

How Do Law Students Really Learn? Problem-Solving, Modern Pragmatism, and Property Law[†]

FUNDAMENTALS OF MODERN REAL PROPERTY LAW, 3d Edition.

By Edward H. Rabin^{††} and Roberta Rosenthal Kwall.[‡] New York, New York: Foundation Press, 1992. Pp. xvi, 1092.

*Reviewed by Craig Anthony (Tony) Arnold**

I. INTRODUCTION

The primary function of a casebook is to facilitate law students' learning. A casebook's roles as a contribution to discourse among scholars, a reference tool, and an exposition of the need for law reform are vastly less important than the service that casebooks provide to our students. Even a casebook that facilitates brilliant teaching has little value if learning by students does not accompany teaching by the professor. At the core, law schools teach students "to think like a lawyer."¹ This educational process requires student participation and mental activity—active, not passive, learning.² Thus, law school teaching is not so much demonstration of legal analysis, communication of well-researched and well-synthesized knowledge, or critique of legal doctrine and institutions as it is guidance of future lawyers

† Cf. Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57 (1992).

†† Associate Dean and Professor of Law, University of California at Davis.

‡ Professor of Law, DePaul University College of Law.

* Associate Professor of Law and Director, Center for Land Resources, Chapman University School of Law. My ideas about legal education have been both nurtured and sharpened in conversations with my colleagues, especially Larry Putt and Daniel Bogart about property law and Nancy Schultz, Judith Fischer, and Larry Putt about the problem method. I also appreciate the assistance of Matthew Beyersdorf, Chuong Ho, and Heather Bush.

1. Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57, 57 (1992); see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34-35, 57-58 (1992).

2. See Gerald F. Hess, *Listening to Our Students: Obstructing and Enhancing Learning in Law School*, 31 U.S.F. L. REV. 941, 943 (1997); Paula Lustbader, *Teach in Context: Responding to Diverse Student Voices Helps All Students Learn*, 48 J. LEGAL EDUC. 402, 412 (1998) ("Most students find that their understanding of material increases significantly when they are active with what they are learning.").

through their own analysis, communication, and critiques.³ Law professors, despite our passion for thinking, cannot do the thinking for our students. Nor can we recreate our students in our own images. We can only guide them in their own educational journeys. A casebook is valuable when it facilitates that journey effectively.⁴

Edward Rabin and Roberta Kwall had student learning in mind when they wrote *Fundamentals of Modern Real Property Law*.⁵ Rabin and Kwall's casebook is an attractive and effective road map for students as they journey through a course (and a body of legal principles and issues) that typically intimidates many law students in virtually every law school.⁶ Students learn well with Rabin and Kwall's casebook for two reasons.

First, Rabin and Kwall use the problem method.⁷ Each chapter contains one or more legal problems and a variety of materials—primarily but not exclusively cases—for students to read and use in solving the problems. Before students ever reach the classroom, they are learning to think contextually, *i.e.*, not in the abstract but in the context of the specific, concrete legal problems about which lawyers think. Students learn not only to read cases and extract legal principles from legal materials, but they also learn to use the cases and apply the legal principles to specific facts. They are more likely to grapple with the course material before the class (or the final exam) because they are reading the material with a purpose in mind—solving problems—rather than merely discussing it. Problems help students focus on what they should be gleaning from the cases and engage them in different kinds of careful, well-prepared reasoning. With problems, professors can lead their classes in exploring ethical issues, policy arguments, professional judgment, and theoretical concerns that may not be treated in edited appellate opinions and that may be too abstract for some students to consider without a concrete hypothetical. The problems provide material for simulations and skills-based exercises, like negotiations, client interviews, writing, and oral arguments.

Second, Rabin and Kwall take a modern pragmatic approach.⁸ By “modern pragmatism,” I mean that its cases and other materials focus

3. See Edwards, *supra* note 1, at 57-66; Lustbader, *supra* note 2, at 407-09.

4. For a discussion of how law students learn, see *infra* Part II.

5. EDWARD H. RABIN & ROBERTA ROSENTHAL K WALL, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* (3d ed. 1992).

6. For a discussion of my experiences with RABIN & K WALL as an effective casebook, see *infra* Part IV.

7. For a discussion of the problem method, see *infra* Part III, and accompanying citations.

8. For a discussion of modern pragmatism, see *infra* Part IV, and accompanying citations.

primarily on contemporary property principles of practical utility, not on the esoteric or archaic. Students learn property law used by today's practicing lawyer, covered on bar exams (both multistate and essay portions), and needed for advanced study in related courses. Because students can see the relationship between their formal education and their vocational goals, they are more willing to venture with the professor into more abstract, historical, or futuristic inquiry without fear that the course is completely irrelevant. The result is lawyers equipped both to operate in the real world of law practice and to think about how and why property law reached its present state and where it should move next.

By "modern pragmatism," I also mean a jurisprudential approach of twentieth-century pragmatism. The Rabin and Kwall casebook is not a "law and economics" property casebook,⁹ nor a "critical legal studies," "critical race theory," or "feminist" approach to the study of property.¹⁰ While it touches on these jurisprudential perspectives at various points and pushes students into grappling with the inequities, inefficiencies, and illogic of the law, it does not paralyze students in deconstructionism, economic analysis, or postmodern indeterminacy. The Rabin and Kwall casebook assumes that law develops to address practical, concrete, specific human problems and that students are learning to solve legal problems.¹¹ This approach, interestingly, allows a professor to expose students to a range of different theoretical and critical perspectives beyond modern pragmatism and show how these perspectives relate to the students' future participation in legal institutions.

In this essay, I contend that the Rabin and Kwall casebook is a wise choice among a wealth of superb property casebooks available today. In Part II, I synthesize others' scholarship and my observations about how law students actually learn. In Part III, I describe the problem method and its advantages in achieving learning by students. In Part IV, I discuss the modern pragmatic approach to casebook

9. A particularly good property casebook emphasizing an economic perspective, yet remaining practical, is JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* (3d ed. 1993).

10. A particularly good property casebook emphasizing critical perspectives, yet remaining practical, is JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* (2d ed. 1997).

11. See also DAVID A. BINDER, ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 2-3 (1991) (contending that the primary activity of lawyers is helping clients solve their problems, which are particularistic and diverse); Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 323-28 (1995) (discussing lawyering as problem-solving); Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 2 (1984) ("Lawyering means problem-solving.").

content as conducive to student engagement and education, while providing the flexibility to introduce other perspectives. In Part IV, I highlight many of the features of the Rabin and Kwall casebook that I have found useful in guiding students on their educational journeys through property law.

II. HOW DO LAW STUDENTS REALLY LEARN?

Legal education lacks a comprehensive, coherent, and widely accepted philosophy of how law students learn.¹² Increasingly, ideas about the law school educational process are advancing with the introduction of theories about adult education,¹³ surveys of and interviews with students,¹⁴ and debates over both the goals and methods of legal education.¹⁵ The lack of uniform understanding and agreement arguably reflects the lack of singular ways of learning in law school. A diversity of learning styles among diverse law school student bodies contributes to law professors' uncertainty about how to maximize learning.¹⁶

Nonetheless, we now understand several important features of law student learning—specific insights or themes that can guide casebook selection and pedagogical choices. First, students learn actively, not passively. They must engage with and use the material they are to learn, not simply listen to someone tell them about it.¹⁷ Gerald Hess writes, "Active learning promotes higher level thinking (analysis, synthesis, and evaluation) and develops skills, both of which are prominent goals of most adult education, including law schools."¹⁸ Aside from the debate over law schools' role in teaching practical

12. See Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 875-77 (1985) (pointing out the need for a systematic theory of law school learning).

