Re-Reading Property*

Joseph William Singer**

Like dozens of other people, I had set up a date to talk with Mary Joe Frug. I had hoped to get her advice about the property casebook I am writing. Her scholarship on gender issues in contracts casebooks has heavily influenced both the content and the structure of my own book. Our conversation setting up our date took place several days before her death. I have been playing out the conversation we might have had ever since.

Mary Joe was a vivid person. When she walked into a room, it was as if a light had been turned on. I see her out of the corner of my eye and I seem to feel her presence. I hear her voice. I hear the questions she might have asked, the comments she might have made. And yet, I know that I cannot know what she might have said; she always said such surprising things. I can only guess at what they might have been. This article is a result of such ruminations.

As many other people have noted, whenever Mary Joe was with anyone else, she made them feel as if they were the most important person in the world. She took other people seriously. She really wanted to know what you thought—about a book, about a movie, about what someone had said. She wanted to know so much that she often refused to say what she thought until she heard what you had to say; she did not want to influence you. She made others feel intelligent, funny, fascinating, original. Of course, it was Mary Joe who was all of these things. She made other people feel as if they had a lot to learn; she always had so many questions to ask. Mary Joe helped other people learn to ask questions. In her presence, other people felt good about themselves. That is a rare, rare talent. She taught us how to treat other people with dignity and love. I cannot say how much I miss her.

I. Questions: Gender, Race and Property

Why did men drink wine and women water? Why was one sex so prosperous and the other so poor?

Virginia Woolf

Five score years ago, a great American, in whose symbolic shadow we stand, signed the Emancipation Proclamation.

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One hundred years later, the Negro lives on a lonely island of poverty in the midst of a vast ocean of material prosperity. One hundred years later, the Negro is still languished in the corners of American society and finds himself an exile in his own land.²

Martin Luther King, Jr.

What would property law look like if we took gender issues as central, rather than peripheral, concerns? Mary Joe Frug's analysis of the role of gender in contracts casebooks suggests that we would learn a great deal about property if we ask this question.³ But why only gender? Why not also ask about other differences that have been made to matter?⁴ What about race? Or class, disability, sexual orientation, religion? In fact, if the social treatment of women and men has differed significantly along these lines, it seems that if we talk about gender without noticing these cross-cutting differences, we will only be talking about some women and some men and therefore failing to notice the different social constructions that gender takes with men and women of different races and classes.⁵

If we take these questions seriously, we might examine property law from several angles. The first angle might involve examining the relation between property theory and social reality. Do the principles used to justify property acquisition apply equally to women and men? Which women and which men? How has race made a difference in the acquisition and distribution of property? How has the intersection of race and sex made a difference? What about other factors, like disability? Does property theory match up with the realities of social practice? Does historical practice correspond with the rhetoric justifying the distribution of property?

Second, if property law is related to the distribution of both wealth and poverty, are there entitlements which are of central importance to men and women of color and white women that are excluded from the traditional concept of property? Which topics are segregated from the traditional subject of property and therefore marginalized? If we take these subjects that have been put on the back burner and make them central—or at least give them equal opportunity to be taken seriously—

⁴ Martha Minow, Making All the Difference (1990).
how would our understanding of the "core" topics change? How do traditional conceptions of the scope of property law obscure the role that law plays in determining the distribution of wealth and poverty?

Third, how might we reimagine property law to take into account the people whose interests, needs, and perspectives are excluded from, or marginalized within, traditional understandings of the field? For example, what would happen if the principles of antidiscrimination law were as central to property law as the principles traditionally associated with property, such as promoting alienability and limiting the power of the dead hand? Does antidiscrimination law constitute a set of counter-principles limiting the effect and validity of traditional property principles or do the values underlying antidiscrimination law cohere with those principles? Or do antidiscrimination doctrines accomplish both these things? If we focus on the interests and situations of women of all races and men of color, how might our understanding of antidiscrimination law change and how would that affect the way we view property? How can issues about race, gender, disability, and the like be integrated into the law school curriculum so that we are not merely reversing what is at the margin and what is at the center but reconceiving the system as a whole?

II. WINE, WATER, AND LONELY ISLANDS: A REALITY CHECK

Mary Joe Frug's work suggests that we ask: Do property rules apply equally to women and men? Do women acquire property in the same ways that men do? Do women acquire property in the same ways that men do? Do property doctrines have an appearance of neutrality but a disparate impact with respect to gender and race? Is property theory gendered in the sense that it directs our attention away from the experiences and social contexts of women and men of color and white women? Is the social and legal construction of property associated with maleness?

