

ARTICLES

I SHARE, THEREFORE IT'S MINE

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ABSTRACT

Uniquely interconnecting lessons from law, psychology, and economics, this article aims to provide a more enriched understanding of what it means to “share” property in the sharing economy. It explains that there is an “ownership prerequisite” to the sharing of property, drawing in part from the findings of research in the psychology of child development to show when and why children start to share. They do so only after developing what psychologists call “ownership understanding.” What the psychological research reveals, then, is that the property system is well suited to create recognizable and enforceable ownership norms that include the rights to acquire and retain ownership of property (parting with it only on terms defined by the owner), thereby also providing necessary economic incentives to share. Along the way, this article bridges the psychology research with Hohfeld’s description of the nature of rights, explaining the corresponding rights characterizations appropriate to describe each step in a child’s development of ownership understanding.

When we have a well-developed ownership regime—with a high reliability of enforcing ownership norms—we create the confidence in ownership that “ownership understanding” reveals is necessary for individuals to feel secure in sharing. So, too, does the development of the right to exclude and the corresponding

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right to include in property law track the underlying psychology to create the prerequisites in law to effect what might be called a “legal ownership understanding” that feeds the sharing economy, with sharing being simply an exercise of the right to include. The article concludes with an ownership-sensitive definition of sharing that should prove useful to courts, regulators, and scholars alike, while remaining largely agnostic on the scope of desirable regulation of the sharing economy.

INTRODUCTION

This article employs a unique mix of law, economics, and psychology to better understand the sharing economy and the ownership principles that form its foundation. In essence, it explores the “ownership prerequisite” to sharing of property in the sharing economy. Only if an individual owns something can she share it. So if she shares it, she owns it. Therefore, whatever she shares is “hers”—even though, for a limited time or for a limited purpose, someone other than her, a non-owner, is also using or accessing the property she owns.

Put another way, I have no authority to offer someone the opportunity to “share” a property that I do not own.¹ I cannot tell you that you can stay in a room overnight at my colleague’s house, nor can I promise you that, when occupying that room, you will be immune from a lawsuit or arrest for trespass. Why? Quite simply because I do not own my colleague’s house. I have no legitimate power to grant you access, possession, or permission to use property owned by someone else. I do, though, have the power, authority, and right as an owner of *my* property to share the property that I own with you. As owner, I can become a “sharer” of my property and, with my permission (contractual or otherwise), you can become a “sharee” of my property. Ownership is the key to authorization of that relationship. So, if I indeed share

1. This limitation flows from the basic maxim *nemo dat quod non habet*. See BLACK’S LAW DICTIONARY 1933 (10th ed. 2014) (“No one gives what he does not have; no one transfers (a right) that he does not possess. . . . [N]o one gives a better title to property than he himself possesses.”); see also *Mitchell v. Hawley*, 83 U.S. (16 Wall.) 544, 550 (1872) (“No one in general can sell personal property and convey a valid title to it unless he is the owner or lawfully represents the owner. *Nemo dat quod non habet*.”). A related maxim is also instructive: *nemo plus juris ad alienum transferre potest quam ipse haberet*, which means: “No one can transfer to another a greater right than he himself might have.” BLACK’S LAW DICTIONARY 1934 (10th ed. 2014).

a property with you, then that property must be mine. If it is not, I cannot “share” it—at least in the sense of the word as here being used and the sense that, I posit, most people are using the word “share” and its derivatives when discussing the modern, so-called “sharing economy.” This relatively simple, but exceedingly important conclusion is what this article will analyze, expand upon, and defend.

One thing that seems clear is that, as law professor Stephen Miller has explained, “[s]haring is no longer an idiosyncratic pursuit; it is now a mainstream manner of consumption.”² Furthermore, we should expect sharing activities to diversify usage and for the intensity of their use to accelerate. Commentators and scholars have described the sharing economy as becoming a “powerful force of market participation,”³ as generating “intense” business interest,⁴ as often being highly profitable,⁵ as “controversial,”⁶ and as a “new economic phenomenon” that is taking the world “by storm.”⁷ It is effecting what Miller has called a “seismic shift” in the nature of business with the idea of the “sharing economy” still remaining a “rapidly evolving, elusive concept.”⁸ The sharing idea is effecting a transformative disruption in our understanding of property and its social uses. Consumers are demanding sharing products—whether it be to “share” because it is cheaper than buying or cheaper than using incumbent products,⁹

2. Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. LEGIS. 147, 201 (2016).

3. Rashmi Dyal-Chand, *Regulating Sharing: The Sharing Economy as an Alternative Capitalist System*, 90 TUL. L. REV. 241, 243 (2015).

4. John J. Horton & Richard J. Zeckhauser, *Owning, Using and Renting: Some Simple Economics of the “Sharing Economy”* 2 (Harv. Kennedy Sch. Faculty Res. Working Paper Series, Paper No. 16-007, 2016), <https://research.hks.harvard.edu/publications/getFile.aspx?Id=1307>.

5. *E.g.*, Georgios Zervas, Davide Proserpio & John W. Byers, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry* 2 (Bos. Univ. Sch. of Mgmt., Research Paper No. 2013-16, 2016), <http://ssrn.com/abstract=2366898> (reporting Airbnb as having an estimated valuation at over \$30 billion) (citing Maureen Farrell & Greg Bensinger, *Airbnb’s Funding Round Led by Google Capital*, WALL ST. J. (Sept. 22, 2016), <https://www.wsj.com/articles/airbnb-raises-850-million-at-30-billion-valuation-1474569670>).

6. Kellen Zale, *Sharing Property*, 87 U. COLO. L. REV. 501, 502–03 (2016).

7. Shelly Kreiczer-Levy, *Consumption Property in the Sharing Economy*, 43 PEPP. L. REV. 61, 63 (2015).

8. Miller, *supra* note 2, at 149, 150.

9. *See, e.g.*, Shu-Yi Oei & Diane M. Ring, *Can Sharing be Taxed?*, 93 WASH. U. L. REV. 989, 1006 (2016) (“[H]ome sharing services allow hosts to monetize unutilized space and provide renters [a cheaper] alternative to standard hotel accommodations.”).

or whether it is to feel good,¹⁰ enhance social interaction, or serve other social goals or values like environmental conservation and reduction in resource use.¹¹ That demand is generating supply, competition, and entrepreneurial enterprises, which are developing new sharing products and platforms,¹² both as disruptive challengers to incumbent sources but also as generators of completely new industries.¹³ Owner-sharers are able to identify new ways to generate revenue from their assets,¹⁴ and user-sharees are able to satisfy their preferences to have access to property they want to use but not buy or to procure a service that they want done, but do not want to perform themselves. These user-sharees get these benefits-without-ownership seemingly at a lower price or with other advantages not traditionally available from incumbent sources.¹⁵

10. See Juho Hamari, Mimmi Sjöklint & Antti Ukkonen, *The Sharing Economy: Why People Participate in Collaborative Consumption*, 67 J. ASS'N INFO. SCI. & TECH. 2047, 2055 (2016) (“[O]ur results also suggest that . . . [s]ome people might take part in [collaborative consumption] simply because it is fun and provides a meaningful way to interact with other members of the community. . . . [P]articular motivations of individual participants vary from mainly altruistic to strongly gain-seeking.”).

11. See Kreiczer-Levy, *supra* note 7, at 77 (“Reasons for this preference include obtaining access at a lower cost and the flexibility of using items in different locations, which brings storage advantages. . . . There are also social and psychological gains, including making a personal statement that denies the traditional market ownership model and supports sustainability.”); Miller, *supra* note 2, at 201 (describing motives to share as including financial ones, like convenience and price, but also broader concerns like sustainability and a community connection or feel); *The Rise of the Sharing Economy*, THE ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy> (describing the environmental and social benefits of sharing resources).

12. See Horton & Zeckhauser, *supra* note 4, at 32 (“The sharing economy has dramatically impacted several important markets in just a few years Given the energy and vision of entrepreneurs, new developments in both technology and the effective communication of information, [peer-to-peer] rental markets have the potential to transform additional markets.”); Kreiczer-Levy, *Consumption Property*, *supra* note 7, at 76 (“This new trend relies on owners that are willing to share and users that prefer to use rather than own.”); Zale, *supra* note 6, at 525 (discussing the sharing economy as involving “micro-entrepreneurship”).

13. Miller, *supra* note 2, at 160–61, 164 (describing how the sharing economy is not just challenging incumbents but also creating new markets and developing new customers).

14. Kreiczer-Levy, *supra* note 7, at 76–78 (“From the owner’s perspective, there are certain types of goods that have excess capacity when they are privately owned and consumed. Because the excess capacity is not used, certain types of goods are systematically underexploited.”) (emphasis added).

15. *Id.* at 77 (“From the user’s perspective, potential users of goods and services prefer to pay or barter for use of a product rather than purchase the product.”) (emphasis added); Miller, *supra* note 2, at 160 (describing how the “sharing economy challenges established markets” and their incumbent participants).

As one might expect, then, literature on the sharing economy (including as a property law phenomenon) has grown substantially in reaction to this dynamic and disruptive sensation.¹⁶ Those writing in the area often recognize an enduring struggle to identify an adequate definition for the sharing economy. Law professor Kellen Zale, for example, laments that “[t]he debate over the sharing economy thus remains frustrating and controversial in large part because we lack a doctrinally cohesive and normatively satisfying way of talking about the underlying activities occurring within the sharing economy.”¹⁷ This article seeks to differentiate itself and fill a void by identifying a fundamental aspect of the sharing economy’s character—it focuses on the “ownership” prerequisite to sharing. I cannot share unless something is mine first. And, when I share, it is still mine; it is just tangled up in some consensually created new strands of legal relationships.

While many sophisticated analyses are emerging in the literature to diagram the complexities and diverse concepts implicated in the so-called “sharing economy,”¹⁸ this article’s purpose is more basic, with the targeted task of emphasizing an otherwise understressed component of the typical sharing of goods and real property in the sharing economy: ownership pre-exists the sharing and that same ownership is sustained while the sharing occurs. In 2013, *The Economist* quipped that the sharing economy could be described as “[w]hat’s mine is yours, for a fee.”¹⁹ Taken literally and in isolation, that phrase more adequately describes a *transfer of ownership* rather than sharing. When I *share* property, what is mine does not become yours; it actually remains mine. So, more precisely, the sharing economy can be tagged as what’s mine is

16. See, e.g., RACHEL BOTSMAN & ROO ROGERS, WHAT’S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION xvi (2010); Jordan M. Barry & Paul L. Caron, *Tax Regulation, Transportation Innovation, and the Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 69, 70 (2015); John I. Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 YALE L. POL’Y REV. 215, 221–22 (2016); Dyal-Chand, *supra* note 3, at 247; Rashmi Dyal-Chand, *Sharing the Cathedral*, 46 CONN. L. REV. 647, 654 (2013); John Infranca, *Intermediary Institutions and the Sharing Economy*, 90 TUL. L. REV. ONLINE 29, 31 (2016); Christopher Koopman, Matthew Mitchell, & Adam Thierer, *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, 8 J. BUS. ENTREPRENEURSHIP & L. 529, 531 (2015); Kreiczler-Levy, *supra* note 7, at 68; Miller, *supra* note 2, at 149; Zale, *supra* note 6, at 511.

17. Zale, *supra* note 6, at 509–10.

18. Infranca, *supra* note 16, at 31 (discussing the diverse lenses of scholarly expertise for which the study of the sharing economy has been and could be applied, including tax, employment, labor, and local government).

19. *The Rise of the Sharing Economy*, *supra* note 11.

still mine, but you may use it, access it, and maybe pretend that it is yours for a limited time and under limited conditions for a fee. But while you are doing those things, it is still mine and, when you are done doing those things, it will still be mine. This fundamental starting point regarding ownership critically informs any evaluation of the structure of the sharing economy and should inform any choice to regulate the shared asset or the act of sharing.

