

# Rhetoric and Romance: A Comment on *Spouses and Strangers*

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Writing this comment was a hard task. I very much admire Milton Regan's *Spouses and Strangers*. It is a significant exploration of the impact of some kinds of property analysis and "human capital" thinking on the distribution of family assets at divorce. Why, then, was this comment a hard task? It was difficult because my own views diverge so dramatically from Professor Regan's, on the very subject that lies at the heart of his analysis. That subject is the rhetoric of property. My comment will focus particularly on our differences, and they are indeed substantial. Nevertheless, I regard Professor Regan's work as a very important contribution.

My overriding concern is that Professor Regan's article argues far too extensively from a rigid and misleading view of property itself. As a general matter, I will stress two themes: first, that the institution of property is far more supple than Professor Regan suggests, and second, that property analysis is far less malignant than he seems to think, even in the context of intimate relations. More specifically, I am concerned that by treating property as he does—as a matter for strangers—Professor Regan is contributing to a romantic separation of home from work, and that his own writings will end up committing the very error that he attributes to property rhetoric: marginalizing women and the work they do. For that reason, I would like to invite Professor Regan and his readers to think again about this matter, and to reconsider whether property might not deserve considerably more attention as a flexible and eminently helpful intellectual tool to open up the subject of disposition of marital assets at divorce.

I will begin with a few words about the general subject of the rhetoric of property, and then examine the alternatives to property rhetoric that Professor Regan presents—alternatives that do not seem to me to move all that far from property. I will then take up and attempt to rebut what I believe are his three major critiques of property rhetoric: first, that property rhetoric is inadequate to explain the gendered distribution of assets at divorce; second, that property rhetoric does not or cannot help in arriving at a more just distribution of those assets; third and last, that property rhetoric is normatively inferior to other approaches to this intensely intimate set of social relations. As readers will see, I disagree vehemently on all these points because—to return to my main concern—I think that Professor Regan's exposition almost entirely overlooks a much broader, more interesting, and more realistic understanding of the possibilities of property.

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## I. OPENING OBSERVATIONS

## A. THE RHETORIC OF PROPERTY

What are we talking about when we talk about property? We could follow along with Professor Regan and trot out that wondrous right of exclusive dominion that so awed the famous Blackstone.<sup>1</sup> The right to exclude is certainly important in property, but there is a great deal more to the rhetoric of property. Here are some other words and phrases from the rhetoric of property and especially the law of property:

Gift  
Trusteeship  
Bequest  
Equal and correlative rights  
Reasonable use

All of those are very significant terms. Moreover, a number of them, such as gift and reasonable use, are very stock parts of an ordinary-language understanding of property, even among people with only a vague perception of the law of property. A number of property scholars (and I count myself among them) have been arguing for years that the features they represent—responsibility, cooperation, and attentiveness to others—are essential features of any property regime.<sup>2</sup> Why is this so? The reason is that property is very largely a creature of culture, and property's complex cultural outcroppings depend on the recognition and acquiescence of entire communities of people.<sup>3</sup> That is why it is so dispiriting to see that Professor Regan's article largely dismisses these more cooperative aspects of property, and instead dwells on the most conventional caricatures of property rhetoric, or as he sometimes says, property's mythology—exclusivity, boundedness, and me-first-ism.

Property and its rhetoric are far more subtle, nuanced, and accommodative than this caricature would suggest. As it is actually used, property rhetoric reflects the central role of the institution of property in mediating human conflicts and in drawing people into a fruitful moderation and mutual attentiveness.<sup>4</sup> It also reflects a mode of thinking that has great power in revealing the underlying structures of human relationships—even relationships so delicate as those within marriage and the family. And so, I

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1. 1 WILLIAM BLACKSTONE, COMMENTARIES \*2 quoted in Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2340-42 (1994).

2. See, e.g., ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 123 (1991); Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J. L. & HUMAN. 37, 50-51 (1990).

3. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 84-85 (1985).

4. See, e.g. Harold Demsetz, *Professor Michelman's Unnecessary and Futile Search for the Philosopher's Stone*, 24 NOMOS 41, 46 (1982) (property regimes attenuate group conflicts).

think that for the most part, Professor Regan is propping up a very dusty straw man when he talks about property rhetoric. Indeed, when Professor Regan tries to state some alternatives to property rhetoric in marriage and divorce, the old-fashioned property rhetoric begins to look rather more attractive.