Many of the most cherished truisms of property theory turn out to be questionable when we find out that they seem not to apply, or to apply in different ways, to white women and women and men of color. We find a sharp disjunction between ideals and reality. The rhetoric justifying property rights does not match either historical or current practice. For example, the two major justifications for original acquisition of property rights—first possession and labor—seem not to apply equally to women and men of color, or to white women. Historically, labor has not led to property rights for these persons; nor were they always given an opportunity to possess property. Rather, more often than not, their labor has been appropriated by others without compensation, and they have been excluded from access to valued resources reserved for white men.
A. Labor

Legal scholars and judges have often argued that labor provides the legitimate basis of property rights. Some labor theories focus on the moral claims of the producer; others focus on the utility of rewarding productive labor. Both approaches assume that those who labor create property and that their rights over the resources they have created are respected by the legal system. This line of argument creates the impression that most property is deserved because it is based on, or has its origin in, productive labor. Arguments based on first possession also appeal to a labor theory; they conjure up images of long journeys into the wilderness and many hardships in preparing and working the land.

If we ask about the relation between labor on the one hand, and race and gender on the other, we see that this hypothesis fails to accord with the facts. The labor of both female and male slaves was appropriated for many, many years. Yet, at no time was this labor compensated. The United States could have attempted to repay this labor by generous payments to the freed slaves, but this did not happen. The United States might also have granted ownership of plantations to the people who had worked the land and the plantation houses without compensation, but this did not happen either. Instead, the federal government assigned ownership to the previous slave masters, thereby piling injury upon injury.

If we think about gender, we may ask with Virginia Woolf: Why it is that women are more likely than men to be poor Women continue

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6. See Richard A. Posner, The Economics of Justice 66 (1983) (explaining the moral difference between purchase and theft of a necklace by arguing that a buyer’s monetary offer “was in all likelihood accumulated through productive activity—that is, activity beneficial to other people besides himself” while the thief “provides no benefit to the owner of the necklace or to anyone else”); International News Serv. v. Associated Press, 248 U.S. 215 (1918) (recognizing a property right in news partly because “the acquisition and transmission of news require elaborate organization and a large expenditure of money, skill, and effort”); see also Carol Rose, Possession as the Origin of Property, 52 U. Chi. L. Rev. 73, 73-74, 80 (1985) (explaining the labor theory of the origin of property rights and arguing that “the common law of first possession, in rewarding the one who communicates a claim, does reward useful labor; the useful labor is the very act of speaking clearly and distinctly about one’s claims to property”).


8. Richard Epstein, No New Property, 56 Brook. L. Rev. 747, 749-50 (1990) (“As inheritors of the Lockean tradition, the basic theory [in the United States] was that property rights emerged from first possession, from first occupation, from homesteading, and not from state grant.”).  


10. Victor R. Fuchs, Women’s Quest for Economic Equality 84-89 (1988) (women are more likely than men to be poor).
to perform most of the labor in the household. Moreover, they do this for free, or, more accurately, without any direct compensation from the labor market. Men as a group are heavily dependent on this uncompensated labor, as is the economy in general. In contrast, most of the work traditionally performed by men is monetarily compensated by means of an employment contract, by sale, or by investment. This social division of uncompensated versus compensated labor has a lot to do with the fact that women as a class are poorer than men.\footnote{Id. at 4 ("[W]omen's weaker economic position results primarily from conflicts between career and family, conflicts that are stronger for women than for men."). See also Paul Weiler, The Wages of Sex: The Uses and Limits of Comparable Worth, 99 Harv. L. Rev. 1728, 1779-88 (1986) (arguing that a significant portion of the difference between the overall wages of women and men can be attributed to the fact that many women work part time or interrupt their work careers to take time out to care for children).}

The fact that women undertake most of the labor of caring for children plays a significant role in perpetuating the correlation between poverty and gender.\footnote{There is still a lot of old-fashioned sex discrimination going on as well.} Women are significantly more likely than men to be poor, especially if they are single and have children.\footnote{Fuchs, supra note 10, at 86.} In 1986, the poverty rate for children was almost twice the poverty rate for adults.\footnote{Id. at 94, 107.} Twenty percent of all children were living in poverty, as opposed to eleven percent of adults.\footnote{Id. at 107.} The poverty of children is strongly associated with single-parent households.\footnote{Id.} Victor Fuchs notes that "children who live in households without an adult male are extremely likely to be in poverty."\footnote{Id. at 107-08.} Further, there is an enormous difference in the poverty rate for children according to race.\footnote{Id. at 108.} In 1986, forty percent of all black children lived in households without an adult male, and seventy percent of such children were poor.\footnote{Id.} In contrast, only twelve percent of all white children lived in households without an adult male, and fifty-one percent of such children were living in poverty.\footnote{Id.}
part-time, to interrupt their careers to care for children, to see homemaking as a career in itself, and to accept the "double burden" of both work and family obligations.\textsuperscript{21} Further, taking care of children is simply not seen as work. Recent workfare legislation directed at women who receive public assistance implicitly assumes that child care does not constitute valuable work, in and of itself. Welfare is conceptualized as a gratuity, rather than an earned salary for parents who do not receive a salary indirectly through the market income of a spouse or partner.