The literature to date on the sharing economy has not focused on sharing as a separate and distinct “stick” in the ownership bundle. While that sharing stick may be a derivative of the right to own, to alienate and to include, the sharing stick has its own characteristics as well, entitling specialized consideration while fully understanding that the owner may only share the sharing stick if she owns that stick.

The literature also has not yet directly engaged in an examination of the fundamental reality that our characterization and treatment of two concepts—sharing and ownership—have direct and immediate consequences for the strength of the other. For example, the only way to reach wise policy on sharing is to ensure that all decisions regarding the regulation or promotion of sharing includes at least a consideration of the impacts on, or necessity to bolster or weaken, our protections afforded to the concept and characteristics of ownership itself.

This article is largely agnostic on the scope of desirable regulation of the sharing economy and does not set forth any specific recommendations for the form that any such regulation might take. There is no doubt that one of the exigencies in identifying appropriate working definitions and understandings of sharing is that, as of now, activities in the sharing economy “operate in a murky area of the law that’s receiving greater scrutiny and creating controversy.”²⁰ But whether existing zoning, landlord-tenant, housing, business licensing, hospitality, public accommodation, or transportation laws, for example, can be utilized or whether new regulatory structures are needed to fit these new and emerging

20. Kevin Davis, *Guest Wrong: Website Raises Legal Questions About Homeowners and Tenants Hosting Travelers*, 100 A.B.A.J. 19, 19 (2014).

business models, services, and practices is beyond the scope of this article.²¹

Instead, the point here is that whatever we do as a society, our choice of regulatory approach (including choices not to regulate) for the sharing economy must be informed by the fact that, first and foremost—to paraphrase Justice John Marshall’s famous words in *McCulloch v. Maryland*—we must never forget that these are individual property ownership rights we are affecting.²² The United States Supreme Court famously opined in *United States v. Willow River Power Co.* that “not all economic interests are ‘property rights’; only those economic advantages are ‘rights’ which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion.”²³ Consequently, it becomes important that the laws surrounding the sharing economy recognize and give due consideration to the status of sharing rights as property rights—not simply economic interests.

In Part I, this article examines the psychology literature on a concept called “ownership understanding.” It describes the existence of strong, enforceable private property mechanisms and that our confidence in them is directly proportional to our willingness to share. By linking law with psychology, this part injects a unique and heretofore missing psychology-based perspective into the legal literature to help owners and regulators better understand the sharing motivation and its interconnection with our system for recognizing private property rights. It draws insights from child psychology, including how we, as humans, come to understand ownership and only fully agree to “share” in its fullest sense once we develop ownership understanding. At the same time, it lends legal insight to concepts of ownership and sharing studied from a psychological basis. Included in this effort is an

21. Many others have begun to focus their analyses on the necessity, development, and appropriate form of a regulatory structure or the need to refrain from regulation. See generally, e.g., Erez Aloni, *Pluralizing the “Sharing” Economy*, 91 WASH. L. REV. 1397, 1403 (2016) (building on insights from pluralistic theory to develop a contextual regulatory model for the sharing economy); Miller, *supra* note 2, at 150 (evaluating existing and proposing new approaches to regulating the sharing economy); Zale, *supra* note 6, at 513 (developing a conceptual and definitional framework to inform future policy regulation of the sharing economy).

22. In *McCulloch v. Maryland*, Justice Marshall advised as he evaluated the case that “we must never forget, that it is a *constitution* we are expounding.” 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original).

23. 324 U.S. 499, 502 (1945).

overlay of the Hohfeldian description of the nature of rights with the psychology literature's description of the stages of children's development of correlated psychological understandings of ownership and sharing related concepts.

Once we have some sense of how sharing motivations develop in humans, Part II provides some basic background on the structure of the sharing economy itself, thereafter focusing this article primarily on the sharing of real property and goods.

Part III then examines property law and some of its fundamental characteristics, including the right to exclude and correspondingly include. These concepts make sharing more understandable. Sharing, as used in the sharing economy's real property and goods sectors, embodies the relaxation of the right to exclude (without sacrificing ownership sticks) through exercise of the right to include. Thereafter, Part IV provides an ownership-based definition of sharing that could be beneficial when employed in ongoing discussions about the future of the sharing economy, giving proper context and appreciation to the ownership principles at stake in any regulatory decision. Part V briefly outlines the regulatory status quo and expected regulatory future for the sharing economy. So long as we correctly conceive of sharing as a stick in one's bundle of property rights, regulatory responses to sharing necessarily implicate our overall protections for individual ownership.

Through each of these parts, this article explains that strong ownership understanding and a confidence in the enforceability of ownership rights is a necessary precondition for sharing. This leads to one of the principal conclusions in this article: without strong protection for ownership principles, we cannot expect a robust or effective sharing economy. And, at the very least, we must understand the ownership role in sharing if we are to reach sound legal decisions and develop wise public policy that accounts for all concerns.

I. THE LINK BETWEEN "OWNERSHIP UNDERSTANDING" AND SHARING: INSIGHTS FROM CHILD DEVELOPMENTAL PSYCHOLOGY

A recent generation of children grew up learning from a purple dinosaur that "caring means sharing" (or "sharing is caring").²⁴

24. See, e.g., *Barney & Friends, Season 1, Ep. 9, Caring Means Sharing*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt1204195/> (last visited Apr. 5, 2017).

Long before and since, other children have heard similar refrains from different sources. But what if a child does not care for the proposed sharee? Must the child share? Of course not. Perhaps understated in this loveable lesson is the reality that one can voluntarily choose whether to share or not share. This matter of choice is especially important because research reveals that children are most resistant to share when they feel compelled to share (rather than doing so on their own terms),²⁵ which may underscore a natural inclination towards ownership principles, such as the right to retain property.²⁶

Thus, part of the parenting lesson involved in encouraging children to share lies in understanding the development of consensual social relations.²⁷ The typical child's reaction—exclaiming “that's mine” when resisting sharing or when just staking a claim to a toy that is about to be confiscated by a playmate—demonstrates a natural human inclination towards possession and an unwillingness to relinquish control over possessed resources.²⁸ Studying a child's reactions as they develop with age and move from a possession-based to ownership-based approach reveals much about our natural understanding of the meaning, qualities, and terms of “sharing,” as it relates to property.

Substantial psychological research—particularly on a concept known as “ownership understanding”—illuminates the fact that a child's approach to sharing can be fully developed only *after* first developing an understanding of what ownership really means, including an appreciation for the full range of rights (and demands for their enforcement) associated with private property.²⁹ As

25. See *Giving Preschoolers Choice Increases Sharing Behavior*, ASS'N PSYCHOL. SCI. (Aug. 19, 2013), <http://www.psychologicalscience.org/news/releases/giving-preschoolers-choice-increases-sharing-behavior.html/> (“Getting kids to share their toys is a never-ending battle, and compelling them to do so never seems to help.”).

26. See generally Donald J. Kochan, *Keepings*, 23 N.Y.U. ENVTL. L.J. 355, 356 (2015) (discussing the legal doctrines and principles relating to owners retention of their property and why such doctrines are necessary in an effective property system).

27. See *Giving Preschoolers Choice, Increases Sharing Behavior*, *supra* note 25.

28. Kochan, *supra* note 26, at 356; see Cliff Goddard & Anna Wierzbicka, *It's Mine! Re-thinking the Conceptual Semantics of “Possession” Through NSM*, 56 LANGUAGE SCI. 93, 93, 102 (2016) (recognizing that “mine” is a semantic primitive available in all languages and that “in all languages, apparently, the same grammatical markers [] are used to express ‘ownership’”); see also Jill Fraley, *The Meaning of Dispossession 2* (Wash. & Lee Pub. Legal Stud. Res., Paper No. 2017-1), https://papers.ssrn.com/sol3/Papers2.cfm?abstract_id=2905798 (“Cross-culturally, most children's fights involve property.”).

29. Celia A. Brownell et al., *Mine or Yours? Development of Sharing in Toddlers in Relation to Ownership Understanding*, 84 CHILD DEV. 908 (2013).

Brownell et al., psychologists from the University of Pittsburgh, explain, “[o]ne aspect of early social cognition that may be fundamental to the development of sharing is ownership understanding. Ownership is an invisible attribute of an object that is socially and normatively defined and that confers unique possession rights.”³⁰ It then follows that “[b]ecause sharing entails transferring ownership, whether temporarily (as in sharing one’s toys with a friend) or permanently (as in sharing food with a parent), until children understand ownership they cannot truly be characterized as sharing.”³¹ This research reveals that, starting from early childhood, an appreciation for ownership and the concept of private property are a necessary step in a human’s development of social integration skills, including the willingness to share. This willingness develops in full form only once one also develops the interdependent and prerequisite understanding of the right to *not* share or the right to share but with conditions.³²

Hence, for an activity to be considered “sharing,” Brownell et al. explain, the sharer first must appreciate that she owns the thing she is offering to “share” with another.³³ Otherwise, it is just some activity motivated, tolerated, or to which the child acquiesces for some other reason (such as, perhaps, because the child does not know that she has the power to say no or the child shows empathy—like when the child might allow another thirsty child to drink from one’s cup of water).³⁴

This ownership understanding progressively emerges within the first five years of a child’s life. Early on, very young children see sharing as particularly risky because they fear becoming dispossessed and worry about the consequences associated with the loss of physical control over the thing.³⁵ It is unclear whether very early-stage protests against having a toy taken away are a result

30. *Id.*

31. *Id.*

32. See Peter R. Blake & Paul L. Harris, *Children’s Understanding of Ownership Transfers*, 24 *COGNITIVE DEV.* 133, 133–34 (2009) (“Children must learn social rules regarding private property in order to integrate into their peer groups and society at large. Understanding ownership is therefore an important part of children’s development.”).

33. Brownell et al., *supra* note 29, at 908.

34. See *id.* at 908–09.

35. See generally *id.* at 907–08 (noting the generally low rates of sharing among young children especially, and studying the underlying factors associated with that behavior).

of ownership principles,³⁶ yet the research seems clear that concepts of ownership begin to emerge in later years in steps. The psychology research reveals that “ownership concepts in toddlers are still fragile and may be specific to particular objects and contexts,” but the ownership concept “begins to appear in primitive form” by age two.³⁷ During the second year, for example, Brownell et al. and previous studies find that struggles over objects “become increasingly common.”³⁸ Nonetheless, at this step, the child seems to be developing a sense of “mine” but not yet a sense of “yours” (or “theirs”)—with an appreciation and respect for both “mine” and “yours” concepts still necessary before true ownership is understood.³⁹

It is useful to think about these stages of development as stages of understanding the nature of rights. Consider how the psychology research discussed here can be related to the seminal work on the nature of rights by the noted jurist and law professor Wesley Newcomb Hohfeld. In his work, Hohfeld endeavored to identify and distinguish the core elements of rights, privileges, immunities, and liabilities.⁴⁰ Hohfeld sets out the definitions and distinctions as follows:

[A] power bears the same general contrast to an immunity that a right does to a privilege. A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative “control” over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or “control” of another as regards some legal relation.⁴¹

Hohfeld's definition of immunities is further benefited by the following example:

36. *Id.* at 909 (exploring alternate justifications that may make a child protest the loss of a toy in the first year of development, such as loss of pleasure).

37. *Id.* at 909, 918 (“Between 18 and 24 months of age, other-oriented resource sharing becomes more frequent, spontaneous, and autonomous, with less need for support and encouragement from the recipient. This transformation is accompanied by, and perhaps partly driven by, growth in social understanding, including which things belong to self and others and language denoting ownership such as ‘mine’ and ‘yours.’”).

38. *Id.* at 909.

39. *Id.* (“[A] young child without ownership understanding may not know that someone else wants something of ‘theirs,’ or may fail to understand that they can opt to give ‘their’ toy to the other.”).

40. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 30 (1913).

41. *Id.* at 55.

X, a landowner, has, as we have seen, power to alienate to Y or to any other ordinary party. On the other hand, X has also various immunities as against Y, and all other ordinary parties. For Y is under a disability (*i.e.*, has no power) so far as shifting the legal interest either to himself or to a third party is concerned; and what is true of Y applies similarly to every one else who has not by virtue of special operative facts acquired a power to alienate X's property.⁴²

By identifying the owner's control over alienability and all others' lack of power (or disability) to take away (or shift) that interest to anyone else, Hohfeld claims the owner is thereby usually the holder of "immunities" against all others.⁴³ These immunities are freedoms from the actions, wants, demands, or control of others—including the freedom from others' attempts to take property away from an owner. An owner can assert her immunity against those who have no legitimate claim to the property because those persons are at a disability *vis-à-vis* the property and its owner.

Applying Hohfeld's concepts to the successive developmental stages of a child's understanding of rights associated with property can enrich psychological insight into the law of sharing. As stated above, we know from the research in child developmental psychology that a child's understanding of "mine"—establishing claim to ownership of a thing and what Hohfeld might call a "power"⁴⁴—happens before Child A can appreciate that the object held by someone else, Person B, is "theirs" (*i.e.*, Person B's).⁴⁵ So, at this stage, Child A does not yet appreciate what Hohfeld would call the "disability" under which Child A is operating—that is, Child A cannot make any legitimate claim to the object and therefore cannot compel Person B turn over the object. However, because Child A does not yet have full ownership understanding and cannot recognize her own disability, Child A does not yet respect Person B's immunity from Child A's demands.

Similarly, if Child A is currently holding an object owned by Person B, then Child A is disabled from refusing to give it back.

42. *Id.*

43. *Id.*

44. *Id.*

45. Brownell et al., *supra* note 29, at 909 (noting that "ownership language also emerges gradually over early childhood with *my* and *mine* appearing before *his/hers* or *yours*") (citing Elizabeth Bates, *Language About Me and You: Pronominal Reference and the Emerging Concept of Self*, in *THE SELF IN TRANSITION: INFANCY TO CHILDHOOD* 165, 175 (Dante Cicchetti & Majorie Beeghly eds., 1990); Alison Imbens-Bailey & Barbara Alexander Pan, *The Pragmatics of Self- and Other-Reference In Young Children*, 7 *SOC. DEV.* 219, 231 (1998)).

But if Child A does not yet understand the meaning of “theirs,” then she might refuse to do so. In this scenario, Person B is also holding what Hohfeld would describe as an “immunity”—right to keep the property or demand its return from Child A⁴⁶—which includes the ability to refuse to adhere to demands made and to repel confiscatory actions by those who would like to take the object away from Person B without consent.

Brownell et al. describe situations in which children at around eighteen months try to retain possession of a toy once they have gained it, even if it does not belong to that child and was originally possessed by another.⁴⁷ And, by around age two, a child at this point of development is asserting “mine” in relation to things presently possessed, seemingly both legitimating their claim to the object on current possession alone and failing to understand the claim of the other child held based on *prior* possession (or legal priority).⁴⁸ Brownell et al. explain: “Although [two]-year-olds recognize their own property rights, they do not seem to understand ownership norms more generally: They protest if their own belongings are taken, but they do not recognize the injustice of someone else’s belongings being taken.”⁴⁹ At this age, one’s ability to grasp “yours” and “theirs” is still underdeveloped. Developing an understanding of “mine” precedes developing an understanding of “yours” or “theirs,”⁵⁰ so children before age five remain without an appreciation of their duty to return the property of others (or even to refrain from taking it in the first place).⁵¹

46. Kochan, *supra* note 26, at 359.

47. Brownell et al., *supra* note 29, at 909 (stating that at 18 months, “when the original possessor tried to regain the toy, the toy takers protested just as much as when someone without any previous possession history tried to take it”) (citing Roger Bakeman & John R. Brownlee, *Social Rules Governing Object Conflicts in Toddlers and Preschoolers*, in PEER RELATIONSHIPS AND SOCIAL SKILLS IN CHILDHOOD 99, 108 (Kenneth H. Rubin & Hildy S. Ross eds., 1982); *see also* Carol O. Eckerman & Karen Peterman, *Peers and Infant Social/Communicative Development*, in BLACKWELL HANDBOOK OF INFANT DEVELOPMENT 326, 343 (Alan Fogel & Gavin Bremner eds., 2001) (discussing the social nature of twenty-one-month-old toddlers during conflicts over objects); Dale F. Hay & Hildy S. Ross, *The Social Nature of Early Conflict*, 53 CHILD DEV. 105, 106 (1982)).

48. *See* Brownell et al., *supra* note 29, at 909 (citing Federico Rossano, Hannes Rakoczy & Michael Tomasello, *Young Children’s Understanding of Violations of Property Rights*, 121 COGNITION 219, 220, 224 (2011)).

49. *Id.* (noting that “[s]imilarly, [two]- and [three]-year-old children do not seem to understand group ownership”).

50. *Id.*

51. *See* Blake & Harris, *supra* note 32, at 143 (discussing children’s ability to distinguish types of transfers).

In Hohfeldian terms, then, the child at this stage is asserting an overinclusive power (an ownership claim in all things possessed) and an overbroad immunity (the right to keep what he possesses despite the demands of another making a claim to it) without recognizing the existence of a disability (that he cannot take the property of another or retain possession of the property owned by another once a demand has been made for its return).⁵²

Sharing starts to seem less risky when it becomes clearer to the child that continuous possession is not a necessary requirement to claim ownership of the thing; she has the capability to demand its return, and there is a reciprocal duty on the sharee to return the thing upon demand.⁵³ With ownership understanding, the child starts to appreciate the distinctions between the nature of rights associated with the thing and to understand how ownership principles govern sharing and other transfers of possession. This situational change is consistent with Brownell et al.'s finding that "sharing varied with children's social understanding," and with their findings that, "[i]n particular, ownership understanding was positively associated with how often and how quickly children shared, even with age and general language competence controlled; conversely, non-sharing behavior was negatively associated with social understanding."⁵⁴

Peter Blake and Paul Harris, psychology and education professors at Harvard University, similarly identify that this "ownership understanding" begins to develop in an appreciable sense usually around age five,⁵⁵ at which point a child begins to develop an appreciation for the rights of retention inherent in the distinction between legitimate and illegitimate transfers (such as stealing).⁵⁶ Custom and imposed norms supporting the ownership val-

52. See Hohfeld, *supra* note 40, at 55.

53. See Brownell et al., *supra* note 29, at 909 ("It might be expected, therefore, that young children would be less likely to share their things spontaneously with others prior to development of such [ownership] understanding.")

54. *Id.* at 915.

55. Blake & Harris, *supra* note 32, at 141 ("The results from the two experiments contribute to our understanding of how children's understandings about ownership develop. A mature understanding of ownership requires an appreciation that permanent transfers of property are possible as well as the ability to differentiate legitimate from illegitimate transfers. Not until [five] years of age do children attain this mature view. Five-year olds recognize that ownership is permanently transferred when a gift is given but not when property is stolen.")

56. *Id.* at 141, 143 ("The two studies provide strong evidence that by [five] years of age, children possess a mature understanding of ownership in several important respects.

ue replace possession as the means by which claim is demonstrated.⁵⁷ Brownell et al. explain this progression (around age five) as a point where children develop wisdom regarding the complementary nature of the “mine/yours” notions, reporting that “an important feature of ownership understanding is knowing that what is ‘mine’ is ‘not yours,’ and vice versa.”⁵⁸ Consequently, as “mine” and “yours” concepts begin to develop, children start to become more likely to share.⁵⁹

Extending from these findings, it seems likely that a child who is told to share also understands the difference between communal toys and individually owned toys.⁶⁰ Based on the insights from ownership understanding, we should expect children to be less resistant in such communal situations and less possessive or territorial when they have no pre-attachment to the thing and no *a priori* claim to its control.

Finally, we might posit that children experience joy when acquiring things that they can call “mine” once they know the full nature of the rights associated with such a claim. For example, a child might experience such joy because she knows that she is not required to share but that she could, if she chooses, capitalize on the rewards of sharing made uniquely available when she (as owner) and the recipient (as a non-owner without any *ex ante* entitlement to use or access the thing) both understand that she is doing something above and beyond what she could be legitimately compelled to do. Thus, the owner is creating an occasion for gratitude or compensation from the benefitted recipient. With ownership understanding, rewards from sharing can also come in terms

First, they recognize that ownership can be permanently transferred from one person to another. Second, they distinguish legitimate transfers, like giving, from illegitimate transfers, like stealing. Finally, they recognize that this distinction applies to both children and adults. Their mature understanding of giving and stealing provides a firm foundation for learning about more complex interactions with property.”); *see also* Brownell et al., *supra* note 29, at 917 (discussing their findings as consistent with a “previous naturalistic study which found that toddlers who produced more ownership language were more likely to share with agemates”) (citing D.F. Hay, *Yours and Mine: Toddlers’ Talk About Possessions with familiar peers*, 24 BRIT. J. DEV. PSYCHOL. 39, 52 (2006)).

57. Blake & Harris, *supra* note 32, at 141–42.

58. Brownell, *supra* note 29, at 909.

59. *Id.* (citing Hay, *supra* note 56, at 50).

60. *See id.* at 917 (“Toddlers may also be starting to distinguish between ownership and possession, with [two]-year-olds understanding that they were granted temporary possession of the playroom toys but not ownership, which could contribute to their greater willingness to share them.”).

of parental praise,⁶¹ strengthening a friendship through a grateful sharee, or even through bargaining (whether it be bartering and reciprocity in getting to play with the sharee's toys or some other type of exchange).⁶²

In light of all of this, it may be reasonable to make the bold claim that our earliest understanding of the value of property assets actually develops when we realize we have control over whether or not to share our toys and other early possessions. The value lies in control, the right to choose not to share (and to exclude) and the endless possibilities from various permutations associated with exercising the right to include (from which we can obtain and internalize payments for the use and access to our owned things). Thus, ownership facilitates sharing, and sharing is contingent on ownership and our understanding of it.

To summarize some of these psychological findings, it is useful to describe the starting point for one of the key research studies discussed above. Brownell et al. set out to study whether there was a relationship between ownership understanding and the likelihood of sharing, "hypothesiz[ing] that children with more advanced ownership understanding, broadly defined, would be more likely to share their toys with a playmate who had none."⁶³ One could re-characterize this inquiry as designed to test whether children are more likely to share if they know they will get the shared object back. Brownell et al.'s findings "confirmed that children who shared more quickly, with fewer cues, and children who shared more often before being asked by the partner were more advanced in self-understanding and better understood ownership."⁶⁴ In fact, after evaluating the possible factors that account for varied approaches to possession and to willingness to share, "ownership understanding" proved singularly important to a heightened propensity to share (even after age-related factors

61. *Id.* at 907 ("[T]hese early social acts may not be prosocial in the sense of behavior that is intended to benefit another. Infants may show a toy to an adult as an act of emotion or attention sharing, or they may be seeking a positive reaction or other form of approval from the adult; they may offer a toy as a way to get the adult to play with them or as part of a regular game or routine, or deposit a toy in the adult's lap to prevent another child from gaining access to it.").

62. *Id.* at 917–18 (asserting that as children start developing the basics of ownership understanding, they "begin[] to understand ownership as a socially defined attribute of objects may provide a rational basis for sharing, as well as an early normative standard for object exchange").

63. *Id.* at 910.

