

CHARACTERIZATION OF SEPARATE PROPERTY WITHIN THE COMMUNITY PROPERTY SYSTEMS OF THE UNITED STATES AND ITALY: AN IDEAL APPROACH?

Stefania Boscarolli

I. INTRODUCTION

Italy and some U.S. states follow a similar community property regime for the division of property between spouses. Nonetheless, U.S. community property systems represent a minority approach. In only nine states do spouses own their property as community property, with the majority of states following a separate property —or common law— system.[\[1\]](#)

De facto, these American community property states share common origins and traits with the Italian system.[\[2\]](#) At the same time, the community property approaches in the two countries show significant differences, one of which pertains the characterization of separate property. Italy and the American community property states characterize separate property through different approaches and policies. The latter plays an important role in influencing the different definitions of separate property in the two countries.

With this in mind, this article represents an opportunity to reflect on the positive and negative aspects of each of the two approaches to community property regime in general and the characterization of separate property in particular. This article proposes a possible way to harmonize the two systems. The combination of the advantageous aspects of the American and the Italian definitions of separate property may result in an ideal model for future reforms.[\[3\]](#)

This article further offers a comparative overview of the characterization of separate property, within the systems that follow a community property regime. After a brief overview of the characteristics of both the Italian and the U.S. community property systems, Part III reviews community property in general, considering its origins. Part IV discusses in more depth property characterization in the two countries, looking at the reasons for and examples of the different characterizations. Likewise, it will consider the implication of each approach on other areas of law in order to identify possible weaknesses and strengths of the systems. Finally, this article will show why revising the characterization of separate property in the two community property systems is desirable. While U.S. jurisdictions should envision a broader characterization of separate property, the Italian system should do the opposite and favor the community property pool.

First, the Italian system could be revised to simplify some distinctions between separate and community property. This could be accomplished by eliminating some nuances, as well as the tripartition of immediate, residual community, and separate property. It should also adopt the flexibility of the American system with regard to marital agreements.

Second, the presumption for community property should encompass broader aspects of community life. Third, a possible reform of the regime should underline the principles of a community property regime. Finally, the basis for the characterization of the property should give more attention to the source of property, rather than its use.

The American system could also be modified. Although the presumption should be in favor of community property, based on the source of funds used to acquire property, the American system should give more recognition to a characterization of property based on its nature. Second, an ideal system could also acknowledge the importance of *strictly* personal property. The American system could consider strictly personal property as separate property, introducing a characterization method based on the use of the property. Finally, property management in the United States should better reflect the policies of community property system.

Further, in order to avoid inefficiencies related to the proof of property use, for personal or family needs, the systems should define strictly personal property. This would limit the property characterization based on the use and nature of the asset to specific items and instances.

II. GENERAL LEGAL FRAMEWORK

A. Basic Terminology

Some basic definitions and a comparison will provide the framework for a better understanding of these community property systems. Community property, also referred to as “marital property,” is a matrimonial regime, based on which each spouse owns an undivided half of the property acquired during the marriage.^[4] Such property is divided at the time of the termination of marriage and at the death of one spouse.^[5]

The law generally characterizes gifts and inheritance, along with any property owned before marriage, as separate property, unless spouses convert it into community property.^[6] Separate property is also property acquired with the exchange of separate assets.^[7]

The Italian system also provides for a type of property owned by spouses that is different from anything recognized in the U.S. community property jurisdictions. This is residual or postponed community property. This category of property includes some specific assets that fall into the community only at the time of the termination of the regime and only and to the extent to they are left over and have not been consumed during marriage.

It is possible to look at the systems through an overall comparison:

	United States	Italy
Community property	<ol style="list-style-type: none"> 1. asset acquired during marriage is not separate property 2. income from community property 3. in some states, the income earned during the marriage from separate property 	<ol style="list-style-type: none"> 1. asset acquired during marriage including that is not separate property 2. <i>earnings of separate property of spouse, if not consumed during the regime</i>

4. asset acquired in exchange of community property

3. *earnings of separate business of spouse, if not consumed during termination of the registration*

4. *business managed by both spouses created after marriage*

5. *income and appreciation of separate property of spouse created before marriage and managed*

6. *asset used for the business of spouse created after marriage*

1. asset owned before marriage
2. asset acquired by one spouse during marriage by gift or inheritance
3. damages for personal injury
4. asset agreed to be separate property
5. asset acquired through an exchange of separate property^[9]
6. asset owned before marriage
7. asset acquired by one spouse during marriage through gift or inheritance if not otherwise provided
8. asset of strictly personal use of each spouse and its accessories
9. asset for the profession of one spouse, unless relating to management of a community business
10. damages for personal injury and compensation for labor injury
11. asset acquired through an exchange of separate property if so expressly indicated by the spouse^[10]

Separate property

B. Principles and Policies Underlying Community Property Systems

Principles and policies, together with history and legal tradition, provide the framework for the adoption and construction of a particular system of property among spouses.^[11] Although there are different nuances and variations, community property greatly resembles the model of a business partnership. In fact, it implements a partnership theory of marriage.^[12] Community property creates a system in which each spouse economically contributes to the success of the family unit.^[13] The partnership model expresses, in its turn, the idea of union between spouses: a family union.^[14] For this reason, in some aspects community property system are strictly

connected to the business field of law: first, in terms of property sharing as co-owners;^[15] second, in terms of division of the fruits and increase in values.^[16]

The marital community differs from an ordinary business partnership with regard to the goals, distribution of gains, and claims of one member against the other.^[17] First, while a partnership in general primarily operates to make profit,^[18] a marital community operates for a more varied set of reasons. Moral and social values also enrich the economic principles of partnership in the marital community.^[19] As partners, husband and wife share their efforts and resources. Marital sharing drives the community property regime.^[20]

Second, unlike in a partnership, where partners divide the profits in proportion to the investment of each,^[21] in communal property, spouses equally share the gains of the community.^[22] Last, a partner in a business may not be able to claim a share after a continued absence,^[23] whereas absence of husband or wife may not affect their rights.^[24]

From a different point of view, the community property system also encompasses a protective role.^[25] This protective role of community property is generally noticeable at the termination of marriage.^[26] This is especially true on the death of a spouse, when such system provides economic protection to the surviving spouse.^[27]

Together with sharing, equality is an essential element of the community partnership model.^[28] The idea is that all property acquired during marriage by each spouse is co-owned, because husband and wife act together as a community, of which they are equal members.^[29] Each member contributes to the community with their efforts and activities and therefore has an equal interest in community property.^[30] The cardinal principle is that gains from the efforts of husband and wife should belong to the community.^[31] The presumption is that each spouse equally contributes to the prosperity of marriage, regardless of the actual market value of the contribution.^[32]

Specifically under the Italian legal system, community property as the legal marital regime by default is greatly due to the Italian constitutional provision of Article 29.^[33] The Italian Constitution states that society is founded on marriage, as based on legal and moral equality of the spouses.^[34] From the text of the Italian Constitution, it is possible to infer the foundation of community property: equality within the family, intended as a fundamental unit of society.^[35]

III. AN HISTORICAL OVERVIEW

In order to better understand the different characterizations of separate property in Italy and the United States a review of the different historical elements is necessary.

A. United States

Scholars have traced the origin of community property back to the East Germanic tribes, in particular, the Visigoths.^[36] Marriage in the United States was likewise founded on the principles of equality and sharing of marital property.^[37] Within the Visigoth tribe, wives “actively shared the daily perils and struggles as well as the gains” from them.^[38] Sharing

acquisitions was “based on the harsh reality of the circumstances, rather than organized or moralistic standard.”[\[39\]](#)

During the fifth century, such tribes migrated across Western Europe during the decline of the Roman Empire, introducing their customs to France and Spain.[\[40\]](#) France and Spain began to assimilate Germanic law, including the Germanic marital system.[\[41\]](#) French and Spanish colonists then introduced their own community property laws and customs in other countries, reaching Mexico through their expansion.[\[42\]](#) Spain, and subsequently Mexico, originally possessed the southwestern states.[\[43\]](#) Therefore, the Spanish system is the main source for the Western states’ community property system.[\[44\]](#) French colonizers influenced community property in Louisiana.[\[45\]](#)

For this reason, it is important to briefly examine some of Spanish and French traits. Spanish and French law, religious values, and women’s rights movements were some of the influences that led to today’s community property system in the United States. The Spanish civil law marital system relied on the proposition that each spouse shares all property acquired during marriage, including the fruits of separate property.[\[46\]](#) Community property included all property acquired during marriage and the earnings generated by the “effort, skill, or industry of either spouse” during the regime.[\[47\]](#)

Further, the Catholic Church played an important role.[\[48\]](#) The French principles of the family system, including religious beliefs, spread to neighboring and conquered countries.[\[49\]](#) The colonists later introduced the inferior role of the woman in marital ownership taken from the French code in the New World.[\[50\]](#) Nevertheless, the legislature eventually realized the defects of the unequal system, introducing substantial rights for married women.[\[51\]](#)

B. Italy

Although Italy shares some common influences with the U.S. community property states, particularly from the French code, the Italian system has various other sources. Historians speculate that the origin of the Italian system does not come from the Visigoths, but rather is rooted in the law of the Longobards, Byzantines, Greek-Romans, and Franc-Normans.[\[52\]](#) In fact, although Italian law shares common origins with the French civil code,[\[53\]](#) its community property system has several sources. Some scholars distinguish the sources in relation to the specific Italian region at issue. In the former Kingdom of Lombardy-Venetia of the XIX century, it likely plants its roots in the law of the Longobards.[\[54\]](#) In other regions, the system derives from Greek-Roman influences.[\[55\]](#) In the islands, community property has Byzantine origins.[\[56\]](#) Generally, community property law was a mixture of influences from religious values, the doctrine of natural law, and Enlightenment ideals.[\[57\]](#)

The French Napoleonic Civil code on one side, and the Austrian code on the other side, were specifically fruits of the Enlightenment.[\[58\]](#) Under the Austrian model, even though women remained subject to the power of the man, a woman could independently administer her own property, as well as stand in court and contract on her own.[\[59\]](#)

After the defeat of Napoleon, the *code civil* was slowly and almost entirely abrogated.[\[60\]](#) The coexistence of different systems and domains led to a heterogeneous approach with regard to

property among spouses.^[61] A compromise was the result of attempts to achieve unity, in terms of territorial and political control.^[62] The husband still had to authorize the wife to sell or purchase property. However, a woman had judicial standing and control over the administration of her business in the case of separation by the husband's fault or if the husband was affected by incapacity or conviction.^[63]

Two kinds of assets constituted the property of the couple. On one side, there was property brought by the wife to support the husband's family management: the dowry.^[64] On the other side, there were the husband's assets intended for business and politics.^[65] Since the two groups of assets were unified under the husband's management, the wife was excluded from control of marital property, as well as from commerce and business.^[66]

Married women had to wait until 1919 to have officially full legal standing.^[67] The authoritarian family traits during the fascist era, however, led again to the husband's centrality within the family.^[68] Despite the default system of separate property, spouses could adopt a community property model through an agreement.^[69] Ultimately, with the first civil code project of 1942, an important idea arose: marriage creates a personal union, to which corresponds a property union.^[70]

This property union was based on two fundamental principles: first, the husband had the duty to maintain the wife, regardless of her economic status; second, the default regime was that of separate property.^[71] Spouses could agree to community property by agreement.^[72]

i. Toward Today's Code

The Constitution of 1948, which defines the new Republic of Italy as a society founded on marriage, based on moral and legal equality of the spouses, determined the first important step toward equality.^[73] The constitutional provisions, expressing the principles of equality and unity, influenced the legislature to revise the statutory family law.^[74] Accordingly, the legislative reform of 1975 exclusively focused on reforming that branch of the law.^[75]

Family law legislative reform abandoned the original default system of separate property, in favor of the community property regime.^[76] This was a 180° shift towards equality within the couple and towards a legal presumption community property..^[77] It achieved equality and unity through an immediate shared ownership between spouses for much of the property acquired after marriage.^[78]

IV. DIFFERENCES AND SIMILARITIES IN PROPERTY CHARACTERIZATION

One of the most significant differences between U.S. and Italian community property system relates to separate property. Traditionally, a community property system encompasses recognition of the right of each spouse to own separate property, in which the other spouse has no interest during the marriage.^[79] This is separate property. The legislative approach in the United States in defining separate or community property varies. While some legislatures first define community property as a general regime by forging the separate property as an exception, others have gone the opposite direction.^[80]

A. What Is “Community” And “Separate” Property Under The American System

Community property is property “owned in common by husband and wife as a result of their having been acquired during the marriage by means other than an inheritance by, or a gift or devise to, one spouse, each spouse generally holding a one-half interest in the property.”^[81] In community property jurisdictions, it exists by virtue of marriage.^[82]

The timeline of marriage defines whether property is characterized as community property or not. Nothing acquired before marriage, or after its termination, is community property: it is separate property. Nonetheless, property acquired through gift or inheritance is separate property, even though they are acquired during marriage.^[83] Damages for personal injury are also separate property.^[84] Separate property also includes assets acquired during marriage in exchange of what was already separate property.^[85] Spouses may also agree to define certain assets as separate.^[86]

The law presumes that all the assets acquired by the spouses after marriage are community property, absent proof to the contrary.^[87] Even for separate assets that are commingled^[88] with community property, the law presumes the asset belongs to the community. One can rebut this through a process known as “tracing out” the separate property, *i.e.* by tracing the origin of the property all the way up to its original characterization as separate.^[89]

i. Appreciation Of Property During Marriage

Sometimes, separate property increases in value during the marriage. States vary in how each characterizes these gains.^[90] Some consider the appreciation as fruit of separate property, hence, separate property. Other state statutes provide that the increase belongs to the community.^[91] Sometimes, the characterization depends upon the source of the increase. In order to determine this, courts look at the control and contribution of each spouse.^[92] For instance, inflation or appreciations are generally natural causes and are considered separate property; as opposed to an increase caused by the spouse making improvements or business investments.^[93] If the increase derives from natural causes, courts are inclined to deem the appreciation as attached to separate property, maintaining its characterization.^[94] However, in some jurisdictions, if the court finds the increase derives from marriage and its labor, the court considers it a fruit of community property.^[95]

ii. Management And Control

Among U.S. jurisdictions, there are three types of management of community property. First, equal management allows either spouse acting alone to manage and control community property.^[96] Second, joint management requires that both spouses act jointly.^[97] Finally, under exclusive management, only one spouse has the authority to manage community property.^[98]

Equal management, a system of autonomous decision-making and broad management powers, governs in eight of the nine community property jurisdictions.^[99] Either spouse may sell, buy, encumber, lease, or use the whole community property, including the other spouse’s share.^[100] The managing spouse has no duty to notify or consult the other.^[101] Yet, joint action is required for certain real property transactions and gifts.^[102] It is worth noting that exclusive management

allows a spouse a right of exclusive control of community assets that the spouse would have owned if single.[\[103\]](#) The spouse can jointly manage all the remaining mixed community property, as well as separate property commingled with the other spouse's separate property or community property.[\[104\]](#)

iii. A Practical Application: The Smiths

Living in a community property system has several implications in the life of married couples. A hypothetical illustrates the related peculiarities and implications: Let us assume that Mr. and Mrs. Smith enter marriage in the State of Olympus, an imaginary community property state. Without contracting a prenuptial agreement, they marry and, by legal default, community property governs the economic aspects of their family life.