#### B. PROFESSOR REGAN'S ALTERNATIVE TO PROPERTY RHETORIC

It seems to me that Professor Regan offers two major versions of an alternative to property rhetoric, at least in the context of spousal claims upon the dissolution of marriage. Both versions stress factors of relationship, needs, and sharing. But my problem is that when I look closely at them, neither seems to me to get very far away from property. Here they are, as I understand them:

*Version 1:* Under this version, spousal claims at divorce are based on, of course, the spouses' relationship. But what is that relationship? I hope that readers will forgive me a caricature of my own, but the beginnings of the relationship seem to run something like this: "It's you and me, Babe, forever and ever. You may work at Woolworth's, but I love your body, I love your mind, I love your spirit. We'll take care of each other, so come away and share everything with me."<sup>5</sup>

That is the start of the relationship under Version 1, and perhaps it describes the middle part too: needs are met and good things are shared in the very relationship of mutual nurturance that both partners thought they were entering. Alas, further down the line, divorce may enter the picture. What are we to do then about claims to the marital assets? At that point, the partners' claims can refer back to the "you-and-me-forever" deal. On this basis, the stay-at-home spouse (presumably the wife) gets somewhat more than she would have had if she had remained in her job at Woolworth's, because, of course, that was the deal when she left the job—she was supposed to share forever and ever, or at least up to the point of satisfying her needs.<sup>6</sup>

Now, here is my problem: For the life of me, this Version 1 of the "relationship" looks like a contract. "You and me, Babe" may have been a contract for sharing and filling needs, but a deal is still a deal. And if so, we are back in Propertyland. That is because, as Oliver Wendell Holmes observed, a contractual right is property, just like the ownership of a horse.<sup>7</sup> We are talking about expectations here, and as Jeremy Bentham so

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5. See Regan, *supra* note 1, at 2384-86.

6. *Id.* at 2405 (describing older pattern of alimony), 2406 (describing same as preferable to modern "property" analysis), 2385-86 (equalizing standard of living matches expectations).

7. *Portuguese-American Bank v. Welles*, 242 U.S. 7, 11 (1916). More specifically, he said that the assignment of a contractual right was as much a transfer of property as the sale of a horse.

pithily put it, “[p]roperty is nothing but a basis of expectation.”<sup>8</sup>

*Version 2:* Version 2 is discernibly different, though it overlaps with Version 1 in a number of areas. This version again consists of sharing, but now it is some kind of equal sharing during a period of transition. Unfortunately, at least in my perception, Version 2 looks like another deal, with allowances made for the fact that the deal went bust—somewhat in the way that contract law makes allowances for impossibility, mistake, and unjust enrichment. Version 2 does coincide with Version 1 in some ways that I find a little murky; here, too, there seems to be a lot of talk about need, but the central focus is on making recompense for a wife’s contribution to the marriage during the time it was still extant.

Version 2 takes particular account of the degree to which the relationship was strengthened over the years as a result of the wife’s contributions. For instance, Version 2 might allow the wife one year’s maintenance for every two years “served,” so to speak.<sup>9</sup> On this principle, for a marriage of short duration, say a year, she might get maintenance for six months. Following out the logic, for thirty years of marriage ending when the wife is fifty-five years old, she would get fifteen years of maintenance and mutual sharing of assets, after which (at age seventy) she may no doubt resume her interrupted career at Woolworth’s. But Version 2 still looks to me a lot like a contract remedy—a kind of quantum meruit—and hence the claims still look like property.

There are some other variants, but I will not dwell on them because they appear to be some combination of Version 1’s “you-and-me-Babe” deal, taken together with Version 2’s attentiveness to contribution—that is, contract and property all over again. Needs enter into the equation, but the basis for satisfying needs appears to be a deal on the one hand, or a restitution of contribution on the other.

My main point, of course, is that Regan’s supposedly relationship-based alternatives still seem to have a great deal of resonance with property. And once again, if Professor Regan had put forth a less jaundiced view of property, he might have treated this resonance more sympathetically, and perhaps noticed more of the lessons to be learned from it. This, of course, is what I would invite him to do.

