

SPEECH

African Americans and Property Ownership: Creating Our Own Meanings, Redefining Our Relationships

Margalynne Armstrong*

I

INTRODUCTION

The global issues of the twenty-first century will include resource scarcity and resource allocation. For environmental, political and — dare I say? — ethical reasons, current discrepancies in resource consumption and contamination will continue to be challenged, and solutions cannot much longer be deferred. The debates and resolutions will take place on local levels, as well as national and international scales. African American communities must position ourselves so as to be able to create solutions that address our varied needs and concerns.

In the United States, property law has always been a foundational, essential element in determining resource distribution and protecting or preserving distributive decisions.¹ African American communities need to take a two-pronged approach to laws that affect property distribution to correct the existing distortions in our relationship to property. On one front, it is time for African Americans to concentrate our efforts on dismantling the barriers to equal rights in property ownership that we face in our interaction with American society as a whole.² On

Copyright © 1994 Margalynne Armstrong. All rights reserved.

* Associate Professor, Santa Clara University School of Law; B.A., Earlham College, 1977, J.D., University of California, Berkeley, Boalt Hall School of Law, 1981. The author thanks Michelle Hilleary for her diligent research assistance. This address was given as a part of the policy panel for the *African-American Law and Policy Report* symposium, *Beyond the Civil Rights Agenda: Defining African-American Empowerment for the 21st Century*, held January 15, 1994 at U.C. Berkeley's Boalt Hall School of Law.

1. See, e.g., JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES AND PRACTICES* 1, 5 - 10 (1993).

2. African Americans routinely face discrimination that impedes the acquisition of both personal and real property by making purchases impossible or more expensive. Patricia Williams's

the second front, we must create and define our own relations to property within African American communities. As in the case of the civil rights struggle, I believe that the approaches that African American communities could develop can serve as models for other movements to restructure resource allocation in the rest of the nation and the world.

II

THE EVOLUTION OF THE CURRENT RELATIONSHIP BETWEEN AFRICAN AMERICANS AND PROPERTY

African Americans have always been forced into a uniquely unprotected position with respect to property in the United States. Professor Cheryl Harris's wonderful article, *Whiteness as Property*, asserts that "[t]he origins of property rights in the United States are rooted in racial domination."³ Harris and other scholars, such as Robert Williams,⁴ Joseph Singer,⁵ Ronald Takaki⁶ and Fran Ansley,⁷ have written about how the interaction of the concepts of race and property were and are used to establish and maintain the racial and economic subordination of Blacks, Native Americans and Mexican citizens. Europeans and Americans of European origin used property, particularly chattel slavery, as a means and motive to construct race as an oppressive characterization.⁸ They *created* (for despite philosophical theories of natural law, American-type private ownership is one of many options regarding

description of a clerk's refusal to "buzz her in" to a Benneton store provides a poignant but familiar example of the commonplace discrimination that thwarts African American personal property purchases. PATRICIA J. WILLIAMS. THE ALCHEMY OF RACE AND RIGHTS 44-45 (1991). African Americans often end up paying more than whites for identical real and personal property. See, e.g., Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991); Anthony Downs, *An Economic Analysis of Property Values and Race (Laurenti)*, in HOUSING URBAN AMERICA 267-70 (Pynoos et al. eds., 1973). African Americans also face significant discrimination in applying for home loans. See MICHAEL A. TERHORST. THE AMERICAN DREAM: OPENING THE DOOR TO CREDIT AND ENDING MORTGAGE DISCRIMINATION (1993), discussion *infra* at note 21 and accompanying text; *Loan Bias Referrals Quadrupled in 1993, OCC Deputy Comptroller Tells Conference*, [62] Banking Rep. (BNA) No. 5, at 173 (January 31, 1994).

3. 106 HARV. L. REV. 1707, 1716 (1993).

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

5. Joseph W. Singer, *The Continuing Conquest: American Indian Nations, Property Law, and Gunsmoke*, 1 RECONSTRUCTION 97 (1991).

6. RONALD TAKAKI. A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA, Chapters 2 (Native American), 3 (African) & 7 (Mexican) (1993).

