The Perfect Blend of Methodology, Doctrine & Theory

PROPERTY, 4th Edition. By Jesse Dukeminier† and James E. Krier.‡

Reviewed by Peter T. Wendel*

I. THE MARKET HAS SPOKEN . . .

Typically, book reviews are written about books recently published. An economist would argue that the function of a book review is to provide the market with additional information to help the consumer make a more informed choice on whether to buy the book. To the extent that is the function of a book review, this review of Dukeminier & Krier’s property casebook is too late. The market has spoken, and it has indicated its overwhelming approval.

The Dukeminier & Krier property casebook is the most widely adopted property casebook.1 It is one of, if not the most widely

† Maxwell Professor of Law, University of California, Los Angeles.
‡ Earl Warren DeLano Professor of Law, University of Michigan.
* Visiting Professor of Law, University of California, Los Angeles; B.S., 1979, University of Chicago; M.A., 1980, St. Louis University; J.D., 1983, University of Chicago.

1. The Dukeminier & Krier casebook, 4th edition, has been adopted by at least one professor affiliated with the following law schools: Albany Law School; Arizona State University College of Law; Baylor University School of Law; Brigham Young University, J.R. Clark Law School; Brooklyn Law School; California Western School of Law; Capital University Law School; Cardozo School of Law; Catholic University School of Law; Chapman University School of Law; Chicago Kent Law School; Cornell Law School; Creighton University School of Law; DePaul University College of Law; Detroit College of Law; Drake University School of Law; Duquesne University School of Law; Emory University School of Law; Florida Coastal School of Law; Florida State University College of Law; Fordham University Law School; Georgetown University Law Center; Georgia State University College of Law; Harvard Law School; Hofstra University School of Law; Indiana University School of Law at Bloomington; Indiana University School of Law at Indianapolis; John Marshall Law School; Lewis & Clark, Northwestern School of Law; Lincoln University Law School; Loyola Law School; Loyola University College of Law; Loyola University School of Law; Marquette University Law School; McGeorge School of Law; Memphis State University School of Law; Mercer University Law School; Mississippi College School of Law; New York Law School; New York University School of Law; North Carolina Central University School of Law; Northeastern University School of Law; Northwestern University School of Law; Nova Southeastern University Law Center; Oklahoma
adopted legal casebooks regardless of subject matter. In many respects, it is the standard against which other property casebooks, and other casebooks in general, are evaluated. In light of the market's overall approval of the casebook, what follows can only be described as but one professor's views on why the Dukeminier & Krier property book works so well for so many and on where it does not work as well as it could.

II. PEDAGOGICALLY SPEAKING . . .

How well a casebook works for any given professor depends in large part upon what the professor wants to achieve in his or her course that semester. I used Dukeminier & Krier's property casebook for the first time in the fall of 1988. It was my first semester teaching. My goal for the course was simply to survive the semester. Although my initial inclination was to use the property casebook that I had used when I was a first year law student, when I began to review the

City University School of Law; Pace University School of Law; Pepperdine University School of Law; President's College School of Law; Rutgers University School of Law at Camden; Rutgers University, Newhouse Law Center; Samford University, Cumberland School of Law; Santa Clara University School of Law; Seattle University School of Law; Seton Hall Law School; South Texas College of Law; Southern California College of Law; Southern Illinois University School of Law; Southwestern University School of Law; St. John's University School of Law; St. Mary's University School of Law; Stetson University College of Law; Suffolk University Law School; SUNY at Buffalo School of Law; Syracuse University College of Law; T. M. Cooley Law School; Temple University School of Law; Texas Tech University School of Law; Texas Wesleyan School of Law; Thomas Jefferson School of Law; Touro Law School; Tulane University School of Law; University of Alabama School of Law; University of Baltimore School of Law; University of California at Los Angeles School of Law; University of California Hastings College of Law; University of California School of Law at Davis; University of Chicago Law School; University of Colorado School of Law; University of Denver College of Law; University of Detroit School of Law; University of Florida, Holland Law Center; University of Georgia School of Law; University of Illinois College of Law; University of Kansas School of Law; University of Louisville School of Law; University of Maryland School of Law; University of Miami School of Law; University of Michigan Law School; University of Missouri School of Law at Kansas City; University of Nebraska College of Law; University of Nevada, Las Vegas; University of New Mexico School of Law; University of North Carolina School of Law; University of Orlando School of Law; University of Pennsylvania School of Law; University of Pittsburgh School of Law; University of San Diego School of Law; University of South Carolina School of Law; University of Southern California Law Center; University of Tennessee College of Law; University of Texas School of Law; University of Toledo College of Law; University of Tulsa College of Law; University of Utah College of Law; University of Virginia School of Law; University of Wisconsin Law School; Valparaiso University School of Law; Vermont Law School; Wake Forest University School of Law; Washington & Lee University School of Law; Washington University School of Law; Wayne State University Law School; Western New England College School of Law; Western State University College of Law at Fullerton; Whittier Law School; Widener University, the Delaware Law School; Willamette University College of Law; William Mitchell College of Law; and Yale School of Law. See the casebook adoption records of Aspen Publishers, Inc.
casebook with an eye toward teaching it, I struggled with how to approach it. Halfway through the summer I finally admitted I needed help. I called a well-known property professor at a well-known law school and asked him which property casebook he recommended for a new professor teaching property for the first time. Without hesitation he said: "The Dukeminier & Krier casebook. It practically teaches itself." In retrospect, he could not have been more accurate.

