); Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CAL. L. REV. 1207, 1209–10 (2016) (arguing for “a project of family and relationship pluralism that respects and values a broader array of relationship and family forms than civil marriage alone”); Edward Stein, *Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism*, 28 LAW

state, and such jurisdictional variation could help to spur innovation. Some already existing examples include California's domestic partnership registries, Colorado's designated beneficiaries scheme, and Hawaii's reciprocal beneficiaries status.³³² With a variety of less property-intensive legal options available, more unmarried partners may choose to formalize their relationships. The law could also encourage more couples to take on some *inter se* property obligations by offering them easy day-to-day ways to do so, for example by including such options when individuals sign leases, elect HR benefits, or purchase insurance policies.³³³ By providing a continuum of intimate property regimes of which marriage is just one, family law would respect and recognize the differing degrees of commitment and sharing that inhere in a wide range of cohabitant relationships.

In addition to expanding its menu of intimate statuses, family law should also protect cohabitants who do not opt into status or formally contract, but whose relationships nonetheless exhibited great degrees of interdependence around resources.³³⁴ For these cohabitants, family law should develop an equitable, asset-restricted cause of action for recovery of some property acquired during the relationship but titled in the other partner's name. By "equitable," I mean that the distributive principle should almost never be marriage's community-minded egalitarianism, but instead a criterion or criteria appropriate to the nature of the particular relationship. I use the term "asset-restricted" to indicate that the corpus of property subject to distribution should almost always be more circumscribed between unmarried partners than it is between spouses. By varying both the distributive criteria and the corpus subject to distribution, family law would follow the approach of property law, which not only recognizes degrees of intimacy, but also defines the res of property disputes more narrowly than family law does.

& INEQ. 345, 349 (2010) (arguing for a "functionalist approach to relationship recognition" combined with "a 'menu' of alternatives to marriage").

332. See CAL. FAM. CODE § 297 (2020); COLO. REV. STAT. ANN. §§ 15-22-101 to -112 (2020); HAW. REV. STAT. §§ 572C-1 to -7 (2020); John G. Culhane, *After Marriage Equality, What's Next for Relationship Recognition?*, 60 S.D. L. REV. 375, 382-85 (2015) (describing Colorado's designated beneficiaries and Hawaii's reciprocal beneficiaries laws); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 114-54 (2014) (describing the history of California's municipal and statewide domestic partner registries).

333. Cohabitants' rights and responsibilities vis-à-vis third parties are also an important issue. See generally Kaiponanea T. Matsumura, *Beyond Property: The Other Legal Consequences of Informal Relationships*, 51 ARIZ. ST. L.J. 1325 (2019). However, those considerations are outside the scope of this Article.

334. Indeed, most cohabitants do not formalize their relationships. See, e.g., Matsumura, *supra* note 300, at 1018 ("Couples . . . rarely elect to enter a formal nonmarital status. . . . Written agreements between nonmarital partners also appear to be rare.").

To illustrate this difference, consider a conflict between neighbors A and B over whether A enjoys a right-of-way over B's land. Even if a court declares that an easement exists, A's property right will be limited to use of a particular path or roadway; the easement will not entitle A to enter B's house to sit and read in B's favorite chair.³³⁵ When property law grants rights in derogation of title, those rights are cabined to a specific asset with which a claimant has had especially close contact, rather than implicating other assets of the titleholder with which a claimant has had little or no contact.

Contrast property law's focus on particular resources and uses with family law's more wide-ranging conception of the property at issue when a relationship ends. Divorce distribution appropriately implicates all property acquired by the efforts of either spouse during the marriage, but cohabitant cases dispute the same set of assets.³³⁶ The breadth of the contested corpus subjects cohabitants to the same expansive financial discovery required of divorcing spouses, even if a court ultimately concludes that no or only minimal shifting of property in derogation of title is warranted. Defining the "cohabital estate" in this way makes the process of resolving unmarried partners' property disputes unnecessarily expensive and invasive in a significant proportion of cases.

