

## REVIEWS

### Property in Context

PROPERTY LAW AND THE PUBLIC INTEREST. By J. Gordon Hylton et al. Charlottesville, Virginia: Lexis Law Publishing, 1998. Pp. v, 778.

*Reviewed by Craig J. Albert\**

"[I]t is my expectation that [the casebook on contracts] will be followed by other volumes of the same plan; but I have as yet formed no definite opinion as to how far the design will be carried."

—C.C. Langdell

So began Christopher Columbus Langdell in the very first casebook for use in an American law school,<sup>1</sup> and the deluge of casebooks has not stopped. The first Property casebook, known popularly as "Gray's Cases,"<sup>2</sup> was introduced to the Harvard Law School in 1888 by Langdell's colleague John Chipman Gray. Gray had one-upped Langdell, at least in terms of weight, for while Langdell<sup>3</sup> condensed his comprehensive treatment of contracts into a single volume, Gray's efforts spanned six volumes. All of that paper was not wasted, for Harvard's law students studied Property two hours per week, every week, for all six semesters of law school. Now, as

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\* Associate Professor of Law, Seton Hall University.

1. C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871).

2. JOHN CHIPMAN GRAY, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY (1888).

3. My aim is not to present either Langdell or his method as the ideal to which we should strive in legal education. Too many scholars of high repute have determined that Langdell's contribution was not wholly positive. See, e.g., GRANT GILMORE, THE AGES OF AMERICAN LAW 42 (1977); Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947). Langdell's life and methods are treated in a variety of sources, including NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 9-64 (1995); WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (1994); and Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). The Langdell literature runs into many hundreds of articles and books. W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 2 n.2 (1997). For what it is worth, though, Langdell came first.

Property has shrunk in most law schools to a single semester of three or four credit hours, Professors J. Gordon Hylton, David L. Callies, Daniel R. Mandelker, and my colleague, Paula A. Franzese, offer a new casebook, *Property Law and the Public Interest*,<sup>4</sup> to respond to the new environment.

The authors have two objectives. First, they sought to create a casebook that could be more easily adapted to the shrinking role of Property in the curriculum, for "the typical casebook . . . forc[es] the instructor to leapfrog through the book covering parts of chapters and omitting others altogether."<sup>5</sup> Second, they sought to present the subject matter in a way that eschews a traditional dichotomy between public and private sources of law and instead focuses on the underlying resources that are allocated by law.

In my view, the second goal is worthwhile because it places Property in context and, therefore, aids understanding; the goal is laudable, even in the absence of a shortened text. But here, where the primary goal is to create teaching materials that can be covered in a single semester, the need to put property in context is absolutely essential. Happily, the authors achieved both of their objectives.

Aside from the authors' stated goals, we might ask independently where the need for another casebook lies. The need is apparent to me each time I open the discussion of a case in which the unstated introduction could easily be: "This may not be interesting to you, but . . . ." Why shouldn't the cases be interesting? Why shouldn't the matter be presented in a way that piques the average reader's interest rather than that of the instructor? This is no idle speculation. With over one hundred years' worth of experience since Gray, Property casebooks ought to be fairly evolved by now. Still, there may be new ways to present the materials in this most essential, but to many students incomprehensible, of first-year offerings. Rather than rationalize about why Property continues to be one of the least favorite subjects for law students to learn and for law professors to teach, perhaps it is sufficient to ask what changes we can make in the way we teach the subject so as to make it more accessible.<sup>6</sup> Considering some of the reasons often advanced—such as Property's arcane language and

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4. J. GORDON HYLTON ET AL., *PROPERTY LAW AND THE PUBLIC INTEREST* (1998).

5. *Id.* at vii.

6. This is fortunate because, in addition to Property, I teach another of those subjects: the required course in Business Associations. A helpful hint to those who wish to teach law is to develop an enthusiastic desire—either real or feigned—to teach those subjects. Hiring committees will be both gratified and amazed to find that people like you exist; you are like a missionary among the lepers. For the record, though, my desire is real, not feigned.

its history based on long-dead social structures—it makes more sense to put Property into context and demote the unpleasant aspects to the side-order status that they deserve. Let the law professors order the odd-flavored appetizers; the students will be ordering the main course.

#### BACKGROUND: OF PROPERTY CASEBOOKS AND THE CASE METHOD

When the editors of this law review asked me to contribute my thoughts on *Property Law and the Public Interest*, I puzzled over what was new that I could say about a subject so old. Indeed, what could anyone say that was new, and why does the world need another Property casebook? The answer lies in understanding how Property casebooks became the way that they are.

My clue came from Professor Farnsworth's history of American casebooks.<sup>7</sup> Langdell's era was (in Farnsworth's terms) the "Age of Anthology," meaning that the cases were arranged chronologically, without comment, to show the historical development of the law. That Age gave way in the 1940s to a new type of casebook filled with editorial opinion and secondary materials.<sup>8</sup> The path from the old to the new was illuminated by such innovations as a detailed table of contents (contrasted with sparse chapter and section headings), footnotes to other authorities, and (finally) extensive explanatory notes, questions, and problems.