13. See, e.g., Blasi, *supra* note 11, at 329-48; Hess, *supra* note 2; Lustbader, *supra* note 2.

14. See, e.g., Judith D. Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students*, 7 UCLA WOMEN'S L.J. 81 (1996); Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994); Hess, *supra* note 2; Lustbader, *supra* note 2.

15. See, e.g., Edwards, *supra* note 1; Schultz, *supra* note 1; see also James Eagar, *The Right Tool for the Job: The Effective Use of Pedagogical Methods in Legal Education*, 32 GONZ. L. REV. 389 (1996/97); Constance Frisby Fain, *A Methodology for Teaching Constitutional Law*, 21 SEATTLE U. L. REV. 807 (1998); Cynthia G. Hawkins-Leon, *The Socratic Method-Problem Method Dichotomy: The Debate Over Teaching Method Continues*, 1998 BYU EDUC. & L.J. 1 (1998).

16. See Frisby Fain, *supra* note 15, at 820-21; Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 63 (1995).

17. Hess, *supra* note 2, at 943 (discussing active learning); Lustbader, *supra* note 2, at 412 (same); see also Schultz, *supra* note 1, at 67-70 (describing student learning from the experience of active involvement with legal problems).

18. Hess, *supra* note 2, at 943.

lawyering skills like negotiation, advocacy, client interviewing and counseling, trial skills, and law office management,¹⁹ there seems to be little doubt that law schools can and should teach students some skills—in particular legal reasoning and analysis, legal research, and problem solving.²⁰ It is hard to believe that students will learn any of the skills that law schools conceivably are expected to teach unless the students actually practice and use the skills.²¹ Casebooks that require active student engagement in a range of legal thinking and activity are ideal.

Second, students learn in context.²² Let us consider three aspects of context: the relationship between learning and (1) cognitive frameworks; (2) concrete, particularistic human situations; and (3) the future use of the learning. Students approach the study of law with existing cognitive frameworks known as schema.²³ Students better understand, explore, apply, and synthesize new legal concepts²⁴ when the concepts are linked or related to their preexisting knowledge and experiences.²⁵ This does not mean that students should be excused

19. Compare AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION—NARROWING THE GAP (1992) with Paul Brest, *When Should a Lawyer Learn the Way to the Courthouse?*, 46 STANFORD LAWYER 2 (1993). For arguments that doctrine, theory, and skills can and should be integrated, see Edwards, *supra* note 1, at 57-66; Schultz, *supra* note 1, at 62-66; Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243 (1988). An excellent example of integration of doctrine, theory, and skills, is Stanford Law School's Environmental and Natural Resources Law & Policy Program. See Stanford Law Sch. Envtl. and Natural Resources Law & Policy Program, *A Brief Curriculum Guide, The Case Study Project, Stanford Environmental Clinic, Multi-Disciplinary Studies, & Stanford Students and Environmental Law* (Jan. 25, 1999) (information sheets on file with author).

20. See Brest, *supra* note 19, at 51; Eagar, *supra* note 15, at 397; Frisby Fain, *supra* note 15, at 816-17, 818-19; William A. Kaplin, *Problem Solving and Storytelling in Constitutional Law Courses*, 21 SEATTLE U. L. REV. 885, 889-90 (1998); Stephen Nathanson, *The Role of Problem Solving in Legal Education*, 39 J. LEGAL EDUC. 167, 167-68 (1989). For the contention that law schools can and should teach professional judgment, see Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527 (1994).

21. See Blasi, *supra* note 11, at 386 ("[E]xpertise in problem-solving is acquired by solving problems."); Brest, *supra* note 19, at 51 ("People learn best when they can utilize the skills and knowledge as they acquire them.").

22. Lustbader, *supra* note 2, at 405-07, 409-11; see also Feinman & Feldman, *supra* note 12, at 891 ("[L]awyers operate in unique contexts with unique materials. Educating students in lawyer-think means grounding them in those contexts and materials.").

23. Lustbader, *supra* note 2, at 406.

24. "New legal concepts" in this context means new to the students.

25. Lustbader, *supra* note 2, at 406. Indeed, one feature of "personalized education" may be the faculty's interest and investment in understanding the schema with which students approach the study of law.

from learning about material for which they lack prior experience. It does mean, however, that students will be more successful at learning property law if they are thinking about issues and factual scenarios to which they can relate based upon their previous experiences. For example, the case of *Pierson v. Post*, involving fox hunting in early nineteenth-century New York and the acquisition of ownership of wild animals by capture,²⁶ may be so remote historically, socioeconomically, and experientially as to be mostly meaningless to many students. They may benefit from either a more recent case on the rule of capture arising out of facts to which they can more readily relate, or supplements to *Pierson* that describe the historical context and the transition to the modern regulation of hunting and protection of wildlife.

Learning in context also means that thinking about legal issues and principles occurs not only in the abstract and general, but also in the concrete and particular—in relationship to the specific human situations in which the legal issues and principles arise.²⁷ Legal problems involve concrete, specific people with relationships, values, thoughts, feelings, goals, and interests. Legal problems arise in concrete, specific social and physical environments. Legal problems develop out of a series of concrete, specific events, actions, and words. Contextualized education asks questions about what is and ought to be in light of these facts and situations, thus building bridges between different styles and modes of processing: abstract and concrete, hierarchical and relational, and sensing and intuitive.²⁸

Learning in context further means that students learn best in the types of situations and environments in which they will use what they are learning. In other words, if they are to learn how to “think like a lawyer,” they must learn in the contexts in which lawyers think.²⁹ They must do, or at least roughly approximate, what lawyers do, instead of what law students typically do. Lawyers rarely think about

26. 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1805).

27. For a cognitive science analysis of various aspects of contextualism, many of which are mentioned briefly here, see Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287, 293-313 (1994). See also Lustbader, *supra* note 2, at 410 (urging law professors' reference to specific examples of situations in which legal doctrine arises); Schultz, *supra* note 1, at 59-62 (discussing a range of contextual factors that lawyers consider cognitively, relationally, and ethically).

28. See Randall, *supra* note 16; Spiegelman, *supra* note 19.

29. For discussions of this functionalist perspective on context, see Baker, *supra* note 27, at 305-06; Blasi, *supra* note 11, at 386-87; Ronald Chester & Scott E. Alumbaugh, *Functionalizing First-Year Legal Education: Toward a New Pedagogical Jurisprudence*, 25 U.C. DAVIS L. REV. 21, 23-27 (1991) (criticizing legal education as teaching students to think like law students, instead of preparing them for the realities of lawyering); Feinman & Feldman, *supra* note 12, at 891; Lustbader, *supra* note 2, at 410; Schultz, *supra* note 1, at 62.

property law as an academic matter. They think about property law as a matter of problem solving, professional judgment, advocacy, negotiation, dispute resolution, drafting, and the like. Students will learn "to think like a lawyer" best with a casebook that emphasizes context.

Third, students are greatly concerned, perhaps even preoccupied, with the practical. Almost all of our students attend law school to become members of the legal profession, and they pay their professors (through tuition) to prepare them for that profession. They want to learn that which will be relevant and useful in their chosen profession.³⁰ Far too often their passion for learning is squelched by the academy's preoccupation with the impractical. Many students' reactions to lengthy explorations of theory, esoteric subjects, and merely historical doctrine range from bare toleration to impatience. The same is true for some professors' repeated and disdainful criticism, whether from the left or the right, of existing legal institutions. The repeated emphasis on intellectual and moral indeterminacy in legal analysis results in alienation, cynicism, and sophism. Students long for doctrinal teaching and instruction in lawyering skills, both of which they regard as relevant and useful to the practice of law.³¹ If they get neither, they cease to engage with the material, except in the fear-provoking shadows of the final exam and Socratic questioning. Little real learning may occur in these situations.