Instead of categorically implicating all property acquired by the efforts of either partner over the duration of their relationship, as marital property regimes do, the cohabitant property remedy should take an asset-restricted approach by identifying and determining rights in a narrower, functionally defined corpus of property. At a minimum, and as a matter of property law, the cohabital estate would include any assets and debts titled in joint name. I propose that the cohabital corpus also include those assets that concretely furthered an unmarried couple's life together. "Concretely furthering," like tort law's requirement of proximate cause, is necessarily a value judgment

335. Cf. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.10 cmt. d (AM. L. INST. 2000) ("The purpose of an easement created by use . . . is generally defined specifically so that only the use that created the easement and closely related ancillary uses are included within the purpose.")

336. See *supra* notes 45–47, 110–117 and accompanying text. Similarly, the July 2020 draft of the Uniform Law Commission's Uniform Cohabitants' Economic Remedies Act ("UCERA"), then called the Economic Rights of Unmarried Cohabitants Act, would authorize "a cohabitant" to "assert a claim for . . . fair and equitable division of assets acquired and liabilities incurred as a result of the efforts of either cohabitant during cohabitation, without regard to legal title," although "court[s] may not presume that any particular . . . division of assets or liabilities is equitable." ECON. RTS. OF UNMARRIED COHABITANTS ACT § 12(a), (e) (UNIF. L. COMM'N, Tentative Draft, July 24, 2020), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=75dee7ba-cbb7-dcab-4d19-ffb3ea8460df&forceDialog=0>. The UCERA is limited to permitting "equitable claim[s]" between cohabitants "based on contributions to the relationship." UNIF. COHABITANTS ECON. REMEDIES ACT § 7(b) (UNIF. L. COMM'N, Tentative Draft, June 1, 2021) [hereinafter UCERA June 2021 Draft] (on file with the *Maryland Law Review*).

that will depend on the nature and length of the parties' relationship.³³⁷ This value judgment should not, however, be made in accordance with family law's traditional conception of intimacy, but rather by employing the expanded conception of intimacy provided by property law and described above.³³⁸ In general, courts should ask which assets constituted the intimate community, what kind of a community it was, and what relationship- and resource-specific vulnerabilities it engendered.³³⁹

To render this query more concrete and methodical, it is helpful to consider property's strategies for assigning entitlements in derogation of title.³⁴⁰ In particular, family law should allow cohabitants to make claims against those assets that were actually used, labored, or relied upon in furtherance of the relationship.

By way of illustration, a pattern of use might support an untitled partner's equitable claims against resources such as housing, furniture and household goods, or a car titled in the other's name, but not against individually titled intangible resources, such as interests in businesses, transaction accounts, and retirement and investment accounts, which would remain outside the cohabital estate. The untitled partner's use right might be conceptualized as a kind of an easement, which the titled partner could "buy out" in the form of a court-defined severance payment. Focusing on resource use also provides justification for equitably dividing individually titled debts, for example credit card debts, that were incurred to cover costs of living and other joint expenses. These debts, which are often the most significant form of property among low-income cohabitants, should also be included in the cohabital estate.

Untitled cohabitants should also be permitted to bring property claims based upon their labor in furtherance of a relationship. Such claims have traditionally failed, not only because both law and society have long devalued "women's work," but also because of the high administrative and privacy costs of establishing a couple's division of household labor.³⁴¹ To navigate these minefields, labor-based property claims should be assessed with an eye

337. Cf. Leon Green, *Causal Relation in Legal Liability—In Tort*, 36 YALE L.J. 513, 532 (1927).

338. See *supra* Part II.B.

339. See *supra* notes 248–281 and accompanying text (describing how resources constitute communities and the values such communities might reflect and further).

340. See *supra* Part II.A.

341. Cf. Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. Rev. 2139, 2145–47 (2019). The UCERA permits cohabitants to bring "equitable claim[s] based on contributions to the relationship," UCERA June 2021 Draft, *supra* note 336, § 7(b), which are defined to specifically include "cooking, cleaning, shopping, household maintenance, conducting errands, or other domestic services . . . and . . . otherwise caring for the other cohabitant, a child in common, or another family member of the other cohabitant," *id.* § 2(3)(A).

to both which assets the labor affected, as well as the benefits conferred and detriments incurred by the laborer. Labor that contributes to the value of a concrete asset would bring that asset into the cohabital estate, in the style of restitution,³⁴² while labor combined with reliance, i.e., cutting back on work hours or quitting a job to raise joint children or to enable one's partner to succeed in a "greedy" profession, would justify conceiving of the supported partner's earned income and increased human capital as shared assets.³⁴³ Although earned income would be included in the cohabital estate and subjected to equitable distribution, the increased human capital should not. Given the especially personal nature of human capital, the laborer's interest in this resource should be "cashed out" through rehabilitative or transitional post-relationship transfer payments.