Is labor in the marketplace equally available as a way to accumulate wealth, regardless or sex or race or class? In a pioneering article, Mary Joe Frug explored what she called the hostility of the labor market to working parents.\textsuperscript{22} Examination of the gendered relation between work and family has now become a staple of feminist legal scholarship.\textsuperscript{23} The fact that women perform most of the work taking care of children means that women are systematically disempowered in the marketplace. Because most women, unlike most men, take on the socially necessary task of taking care of children, they cannot devote as single-minded attention to jobs as men. Because many women work part-time for some portion of their earning lives, they necessarily earn less than those who work full-time. Interrupting careers or working part-time interferes with advancement, which further decreases women's wages relative to those of men. Women more than men bear the double burden of work and family, both by sacrificing career opportunities and higher salaries and by assuming the responsibilities of juggling work and family, often with little sympathy or help from their employers.

In addition, the historic pattern is that work performed mostly by women is significantly undervalued.\textsuperscript{24} For example, given the importance of education, both to individuals personally and to the economy as a whole, one might expect that teachers of young children would be

\textsuperscript{21} Id. at 58-64. I get this phrase from Marlene Booth.


\textsuperscript{24} See \textit{Alice Kessler-Harris, A Woman's Wage: Historical Meanings and Social Consequences} 117 (1990).
valued as important professionals. Furthermore, teaching is not easy. Yet both elementary school teachers and child care workers are paid relatively low wages. Similarly, nurses have traditionally been poorly paid relative to their degree of education and the social value of their work. Labor traditionally performed by women appears to be not as highly valued in the marketplace as labor traditionally performed by men. Many people have made comparisons between school administrators and teachers, doctors and nurses, truck drivers and secretaries.

The relation between gender and oppression is not simple, however. Many women who have jobs in the workforce hire other women to take care of their children while they are at work. Although childcare is expensive from the standpoint of the working parent, it is often insufficient from the standpoint of the childcare worker, who may be underpaid relative to the social importance and difficulty of the work she does. Similarly, some women may hire others to clean their houses. The valuation of this work, the form that personal interaction takes between employers and domestic workers, and the differences among relationships of women of different races, may be critically related to the social construction of both class and racial relationships. Elizabeth V. Spelman notes that the failure to consider such relationships not only hides from our view the differences among women, but also the ways in which some women may participate in perpetuating oppressive social relationships.

Focusing on gender and race teaches us that the relation between labor and property is not linear. Labor has often not led to property rights or to wealth, and the occasions on which it has not are often related to gender and race. Does this mean that labor is not a legitimate source of property, or that the labor of women and men of color and white women should be recognized and given equal treatment? What would it mean to give all labor equal treatment, anyway? Com-modifying all work in the home may be exactly what we do not want to do.

Focusing on gender and race problematizes the relation between labor and property without clearly solving the problem. Yet it may be a significant advance to realize that traditional discussions of the topic were implicitly focused on white men, and that one of the central justifications for the distribution of property has not been consistently applied. This places the justice of the existing distribution of wealth in substantial doubt and raise serious questions about what can and should be done about it.

25. Fuchs, supra note 10, at 137 ("Women 'childcare workers' earn only about two-thirds as much per hour as other women at comparable levels of education.").
26. Spelman, supra note 5.
B. Possession

Legal scholars often argue that first possession is the basis of original acquisition of property. The traditional story about the settlement of the frontier in the United States is that pioneers made the difficult journey out into the wilderness, staked their claims and worked the land. Government followed, recognizing their property rights based on their occupation of vacant land and the labor they expended in improving it. I believe some property casebooks unconsciously convey this message. By beginning consideration of the topic of property with cases about first possession, lost or abandoned property, or wild animals, these books suggest that property rights in the United States originate in possession of unclaimed resources. First possession appears legitimate as a principle of property acquisition since it rewards investment and labor and does not interfere with the rights of others. This traditional story allows Richard Epstein, for example, to claim that property rights originate from below in the United States, by the actions of private individuals possessing vacant land, and not from governmental grant, as in what he views as tyrannical regimes. This assumption overlooks the fact that homesteading itself was based on governmental grant.

