

BROKEN LINKS: A CRITIQUE OF FORMAL EQUALITY IN INHERITANCE LAW

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There is a recognition of long standing that formal equality in law often fails to lead to substantive fairness on the ground for women, minorities and other disadvantaged groups. This insight has inspired a critique of formal equality jurisprudence in relation to gender and race, in particular. In the context of gender and the family, much attention has focused on post no-fault divorce law, specifically property division upon divorce. There has also been an extensive critique of spousal inheritance law and the ways its formal equality has disadvantaged women due to their longevity and lower average earnings. This article is the first attempt to apply a critique of formal equality to inheritance law as a whole and to show how some of its default rules disadvantage already vulnerable groups across the board and in similar ways. I revisit gender and spousal inheritance, and then discuss the role of the default title of tenancy in common in divesting holders of heirs property—African Americans, Native Americans and others—of property. Ultimately, I argue that default rules which serve some social and policy goals operate to harm these communities and require change.

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INTRODUCTION

No one can deny that there is a significant wealth gap in this country. It has many causes: low wages for hourly workers, deregulation, technology replacing service jobs, tax cuts for corporations and the rich, and lack of support for families, among others. This Article focuses on a less visible reason for the wealth gap: inequality in inheritance laws. On their face, the laws that determine how wealth passes from one generation to the next or from one spouse to another treat everyone the same: the same succession and default laws apply to men and women, to whites and African Americans, rich and poor. Although Native Americans have different Indian probate codes, many of the same default rules which apply to the passage of real property in the common law apply to them as well. In many cases, however, these laws and defaults disadvantage these groups because of the real life differences in ways people in these groups are situated with respect to property. The law does not take account of these differences. The overall result is that inheritance law often fails to pass wealth as effectively among the already disadvantaged as it does among others. This failure contributes to higher rates of poverty among these groups. These broken links of our property inheritance system deserve attention because they contribute to inequality and vulnerability. They also compound, rather than ameliorate, historical injustice.

Since the 1990s, there has been a growing understanding among legal scholars and practitioners that laws that are equal on their face in fact discriminate when applied to people who do not start out with equal access to resources or equal standing in society.¹ This critique of formal equality has largely focused on the limits of anti-discrimination law, civil procedure, and the doctrine of free speech, among others. It has also, however, paid attention to the similar ways property and inheritance law discriminate against subordinate groups by imposing formal equality without regard to the playing field those groups stand on in the first place. In particular, there is an extensive literature in regard to gender and property law, especially in the context of property division at divorce.²

1. Two of the first seminal works critiquing formal equality were CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979) and CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987). Since then, notable interventions have included: Katie Eyer, Brown, *Not Loving: Obergefell And The Unfinished Business Of Formal Equality*, 125 *YALE L.J. FORUM* 1 (2015); Ruth Colker, *Reflections On Race: The Limits of Formal Equality*, 69 *OHIO ST. L.J.* 1089 (2008); ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM* (1994); Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 *S. CAL. L. REV.* 1699 (1990).

2. See, e.g., Laura M. Padilla, *Gendered Shades of Property: A Status Check on Gender, Race & Property*, 5 *J. GENDER, RACE & JUST.* 361 (2002) (providing

This Article contributes to that literature by applying the critique of formal equality to inheritance law across different populations and by showing how its formal equality actually creates on-the-ground inequities which contribute to systemic inequality. The aspect of formal equality I focus on here is the default tenancy in common form of concurrent property ownership.³ Specifically, I show that succession law disadvantages women who, because of their higher longevity and other factors, are more likely to lose out financially as surviving spouses, and argue that the default tenancy in marriage should be tenancy by the entirety, not tenancy in common. African Americans, Native Americans, Hispanics, and others, I will also show, are disadvantaged by the tenancy in common default for intestate real property. This default rule makes sense in many modern American contexts, but, when imposed on the estates of low income African Americans, Native Americans, Hispanics, and other owners of heirs property, whether rural or urban, it actually inhibits the transfer of wealth. I propose a substantive equality approach to both of these issues, and suggest that other forms of concurrent ownership are more constructive ways of transmitting property in these contexts.

I proceed in three parts. Part I makes the connection between inheritance and the accumulation of wealth, and documents disparities in intergenerational wealth transmission among various groups. Parts II, III, and IV show how inheritance and property law, by applying the tenancy in common default across the board, often disadvantage already financially vulnerable surviving spouses, African Americans, and Native Americans, and, in each case suggest solutions based on a substantive approach to property distribution.

Finally, in Part V I point to the gaps in the Bar's provision of estate planning services to underserved communities. I trace this in part to the lack of pro bono services in estate planning, and the failure of the

a history of gender discrimination in marriage and divorce and highlighting the limits of formal equality); Martha Albertson Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, in *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* 265, 268–74, 277–78 (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991) (criticizing feminist divorce law reformers for failing to offer affirmative action-style standards for property distribution at divorce and feminists' commitment to formal equality and reluctance to challenge the ideal of family equality deny the reality of many married women's experiences); see MARTHA FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 4, 29, 33, 36, 47 (1991).

3. For a general discussion of the tenancy in common as a default rule, see John V. Orth, *The Paradoxes of Joint Tenancies*, 46 *REAL PROP. TR. & ESTATE L.J.* 483 (2012); Sarah E. Waldeck, *Rethinking the Intersection of Inheritance and Tenancy in Common*, 87 *NOTRE DAME L. REV.* 737 (2011); John V. Orth, *Presumed Equal: Shares of Cotenants*, 37 *ACTEC L.J.* 463 (2011).

trusts and estates curriculum to emphasize the links between succession law, wealth inequality, and the makeup of society as whole.