A relationship's reliance upon the availability of certain assets may also justify their inclusion in the cohabital estate, though the extent to which reliance renders assets subject to distribution will depend on the nature and duration of the relationship. Because many cohabitants view their relationships as contingent and are reluctant to pool assets,³⁴⁴ the law should not automatically assume a high level of reliance between unmarried partners. Thus, in shorter-term relationships, use- and labor-based claims are likely to predominate. However, even relatively brief reliance upon a richer partner's assets (for example, if one partner covered the majority of living costs) might ground limited post-relationship transfer payments to ease the vulnerable partner's transition to his or her new life. This proposal would justify the trial court's rehabilitative award to Michelle Marvin, which was vacated on appeal.³⁴⁵ In longer-term high-commitment relationships, reliance-based claims might become more important and may implicate intangible assets. Long-term unmarried partners' structuring of their common lives against the backdrop of interests in businesses, transaction accounts, and retirement and investment accounts might justify converting a portion of these individually titled assets into cohabital property, perhaps on a schedule conceptually analogous to those proposed in the ALI Principles and the Uniform Probate Code.³⁴⁶ This kind of reliance would counsel for

342. Cf. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28(1) (AM. L. INST. 2011).

343. See Miller, *supra* note 325; cf. UCERA June 2021 Draft, *supra* note 336, § 7 cmt. ("mak[ing] clear that unjust enrichment and other equitable claims available to cohabitants need not be tied to a specific asset, and that such claims may be based on non-monetary contributions to the relationship").

344. See Carbone & Cahn, *supra* note 40, at 94, 99–101.

345. Marvin v. Marvin, 176 Cal. Rptr. 555, 559 (Ct. App. 1981) (vacating the rehabilitative award as lacking legal basis); see also *supra* notes 1 & 4 and accompanying text.

346. PRINCIPLES OF THE L. OF FAM. DISSOLUTION, *supra* note 11, § 4.12; UNIF. PROB. CODE § 2-203(b) (UNIF. L. COMM'N 2008) (setting forth a schedule for determining what percentage of a

different results for Victoria Hewitt and Shaniqua Tompkins, as well as in the *Friedman* case.³⁴⁷

This asset-restricted, functional approach to defining the cohabital estate could contribute to more appropriate outcomes in cohabitant property disputes. This approach is not only potentially less invasive and less financially risky for couples who have not explicitly invited the state into their intimate relationships. By analyzing the parties' relationships to one another and to their shared resources in the first step of the equitable distribution analysis, this approach can also help to take some pressure off the third, distributive step. For rather than beginning with an expansive corpus and considering commitment, contribution (which is a species of desert), reliance, and intent all together, and only in the distribution phase, as current cohabitant cases do, my proposal asks a few important normative questions right off the bat. Constructing the cohabital corpus according to property law's expansive conception of intimacy gives us confidence that all the assets subject to distribution are truly community resources. With the underlying question of entitlement thus settled in the identification phase, the distribution phase need only ask what kind of sharing outcome to effectuate.³⁴⁸ Breaking down the inquiry in this way allows us to import some of the communitarian values that property law can provide, prior to the necessary step of individuating property entitlements between former unmarried partners.

Although the cohabital estate is comprised of shared resources, distribution should not begin with a presumption of equal division. Instead, courts should consider a variety of factors, some of which are familiar from current equitable distribution schemes and some of which are not. These factors might include (1) the partners' respective contributions to the relationship, including domestic services and caretaking; (2) the degree to which the parties shared tangible and intangible property; (3) one party's vulnerability resulting from the couple's interdependence around resources; (4) the degree of the parties' commitment to one another and the relationship; and (5) career or other economic sacrifice for the benefit of the other partner or the relationship. I do not intend for these factors to be exhaustive, and it would be up to each state to determine which considerations should apply in which cases. Here, jurisdictional variation and the common-law development of bodies of precedent would help to move cohabitation law

decedent's augmented estate is the marital-property portion for purposes of a spouse's elective share).