Before marriage, Mrs. Smith had a car and a dog, while Mr. Smith had a house and stocks in Company. After they marry, Mrs. Smith moves in with Mr. Smith, in his house. Recently, Mr. Smith's mother died, leaving him her trailer and some furniture. Moreover, Mrs. Smith occasionally works as a substitute teacher, while Mr. Smith has a full-time job with the government.

Mrs. and Mr. Smith each own one-half of all the assets they acquire after marriage. They will own together each other's earnings. As for the rest, Mr. or Mrs. Smith did not acquire the dog, the car, and the house during marriage. These items were originally separate property. However, once the Smiths form a family, Mr. Smith sometimes pays for the vet expenses and the gasoline; Mrs. Smith uses her earnings to pay property taxes and home improvements. A commingling between separate property and community efforts occurs. The dog, the car, and the house are no longer outside the community property; rather, the common efforts by the spouses during marriage triggers the presumption that such property is community property. This is so, unless the initial separate asset can be traced from the commingled asset.[\[105\]](#) Further, although the couple equally owns community assets, each of them might exclusively manage the entirety.[\[106\]](#)

B. What is "Community" And "Separate" Property In Italy

Community property generally includes all the acquisitions of the spouses during marriage. The legislature included a specific list of community property assets in the code.[\[107\]](#) Community property is the default legal system arising by operation of law, unless the spouses agree differently at the time of marriage.[\[108\]](#) Indeed, the spouses may agree, to some extent, to a modification of the regime even after the wedding.[\[109\]](#)

In some ways, the community regime is similar to ordinary shared ownership.[\[110\]](#) However, the marital community property is automatic, rather than by contractual agreement, and the code specifically indicates what assets fall within it.[\[111\]](#) In addition, community property is a quite rigid system, and the spouses have not much flexibility in getting around it.[\[112\]](#)

The Constitutional Court held that the legal structure of the community property regime could hardly be assimilated to the ordinary shared ownership, where the titleholders have an individual interest in their part of co-owned property.[\[113\]](#) Rather, the spouses own a virtual undivided

share in the community.^[114] The fact each spouse owns half of community property, which seems like a divisible share, limits the ability of a personal creditor of one spouse to reach all community property. It also delineates the division of property at the time of termination of the regime.^[115]

The code subsequently defines what separate property.^[116] Like the provision regarding community property, article 179 c.c. lists specific goods or categories of goods that are separate property.^[117] From the list, it is possible to infer the legislature intended to recognize for each spouse an exclusive sphere of strictly personal activities, including professions.^[118]

i. Residual Community Property

While one portion of the assets automatically falls within the community, and remains community property until the marriage ends, another group of property only falls within the community temporarily.^[119] The reference is to the community property “*de residuo*.”^[120] In this sense, the system envisions a third type of property during marriage that falls in a middle ground between separate and community property. It includes assets that remain separate property of one spouse during marriage, but automatically become community property at the termination of marriage. At termination, the other spouse automatically acquires an immediate interest in half of the spouse’s residual property.^[121] This ensures an increase of the community property at time of division.^[122] For a spouse to acquire an interest, it must still be “left over.” A spouse can consume his or her property alone, before the termination of marriage. This includes earnings.

Since earnings are separate property during marriage, the spouse is free to use them as preferred.^[123] The non-earning spouse has a mere expectancy of community property in the other spouse’s earnings.^[124] That spouse has no right to contest that the spouse consumed the residual property for interests that go beyond the family.^[125] Additionally, the spouse who uses most of the personal earnings for his or her separate property has no duty to reimburse such expenses to the community; nor must the spouse gain of the other to manage it.^[126]

a. The Nature Of Residual Community Property

There have been several debates on the nature of residual community property. Certainly, during marriage it is not community property.^[127] Hence, it is separate property of the earning spouse.^[128] Initially, the Supreme Court held that property acquired with earnings immediately fall into the community pool.^[129] However, the assumption was that the fruits of a job are community property, which conflicts with the text of the provision.^[130] Indeed, the court itself later overruled the holding.^[131] Courts have recently clarified that only assets actually present and existing at the time of division are community property.^[132] Such property is residual community property during marriage, although community property at its termination.

Generally, residual community property allows a spouse to subtract property from the community by consuming earnings, impeding any claim from the other spouse.^[133] Therefore, scholars have attempted to interpret the provision restrictively, by stressing the duty of each spouse to contribute to family needs.^[134] According to this view, not only do leftover earnings fall into the community pool, but also that property of which the spouse is not able to prove used

for the family.^[135] A string of authorities holds that property use determines the inclusion within the postponed community. If a spouse uses property for purposes unrelated to family, it does not result the exclusion of such property from the *de residuo*.^[136] Oppositely, some hold that until termination, residual community remains of exclusive separate ownership of the spouses.^[137]

ii. Appreciation Of Property During Marriage

Courts have determined that since community property refers to purchases during marriage, these include appreciation.^[138] Appreciation becomes part of community property at marriage termination, because it falls within the residual community.^[139] Article 177, cl. 2 c.c. specifically dictates that profits and appreciation of the business of one spouse are community property.

iii. Management And Control

Italian law adopted an approach similar to the exclusive management system in Texas.^[140] Generally, the management of community property belongs equally to both spouses.^[141] However, in order to avoid a burden on activities regarding community property, the legislature has provided for a disjunctive management by each spouse as well.^[142] The reference is to the distinction between ordinary management acts and extraordinary management acts.^[143] While for the former, the spouse can act each on their own –like “equal” management in the United States, for the latter the spouses need to act jointly.^[144] Generally, acts of extraordinary management affect and burden community property significantly.^[145] These acts modify or alter the corpus of the property. A spouse must also obtain the other’s consent when the spouse wants to transfer rights of enjoyment –*atti personali di godimento*– of real community property, such as a lease.^[146] On the other hand, ordinary acts tend to maintain, improve, or increase community property.^[147]

iv. A Practical Application: The Rossis

The same facts regarding the Smiths apply to Mr. and Mrs. Rossi, who live in the State of Cornelianum.^[148] Like for the Smiths, the Rossis virtually own a half of each community property asset. During marriage, they use earnings to make some improvements to the house: they add new furniture and they buy a summer home. These are community property. Yet, Mr. Rossi remains the owner of the house and of the furniture acquired through inheritance, while Mrs. Rossi owns the dog and the car.^[149] However, the earnings retained are residual community property –Mrs. Rossi is the editor of a magazine and Mr. Rossi works as an architect.

The management and control of the property depends on the qualification of their acts as extraordinary or ordinary. Mrs. Rossi may change the house’s carpet, or the fridge, and Mr. Rossi may buy a new television without involving the other in their decisions, because these involve ordinary administration. Yet, practically speaking, they will consult each other beforehand. On the contrary, they must have acted jointly when they purchased their summer home because, being an act of extraordinary administration, it significantly affects family asset.

V. POSSIBILITIES OF THE SPOUSES TO MODIFY THE SYSTEM

Being in a community property regime implies equal rights and equal duties of the spouses in relation to community property. This also means each spouse, acting alone, generally may manage community property on behalf of both.^[150] In community property states, marriage means opting into the community, for better or for worse.^[151] Sometimes, the community property regime constitutes a risk for the spouse married to a spendthrift.^[152] Marital agreements represent an important tool for spouses to remedy an “ineffective” regime.^[153] Nevertheless, the Italian system greatly limits the ability of the spouses to modify the regime by agreement.

A. Opting Out The Community Property Regime In The United States

Traditionally, U.S. community property systems did not allow the spouses to “opt-out” of the regime through an agreement.^[154] Today the spouses can jointly execute a pre- and postnuptial agreement, and all community property states allow opting out by contract.^[155]

Marital agreements are arrangements between spouses about the disposition and ownership of property during marriage and at divorce.^[156] Through such agreements, the spouses can modify and provide for specific provisions that differ from the system imposed by default.^[157] Since the agreements change the default system, they are subject to public policy limits and formalities.^[158]

B. Freedom To Modify The Default System In Italy

The Italian system does not envisage pre- and postnuptial agreements as they exist in the United States.^[159] Nevertheless, spouses may choose a different community property regime.^[160] Similar to the American formalities requirement, an agreement is valid if performed by way of public deed, notarized, and noted on the marriage certificate.^[161]

In general, with a marital agreement, spouses can choose a separate property regime; institute a community trust fund –*fondo patrimoniale*;^[162] or modify the legal community property regime by creating a contractual –*convenzionale*– community property regime before or after marrying.^[163] However, the legislature still restricts spouses from modifying the equal ownership or management of community assets and from re-characterizing specific separate assets as community property.^[164]

VI. CHARACTERIZATION IN RELATION TO THE TIMELINE OF MARRIAGE: AFTER MARRIAGE IN THE TWO LEGAL SYSTEMS

Community property changes in relation to the phases of marriage: before, during, and after marriage. At the time of division of property, the fifty-fifty ownership of community property acquires especial practical relevance. This section provides an overview of the differences of regime at the time of termination of marriage.^[165]

A. Inheritance

i. United States

The death of one spouse terminates community property.^[166] It works as a “legal partition” of the community property assets.^[167] Upon the death of one spouse, the surviving spouse automatically owns half of the community property.^[168] The law of intestacy or the decedent’s estate plan will regulate the distribution of the decedent’s half of the property.^[169]

ii. Italy

Like the American system, the death of one spouse determines the termination of marriage and of community property.^[170] Following the death of the spouse, both the rules regarding the termination of the community property and the rules governing succession jointly determine the destiny of the deceased spouse’s assets.^[171]

Spouses are treated as if each owns half when the marriage ends. At death, the surviving spouse automatically owns half of the community property, just like in the United States.^[172] Further, Italian law includes a forced share of the decedent’s estate for the surviving spouse.^[173]

B. Divorce ^[174]

At divorce, courts divide and distribute property owned by the marital unit.^[175] In order to divide community property, courts consider factors such as the length of the marriage, the contribution of each spouse to the community, the dissipation of the assets of marriage etc.^[176]

At divorce, the community unity divides according to the contribution and reductions of each spouse to community property during marriage. The needs of each spouse play a significant role as well, in the court determination of property division.^[177] The recognition of property division to satisfy the needs of each spouse occurred gradually.^[178]

i. United States

Interestingly, while spouses own community property during marriage fifty-fifty, at divorce community property division is not necessarily equal. Rather courts take into account factors and the equal ownership no longer dictates in most jurisdictions.^[179] The general approach of property division at divorce is equitable distribution. Equitable distribution tends to compensate the economic hardship of one spouse after divorce that the recognition of half of the ownership of the other spouse’s assets would not protect.^[180] It protects the spouse that has fewer resources and it helps to restore the individual’s interest in owning and managing property.

The partnership model, on which the community property systems are based, explains the rationale of equitable distribution.^[181] In a business partnership, the partners’ shares correspond to their contribution.^[182] Equitable distribution of community assets reflects a similar approach.^[183]

However, the treatment varies from state to state.^[184] Courts consider factors including fault, earning capacity, and separate property.^[185] Equitable distribution is not always desirable, because of the broad discretion of the courts in dividing property.^[186] Nevertheless, the debates

concerning the court's discretion in property division continues to swing between supporting the possibility of divesting one spouse's separate property, and excluding such discretion.[\[187\]](#)

ii. Italy

Article 191 C.c. lists the events that terminate community property.[\[188\]](#) These events include divorce.[\[189\]](#) Three effects derive from divorce termination of the community property regime, inclusion of the residual community property as community property, and creation of ordinary community property between spouses of the property that has been legally co-owned.[\[190\]](#) Each spouse acquires the exclusive ownership of property obtained independently after the divorce, can ask for the division of community property, and acquires half of the residual community property.[\[191\]](#)

The code provides for equal division of community property.[\[192\]](#) Equal division pertains to the "active and the passive" items of the community property, meaning rights and obligations regarding community property.[\[193\]](#) Equal division confirms the purpose and policy of the regime: equal contribution and participation of each spouse to the marital life.[\[194\]](#) The legislature highlights the need for equality in marriage regardless of the contribution to the marriage.[\[195\]](#)

Each spouse must reimburse to the pool of community property the entire amount withdrawn from community property and used for purposes other than supporting the family and the expenses and debts of the community.[\[196\]](#) The same is true for the value of goods acquired with community property without the consent of the other for extraordinary administration.[\[197\]](#) To offset this reimbursement, spouses may ask for restitution of money withdrawn from personal property which has been invested for the community.[\[198\]](#) If this is not materially possible, the spouse can ask for restitution of the corresponding value.[\[199\]](#) After the termination of the regime, the spouse in exclusive possession of community assets capable of producing income must retribute to the other spouse the value of the appreciation up to the share of to each spouse.[\[200\]](#)

VII. CONCRETE APPLICATIONS AND EXAMPLES

Considering practical examples will further clarify the differences in characterizing property in Italy and the United States. This section will apply the analysis to the most common types of assets that might be relevant to a married couple.

A. Jewelry

Jewelry is one of the first types of property that may strike one's mind when thinking about property exclusively used for one spouse. Let us assume Mrs. Smith uses her earnings to purchase a Tiffany necklace and earrings during marriage. Since she used earnings, the necklace and earrings become assets of the community. Mr. Smith owns half of the necklace and half of the earrings, even though the jewelry is feminine and Mrs. Smith is the only one wearing and managing it.

The fact that Mrs. Smith spent earnings in order to buy the jewelry would be sufficient for her husband to claim half of its value. Only if Mrs. Smith used her separate money would the result be different. Analogizing from the considerations on separate property, exchanging community assets with others does not change its nature in separate property. The money, which is community property, becomes the jewelry through the purchase transaction, which takes the place of the dollar amount.

Mrs. Rossi too decides to treat herself to a shopping trip. When Mrs. Rossi returns from the store, she has a precious necklace and matching earrings. Although Mrs. Rossi wears her earnings, Mr. Rossi is concerned because the bill payments are due and Mrs. Rossi contributes to expenses in proportion to her financial capacity. However, Mr. Rossi has no claim against the jewelry because it belongs to Mrs. Rossi as a separate asset. Ms. Rossi is happy about the investment and her happiness contributes to the interest of the family and to the unity of the couple. In contrast, Mr. Rossi argues that the purchase makes them fight despite the fact that he recently purchased a new golf set that was not any less expensive than the jewelry. Both have a duty to support the family in proportion to their own resources.^[201] Further, Since Mr. and Mrs. Rossi's earnings are important for future division as residual community property, each of them might claim reimbursement for expenses. If the marriage dissolves, they must show those purchases that took property from the residual community property and were not used for the family.

One can see how the American system gives the non-purchasing spouse more protection through a claim of part ownership over the jewelry. Under the American system, upon the death of one spouse the surviving spouse automatically owns half of the community property. In contrast, under the Italian system, the non-purchasing spouse would not have a direct claim of ownership, but could recall the duty to contribute to family needs. If Mr. Rossi dies, regardless of the existence of a will, Mrs. Rossi receives a share of all Mr. Rossi's property – his half of community and his separate property.^[202] Moreover, the purchasing spouse has the freedom to manage her property without having the other spouse limiting her. This is the same in U.S. community property states where Mr. Smith could sell the jewelry without Mrs. Smith's consent.^[203] Of course this is an extreme example, but one that serves to demonstrate the concrete differences under the two systems.

B. Appliances ^[204]

Mr. Smith has an interest in wine and he would like to be able to store his bottles properly. In fact, he has recently attended a sommelier class. He saw an advertisement in a weekly magazine for a white-wine fridge-cabinet, which would fit perfectly at the end of the kitchen counter. Mr. Smith decides to order one and after two weeks finally installs the new wine fridge. He purchased the new appliance during marriage with earnings making it community property even though Mr. Smith is the only one who uses the fridge. Mrs. Smith will probably complain because she believes the purchase was superfluous, yet, she now owns it too.

