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PROPERTY LAW SERVES HUMAN SOCIETY: A FIRST-YEAR COURSE AGENDA

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I. INTRODUCTION

Property law is about people and how they use things. The people element underlies the two branches of property law, estates, also known as probate law, and real estate. However, it often gets obscured because of the emphasis on things in those two branches. Practicing property lawyers affectionately mark the distinction between the two branches when they refer to themselves as "dead" lawyers (probate) or "dirt" lawyers (real estate).[1]

The relationship of people to things is a special, often highly emotional relationship. From early childhood to the end of life, one's sense of worth, sense of self and identity are influenced by this relationship. Children accumulate and control toys, then learn to share them as they develop relationships with parents, siblings and other children.

The impulses to accumulate, control and share are recognized in the world's great religions and philosophies.[2] In another context, I described the Judeo-Christian principle of stewardship and its application to land ownership.

> The religious concept of stewardship is derived from the belief that all material goods, including land, belong to God. The earth and everything in it was created by God. Humankind was created in the image and likeness of God and given dominion over material goods of the earth. Since all humans are created in God's likeness, all have a claim to the earth's bounty. Individuals may appropriate what they need for their own sustenance and development but only what they need. Civil title to land, while giving the holder substantial power to

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1. *See, e.g.*, American Bar Association Section of Real Property, Probate and Trust Law (Jan. 29, 2001), *at* http://www.abanet.org/rppt/section_info/home.html. The American Bar Association's Section of Real Property, Probate and Trust Law, with over 30,000 members, is organized into two divisions, the Probate and Trust Law ("dead") division, and the Real Property Law ("dirt") division.

2. *See generally* PHILIP ST. ROMAIN, PATHWAYS TO SERENITY (1988), *available at* http://shalomplace.com/download/pathways/pathways.pdf.

> possess, use, and dispose of that land, is not absolute. With title comes a responsibility to care for the land and use it wisely for the betterment of the landowner, the landowner's community, and future generations. The landowner, as steward, will ultimately be asked to give an accounting of that use to God, the Master.[3]

Property law represents our society's attempt to manage these impulses and provide a vehicle for resolving disputes when interests and impulses collide.

The first-year property law course offers an opportunity to explore the human relational dimension of property while learning the language and rules of property law. Former Attorney General Janet Reno, in a speech to law teachers, exhorted members of the legal profession to pay more attention to the impact of law on people. "Don't forget the foundation of the law: the people the law is meant to serve," she declared. The relational dimension of property law is one place where the interface of law and people can and should be emphasized.

First-year law students often approach the property law course with a great deal of trepidation. They have heard horror stories, usually from 2Ls and 3Ls, about the Rule Against Perpetuities' impact on the Unborn Widow and the Fertile Octogenarian[4] and the fact that the Rule in Shelley's Case[5] trumps the Doctrine of Worthier Title.[6] I once had a frustrated student declare in class: "I can't tell a shifting executory interest from a double back flip."

The emphasis on human relationships can help dispel this trepidation, particularly if concrete examples drawn from contemporary public issues are employed throughout the course. Use of relationship issues also can be an effective way of presenting property law principles the instructor wishes to emphasize. In doing so, however, care must be taken to avoid creating the impression that the course really is a series of sermons designed to emphasize the instructor's political and/or philosophical points of view. In this Essay, I will suggest several places in the traditional property law course where the relationship issues can be highlighted: the role of discovery in the acquisition of property, transferability of property through common law estates in land, the law of gifts and commercial real estate transactions, sharing of property as common owners, landlord and tenant, or members of planned unit

3. Peter W. Salsich, Jr., *Toward a Property Ethic of Stewardship: A Religious Perspective*, *in* PROPERTY AND VALUES 21-22 (Charles Geisler & Gail Daneker eds., 2000).

4. The classic article, from which most Rule Against Perpetuities hypotheticals are drawn, is W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938).

