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978-1-108-83553-4 — Feminist Judgments: Rewritten Property Opinions

Edited by Eloisa C. Rodriguez-Dod , Elena Maria Marty-Nelson

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PART I

Introduction

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## 1

Introduction to *Feminist Judgments: Rewritten  
Property Opinions*

ELOISA C. RODRIGUEZ-DOD AND  
ELENA MARIA MARTY-NELSON

This book started with an inquiry – whether judicial opinions written from feminist perspectives could have affected the development of the foundational legal subject of property law. We were inspired by how the original volume of the Feminist Judgments Series, *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*, demonstrated that feminist reasoning could have changed the development of key areas of the law, including constitutional law doctrines, such as equal protection and due process, and the interpretation of certain federal statutory laws, such as Title VII and Title IX.<sup>1</sup> We recognized the need to demonstrate how feminist analysis could similarly have affected the path of property law.

Why is a feminist perspective critical for property law? Feminist analysis highlights the impact and influence of perspective, background, and preconceptions on the reading and interpretation of property law. Despite some theories, particularly those focused on law and economics that approach property law as a neutral system for recognizing, allocating, and protecting competing claims to resources, property law is far from neutral. Sexism and other biases have shaped the development of property law in ways that perpetuate economic imbalances and maintain power inequities. For example, we are painfully aware of landlord–tenant laws that prevent victims of domestic violence, predominantly women, from terminating leases early even when necessary to protect their lives.<sup>2</sup> In Chapter 16, commentator Lua Kamál Yuille and rewritten opinion author Pamela A. Wilkins describe how,

<sup>1</sup> Kathryn M. Stanchi, Linda L. Berger, & Bridget J. Crawford, *Introduction to the U.S. Feminist Judgments Project*, in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* 12 (Kathryn M. Stanchi, Linda L. Berger, & Bridget J. Crawford eds., 2016).

<sup>2</sup> See Elena Marty-Nelson, *We Gotta Get Out of This Place: When Residential Tenants Leave Due to Exigent Circumstances*, 35 U. ARK. LITTLE ROCK L. REV. 871 (2013). We had hoped to include cases addressing these and similar landlord–tenant issues in the book; however, these

in *Phillips Neighborhood Housing Trust*, an entire family was evicted, pushing them into homelessness, for the actions of one tenant.<sup>3</sup> In analyzing *Botiller v. Dominguez*, a United States Supreme Court case deciding competing claims to land, commentator Marc-Tizoc González and rewritten opinion author Guadalupe T. Luna describe how power dynamics played a role in the denial of land titles held by Mexican-American women.<sup>4</sup>

There is a robust body of theoretical scholarship analyzing how property law policies have exacerbated inequality and have served to deny property rights for women and other marginalized groups.<sup>5</sup> This volume in the Feminist Judgments Series uses applied feminism scholarship to critique the development of the law of property and to demonstrate how feminist perspectives could shape its ongoing trajectory.

#### THE FEMINIST JUDGMENTS PROPERTY PROJECT

This feminist judgments property project is part of the Feminist Judgments Series, which in turn is part of a global project. The US feminist judgments project was itself inspired by a similar venture in England called *Feminist Judgments: From Theory to Practice*.<sup>6</sup> The English project, which in turn was inspired by a similar project in Canada – the “Women’s Court of Canada” – also spawned similar projects in Australia,<sup>7</sup> New Zealand/Aotearoa,<sup>8</sup>

types of landlord–tenant cases involving vulnerable women rarely reach any level of the court system, let alone the appellate level.

<sup>3</sup> *Phillips Neighborhood Hous. Tr. v. Brown*, 564 N.W.2d 573 (Minn. Ct. App. 1997) (see Chapter 16).

<sup>4</sup> *Botiller v. Dominguez*, 130 U.S. 238 (1889) (see Chapter 5).

<sup>5</sup> “When it comes to property, the questions of the day revolve around inequality, and this is reflected in the broad nature of the questions scholars are asking of property law. But, while the questions are broad, the answers are too narrow.” Ezra Rosser, *Destabilizing Property*, 48 CONN. L. REV. 397, 399 (2015).