The principal reason the Dukeminier & Krier property casebook virtually teaches itself is its teacher's manual. The teacher's manual is the most comprehensive on the market. The Dukeminier & Krier teacher's manual takes the professor through each case in the book, each note in the book, and each question in the book. It briefs each case in detail, discusses the significance of the case, discusses how the case can be used to raise different points and theories, and then relates the case to the note material and problems following the case. The teacher's manual briefs key cases cited in the note material, and it even summarizes key law review articles cited in the note material. The teacher's manual anticipates questions students might ask about the material and provides thorough answers. It anticipates where the students may struggle with the material and provides more in-depth discussion of those points. It not only relates cases to cases, but chapters to chapters, providing both a micro and macro perspective on the law of property and the organization of the material. After reading the casebook and the accompanying section of the teacher's manual, one is fully prepared to go into class and cover the material.

The Dukeminier & Krier teacher's manual provides a road map on how to teach the material, while at the same time pointing out all the relevant landmarks to watch for and to point to for the students while traveling down the road. The teacher's manual serves as a security blanket, virtually guaranteeing survival for someone teaching property for the first time. Any professor teaching property for the first time would be well advised to seriously consider adopting the Dukeminier & Krier casebook.

While "maximizing my chance of surviving" may explain why I first adopted the Dukeminier & Krier property casebook, it doesn't explain why I have stayed with it. Sunk costs may have a lot to do with it. The costs inherent in switching casebooks can be significant. I would like to believe, however, that my decision to stick with a

---

2. A colleague of mine just finished authoring a nonproperty casebook, and his publisher recommended that he take a look at the Dukeminier & Krier teacher's manual as a model of what a well-written teacher's manual should look like.
casebook is based upon more than my own self-interest. While "survival" was my initial goal for my property class, with time I have developed other goals—more diverse and, I would hope, "loftier." I have stuck with the Dukeminier & Krier casebook because of how well it serves my goals for my property course.

No doubt all law professors include among their goals teaching law students how to "think like a lawyer." Those professors who teach first year courses, however, arguably bear a greater responsibility to teach students the skills necessary to "think like a lawyer." Students do not practice law based on the substantive rules of law they learn in the classroom; they do, however, practice law based on the analytical skills they learn in the classroom. Students need to learn how to read and analyze cases, how to discern rules of law and identify the relevant public policy considerations, how to analyze new fact patterns, how to spot issues, how to analyze issues, how to apply the rules and public policy considerations they have learned, how to analogize and distinguish cases, and how to communicate their analysis. I tell my students it is not my job to teach them property, it's my job to teach them how to think like a lawyer—I just use property as the means of achieving that goal. While that is obviously an overstatement, I do consider teaching my students to think critically and analytically the most important goal of my property class.

The Dukeminier & Krier property casebook is particularly well-suited to teaching students to "think like a lawyer." As discussed in greater detail below, the book's opening chapters contain a series of cases which are perfect for teaching legal methodology by illustrating the interplay between facts, rules, and public policy considerations. More importantly, the book is full of challenging cases, often followed by challenging problems that require the students to apply what they have derived from the cases to new factual situations. I recently received a flier on a new property casebook which claimed that it contained "easy to read cases" with "clear statements of the rules of law." I immediately recognized that those claims were directed at those professors who use the Dukeminier & Krier book and whose students complain about the difficulty of the material. If you want a book that "spoon feeds" the law of property to the students, the Dukeminier & Krier casebook is not for you. If, on the other hand, you want a property casebook that challenges the students both substantively and analytically, you need look no further. Students don't always appreciate it at the moment, and teaching challenging material is more demanding, but as law professors we owe it to our students to challenge them and to help them become the best lawyers
they can be. The Dukeminier & Krier property casebook facilitates that goal.

Lastly, different casebooks bring different theoretical perspectives to the subject matter they cover. While a well-written casebook should permit the professor to raise and discuss different theoretical perspectives that may apply to that area of law, most if not all, casebooks emphasize one theoretical perspective. The same is true of the Dukeminier & Krier property casebook. Although it permits the students to analyze existing property doctrines from many different theoretical perspectives, the book emphasizes the law and economics and the utilitarian perspectives. One need not be an economist or law and economics expert, however, to feel comfortable with the material. The law and economics perspective is not overbearing, nor is it forced upon the professor or student. The law and economics perspective is flexible enough that one can teach it at a rather simplistic, holistic utilitarian level (law and economics for "nonecon" majors) or at a more sophisticated level (law and economics for "econ" majors). It is even possible to teach the book without mentioning, expressly or implicitly, law and economics. To the extent that a professor wishes to emphasize a particular theoretical perspective, however, the material is best suited to a law and economics/utilitarian approach to property law.