## II. THE CRITIQUES OF PROPERTY RHETORIC

At this point I turn to what I believe are Professor Regan’s main attacks on what he calls property rhetoric, and I attempt to point out why he and

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8. JEREMY BENTHAM, *PRINCIPLES OF THE CIVIL CODE*, pt. 1, ch. 8, Of Property, in *THE THEORY OF LEGISLATION* 111 (Charles K. Ogden ed., 1931).

9. See Regan, *supra* note 1, at 2389.

others might want to re-evaluate these views of property rhetoric. Here are his accusations:

CRITIQUE ONE: PROPERTY RHETORIC DOES NOT EXPLAIN WHAT REALLY  
HAPPENS IN MARRIAGE AND DIVORCE

The argument behind this critique is that marriage—and divorce by extension—are more accurately seen not in property terms, but rather in terms of relationship, needs, giving, nurturing, and caring in those intimate social spheres where matters are supposed to be more egalitarian and fair than in the market or the agora.<sup>10</sup> As I just mentioned, there are some property trolls lurking even in the gardens of relationship. In any event, my view is quite different: I think the problem is not that there is too much property talk in explaining marriage and divorce relationships, but rather too little—far too little.

Are familial relationships marked by sharing, nurturing, and attentiveness to needs? Of course they are. Does this undercut the point that property and entitlement enmesh these very features of family relationships? Absolutely not. Several years ago, for example, the sociologist Viviana Zelizer wrote a very illuminating article about domestic money arrangements in late nineteenth- and early twentieth-century American families.<sup>11</sup> Scholars such as Regan, who regard intrafamilial arrangements as a stable repository of the ideal of equal sharing and nurturing, might wish to contemplate the intense conflicts that Zelizer describes over access to money within families of this era. One such incident is a 1905 news story that smugly reported how a husband had set a small rat trap in his pants pocket overnight, successfully catching his wife as she searched for loose change.<sup>12</sup> The anecdote illustrates Zelizer's major point: that husbands made the decisions about the "serious money" in the family, while their wives controlled at most only the "pin money" given them as allowances.<sup>13</sup> Of course, the even larger point is that the supposedly shared assets in the family may be shot through with individual entitlements, and there is no logic dictating that these entitlements need to be distributed equally among the family members.<sup>14</sup>

As a matter of fact, there is every reason to think that depressingly often, family relationships may provide very differently for the treatment of different members' "needs." Those different treatments can be read as

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10. See, e.g., *id.* at 2347-50.

11. Viviana A. Zelizer, *The Social Meaning of Money: "Special Monies"* 95 AM. J. SOC. 342 (1989).

12. *Id.* at 354-62. The wife's legal complaint against the husband was rejected, but another wife was jailed for four months in 1921 for stealing \$10.00 from her husband's trouser pocket. *Id.* at 358.

13. *Id.* at 352-67.

14. *Id.* at 353 (wealth may be unevenly distributed within families).

implicit entitlements, whether they are ever explicitly discussed as such or not. Property analysis helps to reveal how this works—how the needs of some family members are more quickly and fully satisfied than the needs of others, and how resources, nurturance, and aid flow systematically and disproportionately toward some family members and away from others.

Along these lines, Hanna Papanek has used property concepts to analyze some family relationships in developing nations.<sup>15</sup> She asks very pointed questions about gendered entitlements among spouses and children: Who gets the food? How much does each get, and when does he or she get it? Who gets the education? Surprise, surprise: wives don't come first in these intrafamilial distributions, and daughters don't either. Quite the contrary—their nutrition, health needs, and education wind up at the end of the line, if they make it into the line at all. They are much more likely to devote their own assets to help in satisfying needs of the family males.<sup>16</sup>

Amartya Sen is another development economics scholar who takes an interest in such intrafamilial entitlements and the implicit bargains on which they are based, in what he calls the "cooperative conflict" context of the family.<sup>17</sup> He pushes the question of entitlement to the limit in his article, *More Than One Hundred Million Women are Missing*, in which he poses the ultimate question: What is the connection between divergent intrafamilial entitlements and women's excess mortality?<sup>18</sup> These are issues of great and sometimes shocking import; it is far too easy to lose sight of them in a generalized rhetoric of sharing and nurturance, as if property questions cease at the homestead door. They don't.

