

INTRODUCTION

Why Isn't This Man Smiling?

*John W. Weaver**

On page 281 of Dukeminier and Krier, there is a picture of John Chipman Gray.¹ He looks out at us, clad in his academic robe, unsmiling, but a satisfied man. He should be—he had twelve hours to teach Property.² One of the recurring themes in the review essays that you are about to read is what we might call the taking, rather than the takings, issue. The taking issue is the taking of hours away from

* Professor of Law, Seattle University School of Law; A.B. Dartmouth, 1966; J.D. University of Michigan, 1969. Some disclosures and disclaimers: I am a Property teacher and have been for more than 25 years. I have used, in one form or another, two of the books that are reviewed here, Dukeminier & Krier and Rabin & Kwall. I am a traditionalist in terms of coverage and interests. I enjoy teaching the rule against perpetuities so much that I wrote an essay about how to do it (*Fear and Loathing in Perpetuities*, 48 WASH. & LEE L. REV. 1393 (1991)), and I am so fascinated by easements (not covenants, and not servitudes or other modern developments) that I wrote an article on them (*Easements Are Nuisances*, 25 REAL PROP. PROB. & TR. J. 103 (1990)).

1. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 281 (4th ed. 1998). Dukeminier and Krier is probably the most illustrated casebook in legal education. There are more than 40 illustrations, not counting maps and other figures necessary to explaining the cases. The only other heavily illustrated casebooks appear to be DAWSON & HARVEY, CONTRACTS, and JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS TRUSTS AND ESTATES (5th ed. 1995), and PROSSER ET AL., TORTS CASES AND MATERIALS (9th ed. 1994), though the last contains only pictures of judges. The tendency toward illustrating more has been noted. John B. Mitchell, *A Clinical Textbook?* 20 SEATTLE U. L. REV. 353, 355 (1997). The use of illustrations is by means universal applauded. See, e.g., Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1119 (1985), and John Robinson, Book Review, 41 J. LEGAL EDUC. 425, 527 (1991) (reviewing JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS TRUSTS AND ESTATES).

2. Lawrence Berger, Book Review, 84 HARV. L. REV. 267 (1970) (reviewing CASNER & LEACH, CASES AND TEXT ON PROPERTY (1969)). To be sure, the course was offered over all three years of law school and dealt with matter we now deal with in elective courses—mortgages, trusts and estates, and perhaps even family law. *Id.* at 268. By Property, we usually mean the first year or introductory course. Advanced courses get more specific names, e.g., Land Use, Real Estate Transactions, Trusts and Estates. All of those seem to have been part of Gray's course, and some part of many of them is found in many property books, if not taught in the course.

the Property course.³ Two of the books reviewed were created (at least in part) for a shortened Property course. Property as a course is apparently ripe for the plucking for a number of reasons. For one thing, it seems to be made up of a series of discrete topic areas—Landlord-Tenant, Estates in Land, Easements and Servitudes, Public Land Use Issues, Takings, and Real Estate Transactions. These can be treated like modules that can be pulled out of the first-year course and taught in second-year and third-year courses. This apparently modular form suggests that there is no underlying theme to Property. Property does not have the sweep of the protection of the person of Torts and Criminal Law, the drama and glamour (I am only kidding) of the trial in Civil Procedure, or the attention to the world's affairs of Contracts. Yet, Property is clearly an important part of the first-year curriculum, and no one would sweep it out entirely. As these reviews and the books they treat show, Property is a course rich with possibilities. It is clearly as rich as any other first-year course, and it can yield cases that are as fruitful as any other course's for the discussion of law and economics, for gendered analysis of the law, for an historical perspective, and for sociological treatment. Property is as rich as its teachers are willing to make it, and the reviews show us how a number of our colleagues are making it rich indeed.

Janet Ainsworth's introduction to the first of these casebook reviews suggested that almost everyone is considering changing textbooks, either consciously or unconsciously.⁴ These reviews are useful to new and experienced teachers alike because, in addition to telling us about the books, they tell us about the ways in which Property is being taught; they are textual show-and-tells about what others deem important in Property and how they use the same book that we do. A reader who has problems with a book or who is puzzled as to how to teach some part of it may get a hint from reading these reviews. Students may find in these reviews some enlightenment: new ways of looking at the texts they lug around; reinforcement of their dislikes of a book or particular parts of a book; or perhaps even new ways of looking at the courses they are studying.

Nineteen ninety-nine is an appropriate year to look at Property books as it neatly splits the fiftieth anniversary of the two prototypical property casebooks. McDougal and Haber's *Property, Wealth, Land:*

3. See Roberta Rosenthal Kwall & Jerome M. Morgan, *The Contemporary Property Law Course: A Study of Syllabi*, 47 J. LEGAL EDUC. 205 (1997).

4. Janet Ainsworth, *Law in (Case)Books, Law (School) in Action: The Case for Casebook Reviews*, 20 SEATTLE U. L. REV. 271, 272 (1997).

*Allocation, Planning and Development*⁵ appeared in 1948. Casner and Leach's *Cases and Text on Property*⁶ appeared in its first standard edition in 1950. These books represent differing approaches to Property, and to casebooks generally, that have endured to our day. Both are, of course, "Cases and Text" or "Cases and Materials." We no longer have the pure casebooks containing only cases (and perhaps statutes) with no notes at all. Even Warren's *Cases on Property*⁷ from 1938 contains a few introductory materials and notes, though not of the kind that we see today. McDougal and Haber's casebook was organized on the basis of themes and developments in the law of property, and it "located the authoritative doctrines and practices of property in their context in community processes."⁸ The Casner and Leach casebook differed in two significant ways. First, it centered the focus of the course on the commercial transaction in land. Second, it demonstrated that the relationship of persons to things that we call property might be divided into discrete rights and that much of what Property was about was the prioritization of those rights when they were divided. It may be safe to say that Casner and Leach won the war; most current property books lean more toward their model than toward McDougal and Haber's. However, as our reviews show, McDougal-type books continue to be written, and the gospel of McDougal has been at least partially incorporated into many Casner-type texts. In addition, as our reviews show, a new type of book, the problem casebook, has entered the market.