Law professors know that students will need to use theory in the practice of law "to criticize doctrine, to resolve problems that doctrine leaves open, and to propose changes in law or in systems of justice."³² Interdisciplinary perspectives enrich the tools and lenses with which lawyers perceive, analyze, and make judgments about human problems arising in legal contexts. Sometimes an esoteric or seemingly impractical topic is necessary to achieve the analytical skills or conceptual understanding desired in the limited time available. Law professors

30. The disjunction between legal education and the legal profession has been documented and analyzed well by several authors, and the observations here are drawn both from these works and from the author's observations of students' learning. See generally Chester & Alumbaugh, *supra* note 29; Edwards, *supra* note 1; Feinman & Feldman, *supra* note 12; Hess, *supra* note 2; Lustbader, *supra* note 2.

31. Some students like theory, history, and criticism. I did when I was a law student. I suspect many law professors enjoyed theory when they were students. However, even among the more theoretically oriented students, there often is a desire to link students' classroom learning to the students' future use of the theory, history, or critique. A professor's self-indulgence in his or her own interests can be an impediment even for scholarly students.

32. Harry T. Edwards, *Another 'Postscript' to 'The Growing Disjunction Between Legal Education and the Legal Profession'*, 69 WASH. L. REV. 561, 564 (1994).

further have an educational responsibility to help students see faulty reasoning, injustice, and the weaknesses of the legal system.

However, the theoretical and critical aspects of legal education can impede learning, it seems, for two principal reasons. One is the tendency of some law professors to self-indulge in their own intellectual interests to the exclusion of their responsibility to educate future members of the legal profession. This is the criticism that Judge Harry Edwards levels at impractical teachers.³³ The other is the failure of some law professors to make clear to students the relationships between theoretical and critical thinking and the practice of law. I have found repeatedly that students are far more receptive to engaging in discussions about theory or policy—whether it is the Coase theorem, Aldo Leopold's land ethic, an Augustinian view of human nature, or feminist jurisprudence—when I describe how the discussion will be relevant and useful to lawyering. The most successful discussions occur in the context of a specific multiissue problem of some factual, legal, and philosophical complexity. When I explain the professional functions of theoretical and critical thinking, students are more likely to engage in it once they graduate. Although law schools arguably should prepare students for "the profession that our society wants and needs,"³⁴ we face the constraints that our students will practice in the profession as it is with its imperfections and shortcomings. Law professors are also a diverse lot, each having limits of cognition, experience, and ethics and therefore should exercise humility in imposing on students the individual professor's ideas about the ideal legal profession. I do not mean to advocate moral relativism or indeterminacy in the classroom. But I do mean to suggest that we must build bridges between the reality of the lawyering world that our students will enter and normative ideas and ethics about the law and lawyering. Our students know that a scholarly critique of regulatory takings doctrine or exclusionary zoning will not obtain a conditional use permit for the client who seeks to build apartment complexes. Nor will the study of heuristics produce a functional commercial lease. These considerations will contribute to thoughtful lawyering, but only if the lawyer also has the practical skills to achieve the results. Law students are most likely to learn when the educational journey they take has a practical, functional destination—lawyering—and the professor shows them how the path they are on now will lead to where

33. Edwards, *supra* note 1, at 57-66.

34. Brest & Krieger, *supra* note 20, at 528.

they want to go and ideally where the profession itself should be. A practical casebook can help.

Fourth, students are more likely to learn in an environment in which they are treated as future members of the legal profession.³⁵ Respect for students can mean accepting diverse viewpoints or it can mean clearly distinguishing between better and worse arguments (or accurate and inaccurate readings of legal texts). It can mean encouraging widespread participation or it can mean keeping the class on track through difficult and essential material. It can mean nurturing students or it can mean challenging them. Most of the time, these multiple meanings are not mutually exclusive, although occasionally choices must be made. Nonetheless, the important question for casebook selection is whether the professor uses a casebook that engages students in the activities and thinking of lawyers with the trust and expectation that they can do so. Teaching methods that repeatedly undermine the basic self-confidence of students to become good lawyers and that render the law a great mystery, the secrets of which are held only by the professor, discourage learning.

Fifth, students learn in different ways. "Learning style is a student's way of responding to, and using, stimuli in the context of learning. It refers to a person's characteristic style of acquiring and using information in learning and solving problems."³⁶ Students' learning styles vary with their personality types, information processing styles, sensory reception preferences, social interaction styles, and instructional preferences.³⁷ Professors enhance learning by all students when they use multiple teaching methods that reach multiple learning styles.³⁸ A casebook that facilitates the use of various pedagogical techniques should be used.

Sixth, students orient learning towards the expectations against which they will be assessed. While it is true that the methods of student assessment should reflect the instructional goals and methods of the course,³⁹ the ways we test students might reflect our latent ideas about what and how students should be learning in the class.

35. See Fischer, *supra* note 14 (describing the benefits of a student supportive law school environment); Hess, *supra* note 2, at 942 (discussing respect for the worth of students); Lustbader, *supra* note 2, at 407-09 (arguing for opportunities for students to express their own opinions and values).

36. Randall, *supra* note 16, at 71.

37. *Id.* at 71-74; see also Frisby Fain, *supra* note 15, at 820-21.

38. Lustbader, *supra* note 2, at 411 & n.24.

39. See, e.g., 1 MICHAEL JOSEPHSON, *LEARNING & EVALUATION IN LAW SCHOOL* 1, 8 (1984).

We should teach students in the class to do what we want them to do when the class is over either in the short-run (*i.e.*, on the final exam) or in the long run (*i.e.*, in the practice of law).⁴⁰ As most law school exams involve multiissue, multifact problems requiring issue spotting and application of legal principles to the facts, students are eager to learn how to analyze legal problems. If the class assignments and sessions focus primarily on reading cases, extracting and synthesizing legal principles, and critiquing legal reasoning, students may never learn in the course how to do what law school exams require. The use of a problem-solving (or at least problem-analysis) assessment method for a course taught primarily by a case analysis method raises questions about the validity of either the exam or the teaching method. Furthermore, even though the typical law school exam does not test the entire range of skills lawyers use or reflect all the circumstances in which they use them, it does recognize that lawyers are primarily problem-solvers who identify relationships among issues, legal principles, specific and complex factual contexts, and policy considerations. To the extent that a casebook exposes students to the type of analysis expected of them on the exam and in practice, it facilitates learning.

The features of student learning discussed here—activity, context, practicality, respect, diversity, and assessment-orientation—can guide professors in casebook selection. In particular, casebooks that emphasize analysis of problems using modern pragmatic materials and reasoning are ideal.

III. THE PROBLEM METHOD

Law students learn well with the problem method of instruction. In recent years, the problem method—with which students read cases, statutes, and other materials to analyze and solve specific, multifact, multiissue legal problems—has emerged as the primary alternative to, and arguably a better method of legal education than, the case method, with which students primarily read, discuss, and answer questions about select cases.⁴¹ Myron Moskowitz has described the problem method:

The first feature is, of course, the problem. The problem involves several issues cutting across several cases and statutes. It is meant

40. See Myron Moskowitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 259-61 (1992).

41. See *id.*; see also Hawkins-León, *supra* note 15; Kaplin, *supra* note 888-91; Gregory L. Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654 (1984).

to resemble a complex situation that a lawyer might face in practice. The problem may be framed in the context of litigation, negotiations, drafting, or planning. The student must approach the problem in a specified role, such as advocate, judge, advisor, planner, legislator, or law clerk.

The second feature is the advance distribution of the problem. Students are expected to work on the problem at home and come to class prepared to discuss it. Whereas the hypothetical sprung during class calls for "thinking on your feet," the take-home problem gives the student time for in-depth, well-organized legal analysis.