Before Langdell arrived, the small minority of law students who attended law schools heard professors lecturing on their synthesis of law; students' preparations consisted of reading from treatises. Most would-be lawyers either trained as clerks, learning the practical aspects of the trade from an experienced practitioner, or simply commenced practice without any training.<sup>9</sup> In developing the case method,

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7. E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406 (1987). A more recent treatment is Steve Sheppard's *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 593-619 (1997). The modern history of Property casebooks (up to 1970) was traced in Lawrence Berger, *Book Review: Cases and Text on Property*, 84 HARV. L. REV. 267 (1970) (reviewing A. JAMES CASNER & W. BARTON LEACH, *CASES AND TEXT ON PROPERTY* (2d ed. 1969)).

8. Farnsworth, *supra* note 7, at 1407.

9. In his history of American legal education, Robert Stevens observed that by 1860, a period of legal apprenticeship was required in only nine of thirty-nine American jurisdictions, while the other thirty required no formal training at all for the general practice of law. That small number represented an evolutionary shrinkage among the original thirteen colonies that had required such training and an increase in the total number of jurisdictions through the admission of new states that never had a training requirement. See ROBERT BOCKING STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 5-7 (1983). At the same time, only six of the nation's nineteen law schools qualified for a "diploma privilege,"

Langdell necessarily had to consider the advantage of students attending law school rather than their traveling the usual road.

Given the fact that the case method of instruction had supplanted a lecture method in which instructors synthesized the law for their students after the students had prepared for class by reading treatises, was it not the case that the evolution of the modern casebook was really a devolution to the pre-Langdell method? Quite possible. Consider, for example, the fact that as soon as it was introduced, Langdell's method had its critics, engendering in turn a criticism of the teaching materials designed for the case method. Take, for example, the review of *Selected Cases on the Law of Property in Land*, an 1898 offering reviewed in the *Harvard Law Review*, in which the student reviewer wrote,

To give the student some idea of the growth of the law, to make him more ready to feel its tendencies and to solve its new problems—all this is no part of Mr. Finch's purpose in the present volume. Presumably he has left it to the instruction accompanying the study. His sole aim seems to be to show what are the prevailing rules of the law of property in America to-day. His method is to make a comprehensive scheme of the law, dividing and subdividing it into a multitude of minor topics which, speaking roughly, include all that is usually given in a course on real property in one of our law schools. These sub-topics are treated as units, a group of cases—or more often a single case—shows the generally accepted rule of law in regard to each of them, constant cross-references show its relation to the rest of the subject. The cases selected are always modern, to the point, and illustrative—though not leading. The requirements of space which cut the collection down to a single volume forced the compiler always to leave out the pleadings and the statements of fact—yet these are the data of the legal problems. To the student of this volume the law of property must appear only a succession of fairly definite rules that stand ready to be applied to every need. No notes guide him to further research, his cases give him no idea of the conflict of authorities, he must rely solely on the acumen and judgment of the compiler. The book points constantly to a complete knowledge of the law rather than a thorough understanding of it.<sup>10</sup>

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in which graduates were not required to apprentice in those states that otherwise required apprenticeships for lawyers who did not attend law school. ALFRED Z. REED, PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA 11 (Carnegie Foundation for the Advancement of Teaching Bulletin No. 21, 1928).

10. Reviews, 12 HARV. L. REV. 362, 362 (1898) (reviewing WILLIAM A. FINCH, *SELECTED CASES ON THE LAW OF PROPERTY IN LAND* (1898)).

In other words, this student of the Gray tradition wrote, the Langdell-style casebook is too sparse; it provides no context.

At Yale, on the other hand, the law students wanted some kind of a commercial outline; forget the notes to the cases and the synthesis. There simply wasn't enough time in the day for the reading that the case method demanded:

After reading a mass of details, rules and exceptions, after going through the cases in point, the really essential thing still remains to be done, namely to reduce this mass of raw material to its proper proportions in the form of general principles. This process of mental digestion is the hardest part of the work, and, owing to the unfortunate fact that there are but twenty-four hours in a day, is seldom well attended to. The difficulty is perhaps more marked in the "case" system than in the text-book system, but it is sufficiently bad in either. . . . Accordingly there is a growing need, particularly in those branches of law where the reasons for the rule are less obvious, for a condensed "practical philosophy" for each branch; and as decisions multiply and details accumulate, this need will become more imperative, until it is met by independent books dealing with the respective subjects from this point of view.<sup>11</sup>

But wasn't the sparse casebook form necessary for the case method? Not really. Langdell created the casebook form as an afterthought to aid him in the case method in a mechanical way. The instruction is separate from the materials. Langdell explained in the preface to the first casebook that his task at Harvard was to teach a large class and that he perceived three things that had to be accomplished. First, the study of the students was to be "with direct reference to [Langdell's] instruction."<sup>12</sup> Second, the students' studies should generate "the greatest and most lasting benefit."<sup>13</sup> Third, there should be an advantage to attending class, rather than devoting oneself to individual study.<sup>14</sup> In other words, the teacher should matter. The casebook, it seems, was an adjunct to Langdell's instruction; its function, in his method, could easily have been served by a set of reporters, a set of hypothetical fact patterns followed by stated outcomes, or by any other materials that would concretize the instructor's exposition.