I. INHERITANCE AND INEQUALITY: THE LINK

Wealth is different from income. The latter refers to the stream of money the workers in a family earn.⁴ Wealth is the sum of a family's assets, including savings, stocks and bonds, and real estate.⁵ More than lack of income, lack of wealth contributes to vulnerability. Wealth means resilience, the ability to weather life's crises, like job loss, sickness, climate catastrophes, and similar setbacks. High income doesn't necessarily demonstrate financial security; net worth—that is, wealth—is a much better indicator of financial well-being. Wealth also allows people to influence the world around them, by donating to political campaigns, supporting charities, etc. It also enables parents to give their children a solid start in life, by paying for education or funding a home purchase.⁶

What the law allows people to inherit correlates highly with their wealth; wealth comes through inheritance.⁷ Inheritance can take many forms: in a University of Michigan study, Fabian Pfeffer and Alexandra Killewald found that financial help in acquiring an education accounted for twenty-five percent of the wealth similarity between parents and children, while help in buying a home accounted for twenty-eight percent (other factors with less impact were marriage and the inheritance of large sums of money).⁸ Thus, inheritance matters, and the unequal ability to inherit also matters.

Moreover, wealth passes within families. Most people choose to leave their estates to their descendants. If they don't make this deliberate choice by executing an estate plan, intestacy laws do it for them, distributing assets to the decedent's close relatives. This should result in the accumulation of family wealth across generations—and it often does. It's also true that, because of the wealth gap, those with less

4. For an explanation of the difference between income and wealth, see Ari Glogower, *Taxing Inequality*, 93 N.Y.U. L. REV. 1421, 1434–35 (2018) (defining income as “flow of new economic resources” and wealth as “accretions from prior periods that were saved”).

5. Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL'Y 53, 54–56 (2006).

6. Fabian T. Pfeffer & Alexandra Killewald, *Generations of Advantage. Multigeneration Correlations in Family Wealth*, 96 SOC. FORCES 1411 (2018); Morgan Sherburne, *Three Generations of Data Show How Wealthy (White) Families Stay Wealthy*, PHYS ORG (Mar. 29, 2018), <https://phys.org/news/2018-03-wealthy-white-families.html#jCp> [<https://perma.cc/ZG8R-9J6W>].

7. Pfeffer & Killewald, *supra* note 6, at 1416.

8. *Id.* at 1428–29.

wealth have less to pass on and thus benefit future generations less. These patterns not only replicate inequality down the line, they can actually increase it. Some demographics actually show a *decrease* in wealth from one generation to the next; this is the case for African Americans and continuing high levels of poverty for Native Americans suggest that this may also be the case for them as well⁹. The University of Michigan study found that even when white and African American families have similar wealth levels, there is a large wealth gap between the children of those same families.¹⁰ Pfeffer and Killewald say: “We knew that racial wealth gaps were extreme, but now [this study] also show[s] that there is a large racial gap in the transmission of wealth across generations.”¹¹ African Americans’ ability to pass on their major assets—usually a home—is hindered by lack of access to estate planning and by the operation of the tenancy in common default of intestacy laws, as I will show.¹²

Native Americans are also subject to the inhibition of wealth transfer from one generation to the next, in large part because of the fractionation of Indian trust lands, which in turn is due to the default tenancy in common imposed by property law.¹³ While it is difficult to determine intergenerational wealth transfer among Native Americans, the reality is that they exhibit very high poverty rates, and this is in large part due to the difficulty of making productive use of fractionated land.¹⁴

In the case of financially dependent spouses, the inheritance phenomenon that contributes to higher poverty rates is not inhibited intergenerational wealth transfer, but the way inheritance law often prevents women from inheriting wealth that is rightfully theirs—wealth they have worked and sacrificed for within a marriage. Although the law defines marriage as an economic partnership,¹⁵ women often do not

9. See Jens Manuel Krogstad, *One-in-four Native Americans and Alaska Natives Are Living in Poverty*, PEW RES. CTR. (June 13, 2014), <https://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/> [<https://perma.cc/P45X-WS2L>].

10. Pfeffer & Killewald, *supra* note 6, at 1428–29.

11. Sherburne, *supra* note 6.

12. See Thomas Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1 (2014); Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs’ Property Owners Facing Partition in Equity*, 17 TEMP. POL. & C.R. L. REV. 1 (2007).

13. For a thorough explanation of Indian land and inheritance law, see Jessica A. Shoemaker, *Complexity’s Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487 (2017).

14. *Id.* at 490–91.

15. See, e.g., Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN’S L.J. 141, 142–43 (2004) (“Sharing a life together profoundly influences the

receive their fair share of marital wealth as surviving spouses. This phenomenon of course also affects any financially dependent spouse, and spouses in same sex marriages are also at risk of disinheritance.

The law of inheritance—of wills and intestacy—treats everyone the same. In other words, it is a system of formal equality. In doing so, it at times maintains and perpetuates inequality. The solution is to revise the law in ways that take into account the context in which inheritance takes place, and revise defaults and norms to create substantive equality in these different contexts.

II. FINANCIALLY DEPENDENT SPOUSES

Women outlive men. Thus, spousal inheritance has increased importance for them, since they are likely to be surviving spouses. By contrast, legislatures, the bodies passing spousal inheritance laws, are still majority male.¹⁶ As mentioned above, this is not a problem of intergenerational inheritance, but rather one of the passage of wealth within one generation, between spouses. This is also an important mode of wealth transfer because it determines whether the heir/survivor will live in poverty or not. Despite general popular and legal belief that marital property belongs equally to both spouses, spousal inheritance law still at its core leaves it in the control of the spouse who received the bigger paycheck. This of course applies equally across genders. But it is still the case that that the male partner in an opposite sex marriage—especially one with children—is more likely to get the bigger paycheck. The same pattern applies in same sex marriages, leaving the financially dependent spouse vulnerable, although the same law applies to both parties. This is one of the broken links of inheritance law. Now that same-sex marriage is finally on equal legal footing with opposite sex marriage, do we risk creating a class of impoverished former caregivers and child raisers?

ways in which couples structure and shape their lives. . . . [M]odern family law recognizes this sharing process through its embrace of partnership marriage as the dominant theory of marriage and divorce.”); Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMP. L. REV. 1413, 1413–16 (1996) (describing how partnership theory of marriage has been accepted in family and tax law).