5. *See* Seymour v. Heubaum, 211 N.E.2d 897, 899 (Ill. App. Ct. 1965).

6. *See, e.g.*, Doctor v. Hughes, 122 N.E. 221 (1919) (doctrine of worthier title is a rule of construction). *See generally* CORNELIUS J. MOYNIHAN, INTODUCTION TO THE LAW OF REAL PROPERTY 141-161 (2d ed. 1998) (discussing Rule in Shelley's Case and Doctrine of Worthier Title).

developments, and controlling the use and development of land through public and private land use regulation.

II. DISCOVERY/FINDING AND THE ACQUISITION OF PROPERTY

"Finders keepers, losers weepers," was a popular ditty sung by children of my generation in the 1940s and 1950s. It expressed a common theme of control: What I found I could keep. The European nations in the Age of Exploration employed a variation of that theme in allocating rights to the vast territories of the New World: the discoverer obtained the right, vis-à-vis other European nations, to take possession of lands discovered on behalf of the nation sponsoring his voyage. Relationships with any occupants of the discovered land were to be worked out by the discoverer, without interference from other nations.[7] Application of this principle led to the tragedy of the Native Americans, in part because of vastly different concepts of property ownership. John Quincy Adams expressed the European view as follows:

> The Indian right of possession itself stands, with regard to the greatest part of the country, upon a questionable foundation . . . . [W]hat is the right of a huntsman to the forest of a thousand miles over which he has accidentally ranged in quest of prey? . . . Shall he forbid the wilderness to blossom like the rose? Shall he forbid the oaks of the forest to fall before the ax of industry and rise again transformed into the habitations of ease and elegance?[8]

In sharp contrast, President Franklin Pierce's expression of interest in buying the land of the Duwanish Indians in present-day Washington State provoked this response from Chief Seattle:

> How can you buy or sell the sky—the warmth of the land? The idea is strange to us. Yet we do not own the freshness of the air or the sparkle of the water. How can you buy them from us? Every part of this earth is sacred to my people.[9]

While teaching the importance of the discovery/control principle of Anglo-American property law, *Johnson v. M'Intosh*[10] and related cases can also be used to raise the question of relationship—to things (land) and to other people.

7. Chief Justice John Marshall discussed this concept at length in *Johnson v. M'Intosh*, 21 U.S. 543 (1823), a staple of first-year property law casebooks.

8. John Quincy Adams, Oration at Plymouth, December 22, 1802, in Commemoration of the Landing of the Pilgrims, *at* http://jollyroger.com/library/OrationsbyJohnQuincy Adamsebook.html (last visited Jan. 25, 2002); *see also* William W. Bassett, *The Myth of the Nomad in Property Law*, 4 J. LAW AND RELIGION 133 (1986) (arguing that the property law of sixteenth and seventeenth century England, on which the colonists based their relationships with Native Americans, was influenced by the "myth of the nomad" which had been articulated to provide justification for the sixteenth century colonization of Ireland).

9. ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990).

10. *Johnson*, 21 U.S. at 543.

Professor Joseph Singer makes this point persuasively in his essay for this symposium.[11] He argues that even the famous case, *Pierson v. Post*,[12] can be taught as a relational issue between two hunters, Post and Pierson, rather than a question of possession of a fox.[13]

One device some of my colleagues and I have used with these cases is to ask the students to negotiate a property law regime for new territory. When the Law of the Sea treaty was being negotiated, we used a problem involving nodules of precious medal found on the ocean floor. Today, with the increasing sophistication of manned space stations, one might use outer space. Suppose a new earth that is capable of sustaining life is discovered. Should it belong to the discoverer? Should it be shared by all the peoples of our earth? Should it be divided up into segments, which are "sold" to interested groups on this earth? We do not presume to have the right answer. But there are many opinions about how to approach the questions. Asking students to think about these questions can impart an air of reality to their study of these old cases and provoke lively discussion about the role of property law in our society.