<sup>6</sup> FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (Rosemary Hunter et al. eds., 2010). The English volume includes twenty-three rewritten decisions, two of which have property law implications: one deals with whether husbands exerted undue influence on their wives to obtain consent for mortgage loans benefitting only the husbands’ businesses and the other dealt with whether a woman engaging in a sit-in at a utility company was improperly treated as a trespasser.

<sup>7</sup> See AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW (Heather Douglas et al. eds., 2015). The Australian volume includes a bankruptcy case that tangentially involved property law issues and cases in the more specialized field of environmental law.

<sup>8</sup> See FEMINIST JUDGMENTS OF AOTEAROA NEW ZEALAND: TE RINO – A TWO-STRANDED ROPE (Elisabeth McDonald et al. eds., 2017). The New Zealand volume includes one property law case regarding a Maori couple seeking to change the status of their land to effectuate a sale. It also includes cases in environmental law.

Ireland,<sup>9</sup> and Scotland,<sup>10</sup> as well as a project devoted to the field of international law.<sup>11</sup> Other feminist judgment projects are underway in India, Africa, and Mexico. The editors of the English project noted the absence of intellectual property cases in their book and expressed hope that future feminist judgment projects could fill that gap and demonstrate the possibilities of a feminist approach in various areas of property law.<sup>12</sup> This volume of the US Feminist Judgments Series responds to the challenge to fill the gap regarding intellectual property, and goes beyond that to include other fundamental property law cases not addressed in the English book, or that represent developments in the law that are unique to the United States.

As with all the volumes in the Feminist Judgments Series, in keeping with the focus on applying feminist theory to existing cases, the rewritten opinions in this volume are framed within the same laws and precedents that bound the original court at the time of the original opinion. In addition, the rewritten opinion writers were bound by the existing facts of the cases and could not change or create facts. The authors could, however, expand on the factual narrative of the original opinion as long as they limited themselves to facts in the record or facts that were appropriate for judicial notice. Even within those confines, the authors in this volume demonstrate how the rewritten opinions could have changed the development of property law. The authors bring to the decision-making and opinion-writing feminist perspectives on the facts and the law. One of the underlying claims of this volume is that even seemingly objective questions – such as when a co-tenant has been ousted or when the government may exercise its power of eminent domain to take private property – are affected by judicial experiences, perspectives, and reasoning processes. The rewritten opinions reveal that incorporating feminist theories and methods into property law cases is consistent with judicial duties and accepted methods of interpretation and has the effect of enriching and deepening the process by which judicial decisions are made.

<sup>9</sup> See *NORTHERN/IRISH FEMINIST JUDGMENTS: JUDGES' TROUBLES AND THE GENDERED POLITICS OF IDENTITY* (Máiréad Enright et al. eds., 2017). The Irish volume includes a property law case discussing extending time to a defaulting mortgagor for payment of a loan.

<sup>10</sup> See *SCOTTISH FEMINIST JUDGMENTS: (RE)CREATING LAW FROM THE OUTSIDE IN* (Sharon Cowan et al. eds., 2019). The Scottish project includes two cases related to property law – one regarding physical alterations to common areas and the other regarding the effect of legislation on the rights of agricultural tenants.

<sup>11</sup> See *FEMINIST JUDGMENTS IN INTERNATIONAL LAW* (Loveday Hodson & Troy Lavers eds., 2019).

<sup>12</sup> Rosemary Hunter, Clare McGlynn, & Erika Rackley, *Feminist Judgments: An Introduction*, in *FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE* 3, 12 (Rosemary Hunter et al. eds., 2010).

Our process for choosing property law cases for feminist rewriting was deliberate. We began by putting together a list of cases culled from our own teaching, knowledge, and scholarship. We were interested in cases that explicitly implicated gender on their face – such as an intellectual property case involving patent claims for the isolation of two human genes linked to an increased risk for breast and ovarian cancers and a case involving landlord premises liability when a tenant was sexually assaulted – as well as in cases that required an understanding of the way the law creates or allocates interests in real and personal property, such as cases involving Indigenous rights, adverse possession rights, and publicity rights. Although we selected several United States Supreme Court property law cases, we also included cases from various federal and state courts. We were mindful to select cases that are generally taught in most first-year property law courses as fundamental to the development of various property law doctrines.