64. *Id.* at 914.

are removed, demonstrating a continuing impact of ownership understanding, regardless of age).⁶⁵ In Brownell et al.'s study, ownership understanding proved far more useful in explaining individuals' differences in sharing than other concepts of self-understanding.⁶⁶

Sharing starts to seem more acceptable to a child when a child understands their reciprocal claims and obligations regarding owned things.⁶⁷ In other words, we are more willing to share once we know three things: (1) we can get our things back; (2) we can set the terms and conditions of sharing; and (3) the sharee must accept the bitter with the sweet in sharing and abide by the owner's terms if the sharee wishes to have the benefit of using, possessing, or accessing the property of another. We are more willing to share when there are strong property norms, backed by the confidence generated by strong property rights enforcement mechanisms.

These conclusions are consistent with Brownell et al.'s child psychology study, which concluded that "associations between ownership understanding and sharing were positive" despite that "one might intuitively expect the reverse—as children better understand ownership, their property claims should increase and their willingness to share should decline."⁶⁸ The counterintuitive result may be explained by the feelings of security in ownership generated once one can fully associate with ownership values, can contemplate the complete package of rights inherent in property (including powers, immunities, and disabilities), and has some confidence in the availability of norm enforcement through customs or laws. Brownell et al. continue, for example, to explain that the increased sharing associated with increased ownership understanding may be reflective of the fact that "[t]oddlers may be starting to understand that ownership can be exchanged between consenting individuals, and that others have expectations with respect to owned things, that objects can make others happy,

65. *Id.* at 917.

66. *Id.* ("Once age was controlled, however, self-understanding was no longer a significant predictor, whereas ownership understanding continued to be associated with sharing. In other words, both self-understanding and ownership understanding explained age-related variation in sharing, but only ownership understanding explained individual differences in sharing above and beyond age-related influences.")

67. *See id.* at 917–18.

68. *Id.* at 917.

and other embryonic notions of objects as possessing social value.”⁶⁹

These findings within the field of psychology demonstrate that an individual’s willingness and propensity to share her property are directly proportional to the strength of her understanding of the ownership concept and confidence in her claim to ownership over the things which she might be willing to share. Brownell et al., state that “[m]ature ownership understanding also distinguishes between possession and ownership . . . which should make sharing easier when it entails temporary transfer of physical possession while retaining ownership and its corresponding rights.”⁷⁰ In many ways, the sharing economy very much mirrors this effect, focusing on temporary access to another’s property rather than sacrificing ownership attributes.⁷¹

The child development findings regarding ownership understanding provide a platform from which property law can model its own ownership-protective blueprint. As the psychological research reveals, the property system is well-suited to create recognizable and enforceable ownership norms that include the rights to acquire and thereafter retain ownership of property, parting with such property only on terms defined by the owner. When we have such a well-developed ownership regime—with reliability upon enforceable, neutral ownership norms—we create the confidence in ownership that ownership understanding reveals is necessary for individuals to feel secure in sharing. Thus, when a property law system protects ownership, it is working to stimulate the ownership understanding that humans develop psychologically in early childhood. It is capitalizing on humans’ natural expectations regarding ownership.

Consequently, there are many good reasons for developing a property law system with strong protections for ownership, not the least of which is because it provides the necessary conditions under which sharing (a pro-social activity which is both culturally and economically beneficial) is most likely to occur and thrive. In fact, the child development research reveals humans are particularly affected by their confidence in a right to exclude or prevent

69. *Id.*

70. *Id.* at 909 (citing Blake & Harris, *supra* note 32, at 133–34).

71. See Zale, *supra* note 6, at 568 (“Property sharing involves the provision of temporary access to property.”).

takings of property (and the related right to demand return of things).⁷² Once an individual believes that she has that immunity (in Hohfeldian terms), she becomes willing to exercise the power that comes with it—to choose to include others, including by sharing.

So, the development of the right to exclude and the corresponding right to include in property law tracks the underlying psychology to create the prerequisites in law to effect what might be called a “legal ownership understanding.” This legal understanding should generate the same motivational and behavioral reactions in all humans which can be expected through social understanding of ownership norms. By keeping the legal-psychology consistent with the social-psychology, the law is able to replicate and solidify the benefits that accrue from confident beliefs in an individual’s ability to control the things that she owns. The law makes her willing to share because she knows that the law will protect her concomitant right to set the terms of the sharing.

Ownership empowers an individual to make a choice whether or not to share. If she shares, it is because it is hers—rather than sharing because of some mistaken belief that she must or some diminished sense of entitlement to make a claim to the property as hers and hers alone. Moreover, even if she has possession of an object, she is less likely to share it without a preceding belief that it is “hers” (in the sense of being able to say to herself that she owns the thing, and all that is attached to the ownership concept attaches to the thing, as well). She shares, therefore it is hers (and she shares when she knows it is “hers”).⁷³

II. SOME VERY BASIC BACKGROUND ON THE SHARING ECONOMY AND EXISTING LITERATURE

The concepts related to sharing real property, goods, and services have taken on many monikers, including among the most

72. Kochan, *supra* note 26, at 356. *See generally* Blake & Harris, *supra* note 32 (stating that “by 5 years of age, children possess a mature understanding of ownership transfer whereas younger children are prone to biases); Brownell et al., *supra* note 29 (finding that “[o]wnership understanding . . . was positively associated with sharing and negatively associated with non-sharing behavior, independent of age and language ability”).

73. If an object is not hers, of course, she cannot share it legitimately (*nemo dat quod non habet*). *See supra* note 1 and accompanying text.

common, but not limited to: the sharing economy,⁷⁴ the peer-to-peer economy,⁷⁵ peer-to-peer consumption,⁷⁶ collaborative consumption,⁷⁷ and access-based consumption.⁷⁸

Despite the similarities between these terms and the activities they attempt to categorize, there is no “universally accepted definition,”⁷⁹ nor is a one-size-fits-all definition or label possible (or even desirable) for the variety of emerging sharing activities.⁸⁰

Nonetheless, as Koopman et al., economists from the Mercatus Center at George Mason University, suggests, “it is helpful to think of the sharing economy as any marketplace that brings together distributed networks of individuals to share or exchange otherwise underutilized assets.”⁸¹ Furthermore, the exchange might be for monetary or non-monetary benefits which accrue to the owner of such under-utilized assets and would otherwise be unrealized but for the sharing.⁸² In such a context, “sharing” means that the assets or services are allowed to be (often non-exclusively) used or consumed by someone other than the owner

74. See, e.g., Horton & Zeckhauser, *supra* note 4, at 1 (“In recent years, technology startup firms have created a new kind of rental market, in which owners sometimes use their assets for personal consumption and sometimes rent them out. Such markets are referred to as *peer-to-peer* or ‘sharing economy’ markets.”).

75. See, e.g., Dyal-Chand, *supra* note 3, at 243 (explaining “collaborative consumption” and “peer-to-peer” as alternative labels to describe “the sharing economy”).

76. See, e.g., Oei & Ring, *supra* note 9, at 991 (“Also known as ‘collaborative consumption,’ the ‘peer-to-peer economy’ or ‘peer-to-peer consumption,’ a broad range of commentators suggest that the sharing economy is transforming the way people consume and supply goods and services, such as transportation, accommodations, and task help.”).

77. See, e.g., Hamari et al., *supra* note 10, at 2049 (“We define the term [collaborative consumption] broadly as the peer-to-peer-based activity of obtaining, giving, or sharing access to goods and services, coordinated through community-based online services.”); Miller, *supra* note 2, at 150 (describing alternative names including “collaborative consumption” and “access-based consumption”).

78. Miller, *supra* note 2, at 150.

79. Koopman et al., *supra* note 16, at 531; see also Zale, *supra* note 6, at 526 (“The lack of consensus about terminology is driven in large part by the lack of consensus about how to define the sharing economy.”).

80. Zale, *supra* note 6, at 509–10 (“The activities blur the familiar binary divisions—personal and commercial, gratuitous and nongratuitous, formal and informal—that the law employs to characterize human activities. . . . sharing economy activities combine features of familiar property law forms—such as leases and licenses. . . .”).

81. Koopman et al., *supra* note 16, at 531.

82. Rand Botsman, *The Sharing Economy Lacks a Shared Definition*, FAST COMPANY (Nov. 21, 2013), <https://www.fastcoexist.com/3022028/the-sharing-economy-lacks-a-shared-definition> (“An economic model based on sharing underutilized assets . . . for monetary or non-monetary benefits.”).

of the property or provider of the services.⁸³ This idea of maximizing the use of unused or under-utilized assets is a critical, unifying characteristic in defining sharing.⁸⁴ Underutilization is a common characteristic because many properties directed towards sharing activity have “excess capacity”⁸⁵ or what some label “idle capacity”⁸⁶—more capacity than the owner can herself use at once and can thereby be monetized.⁸⁷ I do not use my house when I am on vacation.⁸⁸ I do not use my car during the workday. I do not use my tools most of the time.⁸⁹ I generally only use the driver’s seat in my vehicle, meaning most of the carrying capacity of my vehicle goes unused,⁹⁰ and so on. The goal is to capture the “surplus value” of these unused or under-utilized assets.⁹¹

83. *See id.*

84. *See* Andrew T. Bond, *An App for That: Local Governments and the Rise of the Sharing Economy*, 90 NOTRE DAME L. REV. ONLINE 77, 78 (2015) (“The sharing economy is a microeconomic system built around the utilization of unused human and physical resources” as connected “via technology”); Oei & Ring, *supra* note 9, at 997 (“While there is no universal definition of the term ‘sharing economy,’ commentators have described it as a model of production, consumption and distribution of goods and services whereby people ‘share’ their assets or other resources on an excess capacity basis via peer-to-peer arrangements.”).

85. *See* Aloni, *supra* note 21, at 1403–04 (discussing the relationship between sharing economy and utilization of excess capacity); Horton & Zeckhauser, *supra* note 4, at 22 (“The attributes that make a good ‘shareable’ get attention from Benkler. He points out that some goods are ‘lumpy’ in that you cannot buy less than some threshold amount, but once you own it, it invariably has excess capacity.”) (discussing Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273, 356 (2004)).

86. Zale, *supra* note 6, at 527–28 (“The economic driver of the sharing economy is what some have referred to as the commodification of ‘idle capacity,’ or the monetization of previously unused or underused assets. The types of assets being monetized fall into two general categories: goods or services.”).

87. Oei & Ring, *supra* note 9, at 990–91 (“On the supply side, these models enable owners of homes, apartments, or vehicles, or those who possess certain skills (such as house painting, home organization, or dogsitting) to monetize those assets or skills.”).

88. Zale, *supra* note 6, at 530 (“[T]he ‘sweet spot’ for asset monetization appears to be ‘high cost, infrequently used’ goods . . . [such as] a place to sleep in a city you do not live in, or a car in a city where it is expensive or inconvenient to own a car.”) (quoting Gansky, *infra* 93, at 23).

89. *See id.* (“The types of property being monetized in the sharing economy spans the gamut from low cost, infrequently used goods, such as blenders and nail guns, to high cost, frequently used goods, such as laptops.”).

90. *See* Dyal-Chand, *supra* note 3, at 253–54 (“In the areas of home and car sharing . . . individuals also share the excess capacity of assets that they do not fully use or need for themselves with strangers—for a price. Without the ability to share, these assets—for example, the back seats of cars—would have much less value.”).

91. *Id.* at 255 (“Philosophers of the sharing economy claim that increasing access to property can best capture the surplus value of property—not collateralizing it or excluding others from it.”).

The sharing economy is often tied with the label collaborative *consumption* because it really is largely a matter of providing *access* in order to temporarily *consume* property rather than providing a transfer of ownership rights in the property.⁹² Property owned by Owner A is consumed by Stranger B.

As the lists of examples often provided in the literature on the sharing economy regularly illustrate,⁹³ the types of sharing are varied,⁹⁴ diverse,⁹⁵ and growing. Consequently, one seeking to analyze the sharing economy should avoid inappropriate general-

92. Hamari et al., *supra* note 10, at 2047 (defining “collaborative consumption/sharing economy” as “[t]he peer-to-peer-based activity of obtaining, giving, or sharing the access to goods and services, coordinated through community-based online services”); Julia Y. Lee, *Trust and Social Commerce*, 77 U. PITT. L. REV. 137, 146 (2015) (“In the standard usage of the phrase [sharing economy], owners rent out personal assets that they are not using, including cars, housing, and household items. Access substitutes for ownership: via the internet, owners of underused assets connect to those willing to pay to use them.”).