16. Women’s Legislative Network of NCSL, *Women in State Legislatures for 2018*, NATIONAL CONFERENCE OF STATE LEGISLATURES (June 28, 2018), <http://www.ncsl.org/legislators-staff/legislators/womens-legislative-network/women-in-state-legislatures-for-2018.aspx> [<https://perma.cc/55CV-XTB9>].

A. The Elective Share

Most people say they believe, and the law seems to recognize, that marriage is an economic partnership, “a sharing enterprise: both spouses labor, although perhaps in different ways, and so each contributes meaningfully to the collective benefits the marital labor yields.”¹⁷ Such a view suggests that both financial and non-financial contributions to the shared enterprise create equal vesting of the property earned by the members of the partnership. This means, among other things, that each spouse stands to inherit half the assets earned by the marital unit. The laws of inheritance often do not reflect this belief, however. Despite attempts to make inheritance law reflect this partnership model, the spouse who “earned” it still has enough control to deprive the surviving spouse of half. This is true even in community property states, which seem at first to have fairer rules.

Because women still live longer than men, the surviving spouse in opposite sex marriages tends to be female; this analysis can also apply to the survivor of a same sex marriage in which one spouse was more financially dependent than the other. Because, however, most marriages are still opposite sex, and within these marriages the female partner is more likely to be the less financially independent one—especially if there are children—this broken link affects women statistically more than men. Surviving financially dependent spouses thus constitute a group made vulnerable by the formal equality of inheritance law.

Common law states have gestured towards the idea of marital partnership in the “elective” or “forced” share.¹⁸ Forty-nine states have laws which guarantee the surviving spouse a share of the decedent’s estate if the decedent disinherited her or left her less than she felt she deserved.¹⁹ Paradoxically, however, these laws often operate to deprive the surviving dependent spouse of an equal share of the partnership.

First, in many states the elective share on its face fails to acknowledge the marriage as an equal partnership. In some states, the share is one-third, not one-half, of the probate estate, even in long term marriages.²⁰ This fraction hardly embodies the concept of an equal

17. Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self over the Marital Community*, 81 B.U. L. REV. 59, 62 (2001).

18. See UNIF. PROBATE CODE § 2-122 cmt. (UNIF. LAW COMM’N 2010) (General Comment: The Partnership Theory of Marriage).

19. Jeffrey N. Pennell, *Minimizing the Surviving Spouse’s Elective Share*, 32 U. MIAMI INST. EST. PLAN. § 904 (1998).

20. States which have enacted a uniform elective share of one-third include: Alabama, ALA. CODE § 43-8-70 (2018) (the lesser of one-third of decedent’s estate, or all the value of the decedent’s estate minus the value of survivor’s separate estate); Alaska, ALASKA STAT. § 13.12.202 (2018) (one-third of augmented estate, minimum of

partnership. Thus, even if the surviving spouse does elect and receive a third of the estate, in many circumstances this could result in her receiving less than half of the marital property accumulated during the marriage. Just because a state has an elective share statute, it has not necessarily acknowledged the economic partnership of marriage and the surviving spouse's right to half of the marital estate. New Jersey's elective share statute, for example, indicates that the share option exists solely to provide necessary support for the surviving spouse.²¹

Thus, the definition of property implicit in the idea of marriage as a partnership and the definition of property for purposes of inheritance contradict each other. Marital partnership defines the assets that come into the marriage as marital property, belonging equally to both spouses. When the first spouse dies, however, the relevant definition of property is that under inheritance law. Inheritance law defines a decedent's property as what was titled in his name during his life. This is his estate for succession purposes. In this way, inheritance law magically transforms property defined as marital during life into

\$50,000); Delaware, DEL. CODE ANN. tit. 12, § 901 (2019) (one third of augmented estate); Hawaii, HAW. REV. STAT. § 560:2-206 (2018) (augmented estate); Iowa, IOWA CODE § 633.238 (2019) (one-third in value of all the legal or equitable estates in real property possessed by decedent); Maine, ME. REV. STAT. ANN. tit. 18-A, § 2-201 (2018) (augmented estate); New Jersey, N.J. REV. STAT. § 3B: 8-1 (2019) (augmented estate); New York, N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (McKinney 2019) (greater of \$50,000 or one-third of estate net of administrative expenses); South Carolina, S.C. CODE ANN. § 62-2-201 (2018) (one third of decedent's probate estate); Tennessee, TENN. CODE ANN. § 31-4-101 (2018) (up to 40% of decedent's net estate based on length of marriage); Florida has an elective share of thirty percent of the fair market value of decedent's net assets, excluding real property not located in Florida. See FLA. STAT. ch. 732.2065 (2018); see also UTAH CODE ANN. § 75-2-202 (2018) (one-third of augmented estate). Oregon has a one-fourth elective share of the net estate. See OR. REV. STAT. § 114.606 (2017).

21. The statute reads as follows:

The right of election to take an elective share by a surviving spouse . . . may be exercised only during his lifetime. In the case of a surviving spouse . . . for whom the court has appointed a guardian to manage his estate, the right of election may be exercised only by order of the court making the appointment after finding that the election is necessary to provide adequate support of the surviving spouse . . . during his probable life expectancy.

N.J. STAT. ANN. § 3B:8-11 (West 2006). The court in *Estate of Bilse* interpreted this statute to mean that the elective share was meant to provide the survivor with support during her lifetime, not "an inheritance to [her] heirs." *In re Estate of Bilse*, 746 A.2d 1090, 1092 (N.J. Super. Ct. Ch. Div. 1999). The statute could plausibly be read to mean that the election may be made if *electing itself* is necessary to provide support for the spouse compared to nonelection—that is, if the amount available to her otherwise would be inadequate. Nothing in the statute actually says that the *amount* of the election is limited by the cost of her support. It's also interesting to note that the statute—like most—refers to the surviving spouse as male, whereas the majority of surviving spouses are female.

property defined as part of the decedent's estate at death—and under his control for purposes of distribution.