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11. Editorial, *Study of Text-Books*, 4 Yale L.J. 78 (1894).

12. LANGDELL, *supra* note 1, at v.

13. *Id.*

14. *Id.*

Langdell faced a practical problem, which he described as "what seemed at first to be an insuperable practical difficulty": the books. If there were more than a few students, the demand for the reporters would be too high—everyone would want to read the same book. He thought of law as a scientific discipline in which the data were the written opinions of appellate judges. The best way to learn the law and its theory was to look at the decisions themselves. The students should, he reasoned, read the reports of the cases as the core of their education. Langdell conceived the idea of the casebook as a carefully chosen selection of cases that each student could own. Read against this background of immense practicality, it is easy to understand how Langdell created *Cases on Contracts*.<sup>15</sup> There are almost no notes or explanatory materials; no problems for further thought or class discussion; and no references to secondary materials.

Not everyone could be Langdell,<sup>16</sup> with the ability to immediately extract from the decisions and opinions the precise rule of law. The publishers with a financial stake in the outcome responded to the demands of the marketplace. The books that the students wanted and the instructors needed started to appear in all fields of instruction.<sup>17</sup>

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15. LANGDELL, *supra* note 1.

16. Nor was being Langdell particularly popular with the students. Langdell introduced the case method to the freshman Harvard Law School class in 1870, and all but seven students dropped his course. 2 CHARLES WARREN, *HISTORY OF THE HARVARD LAW SCHOOL AND EARLY LEGAL CONDITIONS IN AMERICA* 373 (1970).

17. A review of an early criminal law casebook of the same turn-of-the-century era reveals a responsiveness to the sparseness issue:

The noticeable features distinguishing the present work are the more refined subdivision of the subject-matter, the tendency to introduce decisions in which the opinions are long and the arguments *pro* and *con* elaborately discussed, and finally the addition of a group of American cases decided since the publication of Mr. Beale's book.

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The introduction of long opinions seems much more valuable in a book that is to be used for private study than in one that is intended to be used for classroom discussion. The most satisfactory cases for use under the "case system" of teaching law are those short, terse decisions which contain a few essential facts and a brief statement by the court of its opinion, but which leave the student to determine the grounds of the court's action and the validity of its position. Decisions which contain elaborate arguments dissecting the varying doctrines upon a questionable point of law leave little opportunity for original thought by a class. At most a student can say only that the decision is right or that a certain objection is not answered convincingly. To the student who does not have the benefit of class discussion the well chosen elaborate opinion is, of course, valuable, as it presents to him just what the discussion by the class and the summary by the teacher ought to put before him.

Books and Periodicals, 16 HARV. L. REV. 460 (1903) (reviewing WILLIAM E. MIKELL, *CASES ON CRIMINAL LAW* (1902)).

If we were to follow Langdell's original plan, we could declare casebooks to be obsolete. After all, our friends Lexis and Westlaw<sup>18</sup> have now put the vast majority of reported cases a few mouseclicks away from every law student. For those cases that are too old or too foreign to be found in the on-line services, the instructor could make free use of the photocopier or establish a website with the full text of the opinions. In short, scarcity of resources no longer justifies the casebook's continued existence.

The simple fact is that Langdell's model is not and (except for a brief time a century ago) never has been the dominant model for casebooks. His ideal world, in which the professor would "select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any [of the subject's] essential doctrines,"<sup>19</sup> does not exist in any modern casebook of which I am aware. Now, instead of proceeding from seminal cases to modern law, casebooks vary markedly in their selection of cases. Except for a few classics that find their way, edition after edition, into nearly every Property casebook (e.g., *Keeble v. Hickering-hill*,<sup>20</sup> *Penn Central Transportation Co. v. City of New York*,<sup>21</sup> *Lucas v. South Carolina Coastal Council*),<sup>22</sup> the dominant approach is to take a representative sampling of the cases that describe some common law concepts and apply them to simple transactions, or choose areas now dominated by statute and find a case—any case—that applies the statute. If the best approach to casebooks were to trot out the old standards irrespective of age and social context, then we might never have moved beyond *Gray's Cases*. We did move, however, and we moved quickly. Casebooks proliferated rapidly as the case method took hold across the nation. From 1898 to 1899 alone, at least four casebooks appeared along the same model as Gray's, with the major difference being that they were shorter than Gray's tome.<sup>23</sup>

Today's casebooks owe their form to Professor Wormser more than they do to Langdell. Wormser reviewed one of his day's

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18. They are our friends, but plainly they are not friends to one another.

19. LANGDELL, *supra* note 1, at vii.

20. 11 East 574, 103 Eng. Rep. 1127, 11 Mod. 74, 130, 3 Salk 9 (Q.B. 1707).

21. 438 U.S. 104 (1978).

22. 505 U.S. 1003 (1992).