Mr. and Mes. Rossi also recently bought a wine fridge however Ms. Rossi did not participate in the purchase. Let us first assume that Mr. Rossi ordered the fridge with his saved earnings –his separate asset. This makes the new appliance his sole property. However, unlike the jewelry, the

fridge is an accessory of the house, where Mrs. Rossi also lives. Yet, since both spouses equally own the house, Mr. Rossi has the right to add the fridge.

To be more precise, the fridge bought in exchange for Mr. Rossi's saved earnings is residual community property and this characterization is only relevant at the time of marriage termination, if not consumed. Here, the savings are "consumed" because they do not exist anymore; they were used for the purchase of appliances. Consequently, if Mr. and Mrs. Rossi decide to divorce they could dispute whether the fridge serves family or individual needs.

On the contrary, if Mr. Rossi purchases the wine cabinet with community money, even though he personally and by his own desire purchased the new item, it is characterized as community property. And, Mrs. Rossi would equally own it regardless of her lack of enjoyment in it.[\[205\]](#)

C. Personal Care Products

Mrs. Smith cares a lot about her beauty and herself. She always seeks the best hypoallergenic products. She uses her savings from her job to buy the products and, therefore, all her beauty products become community property. Mr. Smith does not use these products and he does not even know how many different lotions or nail polishes his wife has. Yet, the law gives him co-ownership of them. Again, this does not matter in practice during marriage. At separation, however, although Mr. Smith might not think of claiming half of her lipstick collection, the court, instead, considers the value of this property in order to divide equitably the community property. Nonetheless, a court likely would award such personal products to the spouse who used them. Interestingly, while the husband might actually think about his ownership in valuable jewelry; it is unlikely that he gives such thought to ordinary, day-to-day products that each spouse purchases.

The Smiths have the same habits as the Rossis. Mrs. Rossi also cares about herself and about natural products; in fact, she only buys her hypoallergenic personal care products at the pharmacy. Unlike the Smith's items described above, personal care products or makeup would be strictly Mrs. Rossi's personal property. This means that although the products were acquired during marriage, maybe with the community money, Mrs. Rossi has exclusive use of it and, therefore, exclusive possession and title. The strictly personal nature and use of the items takes the property away from the community pool. In some ways, Mrs. Rossi's makeup or Mr. Rossi's aftershave do not really contribute to the community interest and do not constitute direct support to the family. For this reason, the legislature has decided to keep personal property of this nature separate and assign it to each spouse.[\[206\]](#)

D. Clothing and Accessories

Mr. Smith and Mr. Rossi always wear suits at work and sweaters on the weekend. Mrs. Smith has a closet full of beautiful dresses, matching bags, and shoes; as does Mrs. Rossi who recently purchased a new evening topcoat. Both the Rossis and the Smiths purchase their clothing with their shared checking accounts. Like with the lotions and shampoos, the Smiths equally own each other's clothes and accessories. Of course, Mr. Smith has no interest in wearing his wife's dresses, nor does Mrs. Smith use his ties. In practice, they might not be interested in having each

other's clothes, but when considering monetary value, their reasoning might be different - especially for Mrs. Smith's Gucci bag, or Mr. Smith's Calvin Klein suits.

For the Rossis, clothing is strictly separate property of each spouse, regardless of whose money was used for the purchases. Mr. Rossi does not wear Mrs. Rossi's clothing, just as she does not wear her husband's suits. The law acknowledges this practical fact and expressly states that these items are separately owned property. Mr. and Mrs. Rossi might nevertheless fight over the beloved sweatshirt, or over the newly purchased Samsonite luggage they have used together in their travels. Per converse, the American legislature avoids such fights by firmly holding that the value of all clothing is equally or equitably divided.

E. Books and Music

Mr. Smith has a passion for rock music and a collection of old CDs and recordings. Likewise, Mrs. Smith enjoys music from the 1980s. Despite the different genres, Mr. and Mrs. Smith sometimes listen to each other's music. They also do not share the same taste in books; Mr. Smith likes mystery novels and Mrs. Smith prefers history novels. Likewise, while Mr. Smith prefers photograph magazines, Mrs. Smith reads romances. They keep all of these items laying throughout the house.

As for the Rossis, the analysis of property-categorization depends on use of the items. Accordingly, they use the books, CDs, and books separately; and only on rare occasions do they share a novel or listen to each other's music. However, unlike the use of clothing or personal care products, it is uncertain whether books and CDs can actually be viewed as exclusively separate property. Mr. Rossi might be interested in Mrs. Rossi's old 45-rpm because of their antique value, but he would not be interested in having his wife's books or gossip magazines. Therefore, depending on its nature, books and music could belong to each spouse, or to the community.

On the contrary, the Smiths once again legally share both books and music. Mr. Smith purchased some rare rock band CDs from a new store in town. Mrs. Smith does not like the music very much, but she tolerates it sometimes. Nevertheless, she owns half of the CDs with Mr. Smith. Beside the rare CDs, it would probably not even cross Mrs. Smith's mind to claim her husband's CDs. However, she is certainly happy when, at divorce, the court finally "compensates" her by awarding her half of the value of the CDs.

F. Computers and Electronics

Both of the Smiths have a cell phone and they share one MacBook laptop computer at home. Mr. Smith has a brand new iPhone which he synchronizes with the laptop while Mrs. Smith has an older Nokia. Mr. Smith bought the smartphone for work, using his separate property to buy it. He used his savings from his earnings to buy the laptop, as did Mrs. Smith when she bought her phone. Mr. Smith's phone is his separate property. Both the laptop and Ms. Smith's phone are community property because they were acquired during marriage with community earnings.

While Mr. Smith does not have much interest in Mrs. Smith's old cell phone, Mrs. Smith might have an interest in the computer. Moreover, since Mr. Smith used community property to buy

the computer Mrs. Smith is part owner. The computer is commonly used and shared by both; Mr. Smith did not expect to have exclusive use of it given that he placed it on the desk in their bedroom and did not set up an access password.

Mr. Rossi is interested in technology; however, he does not feel comfortable with Apple computers or cell phones. He uses his earnings to purchase the latest Samsung smartphone and the latest HP computer. Mrs. Rossi recently purchased the latest iPhone model. While walking home, she was distracted by an item displayed in the window of a little shop. A few minutes later, she left the shop with a Microsoft Tablet and software for digital photography. She made all of these purchases with her earnings

While the photo software is the result of an exchange for Mrs. Rossi's separate property earnings, donating it to Mr. Rossi does not alter its categorization as separate property. Mrs. Rossi will not be able to claim an interest in the software. Since Mrs. Rossi used her paycheck to buy the tablet and the iPhone, they are her separate property unless they serve family needs and are not of her exclusive use. Mr. Rossi may still complain that, having spent all that money on electronics, she "took" that money which should have been used as her contribution to the support of the family. Moreover, Mr. Rossi owns his phone and computer because he used his earnings, although he shares use of the computer with his wife.

G. Medicines

Mrs. Smith suffers from allergies and always has antihistamine tablets with her as well as an inhaler for emergencies. She also takes a contraceptive pill. Mr. Smith takes two pills every day has for blood pressure. Both take vitamins with their breakfast. Similarly, Mrs. Rossi takes anti-allergy medicines, and Mr. Rossi takes pills for his heart. They purchased the medications with their earnings.

The analysis used here is the same as for books or CDs. While the Smiths equally own each other's medicines, the ownership of the Rossis' medicines depends upon how they are used within the family. It can likely be argued that medications are commonly used for the needs of the entire family even though some of them are specifically for either Mr. or Mrs. Rossi. Accordingly, the medicines are likely community property in both jurisdictions.

H. Real Property and Vehicles

Unless property purchased by a spouse is actually used for family purposes, the non-purchasing spouse will have no claim against the other spouse if he or she used individual earnings to make the purchase. The legislature has acknowledged this "lack of protection" and provides for highly valuable purchases – like real property or vehicles – that such purchases are automatically community property. This is true unless the non-purchasing spouse participates in the purchase and consents to its characterization as separate property. If Mrs. Rossi buys a new car without Mr. Rossi's consent, he can ask to avoid the purchase made without common consent. In contrast, Mr. Smith could purchase a car with community property money without his spouse's consent. The new car would be community property.

VIII. POSSIBLE REASONS AND POLICIES FOR THE DIFFERENT CHARACTERIZATIONS

The sections above show how the U.S. and the Italian systems differ, in that the latter not only provides for a postponed community property, but also generally excludes the earnings from community property during marriage and provides for joinder of acts that greatly affect community property. Different policies and reasons justify the adoption of one approach over the other. Despite the many difference, American and Italian laws on community property do share similar rationales.^[207] Yet, with regard characterization separate property, the results are quite different.

The inclusion of earnings in community property in the U.S. system is based on the stronger policy that awards the joint efforts of the spouses. Therefore, although a purchase with earnings only pertains to one spouse, the existence of marriage makes the results of that activity a community activity. Husband and wife are one entity, in which each member contributes his or her own efforts for the satisfaction of the entity's interests ensuring independence. Under this approach, what each spouse brings to the marriage entity with his or her own effort belongs to the community. Mr. and Mrs. Smith are seen as "the Smiths," one family, and not as separate individuals that work separately. It seems that being a member of the marital community and striving for the interest of the community itself changes the nature of individual activity of one spouse to activity for the community. The Smiths, therefore, enter marriage thinking of themselves as one unit.

Another question pertains to the reasoning behind the categorization of each spouse's personal clothing as community property. It can be hard to see such categorization as a result of a spouse's effort; it is easier to consider such an item as one of strictly personal use for a spouse. We have seen how Mrs. Smith has a closet full of dresses and purses which Mr. Smith does not use, and how Mrs. Smith will likely never wear her husband's attire. Yet if clothing is viewed from an economic, monetary point of view, the result is different. Instead of considering the women's clothing as belonging to the wife and the man's clothing as personal to the husband, the system looks at the source of the purchase and its economic value. The system translates the material essence of the clothing into a monetary amount. The example of the expensive Gucci purse is self-explanatory: Mr. Smith will be interested in getting half of the considerable value of the purse, even though he has no interest in the purse itself. Therefore, it would be somewhat erroneous to claim that the wife owns half of the husband's clothes and vice versa. Rather, she owns half of its *economic value* because she owned half of the earnings used to purchase his clothing.

On the other side, Italian law takes into consideration the practical and, maybe biological differences between sexes. Items of strictly personal use are separate property. Clothing is strictly personal because generally only the wife would wear women's clothing, while only the husband would wear the men's attire. Just like Smiths, the Rossis never wear each other's clothing. Maybe amore than the concrete difference is the focus is on practical use of the property, rather than the property's value or use-by-gender. This approach and point of view appears to be more practical and factual than economical.

Certainly, the main justification leading the legislature in regulating the community property regime rests on a balancing test.^[208] It is important to recognize the coexistence of each spouse's individuality in modern society, with marriage intended as a community of these equal individuals.^[209] These ideas are in tension and it is difficult to reconcile them.^[210] The American and Italian systems achieve compromise through different paths. The American system seems to favor unity, by including strictly personal and professional property in the community pool. A recognition of each spouse's ownership in half of strictly personal property and considering the property for its value rather than for its practical use^[211] is more protective of community interests. This reflects the ideal behind the regime: after many years of marriage, the spouses do not think about separate property as separate any more.^[212] Again, the Smiths enter marriage thinking of themselves as one, sole family, rather than as individuals who cooperate. The Italian system focuses on solidarity by imposing joinder in transactions with a great financial impact on community property.^[213] The Rossis need to act jointly with regard to disposition of real property, or of their family car.

On the other hand, the U.S. law allows exclusive management of community property.^[214] Italian law achieves a similar result when it determines that earnings and other property are separate property during marriage. This gives importance to individual needs and autonomy. In modern society, the individuals highly value their personal property and their freedom to manage it. Today's spouses have grown up with the idea of autonomy and the ability to be independent.^[215] Such values do not cease to exist at the time of marriage, despite the new community coming into existence, and spouses want to retain their right to have and manage their own property.^[216] Despite what both the Rossis and the Smiths think about themselves as a family unit, every single one of them still values being able to have autonomy and still feel like an individual in the community.

If the individual's autonomy reaches too far, both systems restore balance. Both countries provide for a system of reimbursements and restitution in case of mismanagement of community property. The U.S system ensures each spouse a claim of the half of the value of community property.^[217] The Italian system gives the spouse that did not participate in an extraordinary administration act the right to void the act.^[218]

Moreover, each system balances itself with different considerations at the time of termination. The American system favors fairness at division through a majority approach of equitable distribution, as opposed to equal shares during marriage. Italy favors equality at divorce, despite a slight more focus on the individual during marriage. One system has a balanced approach and distinction between community and separate assets, but asks for equal division at termination of marriage. The other one adopts an easier, simpler characterization, although prefers an equitable division of property. In addition, although the American system does entitle each spouse to half of the interest in community property, at the death of one spouse it leaves freedom as to the other half of property. Italy further recognizes a forced share, such that even if community property is not big as to protect the surviving spouse, the survivor is still shielded by disinheritance from the decedent's assets.^[219] If Mr. Smith passes away, Ms. Smith automatically owns half of the community property and, often, depending on the jurisdictions half of her husband's separate property. Ms. Rossi, on the other hand, does not automatically acquire half ownership, although

she will be entitled to one share, generally one third of Mr. Rossi's estate. More precisely, the third will include her husband's half of community share and separate property.

In this way, both systems acknowledge modern reality, where, in practice, it is not always true that "all mine is yours, and all yours is mine." Spouses share what they believe is employed for the interest of the family. On the contrary, they keep and use as separate property that is deemed to be of exclusive use and satisfaction of the person of one spouse. They want to be able to keep some assets divided, regardless of the belief in the community. Yet, the countries accomplish this goal in different ways. Mr. and Ms. Smith share almost everything, including the ownership of personal care products, but each of them can autonomously dispose of it without the other's consent. Mr. and Ms. Rossi have vast authority regarding their earnings or strictly separate property, although they need each other's consent for acts affecting community property. This consideration might be helpful to further examine the reasons that led the two legislatures to adopt different approaches with respect to property characterization.[\[220\]](#)

A. Specific Assets: Reasons Behind the Characterization

It is possible to identify the reasons behind the characterization of the specific assets the law considers separate property. Property brought into marriage involves the simplest, most intuitive justification for the separate property characterization. Property owned before marriage does not derive from community efforts.[\[221\]](#)

Gifts and inheritance as separate property in both Italy and the United States can be considered jointly because of their common trait as gratuitous transfers, one *inter vivos* the others *mortis causa*.[\[222\]](#) Mr. Smith's inherited furniture derives from his mother, and has nothing to do with his family and union to Ms. Smith. Some justification for the exclusion of such property from community property is because it does not derive from the common and joint contribution to the interest of the family of the spouses during marriage.[\[223\]](#) Others argue that the characteristic of the gifts is the so-called *intuitu personae*, i.e. the individual, personal nature that connects the transfer of the property by gift to the person that receives it.[\[224\]](#) In this sense, gifts are separate property because its source is in the individual spouse, rather than in the community.