Moreover, if we focus our attention on the relation between race and property, we notice that American Indians are left out of this traditional story of origins. Often they are not mentioned at all in legal scholarship about property, in property casebooks, or in cases about property rights. This omission in discussions of the principle of first possession implies that the land which the settlers occupied was vacant. When American Indians are mentioned, their situation and history is often distorted and false. Many non-Indians believe that American Indian nations did not occupy most of the land in the United States; that

28. Epstein, supra note 8; Richard Epstein, Possession as the Root of Title, 13 Ga. L. Rev. 1221 (1979); Rose, supra note 6. But see Robert A. Williams, Jr., The American Indian in Western Legal Thought: The Discourses of Conquest (1990) (explaining how colonial theories of first possession justified seizing land from the actual first possessors of land in America).


30. Epstein, supra note 8, at 750.

it really was vacant.\textsuperscript{32} Or they assume that these nations voluntarily ceded their lands in mutually advantageous treaties.

The truth is that, although the United States generally protected the possessory interests of non-Indians, it has often run roughshod over the possessory interests of American Indians. It is simply not true that most of the land in the United States was “vacant.” Although the land may not have been built up, almost no land fell outside recognized areas of tribal sovereignty. The settlers did not enter wilderness lands unclaimed by anyone. Rather, they invaded Indian lands. They took land away from the first possessors, and in most cases, were backed up by the coercive power of the United States military. The history of original acquisition of property in land in the United States therefore is based not on the principle of first possession, but on the very opposite: the seizure of property from first possessors by force. The real first possessors of land were deemed to be outsiders, savages. Their humanity was questioned, their possessory rights denied, their just claims rendered invisible.\textsuperscript{33}

Nor is this oppressive treatment of American Indian nations something that happened only in the distant past. In 1955, for example, one year after the decision in \textit{Brown v. Board of Education},\textsuperscript{34} the Supreme Court ruled that Congress was constitutionally free to seize the property of American Indian nations without compensation if the United States had not previously recognized tribal rights to the land by treaty or statute.\textsuperscript{35} As recently as 1980, the Supreme Court held that Congress has no constitutional obligation to pay just compensation for property seized from American Indian nations if it is, in good faith, exercising its so-called “trust” power to manage tribal property, as it sees fit, in the best interests of the tribe, and exchanges that property for property of “equivalent value.”\textsuperscript{36} In the non-Indian context, the

\textsuperscript{32} Reverend Lyman Abbott, one of the founders of the Lake Mohonk Conference, wrote in 1885: “‘We do owe the Indians sacred rights and obligations, but one of those is not the right to let them hold forever the land they did not occupy, and which they were not making fruitful for themselves or others.’” \textit{2 Francis Paul Prucha, The Great Father: The United States Government and the American Indians} 624 (1984) (quoting Lyman Abbott).

\textsuperscript{33} \textit{Williams}, supra note 28.

\textsuperscript{34} 347 U.S. 483 (1954).


Supreme Court is not satisfied with equivalent value; it requires fair market value for the property.\textsuperscript{37} Nor would the Supreme Court ask whether or not the government acted in "good faith." The government's motivations are simply irrelevant in the non-Indian context; compensation is required if a property right has been invaded, period.

Although many treaties were entered into with the American Indian nations, it is wrong to conceptualize these agreements as mutually advantageous, voluntary undertakings. They were, rather, involuntary arrangements by which the various Indian nations gave up their lands under threat of violence and further loss. The treaties were advantageous to the tribes in the same way that it is advantageous to acquiesce when a robber announces: "Your money or your life"—advantageous compared to the available alternatives.

These agreements did provide some security to the tribes that their right to possess their remaining lands would be protected forever. The United States has repeatedly violated those promises, abrogating almost every treaty it has ever made.

It turns out that the fundamental premise underlying the actual distribution of land in the United States was not first possession, but rather the race of the possessor. The United States failed to respect the first possession of American Indian nations. It is true that the federal government at times distributed the property it had seized from Indian nations to second possessors; that is, the first people to settle the land after the Indians. This practice, however, conditioned the principle of first possession on race: first possession was protected, as long as the possessor was not an American Indian.