III. ORGANIZATIONALLY AND SUBSTANTIvely SPEAKING . . .

At the macro level, the Dukeminier & Krier property casebook presents the law of property from a rather classical organizational scheme. Part I raises a number of fundamental property issues relating to "possession"; what is property? how does one acquire a property interest? what does it mean to have a property interest? Part I addresses these issues by examining a number of classic personal property cases involving wild animals, the law of finders, and then, shifting over to real property, the law of adverse possession.3 Having looked at how one acquires a property interest, the casebook in Part II looks at the different ways one may hold a property interest. It examines possessory estates, future interests, concurrent estates, and marital interests.4 Part III shifts to the leasehold estates and the law of landlord and tenant, moving through the material in a very logical, temporal sequence from creation of the leasehold to the rights and duties of the respective parties.5 While Part III focuses on the transfer

4. Id. at xv-xix.
5. Id. at xix-xxi.
of possession to real property (the law of landlord and tenant), Part IV focuses on the transfer of title to real property: the law of land transactions. Again, the material moves through the topic in a fairly logical, temporal sequence from the contract of sale, to the deed, to closing, to the recording system and related doctrines of title assurance. Part V addresses land use controls: judicial (the law of nuisance); private (the law of servitudes); and legislative (the law of zoning). The book closes with a look at eminent domain.

While the casebook's macroorganization is rather classical, at the micro level, the presentation of the material is exquisite. What distinguishes this book is the way the authors sweat the details. From the selection and editing of cases, to the note material, to the questions and problems, to the transitions from one section to another, the difference is in the detail. Dukeminier & Krier have compiled a set of materials that challenge the students methodologically, doctrinally, and theoretically. If "[t]he law is the calling of thinkers," the Dukeminier & Krier casebook is the calling of those who wish to be challenged when thinking about the law of property.

A. Part I. An Introduction to Some Fundamentals

1. Chapter 1: First Possession: Acquisition of Property by Discovery, Capture, and Creation

As one who likes to emphasize legal analysis and critical thinking, my favorite chapter of the Dukeminier & Krier Property book is the opening one. The chapter is full of cases that are arguably of little value from a contemporary perspective of the substantive law of property, but they challenge the students analytically and theoretically. Methodologically, the cases are ideal for teaching students how to read and analyze cases—in particular, how to think about facts, rules, and public policy considerations. Theoretically, the cases force the students to consider a number of fundamental property issues: how does one acquire a property interest; what is "possession"; why do the courts recognize it in some situations, but not in others; is "possession" a

---

6. Id. at xxi-xxiii.
7. Id. at xxiii-xxvii.
8. DUKEMINIER & KRIER, supra note 3, at xxvii-xxviii.
9. See Oliver Wendel Holmes, Jr., The Profession of the Law (conclusion of a lecture given to undergraduates of Harvard University, February 17, 1886), in THE ESSENTIAL HOLMES: SELECTION FROM LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDEL HOLMES, JR. 218 (Richard A. Posner ed., 1992) ("[O]f course, the law is not the place for the artist or the poet. The law is the calling of thinkers.").
factual conclusion or a legal conclusion; what is the legal significance of recognizing a property interest; and how absolute are property rights? The cumulative effect of the cases is to force the students to reconsider their notion of property. Most students begin the chapter thinking that property is a thing from which certain absolute rights flow. By the end of the chapter, the cases have stretched the students to the point where they begin to recognize that property has more to do with the relative rights of people among themselves, with the critical issues being when should society recognize a property right, why, and to what extent.

As much as I enjoy the opening chapter, however, I have trouble with the first case in the book. The book opens with Johnson v. M'Intosh,\textsuperscript{10} and Justice Marshall's apologetic attempts at justifying the rule of discovery and its concomitant rule of conquest as applied to the Native American Indians who occupied the land first. As the note material after the case admits, from a substantive law of property perspective, these rules are not of much relevance today;\textsuperscript{11} and the material is discomfiting.\textsuperscript{12} So why cover the case? The note material emphasizes the historical significance of the case, as it represents "the foundations of landownership in the United States."\textsuperscript{13} While that may be true, I think the costs associated with covering the case as the first case in the course far outweigh its benefits.

The students usually come away from Johnson v. M'Intosh with a bad taste in their mouths. Most view the opinion as standing for the proposition "we stole it fair and square." Not exactly what I want them thinking about as "the foundations of landownership in the United States."\textsuperscript{14} Although I recognize some merit to the Critical Legal Studies approach to the law, I am not a "Crit." I do not want my students starting law school, and starting property, thinking that the "law" is no more than what those with power (either military or economic) say it is. To the extent there may be some merit to the Critical Legal Studies approach, I would prefer that it be presented later in their studies, when the students have greater context with which to assess it. I no longer start with Johnson v. M'Intosh; I start with the second case in the book: Pierson v. Post.\textsuperscript{15}