Once this new, contradictory definition has come into play, along comes elective share law to decree that the survivor may choose to “take” a “share” of this now redefined property. Framed this way, the elective share looks like an incursion into the decedent's property.

Moreover, when a surviving spouse is incompetent, a guardian may make the election for that person. Guardians are instructed to do this, however, based on the surviving spouse's needs, not on the idea of marital sharing. If a guardian elects the share for an incompetent surviving spouse, the UPC states that the amount in excess of what the decedent provided for her in his will is to be placed in a custodial trust for the benefit of the surviving spouse, and, upon her death, whatever is left in the trust is to be given to the devisees of the decedent's residuary estate or to his heirs if there is no residuary estate.²² It does not leave these assets to pass to the surviving spouse's heirs as would have happened had she had full property rights in them.²³

Many state laws also create many “loopholes” to elective share laws—ways the more economically independent spouse can shrink the elective share available to the surviving spouse. For example, many states still limit the pot from which the share is taken to the “probate estate,” thus allowing non-probate transfers—often even trusts which give the decedent ongoing control over the assets until death—and causing them to disappear from the elective share pot.²⁴

This gap between partnership theories of marriage and the reality of spousal inheritance laws creates vulnerability and lessened resilience. A surviving spouse who was the economically dependent partner in a marriage may face any of the potential devastating events which threaten us all. Being bereft of a fair share of a long term partnership can impair that person's ability to “bounce back” from these events.

The broken links here may explain why many more older women and widows live in poverty than do older men. Seventeen percent of women over sixty-five live at or below the poverty line.²⁵ Widows are twice as likely to be poor than widowers.²⁶ There are certainly many

22. See UNIF. PROBATE CODE §§ 2-209, 2-212 (UNIF. LAW COMM'N 2010).

23. § 2-212(b), (c), cmt.

24. Raymond C. O'Brien, *Integrating Marital Property Into a Spouse's Elective Share*, 59 CATH. U. L. REV. 617, 634 & n.73 (2010).

25. Monique Morrisey, *Women over 65 Are More Likely to Be Poor than Men, Regardless of Race, Educational Background, and Marital Status*, ECON. POL'Y INST. (Mar. 8, 2016), <https://www.epi.org/publication/women-over-65-are-more-likely-to-in-poverty-than-men/> [<https://perma.cc/77G3-KKNP>].

26. JENNIFER ERIN BROWN ET AL., NAT'L INST. ON RETIREMENT SECURITY, *SHORTCHANGED IN RETIREMENT: CONTINUING CHALLENGES TO WOMEN'S FINANCIAL FUTURE* 14 (2016), <https://www.nirsonline.org/wp->

reasons for this: many more women than men take time off from full time work to raise children, thus depleting their social security accounts, and women tend to work in lower-paying jobs than men, also lowering their social security payouts and limiting their ability to invest for retirement. But another component of this pattern is that the law prevents financially dependent surviving spouses from inheriting all of the property which is rightfully theirs under a marital partnership.

B. Community Property States

Community property states seem to offer a fairer view of marital property and inheritance. In these states, each spouse has an undivided half interest in all the assets which come into the marriage; each spouse may devise half the assets, and each spouse stands to inherit half the assets. Thus, division of the marital assets for inheritance purposes in these states seems to better embody a partnership view of marriage.

But the reality of community property law still leaves much to be desired. Again, this is because primary control of assets remains in the hands of the “earning” spouse. As Elizabeth Carter has pointed out, the day-to-day management of assets—decisions about how much to invest and how much to save for retirement, for example—often remains in the hands of the spouse who technically “earned” them.²⁷ California, Louisiana, Nevada, and Washington have a business exception to equal management; in these states, the spouse who is the manager of a sole proprietorship has the exclusive right to make decisions affecting the business.²⁸ Carter notes that the debate leading to the adoption of these laws was “quite clearly gendered in nature.”²⁹ Although some procedural safeguards were in place at the time these laws were passed to protect the non-managing spouse, these safeguards are inapplicable to most business entities available today, such as limited liability companies.³⁰ Community assets in these business entities generally fall under the control of one spouse because of concepts of privity and

content/uploads/2017/06/final_shortchanged_retirement_report_2016.pdf
[<https://perma.cc/2Y63-2RYF>].

27. Elizabeth R. Carter, *The Illusion of Equality: The Failure of the Community Property Reform to Achieve Management Equality*, 48 IND. L. REV. 853, 880–83 (2015).

28. CAL. FAM. CODE § 1100(d) (West 1993); LA. CIV. CODE art. 2350 (2017); NEV. REV. STAT. § 123.230(6) (1999); WASH. REV. CODE § 26.16.030(6) (2008).

29. Carter, *supra* note 27, at 879.

30. *Id.* at 880.

title.³¹ In this way, as Carter notes, the exceptions “swallow[] the default rule of equal management.”³²

It’s easy to see how, in this way, the law of community property states allows for the economically dependent spouse to be cheated out of property she is entitled to inherit under the theory of community property. A managing spouse has ample room to divert assets from a business, squander property both spouses have worked for, and prevent a surviving spouse from inheriting a fair share of property deemed hers under the law. Again, this outcome is the result of formal equality which ignores the fact that one spouse is more likely to have day-to-day control of assets than the other.