We put together a diverse and distinguished group of leading property scholars as our Advisory Board to help evaluate the cases on our list as especially deserving (or not) of feminist rewriting and to help suggest other cases. This Advisory Board consists of Kristen Barnes, Rashmi Dyal-Chand, Lee Fennell, Angela Gilmore, Stacy L. Leeds, Amy J. Nelson, Eduardo Peñalver, Kalyani Robbins, Ezra Rosser, Rebecca Tushnet, and Darryl C. Wilson. The Advisory Board members gave us valuable feedback on the cases we had selected and offered suggestions for what became a somewhat expanded list of cases. We then disseminated a public call for authors, allowing prospective authors to specify their top three choices of cases and indicate whether they preferred serving as the author of a rewritten opinion or a commentary. Prospective authors were further invited to suggest cases that were not on the list.

With the goal of choosing the most impactful cases and diverse range of authors for the book, and taking into account the input of our Advisory Board, we selected the fifteen cases for this volume and the authors for the rewritten opinions and commentaries. The cases in this book address many topics covered in property law courses, including acquisition of property by capture; Indigenous property rights; gifts; intellectual property, including patents, trademarks, and publicity rights; eminent domain; adverse possession; future interests; concurrent ownership, including tenancy in common, joint tenancy, and tenancy by the entirety; zoning; rights of licensees; and landlord–tenant rights and obligations, including possessory rights and premises liability. Most of the authors of the rewritten opinions and the commentators specialize in property law, but a few have recognized expertise in a substantive specialty that underlies the focus of the chosen case.

In addition to the authors for the cases, we invited two preeminent scholars to participate in the project by writing complementary introductory chapters to further situate this feminist project within the broader development of property law. In her chapter immediately following this Introduction, Lolita Buckner Inniss explains that, although several cases over the course of US property law jurisprudence have reached groundbreaking outcomes that reshape the common law and many others have represented major restructuring and reallocations of property rights, courts have rarely explicitly taken account of feminist legal theory. We also include a chapter written by Hannah Brenner Johnson highlighting the importance of including feminist viewpoints in first-year property courses and throughout the law school curriculum, and discussing how to interweave the rewritten property feminist judgments not only in the first-year property course, but also in advanced property courses such as intellectual property, landlord–tenant, and land use.

#### ORGANIZING THE CASES FOR THE FEMINIST REWRITE

Having chosen the cases and the authors, we turned to the organizational framework of the feminist judgments for the book. We debated organizing them by chronological order, by feminist theories or methods employed by the authors, or by property law subject matter. We recognized that there are benefits and burdens to any of these three organizational methods. Presenting in chronological order benefits from avoiding signaling our own personal preferences on theories or subject matter. On the other hand, using chronological order does not easily serve readers who wish to delve quickly into a particular feminist theory or property law topic.

Organizing by feminist theories (e.g., formal equality, anti-subordination/dominance, anti-stereotyping, intersectionality, autonomy and agency, cultural) or by feminist methods (e.g., feminist practical reasoning, narrative/storytelling, widening the lens) would demonstrate the rich and varied field that is feminist legal theory and would provide readers with guideposts for teaching particular feminist theories or methods in connection with property law. Although tempting, we ultimately chose not to use this organizational framework because, as evident in the rewritten opinions and commentaries, many of our authors used multiple and overlapping theories and innovative methods in their rewritten opinions and commentaries making groupings somewhat artificial. What is not evident but is just as impressive is that, in developing their feminist rewritten opinions, the authors were innovative not only in the theories they used, but also in how they found ways to apply a feminist lens. Several of our authors took to heart the instructions that they

could use additional facts as long as such facts were in the record. In order to create a richer more thoughtful narrative, the authors did significant detective work to uncover critical facts that were not included in the appellate decisions, such as interviewing lawyers or parties of the original cases to elucidate facts in the record. Other authors used literature and history and went beyond standard legal authority to infuse their rewritten opinions with feminist takes from the era. In addition to using different feminist theories, a few of our authors took their rewritten opinions in unexpected directions – in fact, in directions diametrically different from where we had envisioned they would take their rewritten opinions. This served as a reminder that there are multiple strands of feminist thought, many diverse feminist views, and no one definition of what is feminist.<sup>13</sup>

Although several of the cases involved multiple property topics that could be viewed as overlapping, we ultimately decided to use the subject matter framework. Grouping by subject matter benefits from a structure similar to first-year casebooks and provides for easier use of portions of this book as a companion to a first-year property course or to a specialized upper-level course, such as intellectual property and land use/zoning.