7. Frances L. Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511 (1991).

8. Michael Omi & Harold Winant, *Racial Formations*, in RACE, CLASS AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY 31 (Paula Rothenberg ed., 1992).

how people relate to land and things)⁹ and imposed a relationship between property and African Americans that to this day is crabbed, oppressive, exclusionary and destructively individualistic.¹⁰ African Americans have a historical relationship to property that differs from that of other Americans. Our introduction into this country was as a form of property.¹¹ The major purpose of American slavery was the sanctioned theft of the basic asset of the immigrant labor; Black slaves were denied rights that many legal theorists consider to be property,¹² such as expression, self determination¹³ and liberty (i.e., marriage and family control,¹⁴ assembly and movement).¹⁵ Reconstruction and Jim Crow

9. Prior to colonialism, individual ownership of land was not the norm in Africa:

[L]and was always recognized as belonging to the community. Each individual within our society had a right to use the land because otherwise he could not earn his living The Africans right to land was simply the right to use it; he had no other right to it, nor did it occur to him to try and claim one. The foreigner introduced a completely different concept — the concept of land as a marketable commodity.

JAWANZA KUNJUFU, *BLACK ECONOMICS: SOLUTIONS FOR ECONOMIC AND COMMUNITY EMPOWERMENT* 20, 21 (1991).

Traditional American Indian cultures did not consider humans to be superior to and above nature and natural resources, but “rather [they] were thought to be connected to and part of nature. People did not own the land and resources; instead, individuals had a responsibility toward all aspects of life.” SHARON O’BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS* 15 (1989). Other Native Americans, such as clans within the Tlingit Tribe, recognized collective property rights, see *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 286 (1955) (“Any member of the tribe may use any portion of the land that he wishes, and as long as he uses it that is his for his own enjoyment and is not to be trespassed upon by anybody else, but the minute he stops using it then any other member of the tribe can come in and use that area.”).

Even in other democratic societies with free-market economies and private property, property ownership has been defined to carry with it societal obligations. Article 14 of the 1949 Constitution of the Federal Republic of Germany provides: “(1) Property and the right of inheritance are guaranteed. Their contents and limits shall be determined by the laws. (2) Property imposes duties. Its use should also serve the public weal.” *Reprinted in FIVE CONSTITUTIONS*, at 203 (S.E. Finer ed., 1979).

10. The American constitutional paradigm of private property ownership incorporates as its basis the individual property owner threatened by and opposed to the democratic state. See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 1-9 (1990).

11. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 408 (1857). (“ . . . And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence . . . ”).

12. See, e.g., Laura S. Underkuffer, *On Property: An Essay*, 100 *YALE L.J.* 127, 135 (1990) (description and discussion of James Madison’s essay, *Property*, which describes property rights associated with liberty interests).

13. “. . . Slavery permitted one group of people to exercise unrestrained personal domination over another group of people,” ROBERT WILLIAM FOGEL, *WITHOUT CONSENT OR CONTRACT. THE RISE AND FALL OF AMERICAN SLAVERY* 394 (1989).

14. See, e.g., HARRIET A. JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL* 37-38 (1987) (Jacobs would not marry as she wished. Slave owners “seemed to think that slaves had no right to any family ties of their own.”) She also discussed the pain caused by seeing her family and relatives dispersed. *Id.* at 8. Throughout the book, Jacobs anguishes about securing her children’s

were not much better for the relationship between African Americans and property. Obtaining and holding on to our earnings and labor were challenges in a share-cropping economy,¹⁶ and ordinances¹⁷ and covenants¹⁸ restricted Black ownership of real and personal property.¹⁹

Contemporary relationships between African Americans and property are still impaired. Not only do African Americans own fewer assets, but the value of many of those assets, from college degrees²⁰ to housing, is less for African Americans than for white Americans. A dollar in African American hands still does not have the purchasing power of a dollar in white hands. Discrimination in the availability of mortgage loans provides a good example. In a recent protest about bank closures in Black neighborhoods, picketers held signs that asked: "My money's as green as theirs, isn't it?" The answer is no. The Federal Reserve Bank of Boston has found that African Americans are 60 percent more likely to be denied bank mortgages, even when their ap-

emancipation.

15. TAKAKI, *supra* note 6, at 66.

16. JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM* 311 (1947).

17. These ordinances were often unconstitutional. *See* *Buchanan v. Warley*, 245 U.S. 60 (1917); *Harmon v. Taylor*, 273 U.S. 668 (1927). *See also* Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289 (1982).

18. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1, 4-5 (1948). The case involved a restrictive covenant which provided in part:

[N]o part of said property or any portion thereof shall be, for said term of Fifty-five years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the said property for said period of time against the occupancy as owners or tenants of any portion of said property for the resident or other purpose by people of the Negro or Mongoloid race.