93. The purposes of this article do not require making a list of examples of sharing platforms and enterprises. Nonetheless, for those curious about the depth of examples available, consider for example the useful sampling of the types of companies that facilitate sharing of goods or real property (along with services, which are largely beyond the scope of this article) provided by Fraiberger and Sundararajan:

In recent years, a number of Internet and mobile-device enabled peer-to-peer marketplaces have emerged to facilitate the short-term rental of durable goods. Examples include Getaround and Re-layRides (which enable car owners to supply their vehicles as short-term rentals), Airbnb (which allows consumers to rent their living space to others for short periods) and StyleLend (peer-to-peer rental of apparel and accessories). These are specific examples of a much broader array of new platforms which facilitate market-based trade between private individuals for a variety of assets and services, from urban transportation (Lyft, Sidecar, Uber), dining (Kitchit, EatWith) and inter-city transit (BlaBlaCar, carpooling.com) to labor (TaskRabbit, Handy), local delivery (Instacart, Postmates), and short-term loans (Lending Club, Funding Circle), collectively sometimes referred to as creating a new “sharing economy.”

Samuel Fraiberger & Arun Sundararajan, *Peer-to-Peer Rental Markets in the Sharing Economy* 3 (N.Y.U. Stern Sch. of Bus. Research Paper, Oct. 6, 2015), <https://ssrn.com/abstract=2574337> (citing BOTSMAN & ROGERS, *supra* note 16; LISA GANSKY, *THE MESH: WHY THE FUTURE OF BUSINESS IS SHARING* 201 (2012)); Arun Sundararajan, *From Zipcar to the Sharing Economy*, HARV. BUS. REV. (Jan. 3, 2013), <https://hbr.org/2013/01/from-zip-car-to-the-sharing-eco/>.

94. See Lee, *supra* note 92, at 147 (providing a diverse set of examples that illustrate “[t]he sharing economy may be conceptualized into three broad categories: (1) product service systems; (2) redistribution markets; and (3) collaborative lifestyles [T]he vast majority of these markets do not involve sharing in the traditional sense, but the exchange of goods or money for profit.”); see also Oei & Ring, *supra* note 9, at 998 (2016) (“With the ease provided by . . . technology, almost anything—bicycles, wifi, clothing, and even kittens and toilets—can be shared.”).

95. Miller, *supra* note 2, at 150–51 (recognizing that the sharing economy is a diverse concept with differentiated sharing models requiring one to describe which type of activities are implicated in the focus of one’s analysis).

izations.⁹⁶ One of the best ways to do so is to clearly define which types of sharing activities one is analyzing. This article, like some others,⁹⁷ heeds such counsel and provides the following qualifier: the remainder of this article is primarily focused on the sharing of real and personal property (epitomized by short-term home rentals, ridesharing, or tool rentals).⁹⁸ This article's focus will be similar to what Zale terms "property sharing" and recognizes that this category "makes up only part of the overall sharing economy."⁹⁹ Zale defines "property sharing" as "when property owned or possessed by Party A is temporarily used or accessed by Party B (either exclusively or simultaneously with A), with ownership or possession returning to Party A after an agreed-upon period of time."¹⁰⁰ These components are key to also understanding what will be discussed in more detail in the next part—property that is shared in this sector is used or accessed rather than owned. The transfer of possession to facilitate such use or access is temporary rather than permanent and involves something less than granting an ownership share. In such a situation, the sharer retains ownership the entire time and has an enforceable expectation for a return of any property and the cessation of use at a pre-determined future point in time.

Sharing property is not a new innovation, but the emerging sharing "economy" is both innovative and the product of innovation.¹⁰¹ Large scale sharing—of both property and services—is a new phenomenon in large part because new technologies have only recently made facilitation of such activities economic and feasible.¹⁰² So, while sharing is not new, "recently developed infor-

96. Oei & Ring, *supra* note 9, at 906 (explaining why defining the scope of a paper is critical and that "generalizations regarding the sharing economy . . . should be made carefully" because of the distinct types of sharing arrangements grouped within the term).

97. *See id.* (offering an example of an article limiting its subject scope to be "focused largely on ridesharing and home sharing").

98. *See The Rise of the Sharing Economy, supra* note 11 ("The model works for items that are expensive to buy and are widely owned by people who do not make full use of them. Bedrooms and cars are the most obvious examples, but you can also rent camping spaces in Sweden, fields in Australia and washing machines in France.").

99. Zale, *supra* note 6, at 511–12.

100. *Id.*

101. *See* Aloni, *supra* note 21, at 1458 (describing "[t]he P2P economy" as an innovative social transformation that "entrenches and intensifies existing economic and social practices and approaches").

102. *See* Zale, *supra* note 6, at 536 (explaining how many sharing economy activities "have only become possible on a large scale because of relatively new technology, such as GPS, smartphones, and app software").

mation technology” makes new kinds and scales of sharing possible by reducing transaction costs and removing other difficulties.¹⁰³ Law professor Julia Lee explains “[t]echnology has enabled innovative forms of exchange to emerge, spanning an ever-broader range of products and services.”¹⁰⁴ It is now cheaper and easier to make the necessary connections.¹⁰⁵ The social networking aspects of technology also create trust- and reputation-networks which establish monitoring, verification, and quality-control mechanisms. These mechanisms could not exist at this scale and levels of reliability without such technologies, and consumers would not feel sufficiently confident to interact at such level with strangers without these protections.¹⁰⁶ “[T]he availability of more data about people and things . . . allows physical assets to be disaggregated and consumed as services.”¹⁰⁷ And, technology-based reputation systems not only create trust, but also enforce norms of competition and tend to improve the quality of the products being monitored and measured.¹⁰⁸ The technological and reputation system infrastructure surrounding the new sharing economy tends to replicate “the market-thickening coordination mechanisms . . . such as coordinating on time and geography” ordinarily only available in physical markets rather than those online.¹⁰⁹

Hence, sharing may have always been part of our ownership package and even something which property owners have always done at some level since the dawn of private property systems. Nonetheless, what we see now are lower costs and higher reliabil-

103. Barry & Caron, *supra* note 16, at 70; *see also* Kreiczer-Levy, *supra* note 7, at 77 (discussing how “new technologies and online markets have significantly lowered transaction costs for short-term use of personal assets”); *The Rise of the Sharing Economy*, *supra* note 11 (“[T]echnology has reduced transaction costs, making sharing assets cheaper and easier than ever—and therefore possible on a much larger scale.”).

104. Lee, *supra* note 92, at 141.

105. *See* Hamari et al., *supra* note 10, at 2048 (crediting technological advances as simplifying “sharing of both physical and nonphysical goods and services”); Oei & Ring, *supra* note 9, at 991 (“The technological platforms employed by these startups enable individual producers and consumers to transact with each other with unprecedented ease.”).

106. *See* Horton & Zeckhauser, *supra* note 4, at 7 (“A key challenge in all markets is facilitating trust among strangers . . .”).

107. *The Rise of the Sharing Economy*, *supra* note 11.

108. *See generally* Horton & Zeckhauser, *supra* note 4, at 2, 7, 8 (explaining that the sharing economy businesses have proliferated in part because of technological advances but also emerging “recommender systems and reputation systems . . . central to the function of P2P rental markets”).

109. *Id.* at 7.

ity mechanisms for making sharing more efficient and more profitable, thereby motivating the expansion of such activities.

As seen in Part I, however, no facilitating technology could have an impact if people did not first have both the motivation to share and the confidence that sharing would not mean losing ownership. There would not be a sharing boom without basic, traditional property norms and the means for their enforcement. So, regardless of how much credit we give the brilliance of technological innovation, strong ownership protections are a necessary precondition to profit from sharing (at any scale) and for the willingness to risk allowing others to use one's property. Thus, before anything else, the strong system of private property ownership deserves initial credit for the existence of the sharing economy. Part III extends this analysis of the leading role the property law system plays in producing the sharing economy.

III. SHARING'S RELATIONSHIP WITH THE FUNDAMENTALS OF OWNERSHIP: EXCLUSION AND INCLUSION

At the heart of any understanding of sharing lies an appreciation of the *sharing* right as an outgrowth of the *inclusion* right, which itself grows out of the *exclusion* right held by property owners. This part examines each of these concepts, beginning with an explanation of the fundamental right to exclude and then examines why a right to include is a necessary extension of the right to exclude, with sharing as an exercise of that right to include.

There is near universal agreement that the right to exclude is a “unifying or necessary characteristic” of the “concept of property.”¹¹⁰ The United States Supreme Court has recognized the “right to exclude” as fundamental to property on several occasions,¹¹¹

110. R. WILSON FREYERMUTH ET AL., PROPERTY AND LAWYERING 7 (2d ed. 2006); see also JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES xxxix (5th ed. 2010) (“[M]ost scholars agree that the right to exclude is either the most important, or one of the most important, rights associated with ownership.”); J. GORDON HYLTON ET AL., PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS 3 (3d ed. 2007) (“Since Blackstone’s time, the Anglo-American legal tradition has honored this view, but the boundaries of the right of property have not always been easy to define.”).

111. See, e.g., Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999) (“The hallmark of a protected property interest is the right to exclude others.”); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (“[O]ne of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.”); Int’l News Serv. v. Associated Press, 248 U.S. 215, 246 (1918)

and scholars repeatedly underscore how our current conception of private property in the American system is based on a recognition of the existence and dominance of exclusion theories.¹¹²

In fact, the importance of exclusion rights are exhibited from the very early formation of ownership understanding. Part I, for example, discussed how children begin to recognize the possibility of a type of inclusion which does not require sacrificing ownership—i.e. sharing—and begin to appreciate the meaning of the right to include only after developing a more sophisticated appreciation of the enforceable right to exclude and to demand return of owned items.

Any understanding of the right to exclude, of course, requires an appreciation for the necessary corollary and corresponding right to include.¹¹³ In fact, the authority to include can only exist if a person has the authority to exclude. The core of managing property rights entails a property owner's authority to part with some or all of his rights—including by relaxing the right to exclude, thus exercising the right to include. Felix Cohen's view on this relationship of rights has been described as a "notion of property" that entails:

[A] relationship among people that entitles so-called owners to *include* (that is, permit) or *exclude* (that is, deny) use or possession of the owned property by other people. . . . [T]he right to include—to sell, for example, to another. . . . [D]oes not of itself result in a fully effective power to transfer. The right to exclude is needed as well. The two rights together are the necessary and sufficient conditions of transferability.¹¹⁴

Through this process of exclusion and inclusion, the law facilitates mutually beneficial exchanges, such as sharing.¹¹⁵ After all, rights in and to property can be altered and exchanged to satisfy

(Holmes, J., concurring) ("Property depends upon exclusion by law from interference. . . ."); *Id.* at 250 (Brandeis, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it.").