The third feature is that the problem is the focus of the class discussion. (Under the case method the hypothetical is incidental.) The assigned cases, statutes, and other materials become tools for helping to solve the problem. A Socratic discussion of the cases—the essence of Langdell's case method—still occurs, because students must understand the cases in order to analyze the problem. But the students must do much more. They must analyze a new complex set of facts, organize the issues into a logical framework, read the relevant authorities with an eye towards resolving the client's concerns, and apply the authorities to the facts of the problem. In class, the professor guides the discussion around these tasks.⁴²

The problem method corresponds well to the features of student learning. It requires active, not passive, learning. Students must engage with the materials and use them to address the problems, in the process practicing the skills of legal analysis, judgment, and problem solving. The problem method places legal analysis and thinking in the context of concrete, particularistic human situations, which are the facts of the problems themselves, and in the practical context in which lawyers think—solving clients' problems. By grounding the course in the concrete and practical, the problems foster a willingness in students to be guided by their professors through theory and policy. The problem is the framework for a bridge between the theoretical and the practical, and between the critical and the functional. Furthermore, problems can form the nucleus of experiential learning (e.g., simulations, role-playing exercises, and writing) in which students assume different roles that use and develop tools of negotiation, advocacy, drafting, planning, client interviewing and counseling, and so forth. Problems are ideal for integrating doctrine, theory, and lawyering skills.

42. Moskowitz, *supra* note 40, at 250-51.

The problem method assumes that students are learning to solve clients' problems and that legal education has a functional end to prepare students to do so. It also assumes that students now can and should be practicing these skills under the respectful but demanding guidance of a thoughtful and knowledgeable professor. The law is not a mystery held by an academic elite, but a pragmatic and intellectual journey that students must undertake themselves. The problems are similar to final exam questions, requiring application of legal principles to new facts and situations. Thus, with the problem method, there is not only less disjunction between legal education and the legal profession, but also less disjunction between classroom education and assessment of students' learning, than there is with the case method. Finally, the professor can use a variety of pedagogical techniques with the problem method to reach the range of learning styles.

IV. MODERN PRAGMATISM

Students are also likely to learn well with a modern pragmatic approach to both course content and the method of analysis. A modern pragmatic casebook contains primarily contemporary cases and other materials chosen for their practical relevance for the contemporary lawyer. There is an assumption that both conceptual foundations and historical developments are discussed in contemporary cases in language and factual contexts that students readily understand. Furthermore, contemporary materials typically contain legal principles important to success in advanced courses, bar exam performance, and the practice of law. A good modern pragmatic casebook contains materials chosen precisely because they feature these principles.

With reading assignments that are both contemporary and practical, students are less likely to struggle with an inability to relate to, and thus understand, the facts and import of the cases. Instead, they are more likely to engage with the material because it is relevant to their educational and professional goals. As a result, the professor is less likely to encounter resistance as he or she uses the contemporary, practical material to explore the historical origins, varying theories, normative critiques, and cutting-edge issues of property law.

Modern pragmatism is also a jurisprudential perspective or way of looking at legal issues to which students respond well. In the early twentieth century, Justice Oliver Wendell Holmes, Jr., articulated the classic, and arguably most influential, statement of legal pragmatism:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the

prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed.⁴³

The past two decades have witnessed a revival of intellectual interest in, and even enthusiasm for, pragmatism.⁴⁴ There has been an attempt to envelop many different legal theories,⁴⁵ including feminist jurisprudence,⁴⁶ law and economics,⁴⁷ and critical theory,⁴⁸ into pragmatist thought, or at the very least, the pragmatist label. In addition, scholars have distinguished between legal pragmatism—pragmatic legal analysis and adjudication—and philosophical pragmatism—an antifoundational philosophical perspective.⁴⁹

The two primary features of legal pragmatism are contextualism and instrumentalism.⁵⁰ To the pragmatist, legal analysis occurs in the context of lawyers solving the concrete and particular legal problems of humans.⁵¹ Legal analysis also reflects the experiences and needs of people and varies with the socially situated facts, circumstances, and human relationships of the particular problem under consideration.⁵² Furthermore, pragmatic legal analysis is not constrained by abstract theory or formal reasoning, but instead is functional, attempting to achieve good public policy as defined by reflection, experience, social

43. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1-2 (1923). See generally Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989).

44. See generally Symposium on the Renaissance of Pragmatism in American Legal Thought, 63 S. CAL. L. REV. 1569 (1990); see also Robert Justin Lipkin, *Pragmatism—The Finished Revolution: Doctrinaire and Reflective Pragmatism in Rorty's Social Thought*, 67 TUL. L. REV. 1561 (1993) (describing pragmatism as an intellectual revolution transforming the law); Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 409-11 (1990) (describing the recent intellectual rush to pragmatism).

45. Smith, *supra* note 44, at 409-11 (suggesting pragmatism encompasses now virtually all theoretical perspectives).

46. See Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990).

47. See Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071 (1996).

48. See Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821 (1990).

49. Thomas C. Grey, *Freestanding Legal Pragmatism*, 18 CARDOZO L. REV. 21 (1996). Grey argues that moral or theological foundationalists, such as theologically conservative Christians, may reject the relativism of philosophical pragmatism while embracing contextualism and instrumentalism in legal institutions (i.e., legal pragmatism). *Id.* at 21, 38-42. See also Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1996) (differentiating between pragmatic adjudication and pragmatic philosophy).

50. Grey, *supra* note 49, at 24-26; Smith, *supra* note 44, at 411, 448.

51. Grey, *supra* note 49, at 26.

52. HOLMES, *supra* note 43, at 1; Radin, *supra* note 46.

forces and needs, and public goals.⁵³ The term "modern pragmatism," though, indicates a contrast with post-modern relativism, indeterminacy, and antirationalism; the modern pragmatist values rational thinking, empirical inquiry, and human judgment about what is good and useful.⁵⁴

Modern pragmatism as a casebook's theoretical orientation has several advantages for student learning. It emphasizes all three aspects of context important to students: (1) past experiences and understanding (schema); (2) concrete, particular situations; and (3) utility to lawyers and society. It values practicality in legal analysis and legal education, thus attracting student interest. Its concern with a variety of human needs, interests, experiences, and relationships encourages students to express a range of ideas. Although students explore the limits of legal principles and institutions, modern pragmatism's grounding in reason avoids postmodern student cynicism and alienation; meaning stems from society's practical, functional grappling with questions about what is just and good. Similarly, because students are not taught all semester that property law is completely indeterminate, they are not baffled when they find that the professor expects them to write final exam answers using traditional legal analysis, not post-modern criticism. Finally, modern pragmatism's great breadth as a theoretical umbrella permits professors to expose students to a variety of perspectives on property law. Professors and students can select different theories for different problems and issues instead of precommitting to any single theory. As a result, students gain greater understanding of, and skill in using, a range of theoretical perspectives. Therefore, the integration of doctrine, theory, and lawyering skills is more likely to be achieved with the practical, functional, and contextual focus of modern pragmatism.

53. Grey, *supra* note 49, at 24-26; HOLMES, *supra* note 43, at 1. Pragmatism rejections foundationalism, which is "the idea . . . that our norms, including legal norms, can be grounded in some transcendent, universal standard external to ourselves." Cotter, *supra* note 47, at 2072.

54. Grey, *supra* note 49, at 790-91; Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1223-25 (1989). A theory of "practical reason" emphasizes both pragmatism and rationality in legal analysis. See William Eskridge & Phillip Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Daniel Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988).