For other material concerning restrictive covenants, see Robert D. Bullard, *Blacks and the American Dream of Housing*, in RACE, ETHNICITY AND MINORITY HOUSING IN THE UNITED STATES 34 (Jamshid A. Momeni ed., 1986) (stating: "Many of the early Federal Housing Administration housing developments included restrictive covenants which discriminated against blacks"). *See also* ROBERT G. SCHWEMM, *THE FAIR HOUSING ACT AFTER TWENTY YEARS* 49 (1988) (providing: "Every single subdivision in the suburb in this country that was eligible for FHA mortgage insurance [during the Truman and Roosevelt administrations] had to have a racially restrictive covenant or it could not be developed.").

19. For example, an advertisement that gave rise to the contract dispute in *Maughs v. Porter*, 157 Va. 415, 417 (1931) (a case completely unconcerned with the issue of racial discrimination) read as follows:

'New Model Ford Free'

'At the auction fifty (50) beautiful residence lots Fry's Spring, Thursday, October 13th, 1:30 on time. Every white person over sixteen (16) years of age has an equal chance at the new Ford regardless of buying or bidding. . . .'

20. ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE. SEPARATE. HOSTILE. UNEQUAL* 95 (1992). Hacker compares earnings levels for comparably educated Blacks and Whites. In every category but one (Black women with four years of college), White workers earned more. *See also* A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 301 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989).

plications are essentially identical to those of white applicants.²¹

The same dynamic occurs in the retail food market. A study by Consumers Union compared food prices in predominantly Black neighborhoods with those in predominantly white areas.²² The only supermarket in West Oakland — a poor, African American neighborhood — was an independent store. The neighborhood had no Safeway or Lucky.²³ The price of a month's supply of groceries in the West Oakland store was 28 percent higher than the cost of the same foods found in the Lucky supermarkets in the majority of white neighborhoods.²⁴

African Americans face the same problems with real property. The value of housing for African Americans is less than for other Americans. Doug Massey has written that because of housing segregation, the same income buys Black and white families neighborhoods and educational environments that are of vastly different quality.²⁵

These situations illustrate the first approach to dismantling the barriers to equal rights in property ownership that we face in our interaction with American society as a whole. African Americans need to use aggressively the laws that currently prohibit discrimination in lending, and we need to work on both individual and collective action. The Fair Housing Act²⁶ and the Equal Credit Opportunity Act²⁷ are out there waiting to be enforced. Only in 1992 did we get the results of the first lawsuit brought under the Justice Department's authority to pursue "pattern or practice" lawsuits against discriminatory mortgage lending.²⁸ Decatur Federal Savings and Loans, one of the largest home

21. TERHORST, *supra* note 2, at 1, referring to a 1991 United States government survey.

22. DAVID D. TROUTT. *THE THIN RED LINE: HOW THE POOR STILL PAY MORE* 42 (1993) (Report of the West Coast Regional Office of Consumers Union).

23. *Id.*

24. *Id.*

25. DOUGLAS S. MASSEY & NANCY A. DENTON. *AMERICAN APARTHEID: SEGREGATION & THE MAKING OF THE UNDERCLASS* 153 (1993).

26. Fair Housing Act, Title VIII of the 1968 Civil Rights Act, (amended and codified at 42 U.S.C. §§ 3601-3619 (1988)). The Fair Housing Act bans "discrimination on the basis of race [and other factors] . . . in most housing transactions and [provides] for a variety of enforcement mechanisms, including complaints to the [Department of Housing and Urban Development] (HUD), private law suits, and actions by the Justice Department." ROBERT G. SCHWEMM. *HOUSING: DISCRIMINATION LAW AND LITIGATION* 1-1 (1994).

27. The Equal Credit Opportunity Act of 1974 (ECOA), (amended and codified at 15 U.S.C. §§ 1691(a)-1691(f) (1982)), and ensuing regulations (12 CFR §§ 202.1, 202.2(1) (1981)), prohibit discrimination in lending based on race, national origin and other characteristics. "The ECOA applies to housing in at least two important ways. First, it covers applications for mortgages and other forms of credit in the housing field. Second, it has been held to provide a right of action for residents in segregated neighborhoods who are denied credit because of the racial makeup of their area." SCHWEMM, *supra* note 26, at 29-7.