23. ELMER E. BARRETT, *CASES ON THE LAW OF REAL PROPERTY* (1898); WILLIAM A. FINCH, *SELECTED CASES ON THE LAW OF PROPERTY IN LAND* (1898); JASPER C. GATES, *CASES ON THE LAW OF REAL PROPERTY* (1898); FRANK H. SOMMER, *PROPERTY IN LAND: CITATIONS, EXTRACTS AND CONDENSED CASES* (1899).

Corporations casebooks—one that made use of notes and commentary—and then observed:

Such a note . . . emphatically does not relieve the student from doing his own thinking. On the contrary, such a note is nothing more or less than an adaptation of text-book methods to the case-book. It would have been both franker and wiser for Mr. Burnett to confess that such topics as corporations do not lend themselves as readily to the pure case-book method as do some other legal subjects. It is necessary (judging from experience) to supplement the cases on many topics in corporations with rather voluminous notes, in order to avoid a two-volume work. . . .

The fact of the matter is that there are certain topics in the law which lend themselves admirably to the pure inductive method. Such a subject is contracts. Another such subject is insurance. Other such subjects are torts, trusts and evidence. . . . A case-book on [a subject that does not lend itself to the pure inductive method] needs full notes and these notes must be frankly inserted with a view to supplement the cases and with a fearless recognition of the fact that the simon-pure case-book method will not suffice in dealing with a rambling topic like corporation law.

The sooner this is openly recognized by law teachers, the better it will be. It is nothing short of absurd to try to apply to this topic the pure inductive method which works out so admirably in handling a topic like contracts.<sup>24</sup>

I would add simply that Property, because it is so steeped in history and economics, is one of those subjects, like Corporations, that benefits greatly from the melding of the textbook and casebook forms. The need for this new kind of casebook was recognized by Charles Clark in his review of an early Property casebook by Bigelow, written in the more modern style. Bigelow eschewed Gray's use of ancient

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24. I. Maurice Wormser, Book Review, 28 YALE L.J. 205, 206-07 (1918) (reviewing DANIEL FREDERICK BURNETT, CASES ON THE LAW OF PRIVATE CORPORATIONS (1917)).

As noted above, I teach Business Associations as well as Property, and my fellow teachers in that field might be interested to know that Wormser felt then as many of us do now:

On the other hand, the reviewer has ascertained from classroom experience in teaching corporations (he deserves sympathy, as he has taught the subject twenty times) that it does not lend itself so well to the case-book method. The reviewer remembers that when Professor Gifford . . . was teaching this topic at Yale, he remarked to the reviewer that corporations was not the "teaching subject" that contracts and evidence are. The reason is obvious. It is because the student's grasp of corporation law cannot be attained inductively alone. In this respect, it differs from contracts and from many other legal subjects. The law of corporations does not "*build itself up*." Therefore, it is necessary to handle it in a somewhat different manner than contracts.

*Id.* at 207.



cases and secondary materials and instead introduced "a frank abandonment of the case method and the substitution of a short treatise covering this history." Clark writes:

Now every teacher of Property will have his own ideas concerning the proper method of approach to real property law. Certainly, however, there is much to be said for Professor Bigelow's plan. Littleton's *Tenures* means little to the beginning law student who has yet to connect the Statutes of Uses with the modern warranty deed. Indeed we may say, why the "Introduction" at all in a case-book? Cases are studied primarily to train the student in capacity to acquaint himself with the living law, not to teach him history. Throughout the study of Property . . . the practical and present day as well as historical aspects of disseizin, grants, estates, uses, and so on are shown. Why should these subjects be fleetingly touched in the classroom in a preliminary historical survey?<sup>25</sup>

Similar critiques led to the inclusion of problems for the student to solve.<sup>26</sup>

#### PROPERTY LAW AND THE PUBLIC INTEREST

All of this history is a roundabout way of getting to the value of today's casebooks in general and *Property Law and the Public Interest* in particular. The debate over the comparative values of the various

25. Charles E. Clark, Book Review, 29 YALE L.J. 477, 477 (1920) (reviewing HARRY A. BIGELOW, *CASES ON THE LAW OF PROPERTY, VOL. II, INTRODUCTION TO THE LAW OF REAL PROPERTY—RIGHTS IN LAND* (1919)). The fact that the materials are in the casebook does not mean that it is the instructor's obligation to rehash the history in the classroom. "Mature law students should be expected to master their historical treatises by themselves and thus leave the classroom for the analysis and discussion of decided cases, particularly as these cases will themselves reflect and illustrate the historical background." *Id.* at 478.

26. Professor Ballantine, in reviewing a Contracts casebook of his day, made his pitch for the problem method:

In a case-book the important thing is to have cases which raise the crucial and vital problems of the subject, in an interesting way, to stimulate thought and discussion. In any argument the first thing to do is to define the issues. It may be suggested that historical materials should be introduced at a point where they will shed light on these crucial questions. They frequently make a poor introduction to a subject because the student cannot appreciate their use and bearing, or what the problem is that they are intended to elucidate. The beginner can often go better from the present to the past than from the dim and uncertain past to the present.

It may also be suggested that more problem material should be included in our case-books and more cases without opinions to stimulate the individual and creative thought of the student, and to make him read his cases as the lawyer and investigator do, with some question in his mind of which he is eagerly seeking the solution. Our case-books and case method of instruction still have undeveloped possibilities.