\textsuperscript{10} 21 U.S. (8 Wheat.) 543 (1823), reprinted in DUKEMINIER & KRIER, supra note 3, at 3.
\textsuperscript{11} DUKEMINIER & KRIER, supra note 3, at 12.
\textsuperscript{12} Id.
\textsuperscript{13} Id. at 11.
\textsuperscript{14} Id.
\textsuperscript{15} 3 Cai. R. 175 (N.Y. Sup. Ct. 1805), reprinted in DUKEMINIER & KRIER, supra note 3, at 19.
Pierson v. Post. Foxes on the beach. While Johnson v. M’Intosh may represent “the foundations of landownerships in the United States,” Pierson v. Post represents the foundations of property law in the western world. Occupancy and the principle of first in time. The labor theory versus the utilitarian/economic theory. The interests of the wealthy, who hunted with hounds and for sport, versus the interests of the community at large. It is no wonder that property casebooks for decades have started with Pierson v. Post. Just like the historical connectedness of the law of property itself, beginning the casebook with Pierson v. Post connects students with generations of students who have studied the law of property. It initiates them into the law of property; it is the “common core” of the law of property.

Who is entitled to the fox? The students can engage in a lively and spirited discussion free of the cultural, political and emotional baggage that comes with Johnson v. M’Intosh. No doubt some professors may want students to deal with the cultural, political, and emotional components in Johnson v. M’Intosh, but most first semester, first day, first year law students are not prepared yet to bare their souls on such issues. Trying to force them to discuss such sensitive issues right off the bat only makes many of them more reluctant to talk in class. As one who uses a benevolent Socratic approach in class, one of my goals is to create a classroom environment in which all students are comfortable expressing any and all points of view. I find that I have better success creating such an environment when I start with Pierson v. Post.

Moreover, from a methodological point of view, I’m not sure there is a better set of cases than Pierson v. Post and Keeble v. Hickeringill. Dukeminier & Krier’s setup is perfect. In light of the rule and holding in Pierson v. Post, is Keeble v. Hickeringill reconcilable? Immediately, students are forced to wrestle with tough analytical questions. They are forced to recognize the interplay between facts, rules, and public policy. They are forced to see the common law’s evolution: if the facts change just slightly, but the change affects the relevant public policy considerations, it is really public policy that drives the rules which, in turn, control the outcome. If the facts appear to fall within the scope of the rule, but the outcome is contrary to public policy, the rule must change. There’s not much substantive property law in

---

Pierson v. Post and Keeble v. Hickeringill, but there is not much better legal methodology. For those professors who have the time in their course, and interest in methodology, these cases often turn students who thought they were going to hate property into students who look forward to coming to class. For although the subject matter may not interest them initially, the methodology engages and fascinates them.

In the note material following Keeble v. Hickeringill, Dukeminier & Krier formally introduce the law and economics theoretical theme. The authors present a rather long excerpt from Harold Demsetz's law review article, which takes a law and economics approach to property rights. Overall, I enjoy the law and economics theoretical approach that the authors take in the casebook, but I find this particular excerpt to be too much too soon. First year law students are still trying to master reading and analyzing cases while trying to get a grip on property and law school in general. Throwing a rather dense law review article at them which addresses the issue of property rights from a totally different discipline—economics—is simply overwhelming for most students. I have the students skim the Demsetz excerpt for general information, but do not attempt to integrate it in any great detail into the class discussion. I do, however, slowly integrate basic economic principles and doctrines where appropriate as the course progresses.

Dukeminier and Krier continue the themes of methodology and "what is property" throughout the rest of the first chapter. The material moves from wild animals to dress designs (intellectual property) to "should one have a property interest in one's own

19. See Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (2d Cir. 1929), reprinted in DUKEMINIER & KRIER, supra note 3, at 60. I have one minor complaint with the intellectual property series of cases. In prior editions, Dukeminier & Krier led with International News Service v. Associated Press, 248 U.S. 215 (1918). In the latest edition, they lead with Cheney Brothers v. Doris Silk Corp. No doubt one reason for the switch is that International News Service represents an exception to the general rule, and leading with an exception to the rule often confuses students. Leading that Cheney Brothers means that the material now leads with a case that represents the general rule, thereby facilitating discussion of the general rule. Cheney Brothers also cites and discusses International News Service, which the authors briefly summarize following the Cheney Brothers opinion, thereby setting up a nice discussion of the two cases. The problem is that in Cheney Brothers the court distinguishes International News Service by saying that the latter is limited to its facts. The authors' summary of International News Service, however, is so brief that it fails to include the key facts which arguably justify the Court's holding. DUKEMINIER & KRIER, supra note 3, at 62. I augment the material concerning the facts in International News Service so the students can better understand the claimed factual difference between the two cases.
Students who thought the course was going to be about "deadly dull" topics like deeds and metes and bounds quickly reassess the course. The students are invigorated by the analytical gymnastics necessary to keep up with the material in the first chapter. The analytical and theoretical challenges generate a level of intrigue and energy that the students did not know existed in the dreadfully dreary world of property. (Then again, it is easier to engage and teach students when they come into a course with low expectations!)