Damages are also separate property in both countries. Under the U.S. system, the source of damages is in the individual. For both the Rossis and the Smiths, when they retire, or if they injure themselves and they receive a compensation, such benefits belong to the specific member of the family to which the benefits are traced. The same applies to Italian law. Damages refer to the individual spouse, but also to its separate property.[\[225\]](#) The rationale is that the damage to the person is strictly related to an individual, rather than the entity "community." The damage awards substitute the property itself.[\[226\]](#) Consequently, separate property is also private or public benefits, including work benefits, because these are strictly personal.[\[227\]](#)

One of the greatest differences between the Italian and the U.S. community property system relates to the spouses' earnings. The goal of the Italian legislature in including it under the residual community property was to guarantee full power of disposition of property needed for one's profession and to safeguard the individual sphere.[\[228\]](#) Mr. Rossi does not have to report to his wife about the use and management of property that is strictly instrumental to his profession as an architect, such as the square ruler or geometric compass, and consequently this

gives him more freedom.^[229] More precisely, the earnings that are used for purchases for the family create community property. On the contrary, if they are used for an individual purchase, it is hard to argue the purchase is not separate property. When Mr. Rossi purchased the fridge with his earnings, it was arguable whether it would serve the family or his own needs. However, Ms. Rossi purchased some new clothes that was clearly for her own sole benefit and use, thus, her separate property.

Generally, entrepreneurial activities receive a different treatment. The code regulates the business activity elsewhere and it takes it apart from the general “professional activities.” While tools of profession are separate property, property for a business is residual community property. While Mr. Rossi’s geometric tools are considered separate property, the property he would use had he a business are considered to be residual community property. Some authorities justify this separation of professions based on a commonly greater value of the business goods, such as to justify their inclusion in the residual community property.^[230] Others argue the professional instruments other than those needed for business are of less importance compared to the latter, as well as that the former can be in some way separated from the activity itself.^[231] From a third point of view, the business activity is by its nature able to attract wealth. Hence, the law must protect the other spouse from being excluded from all of the wealth gained by the activity.^[232] Another view argues the rationale rests on the preference given to intellectual activities over manual jobs.^[233]

Nonetheless, even valuable property that is complementary and instrumental to one spouse’s profession remains part of the separate property of that spouse.^[234] For instance, Mr. Rossi’s computer would be separate property if it were instrumental to his job. If the use of such property is subject to modification that no longer aims at serving the profession of the spouse, the property is automatically characterized as community property.^[235] Another view claims the change in use is not sufficient to consider it community property. Supporters of this theory argue that the code generally allows a spouse to dispose separate property.^[236]

Another difference with the American system is the characterization as separate property that is strictly personal to one spouse.^[237] Ms. Rossi’s dresses are exclusively used by her and her own.

IX. RECOMMENDATIONS

This section explores several reasons to revise the current characterization of separate property in both the United States and in Italy. The two systems could combine their most efficient aspects, moving toward a better generally applicable approach.

A. Italian System Changes

i. Simplification Of The Italian System: Products Of A Professional Activity And Freedom With Regard To Marital Agreements

The Italian system has many variations and nuances, which could be simplified, by looking at the American system. For instance, a uniform consideration of tools of the profession and property for a business might be desirable. It is true the business is generally considered to produce more income; thus, it might be more valuable. The Italian system distinguishes it from other

professions and includes appreciation derived from a business and business property as community property. However, the suggested limited interpretation of separate property would already take care of the protection ensured by distinguishing these types of assets.

Regardless of the type of job, its tools and its products result from a common effort of each spouse for the benefit of the community. Regardless of whether Mr. Rossi works as an architect or as an entrepreneur, the assets he employs in his job do not differ in nature. If such property is not used for individual needs, it should be separate property. U.S. community property states uniformly regard tools of profession from work as community property regardless of the type of work. Ms. Smith's tools of profession would still be community property even if it derived from a business, rather than any other professional activity. For the same reason, the Italian system should abandon such distinction, uniformly treating all types of tools of profession.

ii. Simplification Of The Italian System Cont'd: The Expansion Of Marital Agreements

Further, the law should allow the spouse to agree on whether to consider some assets as separate or in common. The limit the Italian legislature imposes, impeding the spouses to include in the community property some separate assets, does not further the interests and freedom of the spouses. For this reason, the Italian legislature should draw inspiration by the U.S. system allowing more freedom to characterize community property through marital agreements.

iii. Elimination Of The Italian Tripartition

The Italian community property system is based on a unique division of community property into three different categories. This renders the marital regime more complex and complicated. First, it has a less clear distinction, because some assets might be either community or separate property depending on their use rather than source of funds to purchase the asset.^[238] Further, it affects the presumption underlying the regime that all the acquisitions during marriage are community property. Eliminating the tripartition would result in a better division of the three properties within marriage: separate property of the husband, separate property of the wife, and property of the community, like the American system. It is, indeed, confusing, considering Mr. and Ms. Smith's earnings as separate property during marriage, but as community property after termination of marriage; considering, at the same time, their purchases for family purpose as community property, although separate property if for clothing.

The debates that led to the adoption of the residual community property, as explained above, already highlight some critical aspects of the system. Some scholars have found advantages in it, arguing that it furthers solidarity, by achieving an actual distribution of individual property appreciation.^[239] However, the absolute freedom of one spouse to manage separate earnings seems to conflict with the purposes underlying the regime.^[240] Further, residual community property seems to conflict with other provisions, such as the duty to contribute to family needs.

Maybe the main aspect that shows the downfall of a postponed community property relates to the spouses' earnings. Earnings are often the bulk of a spouse's estate. Eliminating residual community property would result in the inclusion of the earnings in community property, in furtherance of the principle of the system itself. Like for the Smiths, the Rossis would share each other's earnings and work jointly for the benefit and purpose of the family.

a. Rationale For the Recommendation: Community Property Presumption

The major reason to include earnings from work in community property is based on the presumption of community asset. The inclusion of earnings within the third category of residual community property consequently creates an exception to the presumption in favor of community property. Considering that the residual community property also includes other types of property besides earnings, the exception is quite broad, which subtracts a considerable amount of assets from the community.^[241] In some ways, through the residual community property, part of the presumption only kicks in upon termination of the regime. In other words, while during marriage the third pool of marital assets are separate property, the law presumes they are community property to the extent they are left over at the termination of marriage.

However, one could argue that the Italian presumption for community property is, in fact, different from the American presumption. The Italian presumption relates to the *purchases* and their use during marriage, whereas the American system it pertains *property acquired* during marriage. At first impression, the two systems seem to adopt the same definition expressed in different ways. However, the interpretation of acquisitions differs. Italy considers earnings as separate property because it does not regard it as a purchase, in its strict meaning. Mr. Rossi's earnings are the product of his work. The first definition of purchase is to buy something, to acquire possession of something through the exchange of money or other payment instruments.^[242] For this reason, purchases obtained by using separate earnings fall into the community with some exceptions. Differently, earnings can be saved as separate property and remain separate unless it increases community property.

However, to purchase more generally means to acquire an interest in real or personal property; to obtain ownership or possession of goods.^[243] Goods include money. Therefore, the exchange of money for labor can also be seen as an acquisition. Ms. Smith's earnings are community property because she acquires, obtains them during marriage.

b. The Conflict With Community Property Partnership

The reduction of community assets during marriage specifically conflicts with the partnership model. Even in a business partnership, the members split the results of each partner's effort. Although in a business partnership partners share the earnings based on their individual contribution, we have seen how the spouses equally share the products of their efforts. One could, then, ask what a community asset is if not what derives from the efforts each spouse puts into its job; into the activity each spouse exercises to contribute to the family.

iii. A Broader Attention To Source Of Property Rather Than To Its Use

Under Italian law, the nature and use of the purchases governs the characterization of certain assets, rather than a characterization based on the source used for the acquisition. Italian law should interpret the nature of separate property more narrowly. Only purchases of goods through individual earnings that are specifically and exclusively of personal use should be separate property.^[244] An example is Ms. Rossi's and Ms. Smith's jewelry or purses. The Italian system should adopt the American approach of giving more centrality to the source of property as a basis for its characterization, although maintaining a narrower division based on property use.

A source characterization furthers community property policies. The joint effort of the spouses is community property and is a source of property. Everything acquired during marriage with earnings should be community property except for items exclusively for personal use.

B. American System Changes

i. Focus On Property Use

For the same reason, the U.S. system could move more toward the Italian attention to the unique use of specific property. Through the source-method of property characterization, the result of any effort during marriage, such as earnings, constitutes community property. This approach is simple, as strictly based on one type of source. Yet, a system should acknowledge that another peculiarity of certain property is its specificity to each individual person. The Smiths use personal care products solely for individual needs, whereas the computer serves the family.

This would take into account that community derives from joint efforts of the spouses, but *for the benefit* of the family, rather than any joint effort, regardless of its use. The timeline of marriage matters because, during marriage, two individuals become members of a community. Each of them, as a member of one entity, works towards supporting such newborn nucleus. Therefore, each spouse puts the effort *into* the community and *for* the family. Spouses have in mind the interests of the family. Then, characterization based on property use should also govern the system. Although this is somewhat implied, the legislature should acknowledge it, by also considering the specific use of an asset acquired during marriage. It is true a property-use approach might reduce a spouse's protection in contrast with the system's policies. However, the protective role of community property really shows up at the time of property division. Further, it has its limits. Instead, other instruments can ensure a spouse's protection after marriage. [\[245\]](#)

ii. Introducing The Notion Of "Strictly Separate Property" In The American System

It follows that considering strictly personal property as separate property balances family and spouses' interests. Furthermore, some assets acquired during marriage should be allocated to one spouse only, because they strictly pertain to the person of that spouse.

First, from a practical point of view, marital unity does not share some property. Although generally couples during marriage share everything, in practice this is not always true. The spouses do not share most of their clothing, personal care products, or, especially, instruments of a profession. While Mr. and Ms. Smith's efforts in their job produces community property, Ms. Smith's bags only belong to her. Just like Mr. Smith is the only one using after-shave. Likely, in their minds, such property belongs to the individual, rather than to the community.

This proposal is supported by the U.S. law's treatment of damages as separate property. If damages are separate property because they specifically pertain to the individual and apply to the person *intuitu personae*, the same reasoning exists for strictly personal property. However, one could argue that the fact the source is the individual itself determines the characterization. Nonetheless, the specificity of damages to the individual spouse might be a stronger policy to consider it as separate property. The same should be for strictly separate property.

a. Joint Efforts

The different characterization between the Italy and the United States rests on the interpretation of joint efforts. Certainly, it cannot be read as activities the spouses do together in a strict sense. It is not necessary that the spouses jointly and simultaneously do the activity. Each spouse works and has his or her own job in order to accumulate assets that support family living. In this sense, the effort each spouse puts into work to contribute to family needs is a joint effort. This produces community property. However, strictly personal property does not represent a joint effort. One could object that the purchase of the property is the result of the joint effort. Following this argument, strictly personal property indirectly is a product of common effort, *i.e.* community property. Nevertheless, by itself, exclusive personal property does not really enhance the contribution of working together, and it would not properly belong to community property.

In addition, property acquired before marriage not only is separate property because it does not derive from a joint contribution of the spouses, but also ensures independence. If this is true, the same should apply to strictly personal property, even though it is acquired during marriage. [\[246\]](#)

iii. A Revision Of Management Rules In The American System

One could argue that the American system already recognizes individual freedom through the equal management doctrine. Therefore, Ms. Smith might not be interested in the property characterization during marriage, as long as she is able to control assets in total autonomy.

However, management of one spouse of the entire community asset encourages a relationship based on power. Despite equal ownership, Mr. Smith could spend the whole paycheck without Ms. Smith's knowledge, nor consent. [\[247\]](#) Hence, the actions of one spouse easily and deeply affect the other spouse, because marital management law influences more than just property. [\[248\]](#)

For this reason, some scholars advocate for a system that promotes participation instead of power of the strongest individual within the family. Likewise, they encourage convergence instead of divergence of management. [\[249\]](#) Maybe, a more equal system of management that encourages the cooperation of the spouses, without burdening property control with consent for every action might be helpful. For instance, U.S. community property states could adopt a management system more similar to the one some U.S. states, or Italy have adopted. Requiring joinder for larger purchases would remedy some issues related to equal management by distinguishing between acts that deeply influence community asset and transactions that only lightly, if not at all, affect the other spouse. While Mr. Smith's management of the alarm clock would not affect Ms. Smith, her disposition of the television or the car might, instead, affect Mr. Smith. Although most community property jurisdictions require joinder for real estate, the system should apply the same policy for acts that greatly affect community assets.

Some might argue, however, that requiring joinder for more acquisitions is inefficient. In fact, the distinction of property management between acts that require joinder and acts the spouses can perform independently would render the system more complex and complicated, as well as create disputes over what purchases are significant enough to require joinder. [\[250\]](#) Further, spouses may find it difficult to agree on a compromise in property control. [\[251\]](#) Likely, Mr.

Smiths would fight about the selling of the brand new television by his wife. The requirement of consent reduces individual autonomy.^[252] Further, the proposal would tell spouses how to manage their property.^[253] A good balance, however, would encourage a reconsideration of the law in order to avoid an unreasonable exercise of power by one spouse over the other.^[254]

C. An Ideal Model

i. Definition Of Strictly Personal Property

In order to avoid an extensive exception to the community property presumption, the legislature could define what strictly personal property is. For instance, Italian courts have adopted an objective notion. Similarly, a model system could adopt a definition based on the actual use: use of an asset connected to the personality of the spouse using it. In this sense, one can infer the quality of strictly separate property from its actual use by one spouse. Property of strictly separate use includes assets for the exclusive exigencies of one particular spouse.^[255] We have seen the examples pertaining contraceptives or a tie.

This differs from a subjective approach, which is based on whether one spouse is able to use the property. The proposed subjective approach considers property capable of being used by both spouses but that is only used by one of them, such as the wine fridge. It follows that property capable of multiple, various uses is not strictly separate property.^[256]

The legislature could determine that property of strictly personal use requires clear and convincing evidence that the use of the asset is strictly traced to one particular spouse. Alternatively, the legislature could envision a presumption of common use, which the other spouse could rebut by showing the usual use by one spouse as strictly separate property of that spouse.

The suggestion is for a system that adopts both characterization approaches, based on the source of property and based on the use a spouse makes of it. We have said community property regimes are based on the partnership model; on the idea of sharing the products of joint efforts; and on protection of each spouse. A dual characterization approach would recognize these policies and the actual use and interests of the spouses during marriage.

ii. A Proposed Provision ^[257]

All considered, maybe an ideal model could deem the following as separate property:

1. Property acquired through gifts or inheritance;
2. damages and compensations;
3. property acquired before marriage;
4. assets agreed to be separate property;
5. property of *strictly* individual use; and
6. property acquired through an exchange with the above assets, if so indicated by the spouse

While the first three are already a common feature of the U.S. and the Italian system, no. 4 would allow systems like the Italian one to recognize more independence to spouses, as analyzed. No. 5 would take care of the recognition of a characterization, beside based on property source, based on the specific use of certain assets by the spouse. No. 6 would allow to consider property acquired through an exchange of the other separate assets if expressly intended by the spouse. In this way, if the damages of one spouse amount to a considerable sum, the purpose of community property sharing would not be frustrated, unless the spouse so decides.

X. CONCLUSION

Characterization of separate property in the United States and in Italy is evidently different in certain instances. This is especially true with regard to earnings during marriage, tools of profession, and property of strictly personal use to one spouse. Italy allocates such property to the separate pool of assets of each spouse, limiting its share only in case of purchases for family needs or at termination. Even more, the Italian legislature prohibits these assets from becoming community property by agreement. Generally, U.S. states deem it as community property.