V. THE RABIN AND KWALL CASEBOOK AS A GUIDE FOR LEARNING PROPERTY LAW

A. *The Choice*

I write from the perspective of an assistant professor who made a property casebook selection two years ago when I was first asked to teach property. As a law student at Stanford Law School in the late 1980s, I had a positive experience with the Dukeminier and Krier property casebook⁵⁵ under the effective teaching of Bob Ellickson, now at Yale.⁵⁶ However, I knew—from my experience teaching legal research and writing at both Stanford Law School and Chapman University Law School, as well as advanced courses in property and public law subjects—that students who are fed a steady diet of the case method may have persistent difficulties with legal analysis (particularly application of legal standards to new facts and structure of analysis), legal problem solving, and professional judgment. Although I value the case method for developing in students the ability to read cases, understand legal principles and rules, and explore and synthesize legal reasoning, I knew that the case method pervades other required courses like torts, constitutional law, criminal law, and civil procedure. Thus, I wanted to select a casebook that, at the least, would be compatible with the problem method of legal education. A casebook that contained problems with cases, statutes, and other legal materials for solving those problems was my ideal.

I also wanted coverage that would include both foundational concepts (i.e., the why and how and so what of property law) and legal doctrine of practical utility to today's practicing lawyer (i.e., the what of property law). In my first year of teaching property, the course was a four-unit, second-year course, taught in the fall to full-time students and in the spring to part-time students. Now, the course is six-unit, two-semester course in the first year for full-time students and the second-year for part-time students. When I was making my initial casebook selection, I knew I would have to make some tough choices in course coverage between depth and breadth. On one hand, I believe students learn "to think like a lawyer" when they linger in intellectual activity like engaging in thorough and rigorous legal reasoning and analysis, unearthing conceptual foundations (i.e., theory), considering

55. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY (1981). For a citation to the most recent edition, see *supra* note 9.

56. Walter E. Meyer Professor of Property and Urban Law, Yale Law School.

policy and ethical issues, and developing lawyering skills. I wanted a casebook that would allow us to "slow down" to explore the richness of some topics. On the other hand, I would have failed as a teacher (or guide for my students) if my students were learning significant chunks of bar-tested property law doctrine for the first time in a bar review course. Thus, I wanted a casebook that would allow us to "speed up" to cover the fundamentals of some topics. Furthermore, I wanted the casebook to offer the maximum flexibility for me to select which areas would receive in-depth treatment and which areas would receive sweeping coverage, instead of the casebook authors making those choices for me.

Finally, I felt a strong sense of responsibility to my students and the school to make a wise casebook choice initially, rather than to experiment. It is axiomatic that the myriad of choices a professor makes about teaching result in a range of good and bad consequences, and these consequences in turn educate the professor and inform his or her future choices about teaching. However, the decisional process is characterized by a spectrum between calculated experimentation and calculated planning. The experimenter tries different techniques and approaches in a thoughtful way, observing what works and does not work in the implementation. The planner attempts to design a comprehensive and preconceived (but not static) educational plan based on an analysis of needs, resources, and goals. A professor's location on the experimentation-planning spectrum may vary by course and educational setting. In a core course like Property and with a set of students whose admissions profiles indicated more potential than innate ability, I decided not to experiment with different casebooks over time. Instead, I opted for a plan that would maximize student engagement in the learning process over other potential goals.

As a result of these considerations and after careful review of several excellent property casebooks with varying approaches and perspectives, I selected the Rabin and Kwall casebook as my property casebook. It is a problem-method casebook, requiring students to think about property law in the context of addressing concrete legal problems. It focuses on modern property law principles that recur in advanced courses, bar exam questions, and the practice of law. Most "assignments" (chapters) contain both an overview of the basic rules and standards relevant to the assignment's subject matter and at least one problem, several cases, and notes following the cases, all of which require careful analysis and raise intriguing theoretical and policy issues. Thus, I can choose when to move students quickly through the

fundamentals and when to romp in ideas, climb analytical mountains, or explore the terrain of lawyering skills and judgment.

I have been highly pleased with the Rabin and Kwall casebook. In class, students seem well-prepared and engaged in both thinking about the legal problem(s) they have read and thinking about property law. They express appreciation for the context in which they are reading cases and the modern pragmatic content. Student and faculty evaluations of my property courses, as well as my perceptions of the difference between students' abilities at the beginning of the course and their performance on the final exam, suggest that students learn well using Rabin and Kwall's casebook.

B. *The Format, Content, and Structure*

Rabin and Kwall's casebook contains fifty-six assignments.⁵⁷ There is a 1996 soft-back supplement that replaces or adds to material in eight assignments.⁵⁸ The typical assignment consists of a one- to four-page introduction, a problem, two to four cases, and notes.⁵⁹ The introduction orients students towards the topic matter of the assignment, sometimes providing an overview of the basic legal principles in the area. The problem is a fact hypothetical of between one-third of a page and one page in length. Many of the problems are based on actual reported cases. The cases are edited without the indicia of editing such as ellipses, bracketed letters when the case was changed, and the like. Some assignments contain excerpts from statutes as well. The notes ask questions, raise policy arguments, comment on the similarities and differences between cases, report modern trends and statutory reforms, provide additional legal doctrine and empirical information, and introduce theoretical perspectives. A number of useful charts, tables, and maps appear without overuse. The authors accurately predict that most assignments take between one and three hours of class time, depending on the specific assignment and the professor's choices about how to teach the assignment.⁶⁰

The casebook contains some variations on the typical assignment. Six assignments contain more than one principal problem. Three assignments contain one or more problem sets (*i.e.*, short problems) instead of a single fact hypothetical. Three assignments contain both

57. See generally RABIN & KWALL, *supra* note 5.

58. EDWARD H. RABIN & ROBERTA ROSENTHAL KWALL, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* (3d ed. Supp. 1996).

59. See, *e.g.*, RABIN & KWALL, *supra* note 5, at 153-73 (Assignment 8).

60. *Id.* at v.

problem set(s) and principal problem(s). There are six pairings of two assignments each: four pairings contain two problems total for the two assignments, while two pairings contain only one problem total for both assignments.

The fifty-six assignments cover most of the subject matter that the range of required property courses in U.S. law schools address, generally overlapping with material tested on property sections of bar exams. The assignments are organized under five major headings. The first, the introduction, covers only the right to exclude, including physically invasive takings.⁶¹ The second, nonfreehold estates, covers leaseholds and the rights and duties of landlords and tenants both during and on termination of the lease.⁶² The third, freehold estates, covers present and future estates in land and the doctrines unique to future interests, particularly the rule against perpetuities.⁶³ It also covers the creation, administration, and termination of concurrent estates, especially joint tenancies, and the classification and treatment of marital property under both common law and community property jurisdictions.⁶⁴ The fourth, nonpossessory interests, covers a range of issues related to easements and covenants, as well as rights of neighbors (*i.e.*, nuisance and lateral support and drainage).⁶⁵ It also has an interesting subsection on government and public interests in private property: land use regulation and regulatory takings, rent control, the public trust doctrine, exclusionary zoning, growth controls, and unconstitutional discrimination in land use regulation.⁶⁶ The final section is an extensive treatment of the acquisition of interests in land.⁶⁷ It covers adverse possession, deeds, the contract of sale (including basic steps in real estate transactions, remedies for breach and failure to deliver marketable title, and fixtures), mortgages, covenants of title, recording statutes, title insurance, the doctrine of equitable conversion, the implied warranty of fitness and the duty to disclose, and landowner liability for toxic wastes.⁶⁸

The problems are not rare or esoteric. Students are not asked to consider the ownership of meteors,⁶⁹ the right to wrecked steam-

61. *Id.* at 1-22.

62. *Id.* at 26-172.

63. RABIN & KWALL, *supra* note 5, at 174-355.

64. *Id.*

65. *Id.* at 357-732.