Henry W. Ballantine, Book Review, 31 YALE L.J. 569, 570 (1922) (reviewing GEORGE P. COSTIGAN, JR., *CASES ON CONTRACTS* (1921)).

methods of instruction and the need (or lack thereof) for some kind of supplemental teaching material is a debate that has raged for over a century. It will not be settled this week. I think that we can agree upon one thing, though. We expect a casebook to be a practical adjunct to teaching in a way that makes the subject matter of the course interesting and understandable to our students. *Property Law and the Public Interest* achieves this result in a way that will appeal to instructors whose interests lie in cutting edge land use and social policy issues. For the most part, each subtopic is illustrated with one case and a brief set of notes. The very fact that the materials are not overwhelming in volume means that the instructor can focus the attention of the class on the broader implications of the cases, both by placing them into context and by using them as illustrations of competing policy interests.

Another advantage to *Property Law and the Public Interest* is that it places its cases in an accessible historical context. It is a sad fact of life today that few students have an understanding of American history, and fewer still have an understanding of English history, histories that are so important to the evolution of American property law. It is not reasonable, however, to expect that the deficiencies in the body of understanding can be rectified by the instructor of Property, even if the instructor desired to do so. The simple fact is that there is not enough time to teach both history and Property during the same class hour and expect to cover the materials in the usual curriculum.

Some casebooks rectify this problem through the use of extensive historical notes.<sup>27</sup> The difficulty with this approach, for the vast majority of law students, is that the historical context overwhelms the law. The first-year law student, not experienced enough in reading either history or law, cannot discern the boundary between the history needed for context and the history needed for cocktail party chatter.<sup>28</sup>

A middle ground is for the instructor to have an understanding of the historical issues and to have teaching materials that provide the necessary background, either through notes or through the selection of interesting cases. This casebook steers the middle course. Its volume of note material on historical issues is not overwhelming, but, where needed, it contains appropriate synopses of them. I would suggest,

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27. See, e.g., RICHARD H. CHUSED, CASES, MATERIALS AND PROBLEMS IN PROPERTY (1988); CHARLES M. HAAR & LANCE LIEBMAN, PROPERTY AND LAW (2d ed. 1985); JOSEPH SINGER, PROPERTY LAW: RULES, POLICIES AND PRACTICES (2d ed. 1997).

28. I am assuming here that they get invited to cocktail parties where people enjoy chatting about the Rule Against Perpetuities. Or am I the only one who gets invited?

however, that instructors who use this book ought to make concerted efforts to go beyond *Property Law and the Public Interest* in order to deepen their understanding of the historical background.

The choice of cases is quite interesting. Having never written a casebook of my own, I can only guess the motivations behind the authors' choices.<sup>29</sup> First, as to the older doctrines of estates and future interests, why is there a need to depart from the standard offerings? The answer is simple: there are no standard offerings. The existing casebooks treat the older issues in one of two ways. First, there is the expositional approach, as in Dukeminier & Krier's casebook.<sup>30</sup> Of the 133 pages in that casebook devoted to the chapters on possessory estates and future interests, there are only nine primary cases. All nine are under the subheads for the life estate, the defeasible estate, the trust, and the Rule Against Perpetuities. Another tack is to proceed by way of case examples. This is the approach of Cribbitt, Johnson, Findley, and Smith,<sup>31</sup> who weight the materials heavily toward cases, with a smattering of textual explanation. *Property Law and the Public Interest* steers a middle course, with accessible explanatory text, followed by cases that illustrate the application of the rules that have been described. Because the book is designed for a one-semester course,<sup>32</sup> this approach condenses these materials into a form that is digestible without overwhelming the rest of the semester's work.

*Property Law and the Public Interest* adopts a hybrid approach in keeping with its goal of reducing the materials to a volume that can be managed within a single semester. There are many illustrative cases, but there is also a textual explanation without a lengthy historical detour. As in other offerings in the field, the selection of cases is meant to illustrate an application of the principle, although often the cases themselves are chosen to perform the dual function of example

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29. Another approach would be simply to ask the authors, but that would take all of the fun out of Critical Casebook Theory.

30. JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* (4th ed. 1998). Other expositional approaches include OLIN L. BROWDER ET AL., *BASIC PROPERTY LAW* (5th ed. 1989) and JOHN P. DWYER & PETER S. MENELL, *PROPERTY LAW AND POLICY* (1998). The expositional approach incorporating the problem method is used in JON W. BRUCE & JAMES W. ELY, JR., *CASES AND MATERIALS ON MODERN PROPERTY LAW* (3d ed. 1994).

31. JOHN E. CRIBBIT ET AL., *CASES AND MATERIALS: PROPERTY* (7th ed. 1996). The exemplar approach, combined with problems, is adopted in EDWARD H. RABIN & ROBERTA ROSENTHAL Kwall, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* (3d ed. 1992).