Chapter 2: Subsequent Possession: Acquisition of Property by Find, Adverse Possession, and Gift

Chapter 2 begins by continuing the methodological emphasis of the early part of the casebook. The law of finders is not a major part of the law of property, but it provides another nice opportunity to work with the students on methodology while at the same time driving home to the students the notion that property rights are relative. Armory v. Delamire is perfect for teaching students not only about the relativity of property rights and the public policy justifications for such relativity, but for teaching students about the judicial habit of overstating rules. In pronouncing rules, courts cannot help but be influenced by the facts before them. Just as property rights are not absolute, neither are rule statements. Courts issue rule statements as if they were absolute, but they cannot anticipate the myriad of possible factual scenarios that might arise with respect to a rule. Subsequent variations in the factual pattern often require courts to modify or refine the rule statement. Students need to realize that they cannot accept common law rule statements as set in stone, but rather students should see the common law as evolving doctrines that may need to be modified or refined as the facts change in light of relevant policy considerations and societal goals.

While Armory v. Delamire is ideal for emphasizing the relativity of property rights, Hannah v. Peel is ideal for teaching students how to read and analyze judicial opinions. Upon first impression, Hannah v. Peel looks like a well-reasoned opinion as the court works through the precedent. If, however, you have the time to take the students through the precedent, the students realize that the court does not apply the rules that it extracts from the precedent. Instead, the court

20. See Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990), reprinted in DUKEMINIER & KRIER, supra note 3, at 66.

21. 1 Strange 505 (K.B. 1722), reprinted in DUKEMINIER & KRIER, supra note 3, at 100.

22. 1 K.B. 509 (1945), reprinted in DUKEMINIER & KRIER, supra note 3, at 103.
appears to apply its own reasoning to reach its desired result. Yet when the students think about the relevant public policy considerations, the students see that the court implicitly applied those competing considerations. The students come to recognize that the court probably reached the right decision, but did a poor job of expressing its analysis. Again, the opinion forces the students to think about the common law doctrines, the relevant public policy considerations, and how the two interrelate when applied to a difficult fact pattern. The students begin to discern what it means to think critically and analytically.

From the law of finders the coverage shifts to the law of adverse possession. Again, besides teaching the students the basic doctrines of adverse possession, the material does an excellent job of showing the students how the theoretical justifications for a doctrine affect the different elements of the doctrine. The competing theoretical justifications for adverse possession and the statute of limitations approach versus the earnings/expectations approach all affect the doctrinal requirements of claim of right, color of title, privity and tacking, and even the doctrine of disability.

The methodological aspect of the casebook is also reflected in the adverse possession cases selected by the authors. Van Valkenburgh v. Lutz23 arguably represents an example of a "result oriented" opinion which does not hold up under close scrutiny. The cumulative effect of Hannah v. Peel and Van Valkenburgh v. Lutz is that the students realize that they cannot be deferential to judicial opinions. Law students come to law school with a fairly deferential opinion of our judicial system and of judicial opinions. To a large degree, this is a function of our legal system. Because the judicial branch has minimal means of enforcing its opinion, it relies heavily upon public respect for the judiciary and its opinions as a principal mechanism of enforcing its opinions. This respect for judicial opinions is also heightened by the assumption that if the opinion is in the casebook, it must be a good opinion. Why else would it be in the book? First year law students do not yet realize that to be an effective lawyer they need to develop the ability to evaluate on their own whether an opinion is a "good" or "bad" opinion. Whether an opinion is a "good" or "bad" opinion does not turn exclusively on whether the holding is "right" or "wrong," but on the court's reasoning in support of its conclusion. By including cases like Hannah v. Peel and Van Valkenburgh v. Lutz, Dukeminier & Krier force the students to realize that they cannot take a passive,
deferential approach to analyzing cases; they have to take an aggressive, critical approach. This is an essential skill students must develop to survive in the real world.

While the casebook's overall coverage of adverse possession is excellent, there is one area that has proved confusing to the students over the years. The notes emphasize that the law of adverse possession is a combination of specific state statutes and judicially generated common law requirements and doctrines. In Van Valkenburgh, the court applied the New York statute that defines "open and notorious." The note material does a good job of clarifying for the students that the New York approach does not represent the general approach to the element of "open and notorious." The students realize they should focus more on the general common law approach to the element and not be confused by the case's state-specific approach.

There arguably is a similar state-specific versus general common law approach in Howard v. Kunto and the court's treatment of the doctrine of privity. The case of Howard v. Kunto illustrates the Washington approach to adverse possession, which at the time required that the adverse possessor be acting in good faith. This requirement affects the court's discussion of privity. The opinion implies that privity requires that the adverse possessors be acting in good faith. That, however, is not the general approach to privity. Most jurisdictions simply require that there be some reasonable connection between the adverse possessors regardless of their state of mind. While the note material after Van Valkenburgh did a good job of alerting the students to the state-specific nature of the court's discussion of the element of "open and notorious," the note material after Howard v. Kunto does not alert the students to the fact that the court's discussion of privity is state-specific, and not the general rule. While the problems after the case give the professor the opportunity to clarify the situation, the students who work through the problems before they come to class are frustrated by the apparently misleading nature of the opinion and accompanying notes. While it is important for students

26. DUKEMINIER & KRIER, supra note 3, at 131-34.
28. Id. at 146.
to realize that doctrinal requirements may vary from jurisdiction to jurisdiction, and while such differences may provide fertile ground for theoretical discussions concerning what the law should be, invariably the students are frustrated by the material's failure to prepare them for the problems on privity—which makes for a frustrating class.