Professor Regan very ably describes the human capital literature that carries out similar entitlement analyses of family relationships in a modern American context. I will not repeat Professor Regan's extensive discussion of that literature, but I do wish to emphasize that the literature suggests that in this country, as in the developing countries that Papanek and Sen investigate, women do not necessarily receive an equal "investment" during the course of the marriage, and instead they may "disinvest" for the sake of others in the family.<sup>19</sup> Again, these are extremely illuminating explorations of issues that go unnoticed if one sees simply a generalized

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15. Hanna Papanek, *To Each Less than She Needs, From Each More than She Can Do: Allocations, Entitlements and Value*, in PERSISTENT INEQUALITIES 162 (Irene Tinker ed., 1990).

16. *Id.* at 165.

17. AMARTYA K. SEN, RESOURCES, VALUE AND DEVELOPMENT 346-60 (1984) (noting women's lesser share of food in families in India and Bangladesh); Amartya K. Sen, *Gender and Cooperative Conflicts*, in PERSISTENT INEQUALITIES, *supra* note 15, at 123-25 (discussing women's lesser gains from intrafamilial cooperation).

18. Amartya K. Sen, *More Than 100 Million Women Are Missing*, N.Y. REV. BOOKS, Dec. 20, 1990, at 61.

19. See, e.g., Regan, *supra* note 1, at 2321-26.

realm of sharing and caring, disregarding the differential entitlements that can dominate those familial activities. Indeed, the human capital analyses cast doubt on Professor Regan's assertion that property rhetoric tends to uphold inequalities. Quite the contrary is true: when we see the unspoken property within arrangements that masquerade as "sharing," we can also see their injustice and hypocrisy. It is only when we neglect the property aspects of marriage that we dub as "equal" relationships that may be profoundly hierarchical.

That is why we need to think about property issues in marriage and divorce more, not less. Marriage may work beautifully for many couples, but the implicit entitlements within marriage nevertheless may put women at risk if things turn sour. Property analysis sheds some very important light on the reasons why divorce is such a bad deal for so many women. To put it succinctly, this analysis suggests that divorce is a bad deal for these women because marriage itself is a bad deal.<sup>20</sup>

CRITIQUE TWO: PROPERTY AND HUMAN CAPITAL LITERATURE DOES A  
POOR JOB OF RIGHTING THE INJUSTICES OF DIVORCE SETTLEMENTS

Professor Regan here cites a number of instances—primarily in the courts—in which property analyses seemed to help little in arriving at a just settlement for divorcing wives, and failed to secure for them the resources that their efforts and sacrifices appeared to warrant.<sup>21</sup> But the obvious response to this criticism is that when one looks at the very cases that Professor Regan cites, the problem lies not in the property/human capital analyses. The problem is that the courts did not *accept* those analyses, and did not have the imagination to notice the significance of women's labor at home, despite the property/human capital arguments that they should do so.

Elsewhere in this symposium Reva Siegel observes a very similar pattern in nineteenth-century judgments: however bravely and cogently women attempted to raise property issues concerning their contribution to the marriage, the courts, for whatever reasons, adamantly resisted those property arguments.<sup>22</sup> Joan Williams' article makes the same point in a more modern context: when it comes to intrafamilial relationships, judges have refused to apply the very property and contractual concepts that are standard fare in other areas of the law.<sup>23</sup> But the injustice lies not in

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20. See Lloyd Cohen, *Marriage, Divorce and Quasi Rents; or, "I Gave Him the Best Years of My Life,"* 16 J. LEG. STUD. 267, 287-89 (1987) (analogizing marriage to contract in which wife performs first, creating exploitable "quasi-rents").

21. See Regan, *supra* note 1, at 2360-67, 2374-79.

22. Reva Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2189-92, 2195-99 (1994).

23. Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994).

property analysis, and not in property rhetoric either. To the contrary, the problem lies in not taking property analyses and property rhetoric seriously.