32. The authors suggest that the instructor who wishes to use the book in a full-year course should do it by including supplemental materials; there is some suggestion that in a single-semester course, the materials on zoning, housing discrimination, and environmental protection be omitted.

and exposition. The student who needs more background can easily look to the traditional offerings, such as Cribbett & Johnson's,<sup>33</sup> Bergin & Haskell's,<sup>34</sup> or Moynihan's respective texts.<sup>35</sup>

Second, as to the newer issues, how does one choose materials? *Property Law and the Public Interest* uses two types of cases. One is the Supreme Court decisions offered in almost every casebook because they constitute the leading cases of zoning, land use, takings, and discrimination law.<sup>36</sup> The bulk of the book, however, consists of less familiar cases, whose facts are interesting and compelling, to illustrate and explain the doctrines they apply.<sup>37</sup> The second type is, to me, most interesting, because the use of stimulating teaching materials will go a long way toward focusing the students on the subject matter.

The book integrates the teaching of other fields and gives due treatment to procedural issues. A good example is the field of intellectual property. The IP cases in *Property Law and the Public Interest*, however, read like an advertisement for IP. I suspect that, if I knew nothing at all about IP and learned Property from *Property Law and the Public Interest*, I would be eager to take a course in IP just to see what it was all about. This textbook adds value in that it provides an introduction to other fields that students might not receive otherwise.

For example, the question of whether the right of publicity is descendible is examined in *Tennessee ex rel. The Elvis Presley International Memorial Foundation v. Crowell*.<sup>38</sup> Every student can easily grasp the issue. After all, what would a holiday mattress sale be without George Washington? But whether people or their estates have rights to their images and reputations from beyond the grave raises

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33. JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY (3d ed. 1989).

34. THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS (2d ed. 1984).

35. CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY (2d ed. 1988).

36. The usual suspects are *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

37. See, e.g., *El Di, Inc. v. Town of Bethany Beach*, 477 A.2d 1066 (Del. 1984) (discussing termination of covenants), reprinted in HYLTON ET AL., *supra* note 4, at 592; *Bove v. Donner-Hanna Coke Corp.*, 258 N.Y.S. 229 (N.Y. App. Div. 1932) (discussing nuisance), reprinted in HYLTON ET AL., *supra* note 4, at 92; *Reid v. Architectural Review Bd. of Cleveland Heights*, 192 N.E.2d 74 (Ohio Ct. App. 1963) (illustrating aesthetic zoning and historic preservation), reprinted in HYLTON ET AL., *supra* note 4, at 686.

38. 733 S.W.2d 89 (Tenn. Ct. App. 1987), reprinted in HYLTON ET AL., *supra* note 4, at 32.

profound questions of how wealth is created and transferred, and what the societal interests are in protecting or neglecting the reputations of famous individuals. The anecdotal note materials following the Presley case are wonderful. The Chief Executive of Elvis Presley Enterprises is quoted as saying,

If Elvis Presley had spent 30 years building a tire factory instead of a vast value to his image and likeness, would the law have held on the day he died that everybody in town could kick open the doors and go take all the tires because Elvis didn't need the tires any more?<sup>39</sup>

That explanation—not a legal explanation, to be sure—captures the soul of the issue in a way that anyone can understand.

Professor Callies is, I suspect, responsible for the large number of cases in *Property Law and the Public Interest* that come to us from Hawaii,<sup>40</sup> as he teaches at the University of Hawaii Law School. These cases wonderfully illustrate how a court might develop a modern system of property law, informed by older doctrine but responsive to present-day needs. The exposition makes clear that Property is a communal concept; it expands through legislation, judicial decisions, and the evolution of community standards.

The note materials speak to the consequences and implications of the cases. The reader is rarely left guessing about the meaning of some obscure note case; rather, the issues are framed and examples given. The result is that the student reader might actually have an incentive to find and read the note cases, rather than view the task as a chore.

*Property Law and the Public Interest* provides a wonderful example of why Wormser and Ballantine's model can and should be adapted for use in the basic Property course. I confess that I had always thought that you need to teach Property like you build a house—from the foundation up. This book proves that I'm wrong. It is feasible (and desirable) to teach from the top down by first looking at the interesting macro issues, like takings and intellectual property cases on intangibles, and then work slowly toward the foundation. The analogy is in

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39. HYLTON ET AL., *supra* note 4, at 42.

40. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984), *reprinted in* HYLTON ET AL., *supra* note 4, at 215; Palila v. Hawaii Dep't of Land & Natural Resources, 852 F.2d 1106 (9th Cir. 1988), *reprinted in* HYLTON ET AL., *supra* note 4, at 752; Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985), *reprinted in* HYLTON ET AL., *supra* note 4, at 242; Topliss v. Planning Comm'n, 842 P.2d 648 (Haw. Ct. App. 1993), *reprinted in* HYLTON ET AL., *supra* note 4, at 710; Campbell v. Hipawai Corp., 639 P.2d 1119 (Haw. Ct. App. 1982), *reprinted in* HYLTON ET AL., *supra* note 4, at 204; Whitesell v. Houlton, 632 P.2d 1077 (Haw. Ct. App. 1981), *reprinted in* HYLTON ET AL., *supra* note 4, at 103.

persuading someone that he or she ought to learn to drive a car.<sup>41</sup> The idea is sold by explaining all the interesting and wonderful places he or she could go,<sup>42</sup> and all of the freedom of movement that driving will afford. You don't sell the idea by explaining the marvels of the internal combustion engine.