One other point about the problems in the casebook: they are challenging. Typically, the problems will involve difficult fact patterns that truly test the students' understanding of the material. Often, however, the problems are sufficiently different from the cases or note material that the fact pattern in the problem really is designed to raise a variation on the rule that is so different that it constitutes a whole new rule.30 Students often complain there is insufficient material in the book to analyze such problems. My response is to explain that the problems are an exercise in how common law rules evolve. Although the fact patterns are similar, the differences are great enough and the public policy considerations strong enough that the courts had to modify or change the rule for the new situation. The common law courts had to reason to the new or modified rule statement, and so too should the students. Quietly, however, I have to admit that often the problems are so different that asking the students to come up with the new rule is asking a lot of them.

Shortly after I began using the Dukeminier & Krier casebook, I asked the publisher's representative about the challenging nature of some of the problems. His response was that many professors complained about the degree of difficulty in some of the problems, but that the authors expect the students to go to the library and look up the cases cited at the end of the problem to find the applicable law.31 In many respects, I think that is expecting even more of the students than asking them to reason to the new rule! Although I have serious doubts about the wisdom of assuming that the students will look up the cases cited in the problems, I think students are better off with problems which overchallenge them as opposed to ones that underchallenge them. I would, however, recommend that the authors reconsider how often they overchallenge the students, so as to avoid exasperating

30. See, for example, the problem set following the rule of capture and wild animals, DUKEMINIER & KRIER, supra note 3, at 35, and the problem set following the note on color of title and constructive adverse possession. DUKEMINIER & KRIER, supra note 3, at 137. Both problem sets ask the students to reason to what amounts to "new" rules based upon factual differences between the problems and the material in the casebook to that point.

31. I do not know if the authors actually believe this or if the publisher's representative simply made it up as a good answer to the repeated questions he received about the problems.
them to the point where they stop trying to analyze the problems on their own.

B. Part II. The System of Estates (Leaseholds Aside)

1. Chapters 3 & 4: Possessory Estates & Future Interests

Part II of the casebook shifts gears from how one acquires a property interest to the different ways in which one can hold a property interest. Part II focuses on the different ways in which multiple parties can hold property interests at the same time, either consecutively (possessory estates and future interests) or concurrently (joint tenancy, tenancy in common, tenancy by the entirety, and marital property). While Part I of the casebook focuses on fundamental property principles which arguably arise by operation of law as a result of possession, Part II focuses on a highly structured system of holding property that for the most part arises from the intent of the parties.

There is a noticeable shift in the material from the conduct of the parties to the intent of the parties as expressed in a written instrument. This shift is brought home rather sharply by the material on possessory estates and future interests that concerns itself almost exclusively with drafting and construction issues ("the taxonomy" of permissible possessory estate and future interests) and the legal consequences that accompany each estate. Gone are the intriguing public policy discussions of Part I, replaced for the most part by purely analytical questions of construction. This section of property can still be interesting and exciting, but one has to work harder at it.

In the ever expanding world of property law, and in the ever shrinking world of classroom hours allocated to the property course, there simply is not enough time to cover all the property topics and doctrines a professor would like. Each property professor must pick and choose what he or she is going to cover, which entails thinking about which topics the students need to be exposed to in the basic property class and which topics the professor enjoys teaching. There appears to be a growing consensus that possessory estates and future interests consume too much of the first year property course relative to their overall worth. Increasingly, property professors are either deleting the material altogether or opting for their own material which covers the basics in a quicker and more straightforward manner.

32. DUKEMINIER & KRIER, supra note 3, at 185-416.
33. Id. at 185.
I must confess to being one of the latter. From the beginning, I concluded that the two chapters, covering some 133 pages, that Dukeminier & Krier devote to possessory estates and future interests are simply too much.\textsuperscript{34} Inasmuch as I cover only about 900 pages of the book as it is, the two chapters would be approximately fifteen percent of the course coverage. In addition, because of the degree of difficulty inherent in the possessory estates and future interests doctrines, teaching the doctrines would consume close to twenty percent of the course’s classroom time.

I opted out and developed my own materials with voluminous problem sets which present the “taxonomy” of the basic possessory estates and future interests in as straightforward a manner as I could.\textsuperscript{35} I find that even with this simplified approach to possessory estates and future interests, the myriad of possible combinations keeps the material challenging and interesting from an analytical perspective. It is, granted, a different type of analytical challenge—but that is true even of the casebook’s presentation. My approach lets me get in and out of the “twilight zone of property” efficiently and with minimal damage to the course. I can cover all of the basic possessory estates and future interests, and the base rules furthering marketability, in about five to six classes. Depending on how many hours are devoted to the property course, this puts the time allocated to possessory estates and future interests closer five to seven percent of the course, much more in line with what I would venture to guess most property professors think is its proper coverage.