The books reviewed here represent five of the seventeen property casebooks in general circulation. There may be more out there in some sort of *samizdat* or virtual form. The reviewers, like most of us, make free in one way or another with the casebook they have chosen. We all delete material, change the order of materials, and suggest or require outside readings. Many of us supplement our casebook more or less extensively with additional cases, comments, or other materials that we have prepared.

These nine reviews of five books also demonstrate one of the continuing tensions for Property teachers. Property teachers not only face the usual problem of coverage versus depth (exacerbated by the cut in hours), but we also have the problem that Gertrude Stein posed

5. MYRES SMITH MCDUGAL & DAVID HABER, *PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT* (1948).

6. CASNER & LEACH, *CASES AND TEXT ON PROPERTY* (first std. ed. 1950).

7. EDMUND H. WARREN, *CASES ON PROPERTY* (2d ed. 1938).

8. MCDUGAL & HABER, *supra* note 5, at iii.

for Oakland—that it sometimes seems as if there is no there there.⁹ A number of years ago one of the main topics at the AALS teaching conference on Property was “Is There a Canon?” One of the review authors asks the same question and concludes that, perhaps except for Dukeminier and Krier, there isn’t.¹⁰ A canon might be found by asking either of two questions: first, is there some set of topics that we universally teach? Second, are there some underlying themes that we all think ought to be made part of the experience in the Property course? I suspect that there may be closer agreement on the set of topics and doctrines that were covered. As I look at the books and read the reviews, I find that we all seem to teach Landlord-Tenant, Private Land Use Arrangements (easements and servitudes), Estates in Land and Concurrent Interests, What is Property?, and some element of Transfer and Transactions. We may be more or less excited about some of these topics, but we all teach them. We all also seem to be concerned with teaching students to think like lawyers—whatever that means. As we get beyond a core of coverage issues, our goals diverge. Some think of developing the students’ skills as transactional lawyers or as lawyers in the service of clients. Others stress the value of using property to expose students to a variety of perspectives on the law. Still others think of the traditional training of students as reading cases, statutes, and other materials, and begin the process of training that will be carried through in other courses.

What do these reviews tell us? As I might say to my students, read them and find out. But I will hint at what I think may be an appropriate approach to take and what I think they may in particular reveal. The number of reviews of the Dukeminier and Krier casebook reflect its dominance in the market. Three of the reviewers, while essentially happy with the book as a whole, want something more from it: Professor Morriss would like more development of property other than land; Professor Wendel suggests that the notes may be too complex for most students; Professor Bogart changes the order of the beginning of the book. Only Professor Nelson seems entirely satisfied with the book, its organization, and its coverage. As I read the reviews and think of my own experience with Dukeminier and Krier, I think that its dominance is due to a variety of features mentioned in the reviews and to the fact that it does attempt to reconcile differences

9. GERTRUDE STEIN, *EVERYBODY’S AUTOBIOGRAPHY*, ch. 4 (1937).

10. This lack of a canon is part of why we face the taking issue. See *supra* note 5. Because Property teachers cannot agree on what is important, we are more at the mercy of those who seek our hours.

between the Casner and McDougal models. Dukeminier and Krier deals with doctrine, but at the same time brings home to students how to look at property law with a long view and to see the themes that can and have been developed through studying it.

Both users of the Rabin and Kwall casebook are enthusiastic, not only about the book, but also about the problem method as a device for teaching those non-doctrinal lessons they feel are most important to students. Professor Arnold's review is valuable not only for its exposition of the problem method, but also for its discussion of how students learn and the citation to materials that we could all read profitably. Professor Lindsey notes the objections to the problem approach and how Rabin and Kwall answer those objections. She also shows how the book is useful to one who wants to develop in students a sound approach to transactional law.

Two of the reviews are of new books of the type that I think of as McDougal-type texts, which emphasize broad themes in property law rather than concentrating on doctrine. Interesting also is that both books seem to have been developed to deal with Property's loss of time. Professor Albert finds that *Property Law and the Public Interest* largely succeeds in its attempts to create a book that places property law in its modern context, that closes the dichotomy between public and private sources of law, and that integrates material and issues from other areas of inquiry. However, he notes that students may find it difficult to extract the black letter law. Professor Halper applauds *Property Law and Policy* as a laudable attempt to reestablish Property's primacy in the curriculum. It is a casebook with fewer cases than we might expect and ultimately it falls short.

Finally, Professor Brown explores the continued vitality of Casner and Leach. He finds that, even today, it fulfills its goals for teachers and students, though it could, as he sees it, use some modification. It is, after all, a living artifact, and as such seems to reflect its time of creation, but it seems to have carried the day in its time and has lived to see its progeny thrive.

These books and their reviews demonstrate the continuing debates—pedagogic and substantive—for Property teachers; while we will never resolve those debates, they are part of what makes Property the most important and interesting course in the first year. We Property teachers know that, and every year we are gratified by the students who tell us that they never thought they'd like property law, but now they do. These books will help keep the Property course lively and provocative. Even John Chipman Gray might smile to read this crop of books.