Having said this, I have to issue a major caveat. It is true, as Professor Regan points out, that the property/human capital analyses can indeed founder on what may seem to be a wife's lesser investment in the marriage relationship.<sup>24</sup> That is, even with the human capital approach, the wife may not seem to have invested as much in the marriage because she has fewer opportunities outside the home, and hence the opportunity costs of her marital contributions are lower than her husband's. But even this caveat suggests the significance of the property/human capital analysis: the caveat reveals how porous the family is to the market. Once we notice this porosity, we can add to the succinct observation made earlier: divorce is a bad deal for many women because marriage is a bad deal, and marriage is a bad deal because women's opportunities outside marriage are a bad deal too.

Others have also remarked on the vicious circularity of a woman's labor at home and her labor-market participation outside. Amartya Sen has done so, and to a certain degree, so have I.<sup>25</sup> As a daughter, a young woman may be expected to work at home for the family well-being, but she may get less nutrition, less medical attention, and less education than her brother. When resources are scarce, the family quite rationally decides to expend more of those resources on the son. Why do the family members make that choice? They do so because the son's chances in the labor market are better than the daughter's, because no one "outside" the family will take her seriously. Hence, improving his human capital, rather than hers, will bring greater returns to the family.<sup>26</sup> But, of course, the daughter then has less to offer if she does try her luck in the labor market, and—to come back to marriage—when she does marry, her opportunity costs in marriage are proportionately diminished. Of course, this means that when she is a wife within the family, her bargaining power is diminished as well. And so, whether she likes it or not, instead of entering the market, she contributes to other family members' well-being—since they may bring in more total assets to the family—and she makes do for herself

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24. See Regan, *supra* note 1, at 2325-26, 2353-56.

25. See, e.g., Sen, *Gender and Cooperative Conflicts*, *supra* note 17; Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 441-42 (1992); see also PAULA ENGLAND & GEORGE FARKAS, HOUSEHOLDS, EMPLOYMENT AND GENDER 57-58 (1986); (noting impact of unequal household burdens on women's wages and criticizing existing theories); Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 GEO. L. J. 89, 96-98 (1993) (same).

26. See, e.g., GARY S. BECKER, A TREATISE ON THE FAMILY 180, 192-95 (enlarged ed. 1991) (families may invest more in sons to maximize next generation's income); cf. Hadfield, *supra* note 25, (criticizing economists for indifference to normative aspects of this pattern).

with the “pin money.” All too often, her diminished bargaining power often makes its final appearance in her unequal treatment upon divorce.<sup>27</sup>

This is a long caveat to property/human capital analysis. Does it lead to a more adequate settlement for women at divorce? No, it does not, and that is why it is a caveat. But we do learn something very important from the human capital analysis. We learn that there is no “In-Here” of family and “Out-There” of work. These spheres are not anywhere near so separate as I believe that Professor Regan would like to think; rather, these spheres interact incessantly. We learn that lesson much more tellingly from property/human capital analysis than we would if we thought that marriage was all a matter of sharing, nurturing, and need, without thinking in terms of multiple and sharply varying entitlements.

CRITIQUE THREE: PROPERTY/HUMAN CAPITAL RHETORIC IS  
NORMATIVELY INFERIOR TO RELATIONSHIP RHETORIC

I mentioned earlier that in my own understanding, Professor Regan’s discussion of a wife’s relationship claim seemed to look much like a contractual (and property) arrangement—based on the deal of “you and me, Babe, forever,” or on some reckoning of her contribution to the relationship, given her time of service. And so I am uncertain just where relationship rhetoric is supposed to diverge from contract and property. If there is a divergence, it appears to lie in the appearance of *need* in relationship rhetoric: the wife’s needs (and not just her “deal” or claims under quantum meruit) should be taken into account in the settlement at divorce. As a matter of fact, I am not so sure that a reckoning of needs actually conflicts with property analysis, since as I hope readers have just observed, one can easily think of the fulfillment of intrafamilial needs as matters of implicit entitlement. And by the way, if the wife’s needs-claims in divorce resemble the needs-claims she can make in marriage, a lot of wives might be well advised not to expect too much when they cut the knot.