III. TRANSFERABILITY OF PROPERTY

A key element of our property law system is the general freedom property owners have to transfer their property to whomever they choose. The relationship implications of our modern law of transferability can be explored in three segments of the property law course: a) common law estates, b) gifts and c) commercial real estate transactions.

A. Common Law Estates

Much of the history of the English common law of property reflects the long struggle between the forces of "dead hand control" (restrictions of the ability to transfer land outside of the family line of succession) and the forces of "free transferability" (the ability of the present generation of land owners to sell or give land to non-family members).[14] Ultimately, the free transferability principle prevailed, with certain important exceptions.[15]

American property law draws heavily on the English common law, which contains important elements of Roman and Canon law.[16] These systems, in turn, were influenced by property concepts in ancient Middle Eastern

11. Joseph William Singer, *Starting Property*, 46 ST. LOUIS U. L. J. 565 (2002).

12. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

13. Singer, *supra* note 11, at 569.

14. *See, e.g.*, Merrill I. Schnelby, *Restraints Upon the Alienation of Property*, *in* 6 AMERICAN LAW OF PROPERTY, 409-84 (A.J. Casner ed. 1952).

15. *Id.* at 485-531.

16. David Siepp discusses the interrelationships of English common law, Roman law and Canon law in *The Concept of Property in the Early Common Law*, 12 LAW & HIST. REV. 29-91 (1994).

civilizations.[17] As Ron Brown explains in his article for this symposium, the American property law system is based on a "recurring pattern . . . called substitution . . . [in which] a successor [in title] is substituted for [his or her] predecessor regarding rights and responsibilities that are related to ownership of land."[18] The relationship created between prior owner and successor by the property transaction informs the rights and responsibilities of the current owner.

B. Gifts

The gift transaction is another example of relationship. One "gives" a gift of land, chattel or intangible interest by parting with control and manifesting an intention to part with control.[19] Once a gift is given, it cannot be recalled. But promises to make gifts are unenforceable because they lack bargained-for consideration,[20] unless the promisee has relied to his or her detriment to such an extent that injustice would occur if the promise to make a gift were not enforced.[21]

The law of gifts is intertwined with the law of estates, particularly when one considers the relational aspect. Most gifts of land are made to family members at the end of the donor's life. The common law of estates gives the donor some choices about how much control over the land is to be included in the gift. Lawyers who assist in the preparation of gifts by drafting gift instruments (wills, trusts or deeds) are true friends of their clients if they help their clients understand the effect a gift of land, which restrains the donee's control over the management and disposition of that land, will likely have on the personal relationship between the donor and donee.[22]

C. Commercial Real Estate Transactions

Consideration of the commercial real estate transaction often gets eliminated from the first-year property law course, particularly those that have

17. *See generally* Robert C. Ellickson & Charles Dia. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.-KENT L. REV. 321 (1995).

18. Ronald Benton Brown, *The Phenomenon of Substitution and the Statute of Quia Emptores*, 46 ST. LOUIS U. L. J. 699 (2002).

19. RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS §§ 31.1, 32.3 (1992).

20. E. J. Baehr v. Penn-O-Tex Oil Corp., 104 N.W.2d 661 (Minn. 1960).

21. Ricketts v. Scothorn, 77 N.W. 365 (Neb. 1898).

22. For dramatic examples of the failure to consider the impact of such gifts, see *Pigg v. Haley*, 294 S.E.2d 851 (Va. 1982), in which the surviving wife who received only a life estate in the family farm through her deceased husband's holographic will was devastated by his apparent lack of confidence in her ability to manage the farm, and *Johnson v. Hendrickson*, 24 N.W.2d 914 (S.D. 1946), in which the adult children of a mother's first husband felt slighted by their mother's decision to give shares of the family farm to the adult children by her second husband while her will left the first children only $5.00 each, even though the result was that all children shared equally in the farm.

been reduced to one-semester, four-hour courses. While something has to go when hours are reduced, an important opportunity to study the relational aspects of property law is missed if nothing is said about deed covenants, employed to protect the free transferability of land, and mortgage liens, employed to persuade third parties to lend money for land acquisition by giving them a claim against the land title.