The Italian approach looks at the practical use of such property. American jurisdictions consider the source of the property, tending to emphasize economic value of all the property and valuing sharing. Both systems try to reconcile the tension between family principles and individual autonomy. Both aim at acknowledging the joint efforts and contributions of each spouse to the community, although in a different way. At the same time, they ensure protection of each spouse, especially at the termination of the community property regime.

Once again, the approaches vary. Italian law provides for equal distribution of community property at divorce, and ensures a forced share to the surviving spouse when the first spouse dies. American community property states mostly favor equitable, fair distribution of property at divorce. Further, by envisioning a more extensive community property pool, these systems award a greater half of community property share at termination of the regime. Moreover, both systems similarly allow spouses to modify the default system. The American law does that more extensively than the Italian system, where marital agreements are subject to strict limits.

Each system has its downsides. Taking the best out of each approach might result in an ideal model. Society is changing, and so is the view of the people entering marriage. The law should adapt to modern society and needs. Among these, property characterization strongly affects daily lives of married individuals. The proposed model might be the response to this.

[1]. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. A community property regime is elective in Alaska. M. Read Moore, *Coming Soon to Your State: Community Property*, in *Estate Planning in Depth* SJ066 ALI-ABA 167, 171 (2004). Further, Tennessee allows spouses to elect a community system for trust property. Tenn. Code Ann. § 35-17-105 (2015).

[2]. The United States and the Italian Republic differ in many ways. In the first place, they differ in that Italy is a civil law system, whereas the United States is a common law system—except for Louisiana that retained the French civil law. The common law system is also referred

to as the “Anglo-American legal system.” William B. Ewald, *What’s So Special About American Law?*, 26 Okla. City U. L. Rev. 1083, 1087 (2001). The civil law, or Romano-Germanic family law, retains the Roman system dominated by written codes established by the legislature. Virginia Zambrano, *National Report: Italy*, 19 Am. U. J. Gender Soc. Pol’y & L. 225, 225 (2011). Such system developed from the VI century Justinian compilation, known as *Corpus Iuris Civilis*. Luigi Moccia, *The Italian Legal System in the Comparative Law Perspective: An Overview*, 27 Int’l J. Legal Info. 230, 232-33 (1999). Courts have limited authority, their role being confined to the interpretation of the law as it appears in codes, statutes, and regulations. Hence, judicial precedent has no formal recognition and is mainly persuasive. More recent court decisions have a stronger persuasive authority than do older ones. Zambrano, *supra*, at 226. The United States acquired a common law approach from British colonization. In common law systems, judicial precedent is one of the main sources of law. Francesco G. Mazzotta, *Precedents in Italian Law*, 9 MSU-DCL J. Int’l L. 121, 123 (2000). However, today much of U.S. law also rests on statutes and regulations. Ewald, *supra* at 1087.

[3]. The article focuses on married couples without offering an in-depth analysis of other types of relationships, essentially because the Italian system does not yet offer the same recognition as the American system to other kinds of partnerships, which impedes a proper comparison. A note is necessary with regard to cohabitants and domestic partnerships. In Italy, community property only applies to married couples. This is due to constitutional principles, which only envision a society based on marriage; and to the civil code, which always refers to spouses, without taking into considerations partnerships. For instance, art. 162 C.c. provides that a simple collaboration by the spouses is not sufficient to impliedly create a community; in fact, it is necessary to bring to the community real contribution. Renato D’Isa, *La Comunione Legale Tra Coniugi E Lo Scioglimento* 2, 7 (May 5, 2013); C.c. art. 162. Only recently, the legislature has moved toward a broader recognition of the domestic partnership. Yet, currently an Italian unmarried couple is treated as a couple living in a separate property jurisdiction: the ownership depends upon the title. *See* Bruno De Filippis, *Il Diritto Di Famiglia* 404 (Cedam ed. 2011). Differently, in the American system, domestic partnerships are commonly legally recognized and the same marital regime applies as if they were married. Jennifer L. King, *First Comes Love, Then Comes Marriage? Applying Washington’s Community Property Marriage Statutes to Cohabitational Relationships*, 20 Seattle U. L. Rev. 543, 544-45 (1997); *see* *Creasman v. Boyle*, 31 Wash. 2d 345, 355, 196 P.2d 835, 841 (1948) *overruled on other grounds by* *Matter of Marriage of Lindsey*, 101 Wash. 2d 299, 678 P.2d 328 (1984). Washington, California, Arizona, Nevada adopt this approach. Charlotte K. Goldberg, *Opting In, Opting Out: Autonomy in the Community Property States*, 72 La. L. Rev. 1, 5-6 (2011).

[4]. Margaret Berger Strickland, *What’s Mine is Mine: Reserving the Fruits of Separate Property Without Notice to the Unsuspecting Spouse*, 51 Loy. L. Rev. 989, 992 (2005). However, community property is more than a system to allocate property between the spouses upon divorce or death; it is a system for determining the ownership of the property and the related administrative powers during marriage. Brett R. Turner, 1 *Equitable Distribution of Property* § 2:5 (3d ed. 2014).

[5]. Turner, *supra* note 4.

[6]. *Id.*; *see infra* Part V.

[7]. *Separate Property*, Black's Law Dictionary (10th ed. 2014). From a terminology point of view, the Italian word to indicate separate property is not, in effect, "separate" – *separato*; rather the legislature has chosen the term "personal" – *personale*, meaning of the individual.

[8]. C.c. art. 177. The code treats differently the income and instruments of a business from other professions. Tools of profession are separate property, but business property is residual community property.

[9]. 19 Wash. Prac., Fam. and Community Prop. L. § 8.6 (2014).

[10]. *See* C.c. art. 179.

[11]. *See infra* Part III.

[12]. Ronald J. Scalise Jr, *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 Duke J. Comp. & Int'l L. 41, 87 (2008); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 Hastings L. J. 63, 73 (1993).

[13]. Scalise, *supra* note 12, at 87; Kornhauser, *supra* note 12, at 73.

[14]. Mark E. Cammack, *Symposium: Marital Property in California and Indonesia: Community Property and Harta Bersama*, 64 Wash. & Lee L. Rev. 1417, 1421 (2007); *see also* Caroline Bermeo Newcombe, *Similarities Between Early Irish Marital Property Law and California Marital Property: The Economic Significance of A Wife's Labor*, 20 Cardozo J. L. & Gender 33, 39 (2013) (referring to the traditional idea by which the wife merged into the person of the husband to become "one person in law"); Caroline Bermeo Newcombe, *The Origin and Civil Law Foundation of the Marital property System, Why California Adopted It, and Why Community Property Principles Benefit Women*, 11 U. Md. L.J. Race Relig. Gender & Class 1, 10 (2011) (highlighting how the oneness ideal of husband and wife was rejected by community property states, as opposed to common law states).

[15]. In the Italian language, community property is indicated with the term "*comunione*," which literally translates into shared ownership. It is the equivalent of a sort of tenancy in common or joint tenancy, depending on the situation. Solidarity is a corollary of the principle of equality and of partnership. Enrico Vitali and Salvatore Berlingò, *Il Matrimonio Canonico* 17 (Giuffrè ed., 3d ed. 2007). Accordingly, a community property regime tends to highlight the nuclear family, focusing the attention to the "communitarian and participatory moment" of marriage. *Id.* 32. Nevertheless, the principle of solidarity finds its limit, in the recognition of separate property of each spouse. Ferdinando Manetti, *L'acquisto Personale Di Beni Immobili E Mobili Registrati Ai Sensi Dell'Art. 179 Secondo Comma Cod. Civ., 2-3* (2004-2005) (unpublished J.D. thesis, Università degli Studi di Cagliari)(on file at http://www.tesionline.it/_PDF/13404/13404p.pdf).

[16]. Some scholars reach further by looking at the marriage as a bilateral contract that created a new relationship: the partnership or community. Kornhauser, *supra* note 12, at 73.

[17]. Pat Riley, 20 Am. Jur. Proof of Facts 2d *Status of Property As Separate* § 1 (1979).

[18]. *See* Rev. Unif. P'ship Act: Formation of P'ship § 202 (2015).

[19]. *See* Robert Rains & Gianluca Benedetti, *A Discursive Essay On The Nature of Marriage And Divorce In Italy And The United States*, 10 Digest Nat'l Italian Am. B. A. L. J. 1, 1 (2002) ("Society defines marriage in various spheres simultaneously: legal, economic, social, moral, ethical, and religious . . .").

[20]. *See* Frances Foster, *The Family Paradigm Of Inheritance Law*, 80 N.C. L. Rev. 199, 199-201, 224-25 (2001) (arguing that inheritance laws are heavily centered on the goal of preserving the traditional nuclear family through marital sharing, but rendered inefficient by antiquated approaches such as the forced share, and would be better served through a marital sharing community property approach).

[21]. *See* Rev. Unif. P'ship Act: Partner's Rights and Duties § 401 (b) (2015) ("Each partner is entitled to an equal share of the partnership profits and is chargeable with a share of the partnership losses in proportion to the partner's share of the profits.").

[22]. Riley, *supra* note 17.

[23]. Rev. Unif. P'ship Act: Continuation of P'Ship Beyond Definite Term or Particular Undertaking § 406 (2015).

[24]. Riley, *supra* note 17.

[25]. Scalise, *supra* note 12, at 92 (citing Unif. Probate Code art. II, pt. 2, general cmt.).

[26]. Foster, *supra* note 19, at 219.

[27]. *Id.*; *see infra* Part IV.A.

[28]. *See generally* William Q. DeFuniak & Michael J. Vaughn, *Principles Of Community Property*, ch. 2–3 (University of Arizona Press, 2d ed. 1971) (explaining the formation and operation of the marital community and distinguishing community and separate property principles).

[29]. *Id.*

[30]. *Id.*

[31]. See Cammack, *supra* note 14, at 1428 (quoting Richard Ballinger, *A Treatise on the Property Rights of Husband and Wife, Under the Community or Ganancial System* § 9 (Lowman & Hanford, 1895)).

[32]. See King, *supra* note 3, at 544.

[33]. Manetti, *supra* note 15, at 2.

[34]. See Costituzione [Constitution] art. 29 (It.) (can be accessed at <http://www.governo.it/Governo/Costituzione/principi.html>).

[35]. *Id.* Some also view community property as permeated by principles of a trusteeship; Amy Morris Hess & George Gleason Bogert, *The Law Of Trusts And Trustees* § 26, in Bogert's *Trust and Trustees* (2015). However, this view finds more support if applied to the historical community property regimes, in which the husband managed the family property on behalf of the wife and the family. According to such approach, the husband, as manager of the community, owed the wife a certain duty, which placed him in a fiduciary relationship. *Id.* Under the historical community property perspective, spouses were viewed as fiduciaries. See Newcombe, *supra* note 14, at 39. Courts have found a trustee relationship between spouses when a spouse buys property in his or her own name with community property. *Id.*

[36]. The Visigoths were a nomadic and migratory group, whose model of family provided for the wife to work next to her husband on the battlefield, as well as at home. Strickland, *supra* note 4, at 994.

[37]. *Id.*

[38]. 4 Ariz. Prac., *Community Property Law* § 1.1 (3d ed. 2014).

[39]. Kelly Cannon, *Beyond the "Black Hole" - A Historical Perspective On Understanding The Non-Legislative History Of Washington Community Property Law*, 39 *Gonz. L. Rev.* 7, 9 (2003/2004).

[40]. Strickland, *supra* note 4, at 994. In particular, Visigoth law was incorporated in Spanish law through the Visigothic Code and then the *Fuero Juzgo* – code of judgments. France incorporated Visigoth law through the *Code Napoleon*. Cannon, *supra* note 39, at 9; see also Newcombe, *The Origin and Civil Law Foundation Of The Community Property System, Why California Adopted It, and Why Community Property Principles Benefit Women*, *supra* note 14, at 15 (discussing the Visigothic Code).

[41]. 4 Ariz. Prac., *Community Property Law* § 1.1 (3d ed. 2015). Community property was incorporated into the Spanish *Fueros*, regional compilations of laws. Later, it became “applicable to all Spanish territories in the New World by the *Recopilacion de Indias* (1680) and later by the *Novisima Recopilacion* (1805).” *Id.*

[42]. Strickland, *supra* note 4, at 994.

[43]. 19 Wash. Prac., Fam. and Community Prop. L. § 7.1 (2014). However, because states had an option of whether to adopt the system, many rejected it. Strickland, *supra* note 4, at 995.

[44]. *Washington, California, Nevada, Idaho, Arizona, New Mexico, and Texas*. Spanish-Mexican law was of great influence in Texas, also because French settlers were only in place for three years, from 1800 until 1803. Lawrence M. Friedman, *A History of American Law*, 169 (2d ed. 1985). After the initial settlements of the Spanish Crown, search for great fortune led Spaniards to Texas, starting in 1528. Robert A. Calvert & Arnoldo de León et al., *The History of Texas*, 13 (5th ed. 2014). *See also* Mary Sherwood Helm & Elias R. Wightman, *Scraps of Early Texas History*, 3 (2008).

California. The same can be said for California, which was part of Mexico until 1848. Cannon, *supra* note 39, at 18. California failed to become a state in 1848 and again in 1849. *Id.* at 19. While the native inhabitants adhered to the civil law brought by the Mexican heritage, American settlers did not want to abandon the system they were familiar with, *i.e.* the common law tradition. *Id.* During the constitutional convention and debates, some urged for the adoption of the law and system existent in Texas at the time. *Id.* Others believed the peculiarity of California, characterized by an eclectic tradition, suggested that the state had no ties to common law. *Id.* at 20. The debate also advocated for the recognition of more rights for married women. *Id.* at 20-21; *see also* Herma Hill Kay, *Symposium on Law in the Twentieth Century: From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 Calif. L. Rev. 2017 (2000) (an article discussing the evolution of women's rights on community property). Because community property was appealing to single women, many proponents strongly encouraged the system. Cannon, *supra* note 39, at 21. In fact, the lack of women in the state constituted a major concern. *Id.* at 22; *see also* Newcombe, *supra* note 14, at 22.

Idaho, Wisconsin, Arizona, Nevada, New Mexico. As opposed to the examples above, Idaho did not have a strong French, Spanish, or Mexican tradition. Cannon, *supra* note 39, at 12. Rather, scholars believe that leaders felt influences from the neighboring California. *Id.* at 17. Wisconsin, on the other hand, did not adopt the community property system until later in 1986. *See* Newcombe, *supra* note 14, at 2 (suggesting that Wisconsin adopted community property system with the Uniform Community property Act.) Eventually, with the 1848 Treaty of Guadalupe Hidalgo, the United States acquired Arizona, Nevada, and part of New Mexico, in which the Mexican heritage was at that point rooted. Cannon, *supra* note 39, at 11.

Washington. Washington was originally part of the Oregon Territory *Id.* at 12. In Oregon, the first government adopted the laws of Iowa Territory; Washington initially continued the Oregon common law tradition. *Id.* at 13-14. In 1853, when Congress created the Washington Territory, it allowed the new territory to repeal the laws incorporated from Oregon, including the common law marital system. *Id.* at 14. This culminated in the first adoption of the community property system in 1869, modeled on the nearby state of California. *Id.* Washington Territory copied it almost verbatim. *Id.* at 15. The territory provided for a default community property system, with the possibility to agree differently with a contract duly recorded. *Id.* The husband had the power to manage both the community and his separate property, and retained the power of disposition. *Id.* He needed the wife's participation for the relative sale and imposition of

encumbrances upon the assets. *Id.* Alongside California, movements advocating for better women's rights, and the substantial lack of women on the territory were some factors that eventually led Washington to community property. *Id.* at 24-25.