2. Chapter 5. Co-Ownership and Marital Property

Chapter five does an excellent job of presenting the basic doctrines inherent in joint tenancies and marital property. Overall, I enjoy teaching the material, and the students seem to enjoy learning it. I have, however, a couple of minor objections concerning the emphasis and scope of the coverage. First, on the topic of sharing the benefits and burdens of co-ownership, Dukeminier & Krier cover two cases,

\textsuperscript{34} Id. at 187-321.

\textsuperscript{35} West Publishing Co. was kind enough to publish the materials, and the book appears to be enjoying some success, as it is in its second printing. See CHARLES I. NELSON & PETER T. WENDEL, A POSSESSORY ESTATES AND FUTURE INTERESTS PRIMER (1996). To avoid the obvious conflict of interest inherent in talking about my approach to this part of the course, I will leave it to others to review and assess that book. A colleague of mine, Shelley Saxer, has produced a set of power point slides which go with the material and she strongly encourages use of that technology at this point in the course. You may contact her at <ssaxer@pepperdine.edu> if you would like to discuss that approach to the material with her.
Spiller v. Mackereth and Swartzbaugh v. Sampson. Following the Swartzbaugh case, there are two pages of dense note material on the complex and important doctrines of a cotenant's accounting rights concerning rents, profits, taxes, mortgages and other carrying charges, and repairs and improvements. While some of these doctrines are raised by Spiller and Swartzbaugh, some additional cases, or at a minimum some additional problems, are probably warranted.

In addition, I have some doubt as to the need for all of the marital property material. Again, with ever shrinking classroom hours for the property course, more than ever before professors are having to be selective in what they cover. Granted, the authors must provide flexibility in the material so that different professors can make different selections. Nevertheless, one might still question the casebook's treatment of marital property. Are two cases really necessary to teach the Married Women's Property Acts? Are two cases really necessary to raise the issue of whether a professional degree or celebrity status acquired during the marriage constitutes marital property for purposes of divorce law? While termination of marriage by divorce gets 17 pages and two cases, termination of marriage by death of one spouse gets 3 pages and no cases. And is Marvin v. Marvin really a property case?

There is no doubt that the issues raised in the marital property section are interesting, but to the extent the cases are not truly property cases—being either family law cases, creditor's rights cases, or contract cases with a property overlap—I think such cases are more effective when they are fewer (as with the intellectual property cases in the opening chapter). Having so many disparate cases together leads to rather superficial coverage and the impression that the property course is a cafeteria style course. Students then begin to lose interest in the law of property. There simply is not enough supporting material for students to really sink their teeth into the cases. Though

36. 334 So. 2d 859 (Ala. 1976), reprinted in DUKEMINIER & KRIER, supra note 3, at 348.
37. 54 P.2d 73 (Cal. App. 4th 1936), reprinted in DUKEMINIER & KRIER, supra note 3, at 352.
38. DUKEMINIER & KRIER, supra note 3, at 358-60.
42. DUKEMINIER & KRIER, supra note 3, at 59-66.
one can make an argument for each of the individual cases included, the cumulative effect of the section is to weaken the course.

C. Part III. Leaseholds: The Law of Landlord and Tenant

1. Chapter 6. Tradition, Tension, and Change in Landlord-Tenant Law

Chapter 6 is one of the real strengths of the casebook. Landlord-tenant law is one of the few topics in property with which most students have had some firsthand experience. They are naturally interested in the material, and the material does not disappoint. The material is organized in a very logical order from creation of the leasehold estates, to selection of the tenants, to the duty to deliver possession, to subleases and assignments, to the tenant who defaults, to the duties, rights, and remedies inherent in the leasehold estates, to termination of the lease. In addition to covering the basic doctrinal information, the material includes just the right amount of historical background to permit discussion of the common law agrarian model of the landlord-tenant relationship versus the contemporary urban model of the landlord-tenant relationship; discussion of the status approach to the relationship versus the contract approach to the relationship; and discussion of whether it should matter if the relationship involves residential leaseholds versus commercial leaseholds. The material is reminiscent of the opening chapters where discussion of the cases permits easy blending of public policy questions. The historical information permits the students to see how changing assumptions about the nature of the landlord-tenant relationship raised different public policy considerations which led to different doctrines. For the most part, the material works wonderfully and is a pleasure to teach.

---

43. The latest edition has a couple of new cases covering the topic of housing discrimination. See Soules v. U.S. Dep't of HUD, 967 F.2d 817 (2d Cir. 1992), reprinted in DUKEMINIER & KRIER, supra note 3, at 439; Bronk v. Ineichen, 54 F.3d 425 (7th Cir. 1995), reprinted in DUKEMINIER & KRIER, supra note 3, at 448. These cases involve allegations of discrimination on the basis of family status (children) and disability, respectively. These cases should facilitate discussion of the issue of housing discrimination compared to the case in the prior edition which involved allegations of discrimination on the basis of race. Many students were reluctant to embark upon a spirited discussion of the issue of housing discrimination in the context of racial discrimination. The new cases should permit a fuller and franker initial discussion of the issues inherent in housing discrimination that can then be used to set up a discussion of racial discrimination, which is raised in the problems. This subtle but important shift should engage the students in the topic of housing discrimination and should end up leading to a serious discussion of racial discrimination in housing.