Modern problems such as environmental cleanup and homelessness can be used to explore the social impact of free transferability on the one hand and third party claims on the other hand. Should, for example, a purchaser of land become responsible for the failure of a previous landowner to clean up hazardous wastes or to pay property taxes? Should a lender be able to evict a family from its home because the family has fallen behind on its mortgage payments? Should the reasons for the cleanup or payment failures make a difference? What consequences are likely to flow from the answers to these questions?

Exploring the human aspect of bankruptcy, mortgage foreclosure, environmental degradation and the like gives students an opportunity to consider some of the consequences of a free society—the responsibilities as well as the rights that accompany land ownership. In addition, the limits of law also can be illustrated in this manner.

IV. SHARING OF PROPERTY

Increasingly in modern American society, land ownership is shared ownership. Most new home construction in the United States is occurring in land developments governed by private homeowners associations that have some form of legal interest in the houses and land. Condominiums and cooperatives are increasingly popular choices for residential and even commercial use of land. Long-term ground leases and short-term unit leases provide important means of acquiring control over particular tracts of land. In all forms of shared ownership, the relational aspect of the property interest is particularly important.

A. Common Interest Communities

The dominant form of residential land development currently is the common interest community, defined as an interest in which ownership of one parcel carries with it the obligation to contribute to the support of other parcels.[23] This definition includes condominiums, cooperatives and planned unit developments. In all cases, complex private regulations, usually

23. *See generally* UNIF. COMMON INTEREST OWNERSHIP ACT § 1-103(7) (1994). *See also* RESTATEMENT (THIRD) OF PROPERTY § 6.2 (2000).

promulgated by developers prior to the sale of units, govern many aspects of life in the community.

Law students in first-year property law study the legal tools to create these communities: easements, licenses, real covenants and equitable servitudes, as well as the forms the communities take: condominium, cooperative and planned unit development. In addition, time profitably can be spent on the personal relationships this form of living entails. While the ownership interest obtained in a common interest community includes much of the flexibility and freedom emphasized in discussions of traditional fee simple ownership, the restrictions contained in the private government charter impose a community discipline on exercise of that individual freedom. My cousin and her family once lived in a "new town" planned community on the East coast. During a visit, I asked my cousin how she liked her community. Before she answered, she showed me a portable clothesline in the garage. Pointing to the clothesline, she said she usually found living there very enjoyable. However, sometimes the rules, such as no clotheslines permitted, became intolerable. When she got fed up, she placed the clothesline in its socket in the backyard, hung out dirty rags and laundry and spun the line around several times. My wife breathed a sigh of relief when we left and drove into a traditional city with its overhanging wires, billboards, and mixed uses.

B. Landlord and Tenant

The property relationship most familiar to students is likely the landlord-tenant relationship. Students may feel most comfortable with this part of the property law course because they probably have experienced the relationship at some point in their lives, including while they are taking the course.[24] With this in mind, efforts to explore the relationship aspects of modern landlord-tenant law are useful.

Professor Tom Shaffer has an excellent technique for pursuing the relational implications of the implied warranty of habitability. A legal aid lawyer was invited to speak to his class. She told the students that she could forestall an eviction for over a year. She then raised a moral issue with students—would this be fair to the landlord? What if the tenant has no money and no prospect of obtaining any in the near future? Who is or should be responsible for providing shelter for that tenant and his or her family? Does it

24. Inevitably, at some time during the course, one or more students ask for advice concerning his or her lease terms or relationship with a landlord. In addition to telling students to get a real lawyer, I try to help them think through the problem themselves. Even though the conventional wisdom is that a lawyer who represents herself has a fool for a client, I try to persuade them that thinking through the problem for themselves is a valuable learning experience.

make a difference if the landlord is a mom-and-pop entity, or a multi-state corporation?[25]

One of the most disturbing relational experiences in our society is racial discrimination. This problem can be introduced to first-year students through the property law power to exclude, as it is manifested in tenant selection practices and land use regulations, both private and public. Professor Florence Roisman's symposium article, *Teaching About Inequality, Race, and Property*,[26] makes an eloquent argument for inclusion of the exclusion problem in the property course.