Not only did the United States take property from first possessors on the basis of race; it also used race as a criterion in distributing the property so acquired. Most freed slaves were not enabled to take advantage of homesteading acts.\textsuperscript{38} "Forty acres and a mule" was a dream that was never fulfilled. In contrast, the United States handed out much of the newly acquired land in the western territory to white settlers and to railroad corporations.\textsuperscript{39}

Focusing on race, therefore, places in substantial doubt the traditional story about the genesis of property rights in the United States. Failing to focus on race means committing the same offense as the United States in its early history; that is, treating American Indians as outside the community, as invisible. First possession was infringed

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\item[38] See Litwack, supra note 9, at 403.

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rather than protected. Therefore, the existing distribution of property in land cannot be justified by the traditional story of origins. Why was land taken from American Indian nations? The justifications were many, including the desire to Christianize and civilize the Indians.\(^40\) Crucial, however, were the arguments that the Indians had more land than they needed, and that they were misusing the land by not developing it.\(^41\) Moreover, the land was needed by non-Indians for settlement. It was therefore deemed appropriate for the state to redistribute land from those who did not need it or were misusing it to those who needed it and would use it in ways that would promote the general welfare.\(^42\)

The origins of property rights in the United States, therefore, are based partly on possession, but possessory rights were associated with race. Moreover, the allocation of property rights was often based on a vast program of nationalization and redistribution to promote social goals and to satisfy the needs of the United States. Does this mean that we should feel comfortable in continuing to redistribute property in this way? Much of this past redistribution was unjust. What lessons are we to take from this history? What obligations does the United States now have toward American Indian nations? What obligations does it have toward the descendants of freed slaves? Can we do something to remedy the injustices of the past without perpetuating wrongful practices in the present? If government distribution and redistribution is implied in the very notion of a private property system, how should those decisions be made and who should make them?

The complexity of these questions is apparent when we consider what response the United States should take toward the possibility of oppression within tribal governments. For example, in the case of *Santa Clara Pueblo v. Martinez*,\(^43\) the Santa Clara Pueblo government enforced a tribal law which provided that children of male tribal members would be recognized as members of the tribe even if they married non-members, but that the children of women members would not be recognized as members of the tribe if they married outside the tribe.\(^44\) Membership was important because it could determine not only the ability to participate in the Santa Clara Pueblo political and religious community but also eligibility for government benefits under treaties between the Santa Clara Pueblo and the United States.\(^45\)

The case presents a wrenching dilemma. If the United States failed to intervene, it may have been allowing the tribal government to en-

\(^40\) Prucha, *supra* note 32, at 198.
\(^41\) *Id.* at 196.
\(^42\) Williams, *supra* note 28, at 312-17.
\(^43\) 436 U.S. 49 (1978).
\(^44\) *Id.* at 51.
\(^45\) *Id.* at 52-53.
gage in wrongful discrimination against women, and therefore failing to protect the rights of American Indian women who are both citizens of the United States and members of tribes. By staying its hand, the federal government may deny Indian women equal treatment under the law. If the United States intervenes, however, it is imposing its vision of membership on the tribe and interfering in tribal sovereignty in a way that may wrongfully impose outside cultural norms upon the tribe. Such a result is contrary to principles of group autonomy implicit, for example, in the constitutional guarantee of free exercise of religion. The dilemma is heightened by the fact that the differential treatment of women and men may be the result, not of longstanding tribal history, religion, and culture, but of outside imposition by the United States itself through its coercive interference with tribal sovereignty in the past.46


Mary Joe Frug believed that questions of race and gender are marginalized in the way law is often presented. She argued that the structure of casebooks and law school courses contain implicit messages about gender.47 These messages may very well not be unintended; nonetheless, given the gendered context in which we live, the presentation of certain materials and issues in a specific pattern, and the exclusion of other issues, may have the effect of reinforcing traditional gender stereotypes. Cases in which women appear are often used to illustrate exceptions to basic rules, and issues of concern to women are often omitted from textbooks.48 I am prompted by her work to ask: What issues of concern to women are excluded from traditional treatments of property? How does the presentation of the subject of property law reinforce traditional gender images?

Property law is often defined in modern, legal realist, Hohfeldian terms, as legal relations among persons with respect to things.49 This definition goes only part way in recognizing the role that property concepts play in the modern United States legal system. In fact, property language is widely used by both lawyers and laypersons to describe a variety of interests that cannot be easily described as interests in "things." We say that people own stocks and bonds, partnerships, television stations, patents, and business franchises. In the family context, a variety of intangible interests are included in the "property" which may be equitably distributed on divorce, including rights in vested but

47. Frug, supra note 3.
48. Id.
49. Restatement of Property §§ 1-4 (1936).
unmatured pension funds, the enhanced earning potential generated by graduate degrees, and business goodwill.