[45]. *Louisiana.* Louisiana was influenced by both French and Spanish traditions. The United States acquired the Louisiana Territory in 1803. Despite the Spanish influences, the eventual state of Louisiana maintained its civil law rooted in French tradition. Cannon, *supra* note 39, at 9, 44; *See also* Hans Baade, *Marriage Contracts In French And Spanish Louisiana: A Study In "Notarial" Jurisprudence*, 53 Tul. L. Rev. 1, 10-11, 14 (1978).

[46]. Strickland, *supra* note 4, at 997.

[47]. *Id.*

[48]. Karen Offen, *National of International? How and Why the Napoleonic Code Drove Married Women's Legal Rights onto the Agenda of the International Council of Women and the League of Nations: An Overview*, in *Family Law in Early Women's Rights Debates* 43 (Stephan Meder & Christoph-Eric Mecke eds. 2013).

[49]. *Id.* at 44. In France, religious values and ideals were incorporated in the *Code Napoleon* of 1800, which itself was based on Roman law. Under French law, the family system followed a hierarchical structure in which the husband was the head of the household and the chief of the family. Ute Gerhard, *Women's Movements and Law*, in *Family Law in Early Women's Rights Debates* 36 (Stephan Meder & Christoph-Eric Mecke eds. 2013).. The wife was responsible for managing the house and fulfilling her marital duties. *Id.* The code recognized three different marital regimes: a dowry, which encompassed property brought into the marriage by the wife to sustain the family; a separate community property based on contractual arrangement; and the default regime of community property. *Id.* Husbands had exclusive control of community property. *Id.* In the code, such hierarchy of sexes within the family constituted a bulwark of marital law, such that it was often referred to with the phrase "the man owes protection to his wife, the wife owes obedience to her husband." *Id.* at 37; C. civ. art. 212-13 (Fr.). Napoleon himself insisted the law provided for the wife's protection, in exchange to her obedience to the husband. Offen, *supra* note 48, at 43.

[50]. Marion Röwekamp, *Equal Rights for Mothers. Custody Law Reform and the Equal Rights Movement in the USA, 1848-1930*, in *Family Law In Early Women's Rights Debates* 200, 203 (Stephan Meder & Christoph-Eric Mecke eds. 2013). Here, too, the role of the wife was stressed in religious teaching, in being a mother and a wife. Accordingly, married women also had an inferior standing as to property. They had no right to their own property. The British colonies also rested on the idea that after marriage the woman merged into the husband, who controlled the property; as opposed to unmarried woman, who maintained certain rights. *Id.* Although wives continued to be disadvantaged in the colonies, where civil law planted its roots, like in Louisiana, married women were allowed to own personal property, as well as monetary rewards from their labor within the family. *Id.* at 204. Married women owned half of the community property and could manage separate property. *Id.* At the same time, political and social campaigns began to proliferate in Europe and in the New World, advocating for women's

emancipation and control of marital property. It occurred by the time of the Third Republic, in 1870. Offen, *supra* note 48, at 45-46. In 1907, three reforms supported equal authority of the wife-mother and husband-father, as well as full independent control by married women over their earnings. *Id.* at 48. These movements played an important role in structuring original French community property law. Gerhard, *supra* note 44, at 35. These movements spread at an international level. Inequalities between married and unmarried women exercised a strong influence in Italian family law reforms as well. Elizabeth Dickmann, *The Passing of the Civil Code in Italy in 1865*, in *Family Law in Early Women's Rights Debates* 143, 152 (Stephan Meder & Christoph-Eric Mecke eds. 2013).. Similarly, in the United States, the equal rights movement was particularly present around 1848. Röwekamp, *supra* at 200.

[51]. *Id.* For instance, reforms allowed women to earn wages; have equal rights over marital and their separate property; and indirectly participate in husband's property through divorce or inheritance. *Id.* From French law, the 1970 Uniform Marriage and Divorce Act took the assumption of the marital system, *i.e.* the idea of sharing. Mary Ann Glendon, *Matrimonial Property: A Comparative Study Of Law And Social Change*, 49 *Tul. L. Rev.* 21, 32, 35 (1974).

[52]. Andrea Finocchiaro-Sartorio, *La Comunione Dei Beni Tra Coniugi Nella Storia Del Diritto Italiano*, 216-17 (Kessingere Ed. 2010); Loredana Garlati, *La Famiglia Tra Passato E Presente*, in *Diritto Della Famiglia*, 3 (Giuffrè ed. 2011).

[53]. Both are rooted in Roman law. Finocchiaro-Sartorio, *supra* note 52, at 216-17.

[54]. *Id.* at 212.

[55]. Finocchiaro-Sartorio, *supra* note 52, at 216; Garlati, *supra* note 52, at 5.

[56]. Finocchiaro-Sartorio, *supra* note 52, at 216. This occurred in Sicily and Sardinia.

[57]. Like in France, the barbaric invasions and shortage following the wars strengthened the spread of Christian ideals, which permeated the notion of community property. Garlati, *supra* note 52, at 3. Further, the doctrine of natural law strengthened the idea of marital unity. This was a philosophical-juridical movement that claimed the importance and superiority of natural law over that imposed by men and started with Aristotle. *Id.* at 19.

[58]. *Id.* at 30. The Napoleonic code spread throughout the whole territory through the French conquests. The Austrian code was enacted in the Kingdom of Lombardy-Venetia, which was, indeed, subject to Austrian domain. *Id.* at 31. *See also* Dickman, *supra* note 50, at 144, according to which were more progressive from the community property point of view.

[59]. Garlati, *supra* note 52, at 35. The kingdom of Naples of 1789 presented a unique situation: dowry was abolished and later substituted by a public contribution to the king in exchange of help to the spouses. *Id.* at 24. Although, once again, the husband was still considered the head of the family, similar to French law, he had to guarantee the wife's protection. *Id.* at 25.

[60]. *Id.* at 36.

[61]. *Id.* Nonetheless, the Napoleonic code is considered as the common thread of community regulation. *Id.* An important trait of the new era of territorial reunification was the substitution of the community property system with the old dowry system. *Id.* at 37. This was reminiscent of French law, which reaffirmed the inferiority and incapacity of the wife, forcing a regression. *Id.*

[62]. In fact, the territorial and political reunification of the various kingdoms of Italy ultimately occurred in 1860. Dickman, *supra* note 50, at 143. The first Italian parliament proclaimed the Kingdom of Italy on March 17, 1861. Garlati, *supra* note 52, at 38. The later adoption of a national code in 1865, as well as the determination of Rome as national capital in 1871, contributed to a uniform system. Dickman, *supra* note 50, at 143.

[63]. Garlati, *supra* note 52, at 41-42.

[64]. Under Roman law, this was called “*gravia at importabilia.*” This was the dowry. Article 177 C.c. defined dowry as those goods the wife or someone on his behalf brought to the husband to sustain economic burdens of marriage.

[65]. G. Baeteman et al., Comparative Law OF Matrimonial Property: A Symposium At The International Faculty Of Comparative Law At Luxembourg On The Laws Of Belgium, England, France, Germany, Italy And The Netherlands, 153 (Kiralffy ed., A.W. Sijthoff International Publishing Company 1972) [hereinafter Law of Matrimonial Property].

[66]. In fact, at an earlier stage, the husband also had full ownership of the revenues deriving from the dowry. *Id.* at 224.

[67]. Garlati, *supra* note 52, at 44; *see* Legge 17 luglio 1919, n. 1176 (It.).

[68]. Garlati, *supra* note 52, at 44-46.

[69]. Dowry persisted, although fading. *Id.* It was superseded by community property – *patrimonio familiare*. Specifically, the *patrimonio familiare* is only for real property and credit titles.

[70]. Röwekamp, *supra* note 50, at 226. However, the civil code of 1942 originated from the “tracks of the past,” and for this reason was already “prematurely old.” Offen, *supra* note 48, at 46-47.

[71]. Francesco Ruscello, 4 Istituzioni Di Diritto Privato, 94 (2014).

[72]. Article 215 C.c. However, the spouses could stipulate matrimonial agreements only by notary. Art. 162 C.c.. The strong French influence was apparent. Like in France, Italian laws recognized the spouse a dowry, as well as property of which the wife had free right of disposition. Law of Matrimonial Property, *supra* note 65, at 224. This code still viewed the

woman as the children's educator, guard of values, and subordinate to the husband. *Id.* at 223. Despite such preponderant role of the woman in the family, this role did not reflect in the recognition of legal rights in the legislative field. *Id.* However, the women's movement and the abolition of the monarchy determined the big change. Dickman, *supra* note 50, at 147.

[73]. Garlati, *supra* note 52, at 47; Art. 29 Costituzione.

[74]. R^öwekamp, *supra* note 50, at 228.

[75]. Garlati, *supra* note 52, at 47.

[76]. Legge 19 maggio 1975, n. 151.

[77]. Ruscello, *supra* note 71, at 94. The focus of the legislature was finally on the unity of family from an economic point of view. *Id.* at 94, 95.

[78]. 2 Luigi Balestra, Commentario Del Codice Civile, Della Famiglia artt. 177-342 ter, (Utet ed. 2010); *see also* Giorgio Cian & Alberto Trabucchi, Commentario Breve al Codice Civile, (11st ed. 2014). The remaining property was left to each spouse, because it is property that seems to express a bond strictly referable to the person of the spouse. *Id.* However, the Constitutional Court has been extremely prudent in engaging in restrictive interpretation of laws that appeared to be in contrast with the constitutional equality. Law of Matrimonial Property, *supra* note 65, at 224. Some claim that in declaring this hierarchy of principles with regard to the role of the woman in the family, the court poses the basis to reaffirm a hierarchical conception of the family itself. R^öwekamp, *supra* note 50, at 229. Today, the property regime of the spouses finds positive expression in articles 177-197 of the civil code.

[79]. 20 Am. Jur. Proof of Facts 2d § 1.

[80]. It may be that the choice to define separate property by characterizing it as an exception to community property is motivated by the effort of the legislatures to highlight the default regime. On the other hand, by defining separate property before defining community property, the legislature is able to exempt certain property from the main pool of community property assets. Here is how states regulate community property:

Washington. The Revised Code of Washington first defines community property as all property not defined as separate property that is acquired during marriage (or after the registration as domestic partnerships) by either or both spouses. Wash. Rev. Code § 26.16.030 (2008). Separate property is, instead, property owned before marriage or acquired "afterwards by gift, bequest, devise, descent, or inheritance, with the rents, issues and profits thereof." Wash. Rev. Code § 26.16.010 (2008).

California. California law determines that, except as otherwise provided, property acquired "by a married person during the marriage . . . is community property." Cal. Fam. Code § 760 (1994). Under Cal. Fam. Code § 770 (a)(1)-(3) (1994), separate property is property owned by each

spouse before marriage, or acquired during marriage by gift or inheritance; also “the rents, issues, and profits” of the separate property are separate property.

Arizona. All property acquired by each of both spouses during marriage is deemed community property in Arizona. Ariz. Rev. Stat. § 25-211(A) (2008). Separate property is property acquired by gift or inheritance, after separation or divorce or annulment of marriage. *Id.* Nevertheless, divorce does not alter the status of preexisting community property. Ariz. Rev. Stat. § 25-211(B) (2008).

Wisconsin. Wisconsin law stresses the presumption that “all property of spouses” is community property. Wis. Stat. Ann. § 766.31 (2005). Each spouse has a “present undivided one-half interest in each item of community property.” Wis. Stat. Ann. § 766.31(3). “Property acquired by a spouse during marriage and after the determination date is individual property if acquired by” gift, inheritance, exchange of other separate property; from appreciation of individual property unless classified as community property; by decree or agreement; damages and recovery of personal injury. Wis. Stat. Ann. § 766.31 (7). In addition, all property acquired after termination of marriage is separate property. Wis. Stat. Ann. § 766.31 (6).

Texas. For Texas, “community property consists of the property, other than separate property, acquired by either spouse during marriage.” Tex. Fam. Code § 3.002 (1997). All property of a spouse owned before marriage and acquired afterward by gift or inheritance is separate property. Tex. Fam. Code § 3.001 (1997). Texas Family Code specifies that separate property consists of property “owned or claimed by the spouse before marriage;” acquired during marriage by gift or inheritance; and recovery for personal injuries during marriage. *Id.*

Louisiana. In Louisiana, community property consists of property acquired during “the existence of the legal regime through the effort, skill, or industry of either spouse.” La. Civ. Code Ann. art. 2338 (1980). Property acquired during marriage, if not otherwise classified, is also community property. *Id.* The same applies to property donated jointly, as well as to fruits of community property; and damages for loss or injury to community assets. *Id.* A catchall clause provides that “all other property not classified by law as separate property” is separate property. *Id.* The separate property provision starts by stating, “the separate property of a spouse is his exclusively.” La. Civ. Code Ann. art. 2341 (1981). Separate property is property acquired by spouse prior “to the establishment of a community property regime.” *Id.* The same applies to asset acquired with separate property, or with commingled things “when value of community things is inconsequential in comparison with the value of the separate things used.” *Id.* Further, assets acquired by inheritance or donation individually, damages for breach of contract, loss or indemnity, and things acquired as result of voluntary partition of community property are separate property. *Id.*

New Mexico. N.M. Stat. Ann. § 40-3-8(A) (1990) defines separate property as property acquired before marriage or after termination, declared by judgment, acquired by gift or inheritance, designated so by the spouses through an agreement. Community property is property acquired during marriage “which is not separate property.” N.M. Stat. Ann. § 40-3-8(B).

Nevada. The Nevada code states that except as otherwise provided, all property acquired by each spouse is community property. Nev. Rev. Stat. § 123.220 (2009). All property of the wife owned before marriage or acquired afterwards by gift or inheritance or award for personal injuries, with rents, issues, and profits, is her separate property; and the same for husbands. Nev. Rev. Stat. § 123.130 (1975).

Idaho. In Idaho, “all other property acquired after marriage by either husband or wife is community property.” Idaho Code Ann. § 32-906 (2003). The same statutory section provides that all earnings of all property – regardless whether separate or community – is community property unless specifically otherwise provided at purchase. Idaho Code Ann. § 32-906(1). “All property of either the husband or the wife owned by him or her before marriage, and that acquired afterward by . . . gift [or inheritance], or that which either he or she shall acquire with the proceeds of his or her separate property” is separate property. Idaho Code Ann. § 32-903 (1866).

[81]. *Community Property*, Black’s Law Dictionary (10th ed. 2014).

[82]. Scalise, *supra* note 12, at 87. As opposed to common law, or separate property states, community property systems do not pay attention to the title of the property to determine the ownership. As explained, the system only looks at the time of the acquisition with regard to marriage. Moore, *supra* note 1, at 171. The treatment of property during marriage is based on the law of the domicile of the spouses at marriage.

[83]. Moore, *supra* note 1, at 171; *Separate Property*, Black’s Law Dictionary (10th ed. 2014).

[84]. *Separate Property*, Black’s Law Dictionary (10th ed. 2014); 719 Wash. Prac., Fam. and Cmty. Prop. L. § 8.6 (2014).

[85]. *Separate Property*, Black’s Law Dictionary (10th ed. 2014).