44. DUKEMINIER & KRIER, supra note 3, at 419-546.
D. Part IV Transfer of Land

1. Chapters 7 and 8. The Land Transaction and Title Assurance

As familiar as the students are with the material in the landlord-tenant chapter, the students are that unfamiliar with the material covering the land transaction. When it comes to title to real property, students revert to their initial assumptions—that property is a "thing" with absolute rights that flow from it. Students assume that if you purchase real property, "it" is yours and you can do whatever you want with it. Students tend to analogize real property to personal property, something with which they have more familiarity. If you purchase it, you get it, and you can do whatever you want with it.

Unfortunately, the material does not sufficiently disavow the students of this belief soon enough. Chapter 7 opens with an excerpt from a law review article which takes the students through the steps inherent in a typical real estate transaction. While inclusion of this excerpt implicitly acknowledges that students have no real background with this area of property law and that they need some overview of where the material is going, the excerpt from the law review article fails to address the problem adequately. The excerpt is, frankly, too legal, too technical, and too dense. What the students need is a simpler example that brings the necessary information home at a level that they can understand and conceptualize. Once they understand the "big picture" conceptually, they then can plug in the legal and technical doctrines. I use a simple hypothetical to bring the issues and material home to the students so that they have a conceptual understanding of the land transaction context within which to analyze the doctrines.

I start the land transaction material by telling the students that I own "Malibu acres," the last parcel of undeveloped land left on Pacific Coast Highway on the ocean side of the road, in Malibu. I tell them that the parcels around it, on both sides of the road, have fairly modest (for Malibu) houses on them. I then select three small groups of students to serve as developers and tell them to go out into the hall and develop a proposal for the land. I give them five to ten minutes and tell them that when they come back into class, they should submit their proposals to the class. The class will select the winning proposal, and I will sell the property to the winner.

While the “developers” are out working up their proposals, I select a “surfer” student and tell the class that the student has been walking across my property for years to get to the beach and surf. Although the surfer would like to buy the land, the surfer lacks the money. All the surfer wants, however, is the right to walk across the land to reach the beach. I explain to the class that I can sell the student a more limited property interest called an easement. I end up selling the student the right to walk across the middle of the western half of the Malibu acres.

I select another student to be my neighbor who lives directly across Pacific Coast Highway. My neighbor’s house has a nice bay window which looks out across Pacific Coast Highway and the eastern half of Malibu acres to the ocean. Although my neighbor would like to buy Malibu acres, she lacks the resources. Instead, to protect her view, the neighbor purchases a restrictive covenant that restricts anything growing or being built on the eastern half of Malibu acres. (Whether this covenant runs to remote grantees is another question!)

Then I call the “developers” back into the classroom. They present their proposals one group at a time. Their proposals are usually rather grandiose, ranging from building a casino or spa, to a high rise apartment complex, to subdividing the land and putting up houses. Some know enough to ask about zoning restrictions, but none ask about private restrictions. The class usually picks the most grandiose proposal to highlight the problems in not checking the state of the title. Then, as the winning group of developers begins diagramming its proposal for Malibu acres on the board, first the surfer comes up and asserts rights in the land, and then my neighbor comes over and asserts rights in the land. By that point, all the students realize the folly in their assumption that when you buy real estate you own “it” and can do whatever you want with it. Students realize you do not purchase real estate, you purchase “title” to real estate, and students appreciate why you need to check the “title” before you purchase. Only then does the legal, technical and dense material in the law review excerpt begin to make sense to them.

My experience has been that the material covering the land transaction does not work as well as the material in other parts of the book. I should, however, qualify that statement. At the case level, and even at the topic level, the material does a good job of raising the relevant issues, presenting the applicable doctrines, and permitting discussion of the pertinent public policy considerations. Yet, the material does not “gel” as well as other parts of the book. Upon further reflection, I think that the organizational scheme that works so
well for other parts of the book does not work as well for this part of the book.

For the most part, the casebook is organized by subject matter, and within each subject matter the material is organized in a logical, temporal sequence of issues that might arise within that topic. The best example of this is the organization of the landlord-tenant material. In that area, linear organizational scheme works wonderfully. I question, however, whether it works as well for the land transfer material for two reasons.

First, while the landlord-tenant material progresses rather linearly, the land transfer material is more like a seamless web of overlapping issues. Moving linearly through the material does not work as well if some of the natural overlaps are not explained at the appropriate time. For example, the concept of defects of title is very important both preclosing and postclosing. To assess the quality of title the seller is contractually obligated to provide, and to ask whether the seller can meet that contractual obligation, one has to understand the scope of potential defects of title. Yet the casebook does not discuss some of the classic sources of defects of title—easements and restrictive covenants—until Chapter 10, well after the land transfers material is completed. When the students read the cases in the land transfers chapters which deal with easements and covenants, they have no real understanding of those legal arrangements. The authors should not assume that the students can either figure it out from the cases or that the students will adequately relate the material on easements and covenants back to the land transfers material. In recent years, I have reorganized the