What is the relationship between all of this and default forms of concurrent ownership? The default forms of property ownership for married couples can affect the dependent spouse’s position in relation to property. For married couples, there are three possible defaults: the common law default of tenancy in common, joint tenancy, and tenancy by the entirety, sometimes depending on the jurisdiction.³³ Of these, the tenancy by the entirety is the most protective of the dependent spouse, because, unlike joint tenancy, it does not allow for unilateral severance.³⁴ This means that neither spouse may alienate his or her interest without the consent of the other spouse. This was the default for any conveyance to spouses under the common law,³⁵ and still is in some states.³⁶ Other states, however, have moved to a tenancy in common as the default unless there is a clear statement of intent to create a tenancy by the entirety.³⁷ Some states, consistent with the common law, deny a lien on tenancy by the entirety property to a creditor of one spouse;³⁸ this is obviously the most protective of the forms of tenancy by the entirety. Thirteen states have actually abolished the tenancy by the entirety.³⁹

31. See generally Richard W. Effland, *Arizona Community Property Law: Time for Review and Revision*, 1982 ARIZ. ST. L. J. 1, 15 (1982).

32. Carter, *supra* note 27, at 881.

33. Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 429 (2001).

34. ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 5.5, at 205 (2d ed. 1993).

35. 7 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 52-01(2) at 52–53 (Michael Allen Wolf ed., 1999).

36. *Id.* § 52-02 (2) at 52–53.

37. *Id.*

38. *Id.* § 52-03 (3) at 52–22 n.7.

39. *Id.* § 52-02 (2) at 52–53; § 52.01[3] at 52-4 to 52-12. The tenancy by the entirety has been abolished in California, Connecticut, Iowa, Maine, Minnesota, Nevada, New Hampshire, New Mexico, North Dakota, South Dakota, Washington, West Virginia, and Wisconsin. *Id.*

Often derided as a feudal holdover, the tenancy by the entirety deserves rehabilitation: it should be the default opt-out for married couples in all jurisdictions—including community property ones, because this would make real the equal management of community property—and it should prevent the creditors of one spouse from alienating his or her share. This may lead to opt-outs in second marriages, where spouses may wish to preserve property for children from previous unions, but it is an appealing form of ownership in first marriages, where most couples likely wish to protect the survivor. Even if there are other factors at play in a first marriage, the tenancy by the entirety should be the default, requiring a conscious decision to opt out and choose some other, less protective, tenancy.

II. AFRICAN AMERICANS, MEXICAN AMERICANS, THE RURAL POOR, AND IOWA FARMERS: HEIRS PROPERTY AND THE DEFAULT OF TENANCY IN COMMON

Inheritance laws contribute to the ongoing vulnerability of communities with significant ownership of so-called “heirs property.” “Heirs property” is the term for real property that has passed down through several generations through intestacy.⁴⁰ Such property is held as a tenancy in common, and ends up being owned by a large number of tenants—the heirs of the original owners—who may be dispersed around the country.⁴¹ The owners of this kind of property are primarily poor, rural African Americans,⁴² Mexican Americans,⁴³ the rural poor in Appalachia,⁴⁴ low income farmers,⁴⁵ and poor urban homeowners.⁴⁶

The law’s formal equality harms the interest of this group in at least two related ways: one involves the law of property and the other involves legal practice. The laws of real property inheritance operate to increase vulnerability in communities of color through the default rules of tenancy in common and partition, and the practice of law leaves these communities vulnerable by failing to deliver estate planning

40. Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 507–08, 523 (2001).

41. *Id.*

42. *Id.*

43. Rishi Batra, *Improving the Uniform Partition of Heirs Property Act*, 24 GEO. MASON L. REV. 743, 747–48 (2017).

44. Jesse J. Richardson, Jr., *Receivership: Another Option for Partition of Heirs Property*, 120 W. VA. L. REV. 917, 920 (2018).

45. Kyle Earley, Note, *Should Iowa Adopt the Uniform Partition of Heirs Property Act?*, 21 DRAKE J. AGRIC. L. 389 (2016).

46. Heather K. Way, *Informal Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113, 175–76 (2009).

services which could alleviate the worst effects of these default rules. Ultimately, I will suggest some solutions and also argue that pedagogical culture of Trusts and Estates in the legal academy is partly to blame in this regard.

First: wealth is “sticky.” Wealth disparities are replicated from generation to generation partly as a function of inheritance. This helps explain the generational cycles of poverty in poor communities such as the ones in which heirs property tends to be concentrated. In some communities, the generational trend is actually downward. As I noted above, studies show that wealth actually decreases down the generational line among African American families, while it tends to increase or stay level among white ones.⁴⁷ Decreasing levels of wealth is strange. Although studies have found that very wealthy families lose much of their wealth by the third generation,⁴⁸ the logic of inheritance is that parents leave some of what they have accumulated to their children, who add it to what they have and pass part of that on to their children, and so on. This is the pattern of white middle class inheritance.⁴⁹ Of course, there are some families who lose or dissipate all of their wealth, but these are exceptions. Overall, wealth should show modest increases, or at least remain stable, from generation to generation among whites. Why are African Americans different in this regard?

There are many reasons for the odd result of wealth reduction among African American generations. As the University of Michigan study shows, passing on educational benefits, enabling homeownership, and leaving wealth to the next generation are all key factors in maintaining or increasing wealth across generational lines. Housing equity is a particularly important part of this transmission: housing equity amounts to two-thirds of the median family’s wealth in the study.⁵⁰ Home ownership, the study showed, accounted for twenty-eight percent of the similarity of wealth between parents and children.⁵¹ One

47. Pfeffer & Killewald, *supra* note 6, at 1430–34.

48. Catey Hill, *Here’s Why 90% of Rich People Squander Their Fortunes*, MARKETWATCH (Apr. 23, 2017, 11:46 PM), <https://www.marketwatch.com/story/heres-why-90-of-rich-people-squander-their-fortunes-2017-04-23> [<https://perma.cc/DZL6-X6P7>].

49. Pfeffer & Killewald, *supra* note 6, at 1411–12, 1430–31.

50. *See id.* at 1422–23; *see also* LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 376 (12th ed. 2012) (finding that home equity amounts to two-thirds of “typical” families’ wealth).