112. See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 734 (1998).

113. DUKEMINIER ET AL., PROPERTY 104 (8th ed. 2014).

114. *Id.*

115. See RICHARD A. EPSTEIN, DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW 88–89 (2011) ("[T]he clear delineation of common-law rules . . . reduces the transaction costs that have to be incurred to fashion specific contract solutions to correct errors in allocation under the existing property rule. . . . [A] voluntary transfer of rights could leave both sides better off than before.").

preferences and desired distribution between parties. As law professor Richard Epstein explains, individuals constantly seek to better their position by finding “some way of altering the control of various resources so as to enhance their value to all people simultaneously: hence the critical role of voluntary exchange.”¹¹⁶ By exercising the corollary right to exclusion—meaning the right to include—an owner can make a choice that facilitates exchange of the property (or of the varying and severable rights, interests, and permissions associated with the property).¹¹⁷ Mutually desirable and beneficial exchanges of rights and permissions helps the market operate to meet the preferences of different actors—including owners and non-owners.¹¹⁸

There is a broad menu of options available to private individuals wishing to engage in adjustments to initial assignments and the trading of rights. Two or more individuals may choose to enter into agreements to adjust their original ownership positions, possibly accomplishing varying degrees of transfer of ownership or access, depending on their desired outcome and how much they are willing to invest in the transfer. The common law has developed several vehicles by which owners can satisfy these preferences, including some especially valuable ones that create ownership-based property interests rather than mere contract rights.¹¹⁹ These property-based vehicles can include concurrent estates or even “servitudes”¹²⁰ and to a lesser extent, licenses.¹²¹ These permanent transfers of sticks in the ownership bundle have long op-

116. RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 71 (1995).

117. See Herbert Hovenkamp, *Bargaining in Coasian Markets: Servitudes and Alternative Land Use Controls*, 27 J. CORP. L. 519, 528–29 (2002) (explaining position by advocates of Coasian bargaining models that “private bargaining would give landowners an incentive to maximize joint wealth” as opposed to public control of land use).

118. See STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 296 (2004); see also DUKEMINIER ET AL., *supra* note 113, at 809 (stating that private land use control agreements usually “involve two or more parcels of land, and the purpose of the agreements is to increase the total value of all the parcels involved,” and usually “the effect of the agreements is to burden one parcel of land for the benefit of another parcel”); JOSEPH WILLIAM SINGER, *PROPERTY* 228 (3d ed. 2010) (“[O]wners are free to make promises restricting land use for their mutual benefit and are secure in the knowledge that such restrictions will be enforceable.”).

119. See SINGER, *supra* note 118, at 228 (discussing the incentives to enter into private agreements for the control of land, including the security and enforceability issues related to such transfers in interests in land as opposed to mere contracts).

120. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.1 (AM. LAW INST. 2000) (adopting a single term, “servitudes,” for a variety of common law mechanisms for adjusting rights in land, including easements, real covenants, and equitable servitudes).

121. SINGER, *supra* note 118, at 180.

erated to alter one's ownership position. The sharing economy has just found new extensions for an owner's voluntary adjustment of her *exclusion* rights and the exercise of her *inclusion* rights without necessarily sacrificing any part of her *ownership* interests.

Law professor Daniel Kelly has produced very insightful work on the right to include and its importance in the system of property law.¹²² If one simply observes how property owners act in real life, one can see that ownership involves something more than simply a way of keeping others off of one's land or away from one's possessions.¹²³ Kelly's insights on the right to include help explain how property law can empower owners to include others in the consumption of their property—including through the types of sharing we see in the sharing economy.¹²⁴ As Kelly explains, inclusion is ubiquitous in society—both informally through means not implicating the law and formally through property devices or contracts.¹²⁵ Indeed, “[t]he ability of owners to ‘include’ others in their property is a central attribute of ownership and fundamental to any system of private property.”¹²⁶ The scope of Kelly's work on inclusion is much broader than “sharing,” but he does touch on the issue and its relation to inclusion generally.

When Kelly discusses sharing, he uses the term in a slightly different way than it is used in this article. He defines sharing as a “gratuitous transfer” as distinguished from a contractual exchange, which has the attributes (and many of the benefits) of what he defines as sharing, but that becomes more formalized through a contract or property form.¹²⁷ For this article's purposes, no such distinction is made. In addition to what has already been

122. See, e.g., Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J. 857, 859 (2014); see also Donald Kochan, *Property as a Vehicle of Inclusion to Promote Human Sociability*, JOTWELL (Jan. 22, 2016), <http://property.jotwell.com/property-as-a-vehicle-of-inclusion-to-promote-human-sociability/> (reviewing Kelly, *supra*).

123. See Kelly, *supra* note 122, at 861; see also Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954) (“[T]hat is property to which the following label can be attached: To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private citizen[.] Endorsed: The state[.]”).

124. See Kelly, *supra* note 122, at 871–72.

125. *Id.* at 859.

126. *Id.*

127. See *id.* at 873 (“Unlike sharing, which entails a gratuitous transfer, exchange entails a transfer with consideration. Exchange is fundamental to a market economy because, through voluntary agreements, resources move from low-value to high-value users.”).

discussed regarding Kelly's examination of the law's treatment of inclusion more broadly, his identification of the attributes of sharing as a subcategory of inclusion are also insightful (even if directed toward a more limited concept of sharing as gratuitous transfers).

According to Kelly, "[i]nclusion is critical because human beings depend upon each other, not only to survive but also to flourish."¹²⁸ In fact, Kelly even posits that inclusion by sharing in one form or another might be part of human nature or a necessary condition for human survival.¹²⁹ He reaches this conclusion after reporting on a study which examined the sharing habits of young children and identified a "human need to voluntarily share," which Kelly speculates may in fact partially explain the emergence of the sharing economy.¹³⁰ At the very least, his critically important work underscores that inclusion—in varied forms, including how it is operationalized in the sharing economy—is a fundamental component of property rights. His research highlights that the right to include is as fundamental to property law as its sibling right to exclude.

Having developed an appreciation for the right to include and its genesis in property law, we can turn next to focusing more closely on sharing as the exercise of one's right to include. Sharing simply becomes a decision by the owner to relax her right to exclude—in varying degrees depending on the owner's chosen type of sharing and conditions—and to operationalize her right to include.

Once we understand sharing in terms of temporary inclusion, it becomes evident that all of the well-developed law and legal literature on the corresponding rights to exclude and include as primary features of property is fundamental to understanding the sharing economy. Inclusion simply becomes one of the rights associated with property ownership, or, in the language often employed in property law, it can be considered one of the sticks in the bundle of rights associated with private property ownership.¹³¹

128. *Id.* at 871.

129. *See id.*

130. *Id.* at 871–72 (quoting Christie Nicholson, *Is Civilization the Result of Humans' Need to Share?*, SCI. AM. (May 27, 2008), <https://www.scientificamerican.com/podcast/episode/cfm2/BA90A6B-C679-1D75-05835D9B22FE24FC/>).

131. Grey's formulation of the things/bundles debate is illuminative:

Most people, including most specialists in their unprofessional moments, con-

The United States Supreme Court articulated the bundle concept as follows: “[a] common idiom describes property as a ‘bundle of sticks’—a collection of individual rights which, in certain combinations, constitute property.”¹³²

As an example underscoring inclusion as a default stick in one’s bundle, consider the increasing number of lawsuits which seek a judicial determination of whether homeowners associations (“HOAs”) can create or enforce rules through covenants, conditions and restrictions (“CC&R’s”), which prohibit short-term rentals, particularly with respect to the members operating through Airbnb and like-affiliations. In other words, many courts are faced with whether CC&R’s have the power to limit the sharing stick in the bundle.¹³³ The fact that HOAs must litigate whether they have the right to prohibit short term rentals underscores the idea that an owner generally has the default right to share his property with others including for a price (and a profit), unless one removes the sharing stick from her ownership bundle (by subjecting her control and use to a collective governance body, like an HOA, and committing to certain CC&Rs).

Sharing, in the sense most often used in short term rentals or goods markets, is a decision by an owner to include a stranger in the benefits of the property. Absent the owner’s choice to allow the stranger to enjoy the property, the stranger would be a trespasser or otherwise lack the authority or permission to access or use the property. In fact, trespass law itself is a recognition of the common law’s default tendency against sharing. Yet, we know

ceive of property as *things* that are *owned* by *persons*. To own property is to have exclusive control over something – to be able to use it as one wishes, to sell it, give it away, leave it idle, or destroy it. Legal restraints on the free use of one’s property are conceived as departures from an ideal conception of full ownership. By contrast, the theory of property rights held by the modern specialist . . . fragments the robust unitary conception of ownership into a more shadowy “bundle of rights.”

Thomas C. Grey, *The Disintegration of Property*, in 22 *PROPERTY* 69, 69 (J. Roland & John W. Chapman eds., 1980); see also Thomas Ross, *Metaphor and Paradox*, 23 *GA. L. REV.* 1053, 1061 (1989) (“[T]he bundle metaphor . . . expresses a special sense of the separability of the various sorts of legally recognized interests.”).

132. *United States v. Craft*, 535 U.S. 274, 278 (2002) (citing BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 129 (1928)). Although the literature usually uses the “bundle of sticks” metaphor only for real property, for this article’s purpose, there is conceptual utility in applying it to both real property and chattels.

133. See, e.g., *Adams v. Kimberley One Townhouse Owner’s Ass’n*, 352 P.3d 492, 497 (Idaho 2015) (citing cases from multiple jurisdictions dealing with HOAs authority to restrict short-term rentals).

that owners nonetheless allow persons to enter their property. But we set as a default that, without an owner's permission (which can be termed his decision to share), a non-owner entering the property of an owner is a trespasser.

Moreover, the contrast between time- or purpose-limited inclusion, primarily through access—as juxtaposed against transfers of ownership—is fundamental to understanding the sharing economy.¹³⁴ In the “most common mode of exchange” present in the sharing economy, Finnish economist Juho Hamari and her colleagues explain that “[a]ccess over ownership means that users may offer and share their goods and services to other users for a limited time through peer-to-peer sharing activities, such as renting and lending.”¹³⁵

It is critical to note that, in these access-based circumstances, ownership remains with the sharer. If an individual simply sells her property to another or transfers part of her ownership interests, she may be giving someone an “ownership share” in the property,¹³⁶ but she is not engaging in “sharing,” as the word is most commonly used in relation to the inclusion-related modern sharing economy vehicles. As consumer marketing scholars Christoph Baumeister and Florian Wagenheim articulate, “[i]n [the] case of ownership, money is exchanged for ownership between buyer and seller to complete a market transaction. In contrast, an access transaction exchanges money for consumption time, while the ownership stays with the provider at all times.”¹³⁷ The sharee is simply consuming resources in an access-related, rather than ownership-related, capacity.¹³⁸ The sharee is using,

134. See Zale, *supra* note 6, at 533.

135. Hamari et al., *supra* note 10, at 2049 (citing Fleura Bardhi & Giana M. Eckhardt, *Access-Based Consumption: The Case of Car Sharing*, 39 J. CONSUMER RES. 882–83 (2012)).

136. See Zale, *supra* note 6, at 542–43 (cataloging the ways in which “numerous property interests enable owners to exercise their right to share their property with others,” including the ways to grant rights to shared ownership).

137. Christoph Baumeister & Florian V. Wagenheim, *Access Versus Ownership: Understanding Consumers' Consumption Mode Preference* 5 (2014), https://ssrn.com/sol3/papers2.cfm?abstract_id=2463076 (citing Yu Chen, *Possession and Access: Consumer Desires and Value Perceptions Regarding Contemporary Art Collection and Exhibit Visits*, 35 J. CONSUMER RES. 925 (2009); Jeffrey F. Durgee & Gina C. O'Connor, *An Exploration Into Renting as Consumption Behavior*, 12 PSYCHOL. & MARKETING 89, 90 (1995)).

138. Baumeister & Wagenheim, *supra* note 137, at 3 (“Users who fulfill their consumption needs via the access consumption mode typically pay for a temporary right to enjoy the benefits of a good that is not owned by them, but by a third party that provides access.”) (citing Chen, *supra* note 137); C. Lovelock & E. Gummesson, *Whither Services Mar-*

accessing, and being included in the stick, while the sharer is the owner of the stick at all times. Sharing involves including a stranger in one's owned property, whereas ownership transfers involve granting a piece of the ownership pie to another. For example, when individuals engage in "ride-sharing" through models like Uber or Lyft, car owners "sell rides in *their* cars."¹³⁹ Similarly, when individuals engage in short term real property rentals through Airbnb, homeowners are selling stays in *their* houses.¹⁴⁰

In an ownership transfer, the owner grants something more than contractually based permission. She gives a legal, property-based and enforceable entitlement to the grantee. "Ownership sharing" involves a permanency to the transfer,¹⁴¹ whereas the temporary nature of the authorizations and inclusion granted is a fundamental aspect of the sharing concept as understood in the sharing economy.