By taking our attention away from intangible interests, the conception of property as control over "things" steers us away from many of the most critical social and legal contexts in which law functions to distribute wealth and poverty. These areas include, for example, (1) government benefits (Social Security, Aid to Families with Dependent Children, investment tax credits); (2) family relations (children's claims on family assets such as child support, equitable distribution, community property, inheritance, trusts); (3) business property (partnerships, corporations, and labor law); and (4) antidiscrimination law (public accommodations statutes, fair housing statutes, employment discrimination legislation). Since wealth and poverty are unequally distributed according to both race and gender, the conceptualization of property which excludes consideration of these legal questions serves to obscure the ways in which the legal rules in force contribute to both gender and racial inequality.

Property scholars should pay more attention to the complex of legal rules which regulates, or fails to regulate, the effect of race and sex discrimination on the market for property. We should also carefully analyze the rules and institutions responsible for the fact that poverty is associated with race and gender. We should focus on concerns central to women's lives, such as how our social and legal system distributes the time and resources necessary to care for children. If the topic of property is to be inclusive, it should include consideration of entitlements not traditionally classified as property interests which provide the resources necessary for white women and many families of color to survive and meet basic needs.

All of these topics are included in the law school curriculum, but they are separated from the basic rules of property law as they are presented to lawyers. They are thus treated as specialized topics which do not affect the core principles in any significant way. For example, property casebooks do cover race and sex discrimination, some at great length. However, the topics are often treated as specialized problems which are peripheral to the main line of analysis. Property rights are analyzed first. Rules about discrimination are usually collected in a separate section or chapter, and are thereby treated as exceptions to otherwise applicable general principles. There is nothing wrong with this procedure as an initial matter. However, there is something wrong with the failure to reevaluate general principles in light of the exceptions. The principle/exception organization of property law fails to acknowledge the central role that gender and race play in defining property law both as a subject and as a social and legal phenomenon. Moreover, treating antidiscrimination law separately from core principles gives the impression that it provides a gloss on the core message. It is treated as
a specialized area—a segregated subject, if you will. Antidiscrimination law is therefore marginalized, unintentionally perhaps, but marginalized nonetheless.

If, instead, race, gender and disability occupy the center of our attention, it becomes apparent that antidiscrimination principles are not minor exceptions to central principles. Rather, every single important area of property law has been historically structured by both race and gender. Similarly, all areas of property law are currently crucially defined by antidiscrimination law.

Take, for example, the topic of land use regulation. Trespass law is often deemed central to property since the right to exclude is often characterized as the most important element of property.50 Yet public accommodations statutes represent a critical limitation on the right to exclude; they prohibit owners who have opened their property to the public from excluding members of the public on the basis of race, gender, religion, and disability. They therefore limit the right to exclude by a competing right of access in members of the general public. If, as I believe, the values underlying public accommodations statutes are widely shared and fundamental to the legal system, then it becomes necessary to restate in a more careful manner the maxim that “the right to exclude” is fundamental to property. This right is fundamental, but it is also significantly limited by an equally important value; the social interest in preventing a racial caste system and distributing access to property on the basis of race, sex, and disability. The right to exclude is most important when we are considering areas of life considered most “private,” including control over one’s home. When we shift to the “public” sphere of the marketplace, the privacy interests of owners become much less significant, and owners’ interests in exclusion are limited to protecting their investment interests by excluding persons whose presence on their property disrupts their business enterprise.51

Focusing on public accommodations laws therefore does not merely identify a minor exception to the principle behind the right to exclude. It enables us to see that the concept of property implicit in our current system includes a variety of principles and counterprinciples. The meaning of any given principle can only be understood in relation to the other principles in the system. Viewing the legal system in this way may cause us to reevaluate the meaning of what we have traditionally viewed as the “core” principles. If we consider the meaning and social


function of public accommodations law, our understanding of the role that the right to exclude plays in property law may therefore undergo substantial revision.

Other areas of land use regulation law are similarly critically affected by racial and gender issues. For example, the law of nuisance is affected by race; in recent years, individuals have begun to make claims of environmental racism. These claims involve allegations that communities with large populations of people of color have been disproportionately burdened by hazardous waste sites and the like.

Additionally, race is heavily embedded in the development of the law of servitudes. For many years, housing development was burdened by racially restrictive covenants which, until recently, was legally enforceable. The cases striking down these covenants, especially *Shelley v. Kraemer*, 52 and cases striking down racially restrictive future interests, 53 have vast implications for the structure of the legal system and the relation between the public and the private sphere.