This approach should be especially refreshing for teachers who have used the case method in a linear way, but do not feel that a radical shift to a pure problem method would be an easy transition. The casebook offers a middle ground, expressing the old concepts in a fresh way. I had thought that I might get away in this review with simply reading the notes and textual material and skimming the cases, but I found myself reading more of the cases because they were so wonderful. In fact, the authors' choices of cases are well-edited (a tribute to the authors) and well-written (a tribute to the judges who wrote the opinions).

This is by no means an easy book because the student who wishes only to extract the black letter building blocks of Property will have to work at it. Much of the material is organized around theme, rather than around doctrine. For example, the eminent domain materials begin with *Hawaii Housing Authority v. Midkiff*,<sup>43</sup> but then present the mechanics of eminent domain with *Rubano v. Department of Transportation*<sup>44</sup> under the heading of "Control of Highway Access" and with *Acierno v. State of Delaware*<sup>45</sup> under the heading of "Recovery of Special Benefits." These materials follow—one hundred pages later—the takings and police power cases of *Nollan*,<sup>46</sup> *Dolan*,<sup>47</sup> and *Lucas*.<sup>48</sup>

Another example of the book's organizational style is found in the landlord-tenant materials. The ancient history of leases in England is nowhere to be found. Instead, the focus is on the modern lease,<sup>49</sup> with which the average student has some familiarity. The basics of the

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41. Where I grew up (in the heart of New York City), you actually have to persuade people to learn to drive; they are not born with this desire.

42. DR. SEUSS, OH THE PLACES YOU'LL GO (1990).

43. 467 U.S. 229 (1984), *reprinted in* HYLTON ET AL., *supra* note 4, at 215.

44. 656 So. 2d 1264 (Fla. 1995), *reprinted in* HYLTON ET AL., *supra* note 4, at 225.

45. 643 A.2d 1328 (Del. 1994), *reprinted in* HYLTON ET AL., *supra* note 4, at 234.

46. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *reprinted in* HYLTON ET AL., *supra* note 4, at 135.

47. *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *reprinted in* HYLTON ET AL., *supra* note 4, at 143.

48. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *reprinted in* HYLTON ET AL., *supra* note 4, at 151.

49. I suggest that the instructor provide the class with an example of a lease.

transaction can be explained quickly, so the book places the transaction in context by providing cases on assignment and sublease,<sup>50</sup> repairs,<sup>51</sup> housing codes,<sup>52</sup> and rent control.<sup>53</sup>

I must emphasize, however, that the book's organization is an advantage, not a shortcoming. Students who want only the black letter are not going to look for it in the casebook; they will look for it in any of the commercial outlines whose size rivals or exceeds that of the book itself. That student faces the daunting task of coordinating the Gray-like digest approach of the outlines with the novel cases presented in *Property Law and the Public Interest*. I venture to guess that the instructors who adopt this text will be, for the most part, the ones who are most interested in policy-oriented instruction, to which commercial outlines are not well-suited. Those instructors should therefore be aware that these students may get lost in *Property Law and the Public Interest* without guidance.

Another advantage of the book is that it effectively incorporates a minicourse on land use. The last forty percent of the book, beginning with a short chapter on easements, licenses, and profits that actually appears in Part III, on the "Rights of Common Owners," is devoted to public, quasi-public, and private restrictions on the use of land.<sup>54</sup> The materials on the creation of covenants and servitudes are covered briefly, but there is then an extensive treatment on the policy concerns associated with these private restrictions.

In keeping with the theme of property law as a system of private and public limitations on the use of land, *Property Law and the Public Interest* places the materials on housing discrimination in the middle of the land use materials rather than in the traditional locale of landlord-tenant materials. In addition to the usual introduction to the Fair Housing Act, the text extends the inquiry by including cases on discrimination against rental housing in general,<sup>55</sup> steering,<sup>56</sup> and

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50. *Jaber v. Miller*, 239 S.W.2d 760 (Ark. 1951), reprinted in HYLTON ET AL., *supra* note 4, at 424.

51. *Bowles v. Mahoney*, 202 F.2d 320 (D.C. Cir. 1952), reprinted in HYLTON ET AL., *supra* note 4, at 431.

52. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), reprinted in HYLTON ET AL., *supra* note 4, at 441; *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. App. 1968), reprinted in HYLTON ET AL., *supra* note 4, at 445.

53. *Yee v. City of Escondido*, 503 U.S. 519 (1992), reprinted in HYLTON ET AL., *supra* note 4, at 466.

54. HYLTON ET AL., *supra* note 4, at 477-756.

55. *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148 (S.D.N.Y. 1989), reprinted in HYLTON ET AL., *supra* note 4, at 619.