66. *Id.* at 569-732.

67. RABIN & KWALL, *supra* note 5, at 734-1084.

68. *Id.*

69. See, *e.g.*, *Goddard v. Winchell*, 52 N.W. 1124 (Iowa 1892); JOHN E. CRIBBET ET AL., PROPERTY: CASES AND MATERIALS 97-100 (7th ed. 1996).

boats,⁷⁰ or the transferability of future interests before 1536.⁷¹ Instead, the problems focus on the problems that lawyers are more likely to encounter regularly. For example, the characters in the leasehold problems include hypothetical students who either encounter holdover tenants in their apartments or want to sublease their apartments to others,⁷² industrial tenants who want to extend their lease terms,⁷³ and commercial tenants who want to terminate their leases early.⁷⁴ Adverse possession disputes revolve around typical boundary uncertainties.⁷⁵ The problems include a right-of-way easement across ranching property,⁷⁶ covenants requiring residential use or prohibiting rental of the property in single-family residential subdivisions,⁷⁷ and an out-of-town homebuyer who offers too much for a house and then wants out of the contract.⁷⁸ Governments require preservation and rental of single-room occupancy units at affordable rates,⁷⁹ approve the filling of submerged lake land for a major industrial redevelopment project,⁸⁰ and enact a moratorium on real estate development based on traffic levels.⁸¹ Rabin and Kwall essentially invites the student and the professor to find the intriguing and stimulating in the ordinary, day-to-day legal problems that clients have, instead of relying on unusual intellectual exercises to entertain. The result is a bridge between legal education and legal practice, instead of the disconnect that many law students and former law students criticize.

The cases are mostly recent appellate opinions from state supreme courts and appellate courts. Of the cases in the main text and the supplement, ninety-three percent were decided after 1950, four percent were decided between 1900 and 1950, and only three percent were decided before 1900.⁸² The only case decided before 1800 is the

70. See, e.g., *Eads v. Brazelton*, 22 Ark. 499 (1861); CRIBBET, *supra* note 69, at 102-04.

71. See, e.g., CHARLES I. NELSON & PETER T. WENDEL, *A POSSESSORY ESTATES AND FUTURE INTERESTS PRIMER* 4-59 (1996).

72. RABIN & KWALL, *supra* note 5, at 35.

73. *Id.* at 106-07.

74. *Id.* at 154-55.

75. See, e.g., *id.* at 738-39.

76. RABIN & KWALL, *supra* note 5, at 382-83.

77. *Id.* at 452.

78. *Id.* at 872.

79. *Id.* at 615-16.

80. RABIN & KWALL, *supra* note 5, at 637-38.

81. *Id.* at 684.

82. See RABIN & KWALL, *supra* note 5.

classic sixteenth-century English case on the running of the burden of a covenant, *Spencer's Case*.⁸³

C. *A Guide for the Guide*

The Rabin and Kwall casebook has teacher's manuals for both the text and the supplement.⁸⁴ They are exceptional aides to the professor guiding students on an educational journey through property law. Organized by assignment, the manuals guide the professor in three ways. First, each assignment has an extensive list of references to scholarly works on the subject of the assignment, including author's last name, the title of the work, the citation, and the date.⁸⁵ Asterisks identify "particularly interesting or useful work[s]."⁸⁶ A wide range of perspectives is covered, and the more influential law review articles that a professor would want to read are included. Student works with valuable research or thoughtful analysis are listed separately. Without having to spend crucial preparation time researching the important scholarship in each subject covered, the professor can use the manual's references for each assignment to select worthwhile articles for immediate reading.

Second, the manuals include the authors' analysis of the principal problem(s) of the assignment, as well as the relevant analysis by majority, concurring, and/or dissenting opinions in any actual cases on which principal problems were based.⁸⁷ The authors' analyses cover application of legal doctrine to the facts of the problem, synthesis and analogic use of the cases that are part of the assignment, and policy issues.⁸⁸ Following these analyses are summaries of each case that is part of the assignment.⁸⁹ The summaries contain a one-sentence overview, a distillation of the relevant facts, the trial court's primary finding(s) (underlined), the appellate court's decision (i.e., affirmed or reversed, also underlined), the holding(s), a summary of the important reasoning, and a summary of concurrences and dissents.⁹⁰ Perhaps most importantly, each summary concludes with one or two paragraphs

83. 5 Co. 16a, 77 Eng. Rep. 72 (1583).

84. EDWARD H. RABIN & ROBERTA ROSENTHAL KWALL, FUNDAMENTALS OF MODERN REAL PROPERTY LAW—TEACHER'S MANUAL (3d ed. 1992 & Supp. 1996).

85. *See id.* at 15-1 (Assignment 15).

86. *Id.* at 1-1.

87. *See id.* at 15-3 - 15-5 (Assignment 15).

88. *See* EDWARD H. RABIN & ROBERTA ROSENTHAL KWALL, FUNDAMENTALS OF MODERN REAL PROPERTY LAW—TEACHER'S MANUAL (3d ed. 1992 & Supp. 1996).

89. *See id.* at 15-6 - 15-11 (Assignment 15).

90. *See id.*

about how the case applies to the principal problem.⁹¹ Although the authors' analyses of the problems and cases cannot and should not substitute for the professor's careful analyses (just like the professor's analyses cannot and should not substitute for the students' analyses), the professor can use the analyses in the teacher's manuals for: (1) a quick orientation to the assignments before he or she begins his or her preparation; (2) a point of comparison for the professor's thinking about the problems and cases; and (3) a short review of the problems and cases after thorough preparation and just before going into the classroom. I do not hesitate to deviate from the authors' thinking about the relevance of some facts over others, the synthesis of legal principles and authorities, the application of legal doctrines to the problem's facts, and the importance of some policy goals over others. However, on the whole, their analyses are well-reasoned, well-supported, functional, and thought-provoking. The authors give great attention to the context in which the problems arise, the policies to be achieved in developing principles of property law, varying visions of justice, the competing arguments of the various hypothetical parties to the problems, and clarity in untangling the complexities of the law. The teacher's manuals prepare the professor to guide the classroom discussion of the casebook's problems and their materials, which in turn becomes a discussion of the principles and practice of property law.

Finally, the teacher's manuals offer a variety of additional questions, information, commentary, and legal authorities, including occasional brief summaries of relevant cases not included in the casebook, which supplement the material included in the casebook. The professor is not left in the uncomfortable position of addressing the questions posed in the casebook's notes (and thus read by students) without any guidance on what the authors were thinking in posing the questions or where to find material for analyzing them.

D. Starting the Journey

One of my favorite aspects of the Rabin and Kwall casebook is the way in which it introduces students to property law. The book and supplement begin with the right to exclude and physically invasive takings. The first assignment contains a principal problem on a municipal ordinance requiring owners of single-room occupancy (SRO) units to "put in habitable condition every SRO unit in their buildings

91. See *id.* at 15-12 - 15-17 (Assignment 15).

and lease every such unit to a 'bona fide' tenant at controlled rents."⁹² The problem is taken largely from *Seawall Associates v. City of New York*.⁹³ The cases included for the solution of the problem are *Loretto v. Teleprompter Manhattan CATV Corp.*,⁹⁴ *State v. Shack*,⁹⁵ and *Yee v. City of Escondido*.⁹⁶

The problem appeals to students' interests they have before law school in the modern issues of homelessness, takings, and private property rights. Most, if not all, students have some basis for understanding the underlying social and policy conflicts. They eagerly "get into" the discussion. I begin our analysis of the problem by asking what our hypothetical clients, owners of SRO units, have as interests, goals, and concerns. Students quickly see that clients do not look at the problem through the legal lens of possessory and regulatory takings. Instead, the students' "clients" may be approaching the problem from the perspectives of financial cost and economic return on their investment in rental units, social biases or prejudices against SRO renters (who may or may not be homeless, low-income, or single), and libertarian resistance to government control over private property. As students identify these perspectives, they begin to think about serving the clients' interests (with its attendant ethical and professional issues) and solving the clients' problems. We then move to legal analysis, focusing on both synthesis of the cases (*i.e.*, developing statements about legal doctrine based on careful reading of the cases) and reasoning by analogy. The students apply their understanding of the cases and principles of takings to the SRO hypothetical. I make sure that they work through all of the facts of the hypothetical, explaining their judgments about which to emphasize more or less than others.