Moreover, public housing law and real estate transaction and finance law have been crucially affected by racial discrimination and by antidiscrimination law. The federal government has often promoted segregation in public housing, 54 and federal and state fair housing statutes have significantly changed both the housing market and the housing finance market. Finally, zoning is similarly impossible to understand without reference to both the Fair Housing Act and state laws regulating exclusion of low and moderate income housing from communities through zoning. In recent years, almost half the cases brought under the Fair Housing Act have presented challenges to exclusionary zoning ordinances. The prevention of exclusion and segregation in public housing and group housing for persons with disabilities is central to current zoning law.

If antidiscrimination law is necessary to understand every area of land use regulation law, it becomes apparent that it is not merely a detail which can be added on after the basics have been covered. Rather, it goes to the core of the social meaning and legal structure of property. The right to use your property as you see fit does not include the right to participate in creating a racial caste system. This principle has profound effects on the conception of what constitutes public and private conduct. It requires us, for example, to reevaluate the social meaning—including the "privateness"—of so-called "private" clubs.
which exclude people on the basis of sex or race.\textsuperscript{55}

By marginalizing both family law and welfare law, the traditional approach to property fails to put at the center of attention issues about resource distribution, such as child support and welfare entitlements, which are of concern to many women.\textsuperscript{56} Women, more than men, have taken or have been assigned responsibility for childcare and are more likely to be dependent on public assistance. Part of the reason women are more likely to be welfare recipients is precisely the fact that they take care of children, and that this labor is uncompensated. The failure to give as much attention to property issues which concern women as to those which concern men conveys an ideological message that women must fit into the male model. This approach therefore reinforces gender stereotypes by placing the blame for women's poverty on women themselves rather than on the legal rules and social practices that cause the inequalities in wealth between women and men.

IV. REIMAGINING PROPERTY: UNSETTLING IDEAS

Because I believe that the social and psychological differences between men and women are constructed and mutable, rather than biologically determined and immutable, I believe that the act of focusing on gender should be oppositional; it should change the effect of gender on a writer and her readers by unsettling those ideas in their consciousness.\textsuperscript{57}

Mary Joe Frug

Considering Mary Joe Frug's scholarship further prompts me to ask: if we take gender, race, and other differences seriously, how would things have to change? What assumptions would be unsettled? How might the basic course in property incorporate some of these questions within the core curriculum? What affirmative lessons can we learn from focusing on the relation between gender, race and property? How might we reimagine property law to incorporate these concerns?

First, the scope of topics covered in property casebooks might be widened somewhat to incorporate topics related to race, gender and disability which affect access to and control of property. Such topics might include federal and state public accommodations statutes; domestic violence restraining order statutes which allow exclusion of the batterer from the household; drug forfeiture statutes which permit eviction of families whose children use drugs in the home; sexual harassment by landlords and brokers; zoning ordinances which exclude group homes for persons with AIDS; and the special takings law applicable to


\textsuperscript{56} Child support is also of substantial interest to men, more often than not, as payors.

\textsuperscript{57} Frug, \textit{supra} note 3, at 1067-68.
American Indian nations. It is perfectly possible to include all the subjects traditionally covered in property casebooks while also introducing these issues. Some of these issues may be used to teach basic rules of property law, such as retaliatory eviction or trespass. Others provide interesting problems or hypotheticals for discussion.

On the other hand, introducing such topics to the property course may appear to "politicize" it by introducing controversial questions that are "really" about family or civil rights law and not property law at all. One answer to this concern is that some of these topics are already part of the property curriculum, such as fair housing statutes. Others are related to topics universally recognized as core property topics, such as real estate and landlord/tenant law. Another answer might be that students will actually misunderstand property law if they do not know the central role that antidiscrimination law plays in the housing, credit and commercial leasing markets. It might also be useful to ask why it appears neutral to define the scope of property law in a way that addresses some segments of the population and excludes others.

Second, antidiscrimination law might usefully be integrated into the property course, rather than segregated. If we take the principles underlying antidiscrimination law to be as fundamental as other core values traditionally seen as central to property law, property law may look different. To some extent, antidiscrimination law places limits on otherwise applicable rules of property law. For example, public accommodations and fair housing statutes limit and restrict the right to exclude and the right to transfer property. These statutes therefore identify instances in which the principles underlying the right to control one's property, such as interests in autonomy, privacy, and security, are overcome by overriding values, including preventing forced racial segregation, limiting the power of groups of owners to restrict the transfer of property on the basis of race and religion, increasing the autonomy and freedom of members of groups who would otherwise be excluded from the marketplace for property, and promoting equal participation in the market.