On any understanding of the marriage/divorce relationship—deal, restitution, or need-fulfillment—it is still not at all clear to me why property rhetoric might be thought inferior. Outside the family, it is well-known that a central function of property and contract regimes is to encourage people to invest, to labor, and to plan carefully, knowing that they will bear the costs of imprudence and enjoy the rewards of wise choices.<sup>28</sup> The great hope is that with the encouragement of entitlements and contractual relations, people will work and trade and make everyone collectively better off. Perhaps you think that from a normative perspective, this is a lowly set

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27. Of course her diminished bargaining ability may also make an appearance—sometimes a final one—in her inability to depart from an abusive relationship. See Rose, *supra* note 25, at 443-50.

28. See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 30 (3rd ed. 1986).

of goals, entirely unsuited to the intimacies of family life. But even these lowly property concepts would suggest that the partners should think very carefully about “You and me, Babe” before they take any big plunges, and especially before they produce those neediest of people, children.

Beyond that, it is simply not true that property is an antisocial institution, as even Regan grudgingly acknowledges toward the end of his article.<sup>29</sup> More central to his thesis however, is his lengthy description of a purported link between the autonomous self and the “independence” implicit in property rhetoric.<sup>30</sup> But individual autonomy is by no means the most important element even in “independence”: in older civic republican thinking, as Regan acknowledges, property and independence were important not simply for autonomy, but because they enabled a person to take part in the civic polity.<sup>31</sup> The same idea expressed in more modern rhetoric appears in the work of Charles Reich—that one indeed needs property for independence, but the point of independence is genuine political participation.<sup>32</sup> As for an iron link between property and commercial markets, as I argued above, property need not take the form of commercial entitlement at all. Property may be implicit in the patterns governing who gets what in the most intimate of relationships. It is equally implicit in the series of informal trades and “even-up” relationships among neighbors who do favors and services for each other over broad fronts of shared community activities,<sup>33</sup> and it is equally central to gift-giving and gift exchange in a number of non-commercial societies described by anthropologists.<sup>34</sup> Having said all that, of course, I agree that property *is* also central to commerce. Moreover, I readily concede that the reputation of greed and avarice has often dogged the practice of commerce and the acquisition of property therein.<sup>35</sup>

But commercial institutions need not be seen as the machinery of a relentless self-interest, particularly when viewed in the light of their early modern intellectual history. In Enlightenment writings, commerce and the market were discussed in almost feminine terms, described in phrases like

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29. See Regan, *supra* note 1, at 2396 (describing the more sociable aspects of property as “counterprinciples”).

30. See *id.* at 2340-50.

31. See *id.* at 2342-43. For the historic intellectual tradition linking property to the ability to play one’s “proper” social and political role, see Carol M. Rose, *Property as Wealth, Property as Propriety*, 33 NOMOS 223, 232-37 (1991).

32. Charles A. Reich, *The New Property*, 73 YALE L. J. 733, 785-86 (1964).

33. See ELLICKSON, *supra* note 2, at 225-29.

34. For a classic study, see MARCEL MAUSS, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES* (Ian Cunnison trans., 1954).

35. For some particularly graphic illustrations, see Lester K. Little, *Pride Goes Before Avarice: Social Change and the Vices in Latin Christendom*, 76 AM. HIST. REV. 16, 37-38 (1971) (describing graphic medieval depictions of avarice, regularly ascribed to merchants, Jews and wealthy persons).

"*doux commerce*" (gentle commerce).<sup>36</sup> The view among the eighteenth-century political economists was that the market would soften manners and make participants attentive to the needs of others.<sup>37</sup> Professor Regan is aware of this intellectual tradition, but he associates commerce with a very thin type of human relationship, that is, relationships among strangers.<sup>38</sup> This is not necessarily the case—not at all. On a day-to-day level, there are many of us who have made friends with our favorite coffee shop proprietors, our landlords or our tenants, our travel agents, or even our tax accountants. Even in commercial life, stranger-relationships occupy a quite marginal role in comparison to the tremendously important long-term or repeat business dealings among market participants who know each other.<sup>39</sup> And at the widest scale, modern scholarship has pointed to the historical connection between the development of European commercial institutions and the growth of philanthropy and organized altruism; commerce apparently drew merchants into some knowledge of and sympathy with very different kinds of people, and made them think that they had the power to help.<sup>40</sup> Thus, commerce may begin with thin relations, but those relations may not have existed at all without commerce, and there is nothing to stop thin relations, once begun, from growing thick.