56. *South-Suburban Hous. Ctr. v. Greater South Suburban Bd. of Realtors*, 935 F.2d 868 (7th Cir. 1991), reprinted in HYLTON ET AL., *supra* note 4, at 629.

group homes.<sup>57</sup> I like both the placement of the materials and the expanded emphasis. Placement is appropriate because, when read along with the landlord-tenant materials, the FHA cases in other texts invariably are perceived as afterthoughts. That is, we learn the mechanics of the lease relationship, then the antidiscrimination legislation is presented as another pitfall to avoid in the creation of the landlord-tenant relationship. The *Property Law and the Public Interest* approach presents discrimination as a public policy concern—applicable regardless of whether the transaction at issue is a sale or a lease.

With the new approach, it is far more likely that our students will engage in a no-holds-barred debate on the public interest in housing. It is no longer that students will, during the course of a class discussion, readily reveal racial, ethnic, or religious prejudices in a discussion of housing discrimination. How, then, can these attitudes be examined and discussed? The answer lies in shifting the discussion to practices and prejudices that enjoy more widespread acceptance. In the problem areas chosen for the text, students from suburban single-family homes will defend their own experiences against the claim that rental housing should be freely available in their neighborhoods; they will justify the practices of real estate brokers in steering clients toward or away from particular neighborhoods; they will readily provide a rationale for keeping the mentally ill or disabled away from their younger siblings. Shifting the terms of the debate provides for a better debate.

*Property Law and the Public Interest* deals with land use restrictions in the chapter on zoning,<sup>58</sup> which I would supplement with selected portions of a local zoning ordinance, and extends the analysis with a healthy dose of materials on environmental protection.<sup>59</sup> The latter provides a wonderful introduction to environmental law, with cases on air pollution, water pollution, the Endangered Species Act, wetlands protection, growth controls, and dedication to public use. Some students who might otherwise not have opted for a course in environmental law may be stimulated to take one. The instructor can also use the zoning and environmental materials as a way to introduce some concepts in administrative law and as a plea for students to take a course with substantial regulatory content.

Instructors of Property have to accept the fact that most students hate the subject. When the course is taught as the building block of

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57. *Larkin v. Michigan Dep't of Soc. Serv.*, 89 F.3d 285 (6th Cir. 1996), *reprinted in* HYLTON ET AL., *supra* note 4, at 641.

58. HYLTON ET AL., *supra* note 4, at 651-99.

59. *Id.* at 701-56.



conveyances and leases, the students' resistance is easily understood, for so many practical conveyance and lease problems are solved via the use of standard forms, statutory deeds, and widely-adopted practices such as those of title insurers.

There is a secret to the law of property, though, that can make it interesting. The secret is that property is the one first-year course in which we can tell compelling stories about how people form communities. Property brings together, in one crucible, the elements of people, places, and things, first through private arrangements, and later through the collective means of government. There is a clear set of personal and economic objectives as well as a set of tools. With that secret disclosed to the class and the appropriate teaching materials in hand, Property can be a wonderful subject for teachers to teach and students to learn.

I close this review with an observation made by another law professor about the way that students use the materials that we provide for them.

What is the earnest law student supposed to do *before* entering the classroom? Is it sufficient that he carefully prepare an "abstract" summarizing the facts and holding in the cases he has read? It will be answered that he is supposed to do more than this; he is expected to reflect on the reasons given for the rulings, and to test their soundness in themselves and in comparison with other cases. The students are supposed to criticize and question what they read; they are to test the practical consequences of a proposition, trying its application to supposititious cases, like an opposing lawyer on the alert to take issue at any vital point.

But why should one suppose that the students actually do this? It is here that the students fall down, and it is at this critical point that the use of the problems comes in to fill the gap. It *forces* reflection and effort on the student's part at the stage where it is needed, before entering the classroom. It gives them the initiative, instead of leaving it all to the instructor.

The merit of the case method, it is believed, is mainly due to the fact that the cases present concrete problems in the application of legal principles to facts, and afford an opportunity for arguing how the rules of law should be formulated. But the student usually regards the cases, not as problems demanding solutions but as problems already solved by the judge, to be studied by him as authoritative statements of the law. His task is that of understanding the judicial opinion.

Even if the professor puts problems in the course of classroom discussion, that subject having been covered, the student does not take the problem home with him for individual original thought. In

reading the cases it does not occur to him ordinarily to compare the various cases that he reads. The average student does not seem to have any adequate conception of what he is supposed to do with the cases assigned. He does not know what he is looking for, or what to put his effort upon. The study hours are confined largely to assimilative reading, and the abstracting and absorbtion [sic] of the doctrines laid down in the opinions.<sup>60</sup>

Professor Ballantine wrote those words about the law students of 1915, but his criticism rings true today. More so than in 1915, our students are overwhelmed by the pressures of course loads and part-time work. We must accept the reality that, while the case method is a wonderful teaching method if used properly by the teacher and if prepared for by the students (conditions that are often not observed in practice), the case method cannot work if cases are so ill-chosen that they obstruct preparation. A solution to the problem is choosing well-edited cases, presented in such a way that the cases relate to one another in some overarching context. In other words, what we need is more than simple Property. We need Property in context.

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60. Henry Winthrop Ballantine, *Teaching Contracts with the Aid of Problems*, 4 AM. L. SCH. REV. 115, 117-18 (1915).