When others use or consume an owner's property, they are sharing in the usage within their granted consumption rights, but not ownership rights. The sharee, for example, cannot sell the home to another while the sharee is staying under contract with Airbnb. They are being included in the property but not included in ownership or the extensive rights associated with ownership.

The sharing economy, then, is about two categories of participants. Some people will choose to own and offer to include others in their property for a price—they supply the sharing-related property.¹⁴² Others will value non-ownership and the access to the property owned by another and will desire to be included without

keting? In Search of a New Paradigm and Fresh Perspectives, 7 J. SERV. RES. 20–41 (2004).

139. Dyal-Chand *supra* note 3, at 252 (emphasis added); *see also* Oei & Ring, *supra* note 9, at 999–1005 (describing ridesharing business models).

140. *See, e.g.*, Dyal-Chand, *supra* note 3, at 251–52 (describing Airbnb, including the fact that "the process is largely under the control of the individual hosts"); Oei & Ring, *supra* note 9, at 1005–06 (describing peer-to-peer lodging and accommodation business models).

141. Zale, *supra* note 6, at n.249 ("When thinking more broadly about sharing in the context of property, we can see how many well-established property law doctrines implicate sharing in a more permanent sense (such as leases for terms of years, or co-tenancy agreements, or ownership in a common interest community or condominium development).").

142. *See* Thomas A. Weber, *The Question of Ownership in a Sharing Economy*, 48 HAW. INT'L CONF. ON SYS. SCI. 4874, 4874 (2015) <https://www.computer.org/csdl/proceedings/hicss/2015/7367/00/7367e874.pdf> ("In the purchasing period . . . [G]iven a functioning peer-to-peer exchange, [one] agent thinks that the item may now well be worth buying because renting it out when not needed remains an option.").

asking to own—they demand the property supplied by owners.¹⁴³ To put it simply, some people buy while others would rather share.¹⁴⁴

Professors John Horton and Richard Zeckhauser, economists from NYU and Harvard, summarize this reality and stress what is a primary conclusion of this article. They contend that the sharing economy is grounded in the division between “owners and non-owners [or ‘users’]” because “[b]efore anyone can ‘share,’ someone has to own and others have to not own (but still want to consume at least some of the good).”¹⁴⁵ Or, as economists Samuel Fraiberger and Arun Sundararajan describe it, decisions—whether to buy for exclusive use, buy and become a sharer, or refrain from buying and use as a sharee—involve “consumers who have heterogeneous price sensitivity, utilization rates, and preference shocks.”¹⁴⁶ These “[n]ew rental marketplaces can increase allocative efficiency by creating new gains from trade between consumers, may generate additional surplus for consumers who could not previously afford ownership, may shift consumption towards higher quality products, and might even increase manufacturer surplus by inducing new ‘ownership for peer-to-peer rental supply.’”¹⁴⁷ It is a matter of preference and choice, determined by a variety of variables, but also determined from a set of options that has necessarily expanded as sharing opportunities have increased.

On the supply side, owners are able to monetize the underused utility in their property and offer those uses for rent¹⁴⁸ without sacrificing the ownership itself, which would be required if they sold the full bundle of property or even if they sold just a stick (like with concurrent ownership). Another distinguishing characteristic currently occurring in sharing markets is that sharing economy models “facilitate [trade, which] is largely between indi-

143. *See id.* (“In the purchasing period, one agent reasons that the possibility of sharing will afford access to the item in question if needed later on and thus forgo a purchase. In that case, the presence of a sharing market would lead to a decrease in sales.”).

144. *Id.* (“In an economy where everything is shared the question arises, who will own the various items, and who will rely on others to obtain access when needed?”).

145. Horton & Zeckhauser, *supra* note 4, at 9 (“Our model’s first task is to explain how consumers divide between owners and non-owners.”).

146. Fraiberger & Sundararajan, *supra* note 93, at 4.

147. *Id.*

148. *See Zale, supra* note 6, at 532 (“Finally, to monetize and share property, there is an implicit underlying requirement that an individual must own—or at least possess—property that others seek to access.”).

viduals or *peer-to-peer* rather than between an individual and a firm.”¹⁴⁹ Owners in the current version of the sharing economy are not, for the most part, in the business of exclusively renting their properties. The owners also use and consume the properties they are sharing, either at the same time but with excess concurrent capacity or at different times or in different manners. Whereas a typical property is owned and dedicated to the interests of the owner, an asset provided in a sharing economy platform is available to more users. This may cause some to invest in properties which traditionally might have been designed for a single owner to capitalize on the value available if the property is instead devoted to a sharing enterprise.¹⁵⁰ Such purchases for purposes of dedicated “sharing” begin to blur the line between peer-to-peer and firm-like behavior.

On the demand side, users make a choice that they value access over ownership. For example, some may decide to forgo buying a car when they live in a big city with substantial parking difficulties because using ride-sharing activities satisfies their preferences at a lower cost to them.¹⁵¹

In fact, many individuals gain access to goods and real property they would otherwise be unable to consume but for owners choosing to engage in sharing arrangements with those non-owner access seekers. Sharing is often cheaper than buying, and sharing marketplaces allow individuals who were financially barred from owning certain resources to access and benefit from otherwise, heretofore unobtainable assets. According to an empirical study by Fraiberger and Sundararajan, results “consistently show economically significant improvements in consumer welfare due to the availability of the ‘sharing economy’ marketplace, and significantly higher improvements for the below-median income segment.”¹⁵² Thus, the lower-income brackets benefit most from having access to sharing resources at a lower price than the market would provide for outright purchase.¹⁵³ These findings lead

149. Fraiberger & Sundararajan, *supra* note 93, at 3.

150. *Id.* (discussing the incentive structures for choosing to purchase property that might be used in sharing exchanges); *see also* Weber, *supra* note 142, at 4874, 4880 (explaining that a robust sharing market may actually increase demand for ownership because properties can be purchased to devote to profitable sharing arrangements).

151. *See, e.g.*, Horton & Zeckhauser, *supra* note 4, at 9–10 (describing the choices to become an owner or a user of property in the sharing economy).

152. Fraiberger & Sundararajan, *supra* note 93, at 28.

153. *Id.* (“This segment is more likely to switch from owning to renting, provides a

Fraiberger and Sundararajan to conclude “the true promise of the sharing economy” may be “as a force that democratizes access to a higher standard of living.”¹⁵⁴ Simply put, “[o]wnership is a more significant barrier to consumption when your income or wealth is lower, and peer-to-peer rental marketplaces can facilitate inclusive and higher quality consumption, empowering ownership enabled by revenues generated from marketplace supply, and facilitating a more even distribution of consumer value.”¹⁵⁵ If regulation drives up the price of sharing, however, these positive effects will undoubtedly be reduced.

While sharees may be forgoing ownership (much like individuals in cities with well-developed public transportation systems might choose to forego owning a car), they are nonetheless becoming a class of individuals who are sharing in someone else’s ownership. This, however, is not evidence of a declining ownership model for property, as some would claim.¹⁵⁶ In fact, it may very well represent a more efficient model with fuller utilization of ownership potential. And, it may illustrate the economic benefit in allocating ownership dollars so that every property is better utilized by dividing the property’s “labor” (or contribution), much like specialization and division of human labor leads to a more efficient allocation of human capital.

Even if one adopts the idea that a resource should be relatively accessible for sharing—perhaps at minimal cost—it seems nearly impossible to imagine an initial capital outlay for the creation of the good or the investment in the acquisition of the property, later dedicated to sharing, without some initial grant of ownership rights. Such a notion would also require the maintenance of an identifiable owner throughout the property’s lifetime who has ultimate control and managerial responsibility over the property. Setting aside utopian ideas of common ownership or socialist type controls on ownership, most of the sharing economy activities involve traditional investment in property. This property is simply

higher level of peer-to-peer marketplace demand, is more likely to contribute to marketplace supply, and enjoys significantly higher levels of surplus gains.”).

154. *Id.* at 28–29 (“Perhaps the most important takeaway from our current findings, one we fully expect to persist with extensions and alternative calibrations, is that peer-to-peer rental marketplaces have a disproportionately positive effect on lower-income consumers across almost every measure.”).

155. *Id.* at 29.

156. *See generally, e.g.,* Shelly Kreiczer-Levy, *Share, Own, Access* (May 11, 2016), <http://ssrn.com/abstract=2777119>.

being dedicated—after the initial acquisition and establishment of ownership rights—to new or broadened uses designed to maximize the utility of the resource.

If at any point the sharing model no longer encompasses a productive and efficient use of the resource, the owner (who has not abandoned any of her traditional rights to property, including control rights) can alter the ways in which the property is utilized and experienced, moving the property away from dedication to the sharing model. Such changes in an owner's sharing position would be subject only to any existing contractual restraints.

Where an apartment might at one point be turned into an Airbnb outlet, the owner can recommit the resource to a purely private residence if the rents become too low or the hassle too much. Would-be sharees could not make any demand to stay at the apartment after the shift away from the sharing model precisely because these strangers to the property would not have any ownership rights to it. Airbnb, as a business, for example, cannot demand that the apartment remain in its rental pool in perpetuity for the exact same reasons. Such a situation would be no different than an owner of a retail space deciding that bookstores are no longer profitable and thereafter making an ownership decision to re-constitute the space as a burger joint. The decisions over how to use the property, including the decision to change the usage, remain and reside with the owner. The right to choose whether to share comes with the rights to choose with whom to share, reject a would-be sharee, eject the sharee, and otherwise exit the relationship (subject to potential liability for violation of contractual terms and for any public policies that might restrict contractual behavior, such as anti-discrimination laws).

The sharer retains ownership rights and control over the property. The sharee is merely partaking in a privileged use of the property as a result of the sharer's choice. The sharer can share because it is hers, making ownership the primary prerequisite to the sharing enterprise. Sharing—whether informally, like hosting dinner guests, or more formally, such as through a homesharing contract—simply becomes an extension of the primary rights associated with one's ability to use the property one owns. As the

noted property theorist James E. Penner has explained, “the ability to share one’s things, or let others use them, *is* fundamental in the idea of property.”¹⁵⁷

IV. DEFINING “SHARING” OF PROPERTY AS DISTINCTIVELY USED IN THE CONTEXT OF THE MODERN “SHARING ECONOMY”

The sharing economy is an exchange economy with critical features that include the exchange of interests in property and a conferral of rights to use or benefit from real or personal property. It is an exchange in property similar to how one leases, grants an easement or license, or otherwise allows one to enjoy the benefits of one’s property, including informal, no-exchange and gratuitous inclusions, like dinner guests and weekend stays by the in-laws at your home, or co-workers sharing a ride to the diner for lunch. While the sharing economy may involve gratuitous sharing at times, most often “sharing with a price” better equates with our discussions of exchange. Either way, it fits within the notion of inclusion and the sticks that one has in their property to allow others to enjoy and use.

Once we understand the need to appreciate the link between sharing and ownership, we can better identify the unique characteristics we are attributing to the word “sharing” as it is presently being used in sharing economy literature. Such a definition should also allow us to better distinguish sharing from other types of stranger relationships with property—like commons, trespass, and stealing—and from other cooperative property relationships, like concurrent tenancies. “Sharing,” as the term is usually used in recent literature, is a special brand of permission; the retained ownership interest and the right of revocability distinguishes “sharing” from these other types of relationships.

Very broadly stated, to “share property” should be defined as: to include, formally or informally, another in the use and enjoyment—and sometimes even formal ownership interests—of one’s property.