[86]. 719 Wash. Prac., Fam. and Cmty. Prop. L. § 8.6 (2014).

[87]. *Id.*; Moore, *supra* note 1, at 171.

[88]. *See infra* Part IV.A.iii for an explanation of commingling.

[89]. *See infra* Part A.iii for tracing.

[90]. This is relevant at the time of termination of marriage: at divorce a court needs to determine how to divide such appreciation. Suzanne Reynolds, *Increases in Separate Property and The Evolving Marital Partnership*, 24 Wake Forest L. Rev. 239, 245 (1989).

[91]. *Id.* at 245-6.

[92]. *Id.* at 246-7.

[93]. *Id.* at 247.

[94]. *Id.* at 246.

[95]. Reynolds, *supra* note 90, at 247; 41 Am. Jur. 2d Husband and Wife § 143 (2015).

[96]. Wendy S. Goffe, *Yours, Mine and Ours: An Introduction to the Laws of the U.S. Community Property States*, in *Estate Planning Essentials: Marital Deductions Post-DOMA and Community Property*, 37 (July 9, 2014).

[97]. *Id.*

[98]. *Id.*

[99]. Elizabeth De Armond, *It Takes Two: Remodeling The Management and Control Provisions of Community Property Law*, 30 GONZ. L. REV. 235, 237 (1995). Texas is the only community property state that distinguishes between exclusive and joint management of community property. *Id.* at 247.

[100]. *Id.* at 237.

[101]. *Id.* at 247.

[102]. Hence, absent a joinder the act is void. For instance: Arizona requires joinder for real property transactions, though not for unpatented mining claims and leases for less than a year; Idaho, Washington, and Nevada, to sell, convey, or encumber; so does California, which adds leases over one year; Louisiana, for transactions involving “immovables;” New Mexico exempts purchase money mortgages or leases for less than five years; Texas, for the couple’s homestead; and Wisconsin, if the spouses jointly hold property, or to assign, mortgage or encumber. *Id.* at 264. California, Nevada and Washington require consent to all gifts. Louisiana and Wisconsin allow individual gifts under a certain value. *Id.* at 265-6. Only two states limit the management powers by imposing a duty to act in good faith: California and Wisconsin. *See* Cal. Fam. Code § 1100(e) (2015); Wis. Stat. Ann. § 766.15(1) (1993).

[103]. So is for Texas. De Armond, *supra* note 99, at 237. *See e.g.*, Tex. Fam. Code § 3.102 (1997); Wis. Stat. Ann. §§ 766.51-.53. This includes, for instance, personal earnings, or revenue from separate property.

[104]. De Armond, *supra* note 99, at 248.

[105]. Although they owned the car, dog, and house before marriage, community labor put into them makes them community property. Secondly, although they acquire the trailer and the furniture during marriage, the qualification as inheritance and the fact that Mr. Smith contributes alone to them, renders this property Mr. Smith’s separate property.

[106]. *See supra* Part IV.A.ii. The approaches vary from state to state. Generally, the spouses can independently manage the whole community property, with some limitations regarding real estate transactions.

[107]. *See supra* Part II.A. First, Art. 159 C.c. regulates the default marital regime, while Art. 177 C.c. defines the content of the community. This is included under the section about persons and family, specifically under subsection VI on property regime of the spouses.

[108]. The couple must opt out at the time of the wedding, when signing the wedding documents. D’Isa, *supra* note 3, at 2; *See also* Legge 19 maggio 1975, n. 151.

[109]. Bonnie Anderson, *A Human Institution: Ernestine Rose and the Campaign for Divorce Law Reform*, in *Family Law in Early Women’s Rights Debates* 238, 239 (Stephan Meder & Christoph-Eric Mecke eds., 2013). However, the fundamental property relationship between husband and wife, as provided by the civil code, is mandatory. This means that the spouses may only choose among enumerated matrimonial regimes: separate or community property. *Id.* at 240. To balance such hardship, courts have interpreted the word “agreements” extensively, as to cover liberties regarding marriage and contract, beside the economic powers within the family. *Id.* at 241. *See infra* Part V.

[110]. Under the Italian system, general community property outside marriage would be defined as ordinary shared ownership –*comunione ordinaria*, to distinguish it from marital community property –*comunione legale*, legal community property because imposed by law.

[111]. D’Isa, *supra* note 3, at 2, 7.

[112]. *Id.* As seen, however, spouses can modify the regime with an agreement.

[113]. Corte Cost. 17 marzo 1988, n. 311, Giur. civ. 1988, I, 2482. Although the spouses are not entitled to a quota of the community property ownership, each one of them owns 50% of it *in solidum*. The share is not a structural division of the community property; it is an element that helps determine what the creditor of each spouse may attach of the community property. In fact, a majority view holds in favor of the undivided nature of community property ownership.

[114]. *Id.*

[115]. *Id.*

[116]. This means that the legislature first highlights the general, legal regime of community property between spouses, leaving separate property in second place, as an exception to the rule.

[117]. The list is not exhaustive. It has to be read in conjunction with other provisions. For instance, art. 2647 C.c. states that the purchase of real property or specific separate property as listed elsewhere, falls outside of the community property after marriage, if so expressed at purchase and if transferred jointly.

[118]. D'Isa, *supra* note 3, at 37. In this way, the code limits the borders of community property based on three criteria. Manetti, *supra* note 15, at 2-3. First, exclusion of property from the community property is given by the time of purchase –before, after, and during marriage. *Id.*; *see infra* Part VI. Secondly, the property source determines which assets are separate of each spouse, such as gift or inheritance. Manetti, *supra* note 15, at 2-3. Finally, based on the use given to the specific property, strictly personal property and property for the use of the profession remain separate. *Id.*

[119]. Manetti, *supra* note 15, at 3.

[120]. *See infra* note 243. The residual community property is sometimes called postponed community property – *comunione differita*, because it becomes actual community assets only at the stage of termination of the regime. Residual community property also arises by operation of law at the termination of the community property. Patrizia di Martino, *La comunione legale tra coniugi: l'oggetto*, in *Il Diritto di Famiglia: Il Regime Patrimoniale Della Famiglia*, 137 (Giovanni Bonilini and Giovanni Cattaneo eds., 2d ed. 2007).

[121]. *Id.* at 227.

[122]. This type of community property is an original and unique aspect of the Italian marital regime. Antonio Testa, *Rapporti Patrimoniali E Famiglia Nell'Evoluzione Interpretativa Della Riforma Del Diritto Di Famiglia* 223 (Ipsos ed. 2010). It does not find any precedent in other European countries. *Id.* However, the German *Zugewinnngemeinschaft* strongly influenced the legislative family law reform. Giovanna M. Cubeddu & Salvatore Patti, *Diritto Della famiglia* 260 (Giuffrè ed. 2011). In France, for instance, earnings from work is a community asset but can be exclusively managed by the earning spouse; in Germany, earnings fall within the community property. *Id.* at 258. Interestingly, in the perspective to adopt a common European regime, the Italian system has been viewed as a good compromise. Balestra, *supra* note 78, at 29. One of the reasons for the tripartition derives from the variety of community property models embedded in European customs. *Id.* Further, the reform of 1975 introduced the residual community property in light of the movements toward equality of the spouses. Testa, *supra*, at 223-24. Essentially, the introduction aimed at reconciling constitutional values of family unit and individual autonomy. In fact, the goal of the reform was to ensure equality of the spouses in marital society, as well as freedom of the individual living in that society. Testa, *supra*, at 224; Balestra, *supra*, at 28.

[123]. Balestra, *supra* note 77, at 29.

[124]. Testa, *supra* note 123, at 225.

[125]. *Id.* at 229.

[126]. Patti & Cubeddu, *supra* note 122, at 259. Nevertheless, the non-earning spouse has a power of information over the other's earnings. Giacomo Oberto, *Lezioni Sull'oggetto Della Comunione Legale Tra Coniugi*, ch. II § 7.1.2 (Class Material Scuola Di Specializzazione Per Le

Professioni Legali «Bruno Caccia E Fulvio Croce» Dell'università Degli Studi Di Torino Nel Corso Degli A.A. 2002/2003, 2003/2004, 2004/2005, 2005/2006), <http://giacomooberto.com/lezionisucomunione/lezionisuoggettocomunione2.htm>.

[127]. Oberto, *supra* note 126, at ch. II § 7.1.1.

[128]. *Id.*

[129]. Oberto *supra* note 126, at ch. II § 2.1.3 (citing Cass. 23 settembre 1997, n. 9355, in Corr. giur. 1998, 69 (It.)).

[130]. Oberto *supra* note 126, at ch. II § 1.1.4.

[131]. *Id.*; Oberto *supra* note 126, at ch. II § 7.1.4 (citing Cass. 12 settembre 2003 n. 13441 (It.)). The Court has further specified that the residual community property does not include real property. Oberto, *supra*, at ch. II § 5.1.10 (citing Cass., 8 maggio 1996, n. 4273 (It.)).

[132]. *See* Balestra, *supra* note 77, at 29. Claiming otherwise would impose upon the spouse a difficult duty to prove some property has been used for family needs.

[133]. *Id.* at 29-30.

[134]. *Id.* at 28.

[135]. *Id.* The Supreme Court held the earning spouse has the burden to prove the spouse consumed the earnings to satisfy family needs or the community property. *See also* Anelli & Sesta, *supra* note 164, at 457 (citing Cass., 10 ottobre 1996, n. 8865, Corr. giur., 1997, 36 (It.)). Yet, the right of residual community property only exists if property is left over at division, regardless of the reasons the earning spouse has used it. Oberto, *supra* note 126, at ch. II § 6.1.6.

[136]. *See* Preite, *infra* note 143, at 389 (citing Cass. 10 ottobre 1996, n. 8865, Fam. e dir. 1996, 515 (It.)); *see also* De Filippis, *supra* note 3, at 245 (citing Cass. 17 novembre 2000, n.14897); Matteo Santini, Separazione E Divorzio: Questioni Economiche E Patrimoniali, 32, 41. (Maggioli ed. 2010).

[137]. Cass. 7 febbraio, 2006, n. 2597, *available at* http://giacomooberto.com/deresiduo/Cass_2597.pdf; Santini, *supra* note 136 at 41. Overall, residual community property envisages three options. First, one spouse can consume personal earnings as the spouse prefers, unless it increases community assets; second, the spouse can use earnings to purchase property for the family —this purchase is community property; third, if the spouse saves the earnings it falls into the residual community property if not used by division. Balestra, *supra* note 77, at 29.

[138]. Cass. 16 dicembre 1993, n. 12439, Fam. e dir. 1994, 297; *see generally* AA.VV., Il Regime Patrimoniale Della Famiglia, La Comunione Legale Ed Il Trust, 116 (Cedam ed. 2011).

[139]. Art. 178 C.c.

[140]. Art. 180 C.c. regulates management of community property: management and judicial standing for acts relating to community property belongs to both spouses jointly. *See infra* Part IV.A.ii on exclusive management.

[141]. Art. 180 C.c.

[142]. Martino, *supra* note 120, at 187.

[143]. The same distinction appears in several other provisions throughout the code, such as in relation to legal incapacity, guardianship, or business management. The lack of a criterion to distinguish between the two types of acts has led several debates. A “functional doctrine” focuses the function of the act as a criterion. If the act changes the property, it is extraordinary. Another doctrine considers the value of the property and the impact it has. 1 Filippo Preite, *Atti Notarili-Volontaria Giurisdizione: Il procedimento Incapaci, scomparsa, assenza e dichiarazione di morte presunta 190-91* (Utet ed. 2012).

[144]. *See supra* note 141, at cl. 2; Martino, *supra* note 142, at 187-88

[145]. Generally, extraordinary administration acts relate to real property or property of high value, acceptance or disclaimer of inheritance.

[146]. Art. 184 C.c.; Martino, *supra* note 142, at 197.

[147]. Preite, *supra* note 143, at 190.

[148]. *See infra* Part IV.A.iii.

[149]. The contributions each of them puts into the other’s separate assets do not change the nature of the property. Yet, Mr. and Mrs. Rossi can ask reimbursements and restitutions of their input at the time of marriage termination. Moreover, only at termination the Rossis will divide those earnings and the savings left. This is because earnings are considered residual community property.

[150]. Andrea B. Carroll, *Incentivizing Divorce*, 30 *Cardozo L. Rev.* 1925, 1945 (2009).

[151]. Goldberg, *supra* note 3, at 1.

[152]. *Id.*

[153]. Sometimes, though, given that agreements require consent of both parties the disadvantaged spouse might not have this option. Carroll, *supra* note 150, at 1946.

[154]. *Id.* at 1944.

[155]. *Id.* at 1945-46, 1955; *see also* Jeffrey Sherman, *Prenuptial Agreements: A New Reason To Revive An Old Rule*, 53 Clev. St. L. Rev. 359 (2005/2006) (for a discussion of the history of prenuptial agreements and current popularity); Carrol, *supra* note 150, at 1955. The phenomenon of leaving more freedom to the parties can be indicated as “privatization of family law.” *See* Margaret Ryznar & Anna Stepien-Sporek, *To Have And To Hold, For Richer Or Richer: Premarital Agreements In The Comparative Context*, 13 Chap. L. Rev. 27, 37 (2009).

[156]. *Marital agreement*, Black’s Law Dictionary, (10th ed. 2014). A premarital agreement specifically concerns the division of the property in case of divorce. It allows the spouses to plan for divorce and to divide property not yet acquired. Carroll, *supra* note 150, at 1955. If made in contemplation of marriage, they only take effect upon marriage. Ryznar & Stepien-Sporek, *supra* note 155, at 30. Often, courts would not enforce premarital agreements if not specifically in contemplation of marriage; these agreements, hence, do not apply for simple cohabitation. *See Family Law In The Fifty States 2007-2008: Case Digests*, 42 Fam. L.Q. 767, 778 (2009). If the agreement is signed after marriage, it is called postmarital agreement. Such distinction does not exist in the European system. Ryznar & Stepien-Sporek, *supra* note 155, at 32.

[157]. *See* Ryznar & Stepien-Sporek, *supra* note 155, at 28. This guarantees the spouses freedom of contract and choice of the applicable regime. *Id.* at 31. A minority of community property states also allows the judgment of separation of property. This instrument, which allows opting out of the community property regime during marriage, originated in Roman law and was later incorporated in Spanish and French law. Carroll, *supra* note 150, at 1946.

[158]. *See* Ryznar & Stepien-Sporek, *supra* note 155, at 29. Courts have slowly recognized the value of prenuptial agreements, until the legislature finally promulgated the Uniform Prenuptial Agreements Act in 1983. *Id.* at 36. The Act was adopted in Arizona, California, Idaho, Nevada, New Mexico, and Texas. *Premarital Agreement Act: Enactment Status Map*, Uniform Law Commission (2015), <http://www.uniformlaws.org/Act.aspx?title=Premarital.%20Agreement%20Act>.

It supports the freedom of contract and sets policy limits based on public policy. *See* Ryznar & Stepien-Sporek, *supra* note 155, at 36. Pursuant to the Uniform Prenuptial Agreements Act, the agreements are not enforceable against the spouse who did not voluntarily execute them; if they are unconscionable at the time of the execution; and there was inadequate knowledge or disclosure of the property. Goldberg, *supra* note 3, at 8.

[159]. Andrea Russo & Benedetta Rossi, Italy, *in* Family Law: Jurisdictional Comparisons, 337, 340 (James Stewart, ed., 2013). In fact, with an agreement prior to marriage, the spouses may waive their future right to alimony, maintenance, and inheritance rights. The Italian law prohibits this because it is considered in violation of public order principles. *Id.* Public order principles are used as a limit, as a floor that cannot be overruled. The application of the order in the system of laws is mandatory, but foreign law may override the order in certain circumstances. *Id.* at 341.