347. *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979); *Tompkins v. Jackson*, No. 104745/2008, 2009 WL 513858 (N.Y. Sup. Ct. Feb. 3, 2009); *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892 (Ct. App. 1993); see also *supra* notes 2, 3, 5, 6, 58 and accompanying text.

348. Cf. *Dyal-Chand*, *supra* note 211, at 714–15.

forward. In terms of what overarching principles should govern distribution of the cohabital estate, equality may be appropriate in the case of long-term, high-commitment relationships of extensive sharing, while for shorter-term, more contingent relationships, principles like desert and encouraging fair dealing may predominate.

Under this proposal, as cohabitant relationships become more marriage-like, the cohabital corpus would begin to approximate the conjugal estate and cohabital distribution principles would tend toward equality. Thus, although I begin with a formal distinction between spouses and unmarried partners, the latter could access marriage-like recovery when their relationships functionally approximate those of committed, economically interdependent spouses. In such a case, the law as applied would blur the line between formal and functional families—a result that is nearly impossible to achieve under the current system of defaults. In this way, the proposed approach balances between the predictability of a bright-line rule (for families who have formally elected such treatment) and the flexibility of standards (for families who have not).³⁴⁹

I attach two additional limits to this proposal. First, because this inquiry is fact-based and extensive, it might make sense to recognize claims only between those cohabitants whose relationships have lasted a significant period of time.³⁵⁰ Recent studies suggest that most cohabitations end within three years,³⁵¹ meaning that four or five years might be a reasonable minimum duration for states to choose. Limiting equitable, asset-based recovery to cohabitant relationships of significant length would help to avoid entangling in the legal process those intimates who eschew marriage for precisely this reason.

Second, all of the above proposals would be default rules that parties could vary by contract or by keeping records showing that they segregated

349. Cf. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

350. This approach also finds support in property law, which requires the running of a statutorily set time period before adverse possession or an easement by prescription may be established. See, e.g., RICHARD R. POWELL, POWELL ON REAL PROPERTY § 91.01 (Michael Allan Wolf Desk ed., Matthew Bender 2009) (1890).

351. Jessica Cohen & Wendy Manning, *The Relationship Context of Premarital Serial Cohabitation*, 39 SOC. SCI. RSCH., Sept. 2010, at 16, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3874393/> (finding cohabitations lasted an average of 31.68 months); Paula Y. Goodwin, William D. Mosher & Anjani Chandra, U.S. DEP'T OF HEALTH & HUM. SERVS., MARRIAGE AND COHABITATION IN THE UNITED STATES: A STATISTICAL PORTRAIT BASED ON CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH 3 (2010), https://www.cdc.gov/nchs/data/series/sr_23/sr23_028.pdf (estimating that most cohabitations end either in marriage or dissolution within three years).

their property during the relationship. Defaults tend to be sticky,³⁵² especially because cohabitants who failed to elect a family status are unlikely to have attended to other legal formalities.³⁵³ But the defaults of the approach I propose are fairer than the current regime's. Not only does the scheme outlined above put the onus on the richer party to contract around the default,³⁵⁴ but it is also more narrowly tailored to a particular set of unmarried partners than full marriage-like obligations would be.

If this set of equitable gap-filling measures proves impracticable, recourse to general private-law protections should be made more available for cohabitants. Private law is full of biases against domesticity, the unsurprising result of coverture's influence on every aspect of the common-law legal system.³⁵⁵ Reducing these impediments to unmarried partners' recovery would go a long way toward preventing property injustice between members of functional families.³⁵⁶ Two examples of such bias-removal include the 2011 *Restatement (Third) of Restitution and Unjust Enrichment*, which jettisons traditional doctrinal requirements that would normally prevent cohabitants from recovering against one another,³⁵⁷ as well as the draft Uniform Cohabitants' Economic Remedies Act, which aims "to remove bars to claims which arise within the framework of a cohabiting relationship."³⁵⁸ A reformed private law of intimates would adjust its assumptions in light of the behavior typical of intimate relationships. In particular, it would expect cooperation but understand it to be mutually beneficial, furthering both parties' interests, rather than purely altruistic. Doing so would not only protect economically vulnerable cohabitants who engage in sharing behavior, but would also help, over time, to abolish the remaining vestiges of coverture—the root of property inequality in families.