28. *U.S. v. Decatur Federal Savings and Loan Association*, U.S.D.C., No. Dist. Ga. (Sept. 17, 1992), Complaint and Joint Motion for Entry of Consent Decree; *Justice Settles Discrimination Suit Against Atlanta Home Mortgage*, [59] Banking Rep. (BNA) No. 10, 405 (Sept. 21,

mortgage lenders in the Atlanta area, entered into a consent decree that awarded damages to individual victims of discrimination and required significant changes in its mortgage practices to protect future African American home loan applicants.²⁹

We must also develop strategies for attacking forms of discrimination against Black buying power that are not governed by law. The failure to locate supermarkets and discount department stores in African American communities and the resulting higher cost of household goods and food staples are examples of such discrimination. It would seem that political, legislative and regulatory approaches are the most viable options, given that constitutional and common law deference to individually-oriented control of private property make successful litigation unlikely. Legislation is potentially fruitful, but if enforcement is left to individual court action, change will be long in coming. Participation in administrative, licensing and permit processes (e.g. participation in hearings for licenses to sell liquor, etc.) can be used to express community concerns. Such processes may result in businesses and communities creating private agreements that help to internalize or neutralize the external effects of stores selling liquor or cigarettes. The agreement should consist of covenants to stock good quality produce to be sold at fair prices. Community action can influence decisions determining the locations of facilities³⁰ that have negative effects on the value of African American assets. Such facilities should be distributed more evenly and fairly throughout all communities, so that other communities are not additionally privileged at the expense of African American communities and property owners.

III

CREATING AND DEFINING OUR OWN RELATIONS TO PROPERTY WITHIN AFRICAN AMERICAN COMMUNITIES

The approach I have discussed so far is not very radical. It re-

1992); TERHORST, *supra* note 2, at 8.

29. TERHORST, *supra* note 2, at 8.

30. As the following passage demonstrates:

Race proved to be the most significant among variables tested in association with the location of commercial hazardous waste facilities. This represented a consistent national pattern Although socio-economic status appeared to play an important role in the location of commercial hazardous waste facilities, race still proved to be more significant Incomes and home values were substantially lower when communities with commercial facilities were compared to communities in surrounding counties without facilities.

UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE. *TOXIC WASTES AND RACE IN THE UNITED STATES (REPORT)* XIII (1987). See also Robert Suro, *Pollution-Weary Minorities Try Civil Rights Tack*, N.Y. TIMES, Jan. 11, 1993, at A1, A12.

quires no direct redistribution of resources. It is threatening to white interests only in its call for an end to some of the privilege accorded white property ownership — a privilege that has been denied the African American property owner. The approach is one that recognizes the political realities of today. Given budgetary, political and attitudinal realities, African Americans who have sought to address the larger question of redistributive justice on a national level will need to develop alternative approaches. African American communities will have to maximize the resources that they already own and those that they acquire in the future. As things now stand, Black income does not usually translate into Black wealth. The United States Census Bureau reports that “blacks with the same incomes as whites are still much poorer because they have fewer assets and higher debts.”³¹ Although transforming income into wealth and assets that produce income for others is one way of more fully utilizing African American resources, maximization must be redefined in terms that address the needs of African American communities.

It is important to understand that property is invested with much more than economic attributes. Property incorporates morality and psychology, provides a means of connection between generations in the family (legacy), and is a tool for controlling behavior.³² In the new or alternative constructions of ownership, property will be necessary to our self determination. But currently, American jurisprudence reinforces selfish and individualistic aspects of property that have not been in the best interests of African Americans.

Current Supreme Court jurisprudence as evidenced in recent takings cases, values and exalts the right to exclude as the defining characteristic of *private* property.³³ From the African American perspective — the perspective of the excluded — the predominance of the exclu-

31. Ramon G. McLeod, *Average American Family Lost 12% of Wealth from '88 to '91*, S.F. CHRON., Jan. 26, 1994, at A3.

32. I intend to develop this discussion in a forthcoming article that expands upon the themes introduced in this address.

33. For example, note the property rights discussion in the following passage:

Property rights in a physical thing have been described as the rights to ‘possess, use and dispose of it’ (citations omitted). To the extent that the government permanently occupies physical property, it effectively destroys *each* of those rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (emphasis in original). See also *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (the Court stating that it has repeatedly held that, with regard to property reserved by its owner for private use, “the right to exclude others is ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property’”); *Dolan v. Tigard*, 114 S. Ct. 2309 (1994).

sionary features of private ownership has been experienced as oppression rather than autonomy. African Americans were long excluded from private property, otherwise open to the public, through both individual discrimination and legally mandated "Jim Crow" legislation.³⁴

Another feature of the current system of ownership harmful to African American communities is the association between individual acquisition and personal identity. The crime and violence that accompany the underground economy surrounding illegal drugs are direct consequences of this association. Cornel West writes of the increasing dominance of a "market morality" that has created a "culture of consumption that capitalizes on every opportunity to make money."³⁵ There is a direct connection between this "market morality" and individualistic conceptions of property — as opposed to considering the community implications of private choices about property acquisition and disposition.