Beyond the process of legal thinking, the first assignment immediately introduces students to several foundational concepts of property law. The first is the concept of property as a bundle of legal rights, duties, and entitlements, not merely ownership of a thing.⁹⁷ I ask students what rights come with ownership of property and hand out a labeled stick from a physical "bundle of sticks" to each student identifying a corresponding right. This approach engages the tactile

92. RABIN & KWALL, *supra* note 5, at 1.

93. 542 N.E.2d 1059 (N.Y. App. Div. 1989).

94. 458 U.S. 419 (1982).

95. 277 A.2d 369 (N.J. 1971).

96. 503 U.S. 519 (1992).

97. See *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); J.E. Penner, *The 'Bundle of Rights' of Property*, 43 UCLA L. REV. 711 (1996).

and visual learners in the class, leaving a lasting image of the “bundle of sticks” concept.

The assignment also raises questions about the relationships among ownership, possession, and the right to exclude. Students grapple with the respective rights and obligations of a landlord who holds title to the property, a tenant who has the right to possess, and the modern regulatory state. As a result, the students see that the right to exclude, which is a core or essential right of a property owner, is not absolute, especially when at least some portion of the right to possess has been alienated. They also see that ownership and possession are not synonymous.

Although students learn that property rights are not absolute, they also encounter the courts’ strong protection of private property rights, such as the categorical requirement of compensation by the state for its permanent physical occupation of private property. Rather than wade through ahistorical (or at least partially ahistorical) myths about the origins of property regimes and ownership, the Rabin and Kwall casebook asks why the legal system defines property and affords the protections it does *now*. Why does a city have to compensate a building owner for placing a small cable TV box and cable on the side of the building,⁹⁸ but does not have to compensate for restricting the termination of mobile home tenancies or the amount of rent charged for mobile home “pads”?⁹⁹ What human values do property rules serve?¹⁰⁰ Students begin to think about the equity and efficiency of property law. I introduce a prominent theme of the course: property rules in the United States are developed and modified to promote the economically productive use of land. I also guide students into thinking about whether property law oppresses the least powerful in society and whether property law can be a tool to remedy or prevent social injustice. All of this occurs in the context of the concrete problems of rental property owners, potential tenants of SROs, and a city seeking to preserve SROs by regulation.

One of the supplement’s notes for the first assignment addresses property interests in body parts and summarizes *Moore v. Regents of the University of California*.¹⁰¹ I assign the entire text of the *Moore* opinion, concurrences, and dissents. The class discussion on the

98. *Loretto*, 458 U.S. at 419.

99. *Yee*, 503 U.S. at 519.

100. *Cf. Shack*, 277 A.2d at 372.

101. 793 P.2d 479 (Cal. 1990) (holding that plaintiff could not maintain a conversion claim for defendants’ patenting a cell line from his white blood cells, but could sue for breach of physician’s fiduciary duties of disclosure).

ownership of body parts highlights property law as a body of law in flux, responding to new conflicts, technologies, and social forces and values. I ask students why people want to own their body parts, pointing out distinctions between economic interests and the more personal interests of human autonomy, dignity, connectedness, and/or flourishing.¹⁰² Students quickly begin to see the differences between the right to exclude and the right to alienate, and imagine a variety of legal regimes with differing mixes of rules about the ability to keep others and the state from possessing one's body parts and the ability to sell or transfer one's body parts.

After one and one-half weeks of thinking about the right to exclude, we ask whether property owners have a duty to exclude. We turn to assignments 39 and 40¹⁰³ concerning adverse possession. Students are generally surprised to learn that the failure to exclude others may result in the loss of title ownership. The assignments have several advantages. We transition naturally from right to duty. We continue our study of ownership and possession, learning, for example, that possession means dominion and control over the property and reinforcing some of the distinctions between ownership and possession. Students feel comfortable with legal rules containing delineated "elements," such as adverse possession.¹⁰⁴ They also appreciate the exposure to causes of action and remedies.¹⁰⁵ The casebook's summaries of general legal doctrine are clear, an advantage early in the course. The assignments include the adverse possession provisions of the California Code of Civil Procedure,¹⁰⁶ in which I ask students to find and identify specific statutory provisions reflecting each of the six common law elements. The exercise develops statute-reading skills. The two principal problems call for facility with, and synthesis of, legal doctrine and authorities, ambiguous facts, and competing policy goals. In particular, students must consider the relative value of the economically productive use of property, certainty in land titles, the reliance of possessors and third parties on the existing possession and use of property, the protection of innocent third parties, the simple and efficient administration of legal rules, the unreliability of evidence, the

102. See generally MARGARET JANE RADIN, *REINTERPRETING PROPERTY* (1993).

103. RABIN & KWALL, *supra* note 5, at 734-70.

104. RABIN & KWALL sets out six elements: (1) hostile possession; (2) possession under a claim of right; (3) actual possession; (4) open and notorious possession; (5) exclusive possession; and (6) continuous possession. RABIN & KWALL, *supra* note 5, at 734.

105. For example, RABIN & KWALL covers ejectment, trespass, and quieting title. See generally RABIN & KWALL, *supra* note 5.

106. Cal. Civ. Proc. §§ 318, 321-25 (West 1982).

incentive to perjure testimony, the reward of bad-faith squatters, the punishment of neglectful landowners, and similar policy considerations. The notes report an ongoing scholarly debate about whether courts adopting an objective test for claim of right actually require subjective good faith in practice. I use this information to point out that legal doctrine and theory do not always reflect how decisionmakers implement the doctrine or theory or how humans behave “in the real world” and to encourage empirical investigation as a lawyering function. We discuss the extent to which boundary disputes are resolved according to the rules of adverse possession, as opposed to negotiation and agreement, acceptance of the status quo, or informal norms.¹⁰⁷

Having considered the acquisition of ownership by possession not voluntarily relinquished by the title owner, we turn to voluntary alienation of possession from ownership by leasing property. Once again, we are on terrain familiar and interesting to most law students: the relationships between landlords and tenants. The seven assignments involving leasehold issues cover the distinctions between leases and licenses, the types and duration of leaseholds, the tenant’s right to exclusive physical possession, the common law rights, duties, and remedies of landlords and tenants, the selection and removal of tenants, and assignments and subleases.¹⁰⁸ The assignments ground students in specific property rules and concepts, while exploring the policies and reasoning behind the rules, as well as the particular factual context in which the rules are applied and the arguments and interests of particular clients. Students are also exposed to the important concept of net present value when they evaluate damages for a lessor’s failure to deliver exclusive physical possession to a lessee. I generally pick and choose among the landlord/tenant chapters, typically skipping the landlord’s liability for personal injuries on the assumption that the topic is covered in a torts class. Either before or after the leasehold “unit,” we also cover possession by finders and bailments, thus rounding out our study of possession, ownership, and the relationship between the two.¹⁰⁹

The Rabin and Kwall casebook’s initial eight chapters, as well as the chapters on adverse possession (placed later in the book under the

107. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991) (demonstrating that informal norms and cooperative behavior—not property law—govern disputes in cattle ranching communities in Shasta County, California).