51. Pfeffer & Killewald, *supra* note 6, at 1428.

commentator puts it this way: “the racial wealth gap is a housing wealth gap.”⁵²

The gap is striking: Pfeffer and Killewald found that about half of the African American grandparents in the study were homeowners in the 1960s, compared to eighty-two percent of white grandparents.⁵³ But two generations later, rates of homeownership were higher for white grandchildren of grandparents who did *not* own homes than for African Americans whose grandparents *did* own homes.⁵⁴

One reason for the replication of poverty and the trend downward in some communities is that the housing equity factors like the heirs property problem play out less advantageously for these communities. History is of course another factor: the long history of de jure housing discrimination, and the continuing presence of de facto segregation make it difficult for African Americans to live in neighborhoods with higher home values.⁵⁵

Here, however, I focus on one key factor: how inheritance law affects the transmission of home—and land—ownership. The operation of this factor lies at the intersection between intestacy—dying without a will—and the default laws of how real property passes, an intersection which causes wealth loss in African American families. Poor people are much more likely to die intestate;⁵⁶ African Americans have much higher intestacy rates than the population as a whole: seventy percent die without a will, a much higher rate than whites.⁵⁷ When real property such as a house or land passes through intestacy, it passes through the default rule as a tenancy in common, a form of ownership some have called “the most unstable and vulnerable form of ownership known to the common law.”⁵⁸

52. Samuel Gunter, *Housing Matters: Monuments and Housing*, N.C. HOUSING COALITION (Aug. 25, 2017), <https://nchousing.org/housing-matters-monuments-housing/> [https://perma.cc/QE4A-93L4].

53. Pfeffer & Killewald, *supra* note 6, at 1432.

54. *Id.*

55. Kai Ryssdal, *Barriers to Homeownership Still Exist for People of Color*, MARKETPLACE (Feb. 15, 2018, 3:43 PM), <https://www.marketplace.org/2018/02/15/world/barriers-homeownership-still-exist-people-color> [https://perma.cc/GX6U-34YG].

56. B. James Deaton, *Intestate Succession and Heir Property: Implications for Future Research on the Persistence of Poverty in Central Appalachia*, 41 J. ECON. ISSUES 927, 927 (2007).

57. Earl G. Graves, Sr., *Lack of Estate Planning Puts Black Wealth at Risk*, BLACK ENTERPRISE (Nov. 3, 2015), <https://www.blackenterprise.com/lack-of-estate-planning-puts-black-wealth-at-risk/> [https://perma.cc/JH57-5QD7].

58. Mitchell, *supra* note 12, at 33 (quoting E-mail from Hugh C. Macgill, Professor of Law, Univ. of Conn. Sch. of Law, to William R. Breetz, President and Exec. Dir. of the Conn. Legal Initiative, Inc., Univ. of Conn. Sch. of Law (July 7, 2010, 2:28 PM)).

Tenancy in common makes land inheritance problematic because it splits the property evenly among numerous owners with varying degrees of interest, need, or presence, in the property. If there are multiple heirs, they all must agree on how to dispose of the property or how to use its equity to get a loan to pay taxes or make repairs, for example. When the time comes to make these decisions, some of these heirs may be hard to find, and they may not form a consensus. Thus, the property becomes fragmented and less valuable to succeeding generations. The same default rules apply to the middle class and the wealthy, but they do not have the same harmful effects. This is because people with higher incomes are more likely to execute wills, and to devise real property in ways that avoid these problems. This is an example of how the same rules have profoundly different effects on different groups of people. In the case of heirs property owners, the tenancy in common default actually undermines the very purpose it was meant to serve when it replaced joint tenancy as the default.

Tenancy in common succeeded joint tenancy with right of survivorship as the default as society evolved from medieval to modern, and as American law cast off the norms of English law after the Revolution.⁵⁹ Joint tenancy served medieval society quite well: because as each owner passed away, his interest automatically passed to the surviving owner(s), the feudal lord always knew who owed him service; because the land passed automatically to the survivors, the owners never had to go through a probate process and pay the associated fees to the lord.⁶⁰

As feudalism gave way, this form of title became less socially useful, and gradually, tenancy in common, which allowed each owner's heirs to inherit his portion of the property, came to dominate.⁶¹ After the American Revolution, many states rushed to abolish the joint tenancy with its right of survivorship. A North Carolina statute explained: "the benefit of survivorship is a manifest injustice to the families of such as may happen to die first," which, as John Orth reads it, "can only mean that widows and orphans were deprived of what they (and the larger political community) thought were their reasonable expectations."⁶² Tenancy in common, rather than consolidating estates, enabled the division of large estates among multiple owners, a result in

59. For this history, see generally John V. Orth, *Joint Tenancy Law: Plus ça Change*, 5 GREEN BAG 2d 173 (2002).

60. *Id.* at 174–75.

61. *Id.* at 175.

62. *Id.* at 177.

keeping with Jeffersonian ideals of widespread land ownership and the need to develop a seemingly vast expanse of under developed land.⁶³

The tenancy in common default still achieves ease of alienation today. And those with access to estate planning services can easily avoid it, if their goal is keeping property in one piece. Thomas Mitchell and others, however, have identified the combined problem of intestacy and default tenancy in common rules as a major cause of African American land loss, particularly in the Southwest, over the past hundred years.⁶⁴ As Mitchell has shown, the widely dispersed tenancy in common ownership of this so-called “heirs property” has allowed land speculators to buy out an interest in the land from a far-flung heir and demand a partition by sale.⁶⁵ Although legal doctrine technically requires that courts favor partition in kind over partition by sale, in reality, it has proven relatively easy to force a sale.⁶⁶ This has led to considerable land loss among rural African American families, as well as Mexican Americans, farmers, and the rural Appalachian poor.⁶⁷

In response, the Uniform Partition of Heirs Property Act, now adopted by eleven states, seeks to address some of these problems.⁶⁸ Most importantly, it requires that heirs who do not seek partition have the opportunity to buy out the partition seeker’s interest.⁶⁹ It also provides that, if at all possible, partition in kind will be the default in case there is no buyout, and lists several specific factors which would support such partition.⁷⁰

This Act fills a critical gap in the effort to stop the slide of heirs property into alienation. It should not be limited to adoption in primarily rural states—Georgia, Arkansas, Nevada, Montana. Heirs property and confusion of title is also a significant problem in urban areas, as the experience of homeowners in post-Katrina New Orleans has shown.