Exclusionary forms of ownership were not created with the interests of African Americans in mind. The situation within many African American communities requires collective and cooperative solutions. One advantage of the American approach to property law is that it is flexible and can accommodate many forms of ownership.

The United States has adopted a rights-oriented approach to property ownership that is almost unique on a comparative basis. Other societies, including many European countries, find that individual ownership rights are accompanied by duties to the society as a whole.³⁶ Community (defined in various ways ranging from family to tribe), rather than individual ownership, is a norm that was found in numer-

34. An adept description of the debilitating discrimination experienced by African Americans is found in the following passage:

The mushroom growth of discriminatory and segregation laws during the first two decades of this century piled up a huge bulk of legislation. Much of the code was contributed by city ordinances or by local legislation and rules enforced without the formality of laws . . . up and down the avenues and byways of Southern life appeared with increasing profusion the little signs: 'Whites Only' or 'Colored' . . . (M)any appeared without requirement by law — over entrances and exits, at theaters and at boarding houses, toilets and water fountains, waiting rooms and ticket windows.

C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 98 (2nd ed. 1966).

35. CORNEL WEST, *RACE MATTERS* 16 (1993). This attitude is not limited to members of the illicit economy; it is also found among the new African American middle-class, which West describes in the following passage:

. . . [they] gain peace of mind and pleasure of body from what they could buy. Like any American group achieving contemporary middle-class station for the first time, black entree into the culture of consumption made status an obsession and addiction to stimulation a way of life.

Id. at 36.

36. MARY ANN GLENDON, *RIGHTS TALK* (1991).

ous cultures prior to imperial and colonial transformation.³⁷ We must look to models other than that of American individualism by which to develop property relationships that serve the needs of African American communities.

One such model is described in the book, *Climbing Jacob's Ladder*.³⁸ Andrew Billingsley portrays collective action by African American churches and individuals that used property ownership as a means of transforming communities decimated by poverty and drug trafficking. By using the institution of the church — a collective that pooled the resources of its constituent community — the organizers acquired real property to provide needed housing and to generate income that was reinvested into providing social rehabilitation for area residents.³⁹ Billingsley also describes individuals who allocated portions of their income to parenting and educating other people's children, a tradition within Black communities. The focus of these individuals was to educate these children *through* college to enable the children to permanently escape poverty through their own potential to generate income and acquire productive property. One of these volunteer parents was quoted as saying: "I'm living in a pretty nice house, I have a good life and manage my money well . . . My wife and I each drive a Mercedes . . . What am I giving up — stocks?"⁴⁰ This anecdote illustrates a strand that could be used in the formation of a model of African American property ownership: satiety as a limit on consumption. The model of providing for the long-term development of others, after satisfying individual and family needs as opposed to amassing and consuming more than needed, reflects both modern resource limitations and traditional indigenous peoples' relation to property as an asset that belonged to the community.

African Americans are often referred to as a monolithic group with a single mind and uniform agenda, rarely with consideration given to the communities with which we personally identify. Yet, it is important to note that there are multiple African American communities. Geography is only one means of defining a community; other communities are defined by family, class or status, economic enterprise, etc.⁴¹ Each of these communities may require different forms of property

37. See *supra* note 9.

38. ANDREW BILLINGSLEY, *CLIMBING JACOB'S LADDER* 358 (1992).

39. *Id.* at 357.

40. *Id.* at 382.

41. See Roy L. Brooks, *Race as An Over-Inclusive and Under-Inclusive Concept*, elsewhere in this volume, (arguing that the civil rights agenda sweeps too broadly with regard to remedies for African Americans because it does not consider important distinctions in addition to race, particularly class).

ownership; each may provide ideas and models that can help others.

IV CONCLUSION

Although I have no blueprint for exactly how African American communities should redefine property, I can point out the need, suggest the direction, and perhaps stimulate some thought and action. But the solutions will have to come from our communities. The important task is to recognize that we are entering a time of opportunity for transformation and that African American communities have the ability, strength and power to transform constructions that were created to perpetuate our subjugation.