[160]. *Id.* at 340; Martino, *supra* note 120, at 3

[161]. See C.c. art. 162 (It.). More precisely, they have to be in form of “*atto pubblico*,” which gives the highest level of certainty, like an American affidavit. See *id.*-which mandates the *atto pubblico*; see also C.c. art. 2699 (It.). that defines the public act as one drafted in compliance with the legal formalities in front of a notary.

[162]. The rules for the creation of the fund are more lax, compared to the provisions concerning marital agreements. Either one or both spouses together, a notary act or will, or a third person may create a trust fund.

C.c. art. 167, cls. 1-2 (It.) The fund will include all real property, vehicles recorded, or financial instruments directed at the satisfaction of the family needs. C.c. art. 167, cl. 1 (It.). Personal property or company business cannot be included.

[163]. See Bonilini & Cattaneo, *supra* note 120, at 25. Contractual community property is community property the spouses modify by entering a contract rather than legal community property operated by law. However, marital agreements do not constitute a third way between community property and separate property: an agreement that slightly modifies separate property regime inevitably falls under the community property regime. Bonilini & Cattaneo, *supra* note 120, at 28. As the Italian system allows spouses to change community property into separate property, some American statutes provide for transmutation of property. A transmutation occurs when spouses agree, generally in writing, to mutate community property into separate property or vice versa. Goldberg, *supra* note 3, at 12. See also Jerry A. Kasner, *Donative And Interspousal Transfers Of Community Property In California: Where We Are (Or Should Be) After Macdonald*, 23 Pac. L. J. 361, 362 (1992).

[164]. Contractual community mainly aims at including separate property, such as earnings or property brought into marriage, in the community. Marco Ieva, *La Convenzioni Matrimoniali*, in 3 Trattato di Diritto di Famiglia. Regime Patrimoniale Della Famiglia 64, 64 (Franco Anelli and Michele Sesta eds., 2d ed. 2012). See C.c. art. 210 (It.), which states property of strictly personal use of each spouse, property related to one spouse’s profession, and damages award cannot become community property.

[165]. In Italy, given the community property regime arises from marriage, before the wedding the future spouses might share assets simply *de facto*, without recognition at law. As an exception, gifts between future spouses or to them by third parties do not require acceptance, although they take legal effect only after marriage. C.c. art. 785 (It.).

Differently, although in most U.S. states community property laws do not apply to unmarried couples, they recognize a registered domestic partnership similar rights to a married couple. For instance, California courts apply marriage-like property considerations to cohabitation. See Adam Hartmann, Comment, *The Yellow Brick Road To Nowhere: California Same-Sex Marvins Rights After Proposition 8*, 14 Chap. L. Rev. 483, 489 (2011).

[166]. § 3:1 Effect of death on community property assets, generally, 1 Tex. Prac. Guide Probate § 3:1 (2014).

[167]. *Id.*

[168]. *Id.*

[169]. *Id.*

[170]. Martino, *supra* note 120, at 281.

[171]. *Id.*

[172]. It is important to keep separated the portion already in the surviving spouse's assets from the part of community property that, belonging to the decedent, will be distributed in compliance with the law of inheritance. Bonilini & Cattaneo, *supra* note 120, at 282; Anelli & Sesta, *supra* note 164, at 299 (citing Cass., 8 maggio 1996, n. 4273, Riv. not. 1996, 1170 (It.)).

[173]. If the decedent spouse does not leave anything to the surviving spouse under the will, the law recognizes a share to the surviving spouse, which is computed by putting together the decedent's community property share and the decedent's separate property. The surviving spouse already owns the other half of community property. *Study on Matrimonial Property Regimes and the Property of Unmarried Couples in Private International Law and Internal Law*, at 21-22 (Jan. 2003), http://ec.europa.eu/civiljustice/publications/docs/regimes/italy_report_en.pdf.

[174]. For the purpose of this section, the analysis on divorce also includes separation. The main difference relates to the fact that, in Italy, separation is a condition for divorce. The termination of the community property only comes into effect if there has been a judgment of separation or a court's approval of the consensual separation. Art. 150 C.c.; Art. 706 C.c.; Giacomo Oberto, *Lo Scioglimento Della Comunione Legale E La Divisione Dei Beni. Giudizi Di Separazione E Divorzio: - Le Domande E Le Decisione Relative Ai Beni Comuni; - Gli Accordi Patrimoniali In Vista Ed In Sede Di Separazione E Divorzio*, 17 (Apr. 23-24, 2009), <http://astra.csm.it/incontri/relaz/17542.pdf>.

[175]. Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 Fordham L. Rev. 827, 831 (1988).

[176]. *Id.* at 832, no. 26.

[177]. *Id.* at 833.

[178]. *Id.* at 832.

[179]. This is true as opposed to inheritance.

[180]. Helene Shapo, "A Tale Of Two Systems": *Anglo-American Problems In The Modernization Of Inheritance Legislation*, 60 Tenn. L. Rev. 707, 712-13 (1993).

[181]. Reynolds, *supra* note 175, at 895.

[182]. Margaret Ryznar, *All's Fair In Love And War: But What About In Divorce? The Fairness Of Property Division In American And English Big Money Divorce Cases*, 86 N. D. L. Rev. 115, 120 (2010).

[183]. Property division is not guided by needs, but profits are shared equally during the life of the business, although based on contributions after its termination. Ryznar, *supra* note, 182, at 120. Consequently, the origin of the contribution, rather than the partners' needs determines the rights under the partnership. Reynolds, *supra* note 175.

at 896. The discussion refers to the distinction of the purpose of looking at the past, in terms of contribution during the lifetime of the partnership; and looking at the future needs of each future-ex spouse. More often, courts recognize and consider both purposes. *Id.* at 897. Rarely one court or legislature would focus exclusively on the business analogy. Reynolds, *supra* note 90, at 398.

[184]. Texas, for instance, authorizes the courts to divide property, as it seems “just and right,” considering the circumstances. Tex. Fam. Code § 7.001 (1997), Tex. Fam Code §7.002 (1997);; *Cameron v. Cameron*, 641 S.W.2d 210, 223 (Tex. 1982). In California and Idaho, statutes provide for a split of community estate into equal shares. David H. Brock, *Community Property-Division Of Property Upon Divorce-Property Acquired During Marriage In A Common Law State Except by Gift, Devise, Or Descent Should Be Treated As Community Property*, 14 St. Mary's L. J. 789, 806 n. 108 (1983).

[185]. Darryl J. Silvera, *Should Your Spouse Be Compensated for Putting You Through School? Texas Says No; Just and Right?*, 20 St. Mary's L.J. 897, 905 (1989).

[186]. *See, e.g.*, Charles Louis Levy, *Cameron v. Cameron: Divestiture of Separate Personality on Divorce*, 35 Baylor L. Rev. 168, 169 (1983) (explaining how Texas courts, although holding unlimited discretion, were not confined to community property).

[187]. *See Cameron*, 641 S.W.2d at 215-16

[188]. Art. 191 C.c.

[189]. The termination of the community is only effective when the judgment becomes final. Bonilini & Cattaneo, *supra* note 120, at 285. *See Legge 1 dicembre 1970*, n. 898, art. 10. Yet, the effect is retroactive –from the request for marriage termination. Bonilini & Cattaneo, *supra* note, 120 at 285, *see Cass.*, sez. II, 18 febbraio 2014, n. 3808. Once the judgment relating marriage termination is recorded, also the termination of community regime is effective against everybody. Santini, *supra* note 132, at 32. There is an “intermediate” stage between the termination of the regime and property division. This period does not encompass concrete portioning. *Id.* 276. *Cass.*, sez. II, 16 aprile 2012, n. 5972, *available at* <http://www.neldiritto.it/appgiurisprudenza.asp?id=7854#.VkKkKrS6ycA>; *see also Cass. Ord.* 12 gennaio 2012, n. 324.

[190]. Bonilini & Cattaneo, *supra* note 120, at 307-08.

[191]. Bonilini & Cattaneo, *supra* note 120 at 306 (it is also important to remember the presumption in favor of the community property). *See* Art. 195 C.c.

[192]. Art. 194 C.c.

[193]. *Id.*

[194]. Bonilini & Cattaneo, *supra* note 120, at 317 (courts consider the whole asset to be divided, not single property).

[195]. *See* De Filippis, *supra* note 3, at 318 (citing Cass. 24 luglio 2003, n. 11467 (It.)); Roberto Giovagnoli, *Separazione E Divorzio: Percorsi Giurisprudenziali*, 502 (Giuffrè Ed., 2009) (it could be hard to identify the property jointly or separately acquired during marriage that definitely belongs to the community property).

[196]. This concerns the acts exercised with the consent of the other spouse, since in case of conduct without consent, there is the possibility for an immediate request for reimbursement during marriage. Bonilini & Cattaneo, *supra* note 120, at 311; Art. 92 cl. 1 C.c. (Art. 192 cl. 1 C.c.)

[197]. Art. 192 cl 2 C.c. (the spouse can avoid the reimbursement by showing the act has been advantageous for the family or community).

[198]. Art. 192 cl. 3 C.c.

[199]. Art. 196 C.c.

[200]. *See* Paolo Cendon, *Commentario Al Codice Civile 120* (Giuffrè ed. 2010) (citing Cass. 24 maggio 2005, n. 10896, GCM 2005, 6 (It.)).

[201]. Art. 143 C.c.

[202]. The same considerations on the death of one spouse as for the jewelry applies to all the following situations.

[203]. However, some jurisdictions, such as Washington, require consent for certain household goods.

[204]. A similar analysis applies to houseware.

[205]. The same can be said for the new dryer Ms. Smith wants to buy, or the technologic mixer Ms. Rossi desires or the flat television screen Mr. Rossi wishes to add to the living room.

[206]. The example of the jewelry can be viewed in a different light because jewelry is generally viewed as carrying a certain value to it, which may be more important at the time of division.

[207]. *See supra* Part II.B.

[208]. *See* Glendon, *supra* note 50, at 23.

[209]. *Id.*

[210]. *Id.*

[211]. *See supra* Part IV.B on how the Italian system recognizes the different use of clothing etc.

[212]. Marsha Garrison, *What's Fair In Divorce Property Distribution: Cross-national Perspectives From Survey Evidence*, 72 La. L. Rev. 57, 59 (2011).

[213]. *See* De Armond, *supra* note 99, at 267 (indicating that in the U.S., some states are already moving toward this solution).

[214]. In this sense, the focus is on autonomy from the management point of view. *Id.* at 248. De Armond suggests that “[i]n sum, by advocating that both spouses should participate in marital property decisions, the law can assist each spouse in developing not just as an individual but also his or her role in the marriage.” *Id.* at 248-49.

[215]. Goldberg, *supra* note 3, at 1.

[216]. *Id.* at 1-2.

[217]. *See infra* Part VII.A, showing that where Ms. Smith uses her own earnings to buy jewelry it is community property.

[218]. This avoids the domination of the spouse dictating decisions, as suggested by De Armond, proposing the introduction and spreading of joinder requirement in the U.S. system. De Armond, *supra* note 99, at 250.

[219]. On the contrary, almost all U.S. states allow disinheritance, remedied in separate property through elective shares. *See* Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. Davis L. Rev. 129, 160 (2008).

[220]. Although it is necessary to keep in mind that the American system encompasses nine different community property jurisdictions.

[221]. As for the property acquired with the exchange of separate property, it also guarantees the freedom of disposition of property. Giovagnoli, *supra* note 195, at 104. In the Italian system, the legal instrument that justifies considering the property acquired with exchange or revenue from separate property is subrogation. Under this connotation, the new property acquired subrogates and comes in place of the original separate property sold. *Id.* It is therefore

necessary to distinguish a first transfer of the separate property and a later purchase of the new item. *Id.*

[222]. In Italian they are known as “*atti di liberalità.*”

[223]. Giovagnoli, *supra* note 195, at 97.

[224]. *Id.*

[225]. *Id.* at 103.

[226]. *Id.*

[227]. *Id.*

[228]. *Id.* at 101.

[229]. *See id.* Moreover, freedom of contract is constitutionally protected; this partly justifies the attention to the individual.

[230]. Cendon, *supra* note 200, at 432-33

[231]. *Id.* at 433. In fact, the entrepreneurial activity is characterized by a “personal” nature.

[232]. *Id.*.

[233]. *Id.*

[234]. *Id.*

[235]. *Id.* at 103.

[236]. *Id.*

[237]. Although the code does not specify the meaning of the expression, some have found its justification in the correlation between the person using the thing and its use. *Id.* at 101. It is the exclusive need of one spouse related to the property, rather than the capacity of one sole spouse to use it that determines its character. Giovagnoli, *supra* note 195; *see also* Corte Conti, sez. un., 30 luglio 1988, n. 590, Foro amm. 1989, 825 (holding that clothing and accessories that have significant values can be seized and cannot fall within article 179 C.c.).

[238]. The reference is to the third category of marital assets: residual community property. This might also create administrative inefficiencies if, at marriage termination, the spouses have to fight over what has been used for personal use versus family purposes.

[239]. Patti & Cubeddu, *supra* note 122, at 259.

[240]. If this were true, the same would apply to the exclusive management of the U.S. system. *See infra* Part IX.

[241]. Other residual community property includes appreciation and income of separate property, or savings.

[242]. *Acquistare*, Garzanti Linguistica, <http://www.garzantilinguistica.it/ricerca/?q=acquistare>; *Purchase* 15c, Black's Law Dictionary (10th ed. 2014).

[243]. *See* <http://www.treccani.it/vocabolario/acquistare/>.

[244]. As mentioned, such property would be considered property not shared with the other spouse; property not resulting in equal contribution to the family; and property held and deemed as separate.

[245]. As we have seen, for instance, with the elective share or equitable distribution, and reimbursements or restitutions.

[246]. Further, the same above argument on the reduction of the system's protective role applies with regard to earnings.

[247]. *See* De Armond, *supra* note 99, at 262 (suggesting that one buys property but then the creditor can reach the other spouse's half even though the other did not participate to the purchase).

[248]. *Id.* at 250.

[249]. *Id.*

[250]. Some administrative inefficiency arises when they fight over community property one wants to keep some the other one wants to sell it. *Id.* at 261.

[251]. A compromise might bring a spouse to sacrifice his or her own interests. *Id.* at 255.

[252]. *Id.*

[253]. *See id.*

[254]. *See id.* The law can be just as powerful in its absence as in its presence. When silent, it implicitly endorses the member with the most power as the ruler, allowing them to coerce others into acceding to their rules. *Id.*

[255]. *See, e.g.* Anelli & Sesta, *supra* note 164, at 237 (citing Trib. Monza, 10 maggio 1995, n. 1158, Giust. Civ. 1996. I. 1158 and Cass., sez. III, 9 novembre 2000 n. 14575, GCM 2000, 2292); Cendon, *supra* note 200, at 1421.

[256]. Cendon, *supra* note 200, at 1421.

[257]. Certainly many have argued that changing the formal law may have little effect on the systems of customary law that hide beneath the shelves of statutes. Several would agree with Bea Ann Smith, a commentator on community property law, that “laws mirror changes in behavior, but rarely shape societal change.” However, if law has no effect on social behavior then it is, perhaps, pointless to have law at all. De Armond, *supra* note 99, at 256.