In short, what earlier thinkers noticed, and what we all too easily tend to forget, is that property and commercial life are intensely social institutions. Those earlier thinkers might have also known better than we that insecurity of property is hardly the ticket to amicable social relations. If we paid attention, we would know this too, simply by the example of the agonies of Somalia in the 1990s, or the post-Berlin Wall writhings of the Eastern European nations that have lost so much of what must be considered a "cultural infrastructure" of property and commerce.

As an institution, property depends upon and encourages moderation and forbearance, negotiation rather than rapine. Those are qualities that are important in the family as well as in business dealings. The pretense that property matters only in commerce, and not the family, only papers over the severe and interactive constraints on women's property in both spheres, and hardly serves feminist goals.

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36. See ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* 56-63 (1977) (discussing 18th-century praise of commerce as softening manners).

37. *Id.*

38. Regan, *supra* note 1, at 2306.

39. See Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 46; Ian R. Macneil, *The Many Futures of Contract*, 47 S. CAL. L. REV. 691, 756-58 (1974) (increasing dominance of "relational contracts").

40. See Thomas L. Haskell, *Capitalism and the Origins of Humanitarian Sensibility* (pt. 2), 90 AM HIST. REV. 547, 549-50 (1985) (discussing the rise in humanitarianism as a result of the emergence of the "promise" as an aspect of contract).

## CONCLUSION

Property relationships are immensely varied, and it is a serious mistake to think of property only in metaphors of exclusion, boundaries, and disengagement. These are metaphors drawn chiefly from property in land, but human beings have devised ways to allocate property in many other things—in flowing water, in the radio spectrum, in expressions of ideas, in growing things, in air rights, in terrestrial and marine habitats for wild animals. We have created not only individual property, but also partnership property, common property, and public property. Human interactions and imagination make property into a thoroughly malleable institution, and one that can adjust to a vast variety of subjects.

It is hardly any wonder that human beings have also thought about family relations through the prism of property, and indeed have been doing so for some time, as Reva Siegel's article points out.<sup>41</sup> In this sense, the human capital analysts are only the latest in a long line of contributors to this way of thinking about family relationships.

And they do have something to tell us—even rhetorically. Professor Regan is right that the human capital rhetoric often has an edgy, hard tone in its application to the disposition of property upon divorce. I would like to suggest, though, that this may not be such a bad thing. The subject under discussion is, after all, *divorce*. The hard-edged quality of property rhetoric in this context may do a service, reminding the erstwhile marriage partners that they are about to leave the life that they have previously shared. Here, too, property and property rhetoric serve one of their most venerable functions—to remind people that they need to think carefully about what they are doing and to act prudently, because measures taken now have consequences in the future.

Besides, the harder edges of property rhetoric have always been with us in intimate relations, even in the heyday of the “You and Me, Babe” version of marriage. It would be hard to find a more caustic example than one popular tune of those days, referring quite pointedly to human capital assets and to the interactions between the “outside” of the market and the “inside” of intimate relationships:

Square cut or pear-shaped  
These rocks don't lose *their* shape.  
Diamonds are a girl's best friend.<sup>42</sup>

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41. Siegel, *supra* note 22, at text accompanying notes 53-59 (mid-19th century feminists asserted wives' right to joint property of marital assets), and text accompanying notes 1-12 (Blackstonian and common law doctrine posited husbands property in wives' persons & labor).

42. JULE STYNE AND LEO ROBIN, *Diamonds Are A Girl's Best Friend*, in GENTLEMEN PREFER BLONDES (1949).

Are diamonds a girl's best friend? Of course not. But they aren't chopped liver either, and the whereabouts of the diamonds (or property generally) may play a substantial role even in the context of intimate relations. And so in thinking about how diamonds or property more generally fit into the disposition of assets at divorce, I hope that Professor Regan in the future will complement his powerful analysis of human capital approaches with a more sympathetic view of property and property rhetoric. There is a great deal to be learned from property and its rhetoric, even, and perhaps especially, in the family—and a great deal to be lost by eschewing it.