Another seemingly logical solution would seem be a revival of the default joint tenancy rather than tenancy in common. Over time, this would gradually consolidate property parcels and end the proliferation

63. William A. Shutkin, *The Concept of Environmental Justice and a Reconception Of Democracy*, 14 VA. ENVTL. L.J. 579, 580–81 (1995).

64. Mitchell, *supra* note 40, at 532.

65. *Id.*

66. *Id.*

67. *Id.* at 507.

68. *Partition of Heirs Property Act*, UNIF. LAW COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d> (last accessed Apr. 3, 2019).

69. UNIF. PARTITION OF HEIRS PROPERTY ACT § 7(a) (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2010).

70. § 9.

of heirs with fractional interests. The trouble with this potential solution is, however, that it flies in the face of the wishes of most owners of heirs property⁷¹—and, as I will discuss in the next section, those of Native landowners as well.⁷² There is powerful historical and cultural significance and emotional resonance around the idea of passing land on to all of the next generation. Thus, joint tenancy is not a viable solution, however appealing it is theoretically; disempowerment of testators and oblivion to their values only perpetuates the problem.

A more practical solution, then, for heirs property may lie in the formation of LLCs and land trusts, both of which create voting structures for the management of property, and eliminate the possibility of a single fractional owner forcing a sale.⁷³ LLCs are available in every state; statutory land trusts exist in Illinois, Florida, Indiana, Virginia, North Dakota, and Hawaii.⁷⁴ Both of these forms of land ownership and management offer solutions to the problems of tenancy in common while also respecting the values and wishes of those involved.

The patterns of inheritance brought about by the tenancy in common default exacerbate vulnerability and reduce reliance in these communities. Ownership of land or a house is a significant buffer against setbacks and emergencies—they are both sources of wealth which can provide financial security when disaster strikes. By making inheritance of such assets so fraught in African American and other low income communities, the law creates more vulnerability and less resilience. The law should enable, not thwart, wealth transmission across generations for those affected.

IV. INDIGENOUS PEOPLES

Although Native Americans have very high poverty rates compared to the population at large, it is very hard to assess the role of inheritance in this cycle. This is because Indian assets are held in tribal or government accounts, which makes it daunting to trace individual sources of wealth. As one study puts it,

American Indians form a unique case when it comes to assets. They are asset rich but control little of these assets. Most

71. E-mail from Thomas Mitchell (Feb. 11, 2019) (on file with author).

72. E-mail from Casey Ross (Feb. 13, 2019) (on file with author).

73. For discussions of land trusts, see generally Julius J. Zschau, Ulysses Clayborn & Andrew M. O'Malley, *Using Land Trusts to Prevent Small Farmer Land Loss*, 44 REAL PROP. TR. & EST. L.J. 521 (2009).

74. Julius J. Zschau, *Uses of Land Trusts in Preserving Tenancy in Common Property*, 23 PRAC. REAL EST. LAW., Jan. 2007, at 53, 54.

Indian assets are held in tribal or individual Indian trust (Office of Trust Responsibilities, 1995). Thus, any accounting of the assets of individual Indian households is nearly impossible to calculate, given their small population and these “hidden” assets.⁷⁵

It is clear, however, that problems similar to those I discuss in relation to African American property undermine Native American land transmission as well, and lead to the inheritance of useless and unprofitable land. While the inheritance/property law applicable to Indians and Indian Trust land is strikingly different from the law we teach in first year Property and upper level Wills and Trusts, the default tenancy in common is one aspect they have in common. It is problematic for Native Americans for many of the same reasons discussed in the previous section: it fractionates land among too many heirs. Though partition by sale is not the ultimate result here, the outcome is the same—the land becomes useless to its rightful owners. In the case of Native Americans, these problems are compounded by the regulatory regime governing Indian Trust land.⁷⁶ The opacity, complexity, and unpredictability of Indian property and wills law seriously inhibit wealth transfer, as do many of its inheritance provisions. Here, however, I focus on the tenancy in common default rules.

A. Fractionation

Indian land fractionation began with the allotment of reservation land under the Dawes Act. In 1888, the federal government decided to attempt to transform the “savage” Indians into well-behaved private property owners and farmers—and incidentally to open up more land to Western expansion—by dividing what had previously been Indian reservation land into individual allotments.⁷⁷

Allotment was a failure in all respects, since it failed to provide enough land for sustainability. In particular, its legacy today is one of the great harms of land fractionation. Similar to the tenancy in common problem of heirs property, this is the process by which land passes through intestacy to be divided among all the heirs at the next generation, thus carving it up into smaller and smaller fractions. The

75. Melvin L. Oliver & Thomas M. Shapiro, *Wealth and Racial Stratification*, in 2 *AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES* 222, 227 (Neil J. Smelser, William Julius Wilson & Faith Mitchell eds., 2001).

76. For a discussion of the complexities of this regulation, see generally Shoemaker, *supra* note 13.

77. Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and Cobell v. Salazar*, 46 *GONZ. L. REV.* 609, 616 (2010).

small fractions in which much allotment land exists today are economically useless; this is exacerbated by the complexities of BIA control. Many produce a few cents every hundred years or so. There are usually so many heirs involved at this point that it is extraordinarily burdensome even to locate them, much less to reach agreement about some kind of productive use of the land.