Of the doctrinal groupings found in Parts II through IX, we deliberately started with the allocation of rights cases<sup>14</sup> – *Johnson v. M'Intosh*,<sup>15</sup> *Botiller v. Dominguez*,<sup>16</sup> and *Pierson v. Post*<sup>17</sup> – for several reasons. Allocation of rights is often the first topic covered in first-year property courses. Moreover, two of these cases deal with dispossession of land – a central tenet of property law. All three cases in Part II deal with devaluing interests of Indigenous persons and other underrepresented groups. Of the cases in this trilogy, both *Johnson* and *Pierson* typically appear in first-year property casebooks. The exclusion of *Botiller* from standard property casebooks is disappointing, but not surprising.<sup>18</sup> Although some scholars have focused on property rights of Mexican, Indigenous, and Spanish women, those women remain primarily missing

<sup>13</sup> For additional discussion of various feminist theories and methods, see *Introduction to the U.S. Feminist Judgments Project*, *supra* note 1, at 13–22, and MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY (3rd ed., 2013). See also, Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

<sup>14</sup> Ironically, had we chosen a chronological framework, these three cases would also have been placed at the beginning of the book.

<sup>15</sup> *Johnson v. M'Intosh*, 21 U.S. 543 (1823) (see Chapter 4).

<sup>16</sup> *Botiller v. Dominguez*, 130 U.S. 238 (1889) (see Chapter 5).

<sup>17</sup> *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805) (see Chapter 6).

<sup>18</sup> See Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 966 (1995) (describing how Latinas and Latinos are treated as “Los Olvidados”).



from feminist and legal scholarship. Including *Botiller* in this property volume gives these women a voice and places them in the current pantheon of feminist-directed scholarship encompassing property rights.

The remaining cases are structured in the following loose subject matter groupings: Part III patents, publicity rights, and trademarks; Part IV condemnation and adverse possession; Part V gifts and future interests; Part VI tenancy in common, joint tenancy, and tenancy by the entirety; Part VII exclusionary zoning; Part VIII evictions; and Part IX landlord–tenant premises liability.

### CONCLUSION

The law of property, a broad yet fundamental area of the law, can serve to subordinate or empower, impoverish or enrich. This volume demonstrates that use of feminist perspectives and methodologies, if adopted by the courts, could make a vital difference on the development of property law and its effect on women and marginalized groups. The transformational force of rewritten feminist judgments, attuned to power dynamics and social relations, is particularly evident in the land title cases, such as *Johnson*. As recently as 2017, in discussing the Dakota Access Pipeline, scholars noted,

It is ironic that a global controversy over indigenous rights takes place in the United States, litigated in a court system that still adheres to case law based on the Doctrine of Discovery, a fifteenth-century concept used to invalidate indigenous land possession and expropriate lands to the colonial forces of western Europe.<sup>19</sup>

All of the feminist judgments and commentaries in this property volume demonstrate how property law could have been reimagined. We were honored to work with our thoughtful and creative authors. Some of the changes that could have derived from the rewritten opinions would have been transformative, some would have been more subtle, but all would have led to a more just and equitable property law system.

<sup>19</sup> Carla F. Fredericks, Rebecca Adamson, Nick Pelosi, & Jesse Heibel, *Indigenous Rights of Standing Rock: Federal Courts and Beyond*, ABA HUM. RTS., Sept. 1, 2017, [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/vol-43/vol-43-no-1/indigenous-rights-of-standing-rock-federal-courts-and-beyond/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/vol-43/vol-43-no-1/indigenous-rights-of-standing-rock-federal-courts-and-beyond/).