CONCLUSION

Although the family is conventionally described as a domain of sharing, family law's deferential approach to title reveals a deep regard for individual property rights. In contrast, property law takes a more nuanced approach to ownership, instantiating a "spectrum of intimacy" that reflects the

352. See generally Erez Aloni, *Compulsory Conjugal*, 53 CONN. L. REV. 55 (2021) (presenting results of a qualitative survey of unmarried couples in British Columbia).

353. Joslin, *supra* note 7, at 923 (suggesting that unmarried couples may not undertake family formalities because they are busy living their lives).

354. See Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 259–61 (2004).

355. Cf. Antognini, *supra* note 341 (describing remnants of coverture).

356. I intend to expand on this argument in future work.

357. See Sherwin, *supra* note 60, at 717–18, 719–20.

358. UCERA June 2021 Draft, *supra* note 336, § 3 cmt.

vulnerability inherent in a wide range of close social relations constructed through and conducted around resources. As I have argued above, family law should adopt property's approach as the basis for an intimate property system capable of reflecting and honoring the diversity of modern family relationships.

This Article puts family law more closely into conversation with property law, a move that presents intriguing possibilities for both fields. I have already sketched out some normative and doctrinal implications of the spectrum of intimacy for family law. But the intimacy approach can be used to evaluate and rethink property law, as well.

The intimacy approach provides an additional lens for assessing and re-envisioning current property doctrine. Although I suggest that family law take property's spectrum of intimacy as a model, property law is by no means perfect, as progressive property scholars have noted.³⁵⁹ Property law reacts to intimacy, but its recognition of intimacy is currently more of an "impulse" than a fully realized and actionable principle.³⁶⁰ To advance this nascent tendency, we might begin by asking whether current property doctrines improperly penalize cooperative behavior, or effectively incentivize normatively desirable interdependence, or provide sufficient protection in cases of inevitable dependence. These inquiries are the first step in teasing out which sharing norms might be appropriate between disputants related by different degrees of closeness, as well as what kinds of legal rules should reinforce those norms. The goal should be to preserve a generous sphere of individual autonomy, bounded when owners' exercise of that autonomy runs afoul of other-facing norms appropriate to the given resource and relationship. This method could be fruitfully employed, for example, in the project of developing "the law of neighbors" as a legal category,³⁶¹ and indeed I intend to explore intimacy between neighbors in future work. The intimacy approach to property law can also offer a compelling theoretical justification for doctrinal change. Here, the Uniform Partition of Heirs Property Act, which reforms the law of co-tenants to protect family members

359. See, e.g., Alexander, Peñalver, Singer & Underkuffler, *supra* note 157; Dyal-Chand, *supra* note 211, at 653 ("Property outcomes have the potential to address acute problems of fairness and distributive justice to a much greater extent than they currently do.").

360. Dyal-Chand, *supra* note 211, at 653 (describing as "a current and compelling problem in property law that the impulse to share often remains inchoate").

361. Smith, *supra* note 267, at 758 ("The future might well bring a world in which . . . a specialized body of doctrine with regard to neighborly relations emerges."); *id.* at 760 ("[I]f the field of neighbor law develops in the United States, academics will have to lead the way. . . . [S]uch an effort could lead to a salutary simplification of the law of neighbors.").

from involuntarily losing their property, is a prime example.³⁶² In these ways, the intimacy approach opens up promising avenues for research and law reform in both family and property law.

362. See generally Thomas W. Mitchell, *Historic Partition Law Reform: A Game Changer for Heirs' Property Owners* (Tex. A&M U. Sch. L. Rsch. Paper No. 19–27, 2019), <https://ssrn.com/abstract=3403088>.