Even if there is agreement among all the heirs about a way to use the land productively—such as logging, drilling, etc.—Indian Trust land requires Secretary of the Interior approval for any such use.⁷⁸ This is very much at the whim of local officials, who have complete discretion to disprove any proposed commercial use of the land, and are not subject to any review of these decisions.⁷⁹

This land fractionation exacerbates the vulnerability of the people who cannot make productive use of their property, and this inability to make productive use of land is one reason for high levels of poverty in Indian communities. In response to this problem, Congress enacted the American Indian Probate Reform Act of 2004 (AIPRA), which seeks at least to halt fractionation by limiting the people who can inherit trust land to Indians, lineal descendants of the testator, and a couple of co-owners of the parcel. In addition, AIPRA codifies the “single heir” rule, which provides that interests in land of less than five percent may pass only to the oldest heir.⁸⁰ AIPRA also creates a default of joint tenancy for real property passing by will, rather than the common law default of tenancy in common.⁸¹ This would insure that when one co-owner dies, the land is not further fractionated among her heirs, but is simply consolidated in the remaining co-owners.

AIPRA’s language does not make clear what the default is for land passing through intestacy. The statute states that intestate real property passes first to the surviving spouse, if there is one, and then any remainder will pass to the decedents who are eligible heirs “in equal shares” by right of representation.⁸² This language seems to replicate the tenancy in common problem, thus allowing for ongoing fractionation. As with heirs property, however, it’s not at all clear that this is a solution that respects the wishes and traditions of the people involved. I suggested above that the use of LLCs or statutory Land Trusts would solve the fractionation/tenancy in common problem while simultaneously carrying out peoples’ wishes to pass on land to all of

78. Shoemaker, *supra* note 13, at 492–93.

79. See JANET A. McDONNELL, *THE DISPOSSESSION OF THE AMERICAN INDIAN 1887–1934*, at 20–21 (1991).

80. See American Indian Probate Reform Act of 2004, 25 U.S.C. § 2206(a)(2)(D)(i), (iii) (2008).

81. § 2206(c)(1).

82. § 2206(a)(3)(B)(i)–(iii).

their heirs. Due to the complexities of Indian Trust land law, these forms may not be available, but the 2006 iteration of AIPRA allows for a “pilot project for the creation of legal entities such as private or family trusts, partnerships corporations, or other organizations to improve, facilitate, and assist in the efficient management of interests in trust or restricted lands or funds owned by Indian family members and relatives.”⁸³ This would enable the development of similar vehicles to address these issues in Indian Country.

V. LEGAL SERVICES

This brings me to the most significant contribution the law can make: legal services. The lack of estate planning is disastrous in all these communities, and the availability of estate planning would alleviate many of the harms embedded in the system without the need for legislative reform. There are some heroic efforts to provide estate planning services to communities of color and Native People around the country, including Oklahoma City University School of Law’s partnership with local Black churches to provide estate planning services and OCU’s Native American Wills Clinic, which provides drafting and planning to Natives around the state. AIPRA authorization included funding the Indian Land Tenure Foundation to offer education and training about fractionation and estate planning to Native populations in the Northwest.⁸⁴ Over its brief seven month life span, the project made significant progress: sixty-five percent of the wills executed avoided fractionation of interests—about 5290 new interests were not created.⁸⁵ The Indian Estate Planning Project at Seattle University saw a ninety-two percent reduction in fractionation through its estate planning services.⁸⁶

Estate planning services in lower income communities and communities of color would—and does, when available—significantly reduce fractionation and partition sales, as well as the loss of title due to lack of probate. Estate planning services more widely available for middle income people would allow economically dependent spouses to protect themselves against the vulnerability written into the laws.

So why is there not more of it? In part, law school pedagogy is at fault. Too often, Wills and Trusts receives second class status in the law school curriculum. It is relegated to adjuncts or taught by

83. § 2206(l)(1)(A).

84. Anthony J. Franken, *Dealing with the Whip End of Someone Else’s Crazy: Individual-Based Approaches the Indian Land Fractionation*, 57 S.D. L. REV. 345, 364 (2012).

85. *Id.* at 363.

86. *Id.* at 365.

professors whose main area of scholarship and expertise lies in a different direction entirely (the contributors to this volume are important exceptions to this tendency). This is unfortunate. The law of inheritance can shape people's lives in ways that perpetuate or redress past wrongs. Law schools need to train students in the nuts and bolts of this practice so they can be part of the process of redress.

CONCLUSION

Inheritance law has broken links at several nodes along the network of intergenerational property transmission. These broken links coincide with already vulnerable populations and those likely to suffer from higher poverty rates: older women, African Americans, Native Americans, and other communities likely to own large amounts of heirs property. Solutions require the understanding that the same laws affect different people differently because history and its ongoing effects have situated them differently in the world. The playing field is not level, and the law needs to change to account for these differences. I hope that this Article can help begin a dialogue about formal equality in inheritance law. Apart from the exceptions I have mentioned, this is new terrain.

For married couples in both separate and community property states, tenancy by the entirety must be the default form of ownership, at least for real property. In addition, state legislatures must materialize the idea of marriage as a partnership by reforming elective share law so that the surviving spouse of a long term marriage receives half of the marital property, and the loopholes in elective share law must be closed. In a nutshell, the survival of a spouse must have the same asset distribution result as a divorce.

For those who own heirs property, both rural and urban, the law must mend the links in inheritance by recognizing that the universal default of tenancy in common under intestacy in these communities achieves the precise opposite of what it was meant to do. It does not democratize land ownership and ensure enough people enough property to have a stake in the social order. Instead, it disenfranchises large numbers of people by depriving them of an important source of wealth, autonomy, and resilience. Property law should not be allowed to subvert the very ends which it means to achieve. The law must be creative in encouraging forms of ownership and management that respect family and cultural values while reducing the destructive effects of fractionation and partition, the results of tenancy in common. These solutions require that we return to the roots of our tenancy in common default system, and ask whether it is achieving the results—democracy, equality, social investment—that it was meant to do. If not, it deserves reconsideration.