In addition to the public policy questions that can be raised during the study of landlord-tenant law,[27] the subject offers an excellent opportunity to examine the relational implications of litigation as a dispute resolution technique. Consider the typical situation that would trigger an implied warranty of habitability (IWH) claim—serious defects in the leased premises; perhaps the heating system is not functioning properly or the apartment is infested with vermin. After discussing whether the facts presented are sufficient to trigger the IWH, students can be asked to consider what will happen to the personal relationship between landlord and tenant if the tenant files suit alleging breach of the IWH, or if the tenant stops paying rent and uses the IWH as a defense to the landlord's suit for rent and possession.

Alternatives to litigation, such as grievance procedures, mediation, and negotiation, can be introduced, as well as the importance of access to lawyers for both the tenant and the landlord. A legal services lawyer in Washington, D.C. once told a meeting of the ABA's Commission on Homelessness and Poverty I chaired that he kept the following sign on his desk: "POSSESSION OF A LAWYER IS NINE-TENTHS OF THE LAW."[28]

The lawyer was addressing the reality that the relatively new tenant protections in landlord-tenant law require energy and discipline, as well as access to legal representation, to be effective. Low and moderate-income tenants and landlords may lack one or more of those qualities, he noted. In giving qualified support to landlord-tenant mediation programs, he cautioned

25. SANDRA H. JOHNSON, PETER W. SALSICH, JR., THOMAS L. SHAFFER & MICHAEL BRAUNSTEIN, PROPERTY LAW: CASES, MATERIALS AND PROBLEMS 386 (2d ed. 1998).

26. Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS U. L. J. 665 (2002).

27. For example, a strong correlation has been noted between a scarcity of decent and affordable housing and the phenomenon of urban homelessness. U.S. DEP'T. OF HOUSING & URBAN DEVELOPMENT, 2000 ANNUAL REPORT; U.S. DEP'T. OF HOUSING & URBAN DEVELOPMENT, OFFICE OF POLICY & RESEARCH, A REPORT ON WORST CASE HOUSING NEEDS IN 1999: NEW OPPORTUNITY AMID CONTINUING CHALLENGES (Jan. 2001); THE U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES (Dec. 2001).

28. JOHNSON ET AL., *supra* note 25, at 386.

against mediation programs that tended to split the difference between the parties, arguing that this was not always a fair result. Rent withholding and other self help remedies can be useful, he stated, but only if two major weaknesses can be overcome: the tendency of low income tenants to spend the withheld rent on household necessities such as food and clothing and the temptation to settle for less than warranted because of the fear of homelessness if the tenant is evicted.[29]

Students should be reminded that common law rules of Property, and Contracts as well, tend to assume two things: parties of relatively equal status and lawyers advising them. The reality often is quite different: parties of unequal status and lawyers advising only the stronger. The lawyer as public servant has a responsibility to respond to this reality by taking steps to "level the playing field" and seeking resolution of disputes, where possible, in a manner that preserves existing relationships.

V. DEVELOPMENT AND USE OF PROPERTY

As John Quincy Adams asserted, Anglo-American property law assumes that the owner of land will wish to develop and use it in a productive capacity.[30] The rise of megacities and the suburbanization of the landscape during the Twentieth Century led to, and was spurred on by, two property law developments: 1) comprehensive private land use restrictions, also known as real covenants and equitable servitudes, and 2) public zoning and subdivision restrictions. The traditional first-year property law course has been heavy on the private land use restriction law, as noted above,[31] but light on the public land use restriction law.