108. RABIN & KWALL, *supra* note 5, at 26-172.

109. For a discussion of how I teach possession by finders and bailments, which are not covered in RABIN & KWALL, see *infra* Subpart F (“Supplementing RABIN & KWALL”).

general topic of "acquisition of interests in land"), generate students' interest in the study of property. The issues are timely and understandable. Students simultaneously learn the lawyering skills of legal analysis, problem solving, and client representation and develop an understanding of broad concepts at the core of property law. They see the changing, policy-driven nature of the law, bound on one side by concrete facts and problems and on the other side by legal precedents and doctrine. They gain the confidence to move on to more challenging areas of property law.

E. Some High Points

I cannot feasibly describe all of the valuable aspects of Rabin and Kwall, so I limit myself here to several "high points" of the casebook. The nine assignments on servitudes (five on easements and four on covenants) are quite good.¹¹⁰ They give clear, carefully organized explanations of: (1) categories of interests (*e.g.*, easements vs. covenants; real covenants vs. equitable servitudes; servient estate vs. dominant estate; appurtenant vs. in gross; affirmative vs. negative; express vs. implied vs. "by necessity" vs. prescriptive easements); (2) potential issues (*e.g.*, creation and classification; validity; extent and interpretation; assignment, transfer, and enforceability—running of the benefit and of the burden; termination; defenses); and (3) the various applicable legal standards, including both essential elements and competing, or alternative, standards. Although the amount of doctrine students must learn is extensive, they have ready access to clear descriptions of the doctrine and can concentrate their efforts on applying the doctrine to different complex and ambiguous fact patterns.

The factual and legal complexity of many of the servitudes assignments, particularly assignments 20¹¹¹ (classification and creation of express easements) and 25¹¹² (creation and validity of covenants involving implied negative covenants and the common plan or scheme), stretch and develop students' analytical skills. Most of the assignments on easements call for introduction to, or reinforcement of, standards for interpreting written instruments and ascertaining the parties' intent. I often use one of these assignments to compare interpretation of written property instruments with statutory construction, to which many law students have far too little exposure. Each of

110. RABIN & KWALL, *supra* note 5, at 357-516.

111. *Id.* at 362.

112. *Id.* at 452-64.

the assignments allows for exploration of various policy issues behind the law of servitudes, including respect for the parties' intent, promotion of certainty and stability in property rules, promotion of economically productive use of land, private control and "private government," prejudice and discrimination, informal and formal relationships among neighbors, and the efficiency and equity of the market. In addition, assignment 21¹¹³ (interpretation and extent of express easements) has an ideal principal problem for a simulated negotiation in class over a right of way across ranching property, while assignment 23¹¹⁴ (termination and extinguishment of express easements) is essentially an easement drafting problem, which I have students work on together in small groups. The law of servitudes becomes much more real and tangible to students when they combine their understanding of the material with lawyering tasks of negotiation, planning, and drafting. They quickly see layers of complexity, not only about the law, but also about client goals, professional judgment, future contingencies, and either the resolution or avoidance of conflicts. Indeed, I ask students how, if they were in practice, they could make drafting the particular ranching right-of-way easement, which is far more complex than it is valuable, economically feasible to them. The related questions of ethics, billing, and law practice produce a stimulating class discussion.

Similarly, the assignments concerning concurrent estates (15-19)¹¹⁵ require students to grapple with the interpretation of ambiguous language in a granting instrument, to use different types of concurrent property interests with facility, and to consider competing policy goals. These assignments also explore tensions between formalism and precedent, on one hand, and pragmatism and change, on the other hand. Assignment 17 on the unilateral severance of joint tenancies (and thus the right of survivorship to the jointly owned property) allows for an engaging discussion on the use of the law to engage in strategic behavior.¹¹⁶

The three assignments that best highlight tensions between public and private interests in land are assignment 1 (right to exclude), discussed above, assignment 29 (nuisance),¹¹⁷ and assignment 34 (public trust doctrine).¹¹⁸ The nuisance assignment exposes students

113. *Id.* at 382.

114. RABIN & KWALL, *supra* note 5, at 419.

115. *Id.* at 282-348.

116. *Id.* at 313.

117. *Id.* at 518.

118. RABIN & KWALL, *supra* note 5, at 637.

to economic theories of property law, the complexities of fairness and efficiency as the ends of legal doctrine, and the potential for flexibility and change in legal rules. It is also a good precursor to the assignments on public land use controls and regulatory takings. I use assignment 29 to get students thinking about the advantages and disadvantages of nuisance as the primary means or justification for land use regulation. In contrast, assignment 34 asks whether the student, assuming the role of Attorney General of a state, can use the public trust doctrine to prevent the legislature from conveying two hundred acres of submerged land in Lake Michigan to a steel plant for expansion of its facilities. It allows me to introduce both ecological perspectives on property law and public choice theories about government action, to explore the subtleties of the costs and benefits of economic development, and to highlight the intensively political nature of government lawyering.

Finally, the sixteen assignments covering various aspects of real estate transactions are practical and contain a variety of useful materials.¹¹⁹ These materials include a description of the basic steps in real estate transactions (with examples), methods of deed descriptions (with diagrams), a good overview of mortgages and deeds of trust, and a title insurance policy, as well as problems, examples, cases, and statutes. Given the likelihood that my students, once in practice, will encounter real estate transactional issues far more frequently than issues of ownership and possession, I am pleased with the relatively thorough and functional treatment that Rabin and Kwall gives the real estate material.

F. Supplementing the Rabin and Kwall Casebook

Although Rabin and Kwall's casebook is an ideal casebook for my purposes, I find that I must supplement it to fill a few gaps. Some of the gaps occur in coverage of specific topics. The casebook does not cover possession by finders and bailments. I teach the subject by giving the students a vague client interviewing problem in which a potential client wants to consult the attorney (student) about "his rights to something valuable that he has found." I tell the students that they must research the relevant law in preparation for the client interview and that I will pick two students in the class to interview me as the client. The assignment is highly successful. Students research hornbooks, treatises, and similar materials for the general legal

119. *Id.* at 734-1084.

typical of the problems clients bring to attorneys than single-topic problems, as well as the standard multiple-issue exam question. Finally, I am exploring ways of giving students more sources of facts for the problems in the Rabin and Kwall casebook than the assignment's brief description of the problem. Attorneys must work with a variety of different sources of facts. Furthermore, attorneys must use judgment in the context of human emotions and interests, concrete details, primary documents, social, political, and economic forces, and similar factors that are difficult to capture in a problem one-third to one page long. Law schools have recently begun using case studies of the type used in business schools to approximate the variety of factors lawyers must consider.¹²² The casebook's problems are rich enough that they can serve as interesting case studies with supplementation.

VI. CONCLUSION

The Rabin and Kwall casebook is one of the best casebooks I have examined in any subject. I remain strongly committed to using it because I have enjoyed success by using it. The Rabin and Kwall casebook is a guide for students to learn how to think like a lawyer, which is the primary goal of legal education. Its practical problems, modern cases and statutes, clear explanations of complex legal doctrine, and modern pragmatic jurisprudential approach are well-designed for the ways in which students learn. They learn because they are doing what lawyers do: analyzing and solving clients' problems; they integrate doctrine, theory, and skills, facilitated by the problems and materials of the casebook. Whether a professor is a planner or an experimenter, he or she should consider Rabin and Kwall's casebook as a guide for students' journey through property law.

122. See, e.g., STANFORD LAW SCH. ENVTL. AND NATURAL RESOURCES LAW & POLICY PROGRAM CASE STUDY PROJECT (visited Feb. 5, 1999) <<http://www.stanford.edu/group/law/library/casestudies/lawschool.shtml>>.