

2011

## Gender as a Core Value Teaching Property

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### Recommended Citation

Joan C. Williams, *Gender as a Core Value Teaching Property*, 36 *Oklahoma City University Law Review* 551 (2011).

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## GENDER AS A CORE VALUE: TEACHING PROPERTY

Joan C. Williams\*

I have been teaching property for nearly thirty years and bring gender to virtually every unit I teach—but in subtle ways that avoid the potential for pushback if students think they are being taught *gender not property*.

The first challenge is to open up room for the view that it is legitimate to talk about the distribution of property as an integral part of the property course. I do this by discussing three different visions of property that co-exist in American law: the feudal vision, the republican vision, and the liberal vision.<sup>1</sup> The feudal vision viewed property as social glue, as an institution whose proper role was to transmit the existing social hierarchy from one generation to the next.<sup>2</sup> Underlying this vision was the view that hierarchy was natural and desirable because the “Great Chain of Being” ordered people’s estates and that virtue consisted in fulfilling the role proper to one’s estate.<sup>3</sup> The republican vision, today associated with Thomas Jefferson, maintained that the purpose of the institution of property was to preserve the republican form of government.<sup>4</sup> Jefferson and others believed that this is best achieved through the widespread distribution of property because property gives people the independence to pursue the common good rather than their own narrow self-interest.<sup>5</sup> Unlike the republican vision, which seeks to design property rights to create a certain type of politics, the liberal vision seeks to design property to achieve the economic goal of creating

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1. See CURTIS J. BERGER & JOAN C. WILLIAMS, *PROPERTY: LAND OWNERSHIP AND USE* 10–111 (4th ed. 1997).

2. JESSE DUKEMINIER ET AL., *PROPERTY* 173–80 (6th ed. 2006).

3. Joan C. Williams, *The Rhetoric of Property*, 83 *IOWA L. REV.* 277, 290 (1998).

4. *Id.* at 308–26.

5. *Id.* at 317.

wealth.<sup>6</sup> Because it is vital to show students how anything out of the ordinary will actually be useful to them as lawyers, I use the *three visions* to help students identify and formulate creative arguments in property contexts where the law is vague or chaotic or when the law cuts against their client. In this way, I turn teaching *theory* into teaching *persuasion*.

I also use the visions to explain the underlying logic of different areas of property law. The feudal vision helps explain estates in land and why *no man can create an estate*; allowing this kind of discretion would jeopardize the feudal goal of recreating the existing hierarchy over time.<sup>7</sup> The republican vision, which shows up in servitudes, landlord-tenant, and takings cases, provides students with a home-grown American language with which to argue that property rights need to be shaped and reshaped to achieve the common good and that concern over the distribution of property is a legitimate concern in American law.<sup>8</sup> When I introduce the republican vision, I also introduce data documenting the profound influence of gender and race in determining the distribution of property in the United States today. By presenting the liberal vision as one vision among others, I also attempt to de-familiarize the *commonsense* notion that property law is *naturally* about unfettering individuals to create the wealthiest society without regard for how that wealth is distributed.

Beyond that basic framework, I weave a gender perspective into my discussions of many arenas of property doctrine. In concurrent estates, I use domestic violence examples to discuss partition and ouster; we also discuss domestic violence in the context of takings law. In landlord-tenant law, we discuss why tenants are disproportionately poor (because women are); we also discuss whether this affects how the judges of the landlord-tenant revolution decided the cases. (It did.) In future interests, we talk about how the ideology of a gender hierarchy was an integral part of the Great Chain of Being mentality behind the feudal system of estates. In the section on real estate, we talk about why women (along with people of color) are disproportionately affected by the foreclosure crisis. Close analysis of a real-estate mortgage and title-insurance policy also reveals how those documents are stacked against the individual and opens up space for discussion about whether liberalism's promise of protecting individual rights is realized in a society with dramatic power

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6. BERGER & WILLIAMS, *supra* note 1, at 33-34, 76.

7. *See id.* at 10-28.

8. *See id.* at 28-64.

differentials.

The most sustained discussion of gender concerns marital property. There, we talk about how and why household work is not translated into property rights in the context of divorce through *Borelli v. Brusseau*<sup>9</sup> and *Martinez v. Martinez*.<sup>10</sup> In *Borelli*, a husband promised to leave his wife property in return for her nursing him after he suffered a stroke; she kept her promise, but he did not keep his.<sup>11</sup> The court determined that he did not have to leave his wife property because there was no consideration for his promise and “spouses” owe each other a “duty of care.”<sup>12</sup> (Does that mean, asked the dissent, that if “Mrs. Clinton became ill, President Clinton [would have to] drop everything and personally care for her?”<sup>13</sup>) In *Martinez*, a trial court made a very low award to a wife with a high school education and three children, rejecting a much higher award and a novel legal theory that would have valued the fact that her husband (a doctor) could not have pursued his studies if she had not been caring for the children.<sup>14</sup> I end this unit by giving the students statistics on the hours lawyers work and discussing who in the class expects to work part time for part of their career. This is a way of 1) teaching students how to use social science to make a point, 2) making the point that Mrs. Martinez’s situation is not a thing of the past, 3) encouraging students to think through who is entitled to what property rights within the family, and 4) giving them a chance to work through their anxieties about the work-family conflicts that are commonplace in the legal profession.

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9. *Borelli v. Brusseau*, 12 Cal. App. 4th 647 (1993).

10. *Martinez v. Martinez*, 818 P.2d 538 (Utah 1991).

11. *Borelli*, 12 Cal. App. 4th at 651.

12. *Id.* at 654.

13. *Id.* at 660 (Poché, J., dissenting).

14. *Martinez*, 818 P.2d at 539.