As the course gets squeezed from six hours in two semesters to three or four hours in one semester, exhortations to add more coverage of public land use issues may be met with a "yeah, right" attitude. But the impact of unrestrained use of the exclusionary aspects of zoning on the cost and availability of housing for low and moderate-income families has become too great to ignore. With the 2000 census data becoming available, studies increasingly are calling attention to a growing mismatch between the movement of jobs to suburban environments and the exclusion of housing affordable to the holders of those jobs from the same suburban environments.[32]

Approaches a property law instructor might have to cover this subject include: 1) "I omit public land use law because I don't have time to cover it adequately," or "because it is essentially a constitutional law matter;" 2) "I

29. *Id*.

30. Adams, *supra* note 8.

31. See *supra* note 23 and accompanying text.

32. THE BROOKINGS INSTITUTION, CENTER ON URBAN & METROPOLITAN POLICY, MELTING POT SUBURBS: A CENSUS 2000 STUDY OF SUBURBAN DIVERSITY (June 2001).

cover the technical aspect of the zoning enabling statute, but omit the exclusionary zoning issue because it is really a political rather than a legal issue, and I am teaching lawyers, not politicians;" or 3) "I cover the basics of zoning, with an emphasis on the exclusionary aspects, because zoning has had such an impact on housing affordability." Good arguments can be made for all three approaches. My preference is number three because of the seriousness of the current housing situation for millions of Americans, and because emphasizing the exclusionary aspects of zoning provides another opportunity to examine the relational implications of modern property law.

Public land use regulation also offers a good opportunity to engage students in thinking about and discussing client relationships. Tom Shaffer and Bob Cochran, in their book, *Lawyers, Clients, and Moral Responsibility*,[33] have a wonderful vignette about a lawyer named Ann, and her client, Albert, who is concerned about the type of people who might occupy a proposed group home for men in Albert's neighborhood. Albert's first thought is to attempt to block a rezoning sought by the church group that wishes to operate the group home. Over a series of office visits, Ann helps Albert realize that the potential occupants are people with human interests and concerns. Together, lawyer and client wrestle with the question of what to do. Lawyer Ann does not tell client Albert what to do. She tells him that she is with him whether he decides to seek a settlement or to fight the zoning petition. The result is an opportunity for moral growth, an opportunity for the client to become a better person because the lawyer has acted as a true friend.[34]

VI. CONCLUSION

"Property rights serve human values"—New Jersey Supreme Court Justice Weintraub made that observation in a case involving access of migrant farm workers to private conversations with lawyers and health care workers while residing on the private property of the farm owner.[35] Applying that concept to the migrant farm worker controversy, Justice Weintraub compared the property rights of the farm owner (use of the farm, power to exclude the public, personal and property security) with the personal rights of the migrant workers (personal privacy, opportunity to receive government benefits, right to receive visitors) and concluded that enjoyment of the personal rights by the migrant workers did not threaten the property rights of the farm owner.[36] In so doing, he stressed the relationship created by the farm owners when he hired the migrant workers. The parties were connected to one another by virtue of their

33. THOMAS L. SHAFFER & ROBERT J. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 113-34 (1994), *quoted in* JOHNSON ET AL., *supra* note 25 at 931-37.

34. *See id*. at 937.

35. State v. Shack, 277 A.2d 369, 372 (N.J. 1971).

36. *Id.* at 374.

consensual relationship and their humanity. The fact that one of the parties had invited the other parties onto his property did not mean that the visitors became subservient, a practice that had been outlawed by the Thirteenth Amendment.

This notion that property rights are not absolute is a crucial one for beginning law students to grasp. While possession may be nine tenths of the law,[37] it is not all of the law. Despite our individuality, we require community to flourish. Emphasizing the relational aspect of property law can help students understand the connection between individual rights and community responsibilities.

37. CHAMBERS DICTIONARY OF QUOTATIONS 23 (2d ed. 1998). This proverb was originally quoted in T. DRAXE, ADAGES (1616).