There are various ways in which we use the word “share” in our vocabulary, including our usage related to property itself. For example, I might say in a will that I want my children to each get

157. James E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 745 (1996).

a share of my estate upon my death. Or, I might own a share of a corporation or in partnership assets. Or, we may share some property in a type of concurrent estate, where co-ownership or cotenancy is present. In each of these situations, the word “share” is used to connote some formal shared ownership interest in an asset.

Alternatively, I might say that I want to share my dinner table with my friends for Thanksgiving. Or, I might share a ride with my co-worker so that we can use the carpool lane. Or, I might say that I am letting my neighbors share my backyard for a game of croquet played across our two properties. Certainly these uses of the word do not suggest that I want my friends to have an ownership interest in my dinner table or my house when they visit and dine with me, that I am claiming an ownership interest in my co-worker’s car, or that my croquet-playing neighbor can somehow profit from the sale of my backyard because he has some stick in that bundle. These most immediate examples, instead, illustrate a use of the word “share” to indicate my willingness to allow someone to interact with and benefit from something that I own and the “sharing” is possible if and only if I permit it. The sharing is not mandated as a result of some pre-existing legal, property rights-based claim to the access or use in question.

More often than not, when individuals use the word “share” or “sharing” to discuss interactions in the sharing economy, their use equates with the latter examples rather than the former—at least when it comes to real property and chattel. The sharing which occurs in the sharing economy is principally related to this type of non-ownership interest which could either involve informal sharing, which does not rise to the level of contract rights (like hosting friends at dinner or neighbors competing at croquet) or, in its more sophisticated and emerging form, it could involve a more formal type of sharing *of property*, but *by contract* rather than through a transfer of an *ownership* interest in the thing.

So, the type of sharing we see in Airbnb or Uber, for example, is distinguished from a tenancy in common for a house or a co-ownership interest in a car because there is no transfer of a fee interest in the house or a property right in the car when those things are “shared.” This is also the differentiating factor which explains why the sharing economy is not equivalent to the types of “shares” in property that we discuss when talking about a partnership, corporation, trust share, or inheritance. If you ask a

passenger in an Uber-operated vehicle whether she owns the car, she will likely (and should) say no. If you ask an individual whose name is jointly titled to a car with another individual whether she both shares and has an ownership interest in the car, she will undoubtedly answer yes—quite differently from the passenger in the Uber-operated rideshare vehicle. A similar contrast could be drawn when asking whether either “owns” the house in which they are sleeping.

Thus, we can start to develop some distinguishing characteristics for the use of “share” and “sharing” in the sharing economy context, from which we can also begin to develop a definition, informed by our appreciation for the prerequisite role of ownership and the right to include when forming the terms governing the sharing relationship. Again, this article limits the scope (and the forthcoming definition) to the sharing of real property and chattel. While what is being said here can certainly be extrapolated to better understand the meaning of sharing services in the sharing economy,¹⁵⁸ service- and human capital-based sharing are beyond the scope of this article.

Sharing occurs when an owner-sharer grants a nonowner-sharere permission to use, possess, or access sharer’s property without transferring an ownership interest and without an ex ante legal obligation to so share (such as through a pre-existing concurrent estate). Put more precisely, an ownership-sensitive definition of sharing can be stated as follows: sharing of a good or real property exists when Owner (“O”) exercises her right to include by authorizing Stranger (“S”) to the property the temporary right to use or access O’s property in some limited and defined manner—converting what would have been a trespassory act by S, into a legal, non-trespassory act—where such authorization is revocable by O in property law, but where liability may exist in contract for any such revocation or interference by O in the rights or authority granted by O to S.

Scholars, judges, and regulators should proceed to use such an ownership-sensitive definition—recognizing that sharing is an extension of ownership and involves an application of the ownership stick authorizing the exercise of the right to include. By doing so,

158. See Kreiczler-Levy, *supra* note 7, at 78 (noting the distinction between “transactions that share products and transactions that provide services”); Oei & Ring, *supra* note 9, at 1007 (describing examples of service-based sharing business models).

they will acknowledge both the legal and practical reality that ownership is a predicate to sharing and that the motivation to share consequently can be substantially diminished if strong protections for ownership rights are not maintained in any legal or policy reforms.

V. IMPLICATIONS OF THE OWNERSHIP PREREQUISITE ON SHARING REGULATIONS

The sharing economy is being examined closely, in part to determine what regulatory structures and mechanisms should be applied to it.¹⁵⁹ This final part examines those questions very generally. This part concludes—as its principal contribution to this growing, complex discussion—that, while making regulatory decisions, law and policymaking must continue to remember that any regulation of sharing is a regulation of property ownership, rather than simply the regulation of ordinary business activity.

There are a lot of unknowns for sharing economy industries when it comes to understanding the regulations associated with their emerging and expanding market footprint.¹⁶⁰ Regulators too are only beginning to grasp their sphere of authority (or lack thereof) over sharing activities and when and how to seek new, expanded, or better-tailored authority to govern sharing. These regulators are struggling to identify a regulatory structure, especially with respect to the proper regulations of owners of the assets shared (a set of questions that have been left “largely in the background”), rather than the businesses running the platform for the sharing, which look more like traditionally regulated businesses (and which have been the focus of most regulatory efforts to date).¹⁶¹

159. See Aloni, *supra* note 21, at 1427–30 (surveying the types of regulatory approaches and paradigms recently being advanced by policymakers and academics); Miller, *supra* note 2, at 150 (setting forth proposed governing principles for the design of regulatory structures targeting aspects of the sharing economy, with a particular focus on short term rentals like Airbnb).

160. See Dyal-Chand, *supra* note 3, at 244 (describing the uncertain state of regulating sharing economy activities); Miller, *supra* note 2, at 200 (“The sharing economy is changing quickly, thus complicating a clear regulatory response.”); *The Rise of the Sharing Economy*, *supra* note 11 (explaining that the “main worry is regulatory uncertainty”).

161. Dyal-Chand, *supra* note 3, at 246.

Some cities have made the reflexive choice to ban certain sharing activities.¹⁶² As Miller explains, however, this may not be an optimal choice given that, even when sharing activities are made illegal, “the market for sharing economy uses is insatiable” and individuals will defy or circumvent bans.¹⁶³

As stated above, one might consider the “sharing right” as another stick in the bundle of rights representing the interests associated with any one piece of property, closely linked with the right to include. It is a stick that is subject to common law limitations and statutory or regulatory control through public laws just like other sticks associated with the property.

Several other regulatory controls seem to exist that are naturally or seamlessly applicable to the sharing economy. Generally, applicable land use controls, like nuisance, could carry much of the regulatory load to control against externalities caused by new or increased intensity of property uses.¹⁶⁴ Similarly, existing civil and criminal laws provide consumer protection and control against fraud and other abuses.¹⁶⁵ Moreover, reputational controls, long applauded by advocates of private ordering, are receiving renewed interest as effective mechanisms for private enforcement of market standards and discipline for bad actors in the sharing economy, especially with diminished information costs facilitated by the internet and social networking.¹⁶⁶ Some contend that attempts to add new regulatory regimes, beyond what have already been generally developed, could actually be counterproductive—decreasing the supply of sharing resources and thereby decreasing the diversity of consumer choice.¹⁶⁷

This article remains agnostic on the advisability or practicality of the existing regimes and whether we should add other ways to control sharing activities. Sharing raises questions regarding how zoning or other land use controls might be used to regulate shar-

162. Miller, *supra* note 2, at 156 (describing some initial efforts by several cities to “ban[] certain sharing economy uses”).

163. *Id.*

164. See Michael N. Widener, *Shared Spatial Regulating in Sharing-Economy Districts*, 46 SETON HALL L. REV. 111, 125, 133–34, 159 (2015).

165. Spencer W. Waller et al., *Consumer Protection in the United States: An Overview* 3–5 (Eur. J. of Consumer L. Working Paper, May 2011), <http://ssrn.com/abstract=1000226>.

166. See Koopman et al., *supra* note 16, at 541–42.

167. See *id.* at 532 (describing the ill-fitting and reflexive attempts by municipalities to “impose older regulatory regimes on these new services without much thought about whether they are still necessary to protect consumer welfare”).

ing activities. Other issues—like whether and how to tax sharing activities like hotels, or whether we should create licensing regimes for ridesharing providers similar to those which traditional taxicab markets have been subjected—are not new or unique to sharing as a use of property. The same is true for the development of consumer protection law, which regularly must decide how to ensure new entrants to the market are not circumventing policies.

Owners may place themselves in certain categories of control established by law based on different types or degrees of usage, such as converting an informal and private dinner party into a public accommodation. When the owner's legal character changes from the private side of the spectrum to the commercial side,¹⁶⁸ policymakers and judges might choose to regulate enhanced degrees of sharing similar to our regulation of firms (with anti-discrimination laws, labor laws, or similar restrictions being triggered by the activity's classification). Again, this article does not propose standards for how or if this should be done. Such choices are inevitable, yet must be made with a background understanding of the ownership rights being implicated.

There is no doubt that these types of questions and concerns will need to be addressed as law and policy adapt to the emerging sharing economy and its social effects.¹⁶⁹ Every property regime eventually develops a set of rules to control its negative externalities and to coordinate its operation with other social values.¹⁷⁰ But, the specific parameters of any of these regulatory choices need not be determined to understand the more basic point of this article.

This article has sought to stress that regulators must understand the basic ownership idea from these pages before proceed-

168. See Kreiczer-Levy, *supra* note 7, at 64 (explaining that the sharing economy increasingly “calls into question the foundational distinction between privately used property and commercial property”); see Miller, *supra* note 2, at 202 (“The differences between individual and corporate interests are becoming increasingly difficult to distinguish as the sharing economy matures.”).

169. Aloni, *supra* note 21, at 1420 (explaining why “the debate on the [peer-to-peer] economy—its benefits and drawbacks—is a heated and complicated one”); Dyal-Chand, *supra* note 3, at 308–09 (“Regulation of the sharing economy is, of course, inevitable” and the “regulatory options are rich and varied”); Oei & Ring, *supra* note 9, at 991 (discussing the necessity to deal with the “important legal and regulatory issues” raised by the sharing economy).

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

ing. The understanding that sharing is grounded in ownership should inform the debate on such regulatory choices and the parameters, scope, structure, and appropriateness of different regulatory regimes that might be developed in relation to these emerging and disruptive property uses. The legal and regulatory decision makers should appreciate the implications of affecting owners and ownership whenever an entity regulates sharing activities. They should be aware, for example, of potential hurdles ahead—such as running the gauntlet of takings law to determine whether regulation of a shared property goes too far in limiting ownership rights, much the same as we do when we evaluate rent control, building codes, or used car sales.

The lesson intended by this article is that one cannot regulate sharing without regulating ownership itself. This reality has implications for any step in the judicial, legislative, or regulatory process. Sensitivity to the reality of ownership principles as the foundation to sharing will ensure that both sharing and ownership prosper.

CONCLUSION

The sharing economy has opened up myriad new opportunities for the expanded and more efficient utilization of property assets. But individuals cannot share what is not theirs and will not share what they fear losing if, upon giving up possession, they do not have reasonably certain legal guarantees of a right to effectively demand its return.

Property law's robust protections for ownership can create the prerequisite fertile legal atmosphere necessary to motivate sharing. Therefore, property law would do well to remember the power of ownership principles as drivers for the enterprise of sharing principles—developed by individuals as early as childhood and informing our choices to share ever since. Regulators too should be cautious about constricting sharing activities and remain conscious of the reality that they are concomitantly restricting private property rights. Scholars and commentators should take notice of the utility in an ownership-sensitive definition for “sharing” when it comes to goods and real property in the sharing economy. This ownership-sensitive conception of sharing helps to properly place the activities we are witnessing within a cohesive framework of property law and its foundational rights of exclusion and inclusion.