When we examine these competing values, we find that there are surprising similarities between the principles underlying antidiscrimination law and the principles underlying a variety of traditional subjects of property law, such as the rule against perpetuities, rules about restraints on alienation and the estates system, and servitudes law. These rules are all intended, in part, to prevent the concentration of power in the hands of the few, to promote both widespread dispersal of property ownership, and to ensure availability of property for current needs. What unites these doctrines is the central importance of distributive questions in defining and allocating property rights. In particular, a core topic of property law is the the principle of promoting
widespread access to and dispersal of property holding.\textsuperscript{58}

Antidiscrimination law promotes similar policies. Discrimination in the housing market and in access to private businesses open to the public on the basis of race, religion, sex, sexual orientation, or disability, has the effect of excluding segments of the population from access to the market. Antidiscrimination law holds that this exclusion is impermissible. Excluding whole classes of people from access to property limits the operation and extent of the market on the basis of arbitrary status distinctions which are illegitimate bases for the distribution of property. These status distinctions are reminiscent of feudalism. Fair housing and public accommodations laws promote access to the market for property. In so doing, like other doctrines of property law, they combat concentration of ownership and promote decentralization of economic decisionmaking.

Third, although traditional market mechanisms fail to adequately reward women for the work they perform, crucial doctrines in the rules in force do value women's non-monetized contributions to the economy. For example, equitable distribution law and community property law recognize women's contribution to the marriage partnership even though the work that women do is excluded from market valuation. This recognition of the value of women's labor is interstitial and provides partial monetary benefits only in the particular situation of divorce. Nonetheless, it provides a legal basis for criticizing the complex set of rules in force that fail to recognize nonmarket contributions to the economy. Moreover, it provides a basis for criticizing market valuations as a legitimate basis for allocating entitlements; that is that the market is dependent on a gendered division of labor which has the predictable effect of systematically exploiting women.

Focusing on these questions reminds us of the extent to which men are dependent on the unpaid labor performed by women.\textsuperscript{59} Contrary to the traditional notion that women on welfare are "dependent" and are benefitting from charity, such people are generally working quite hard—taking care of children. This is socially beneficial labor and, if it were not performed by these women, it would have to be performed by someone else. Men who work are often dependent on women staying home to take care of the kids.\textsuperscript{60} It is true that such women are also


\textsuperscript{59} Interdependence is recognized in antidiscrimination law when public accommodations statutes regulate private clubs located inside places of public accommodation or which have an integral relationship with those places. Frank v. Ivy Club, 576 A.2d 241 (1990) (holding that "private" eating clubs were places of public accommodation because of their integral relationship with Princeton University).

\textsuperscript{60} See Frug, \textit{supra} note 22. As Jack Beermann notes: "All institutions—including the family, the corporation, and the school system—structure themselves
dependent on the salary brought home by the working spouse, but it is
not the fault of the woman who stays at home that the legal system has
arranged things so that her labor gains her no earning power. Finally,
government cannot remove itself from distributive questions when it is
inherently involved in distributing and redistributing property. Prop-
erty rights have been historically redistributed by the state to promote
its notions of both justice and social welfare. Property was taken from
American Indian nations because they were thought not to need all the
property they had and because they were thought to be wasting it by
not developing it. It was forcibly transferred to those who were
thought to need it more—homesteaders—or to those who would de-
velop it in ways that were thought to promote the general welfare, such
as railroads and colleges. Property rights have always been defined and
distributed so as to promote both desirable economic development and
widespread ownership and access to valued resources, at least among
particular segments of the population. At the same time, this historical
practice embodied substantial injustice. It put into effect an oppressive
expropriation of property and a program of massive cultural
annihilation.

John Kenneth Galbraith reports that Professor Robert Montgomery,
an economist at the University of Texas, was unpopular with the Texas
legislature because of his liberal views. When asked whether he fa-
vored private property, he replied, "I do so strongly that I want every-
one in Texas to have some." If the distribution of property is related
to factors such as gender, race and disability, perhaps we should reex-
amine the system by which the rules in force define and allocate prop-
erty entitlements. If "everyone should have some," then, as Mary Joe
Frug reminded us, we need to "unsettle" the role that gender and race
and other differences have historically played in the distribution of
property. This is not a process which can be accomplished once and
for all. Property rights must be defined contextually to prevent concen-
trations of wealth on the basis of differences that should not matter.
This will not happen unless we consciously take such differences into
account.

in response to the institutions that surround them." Jack Beermann, Administrative
62. Frug, supra note 3, at 1067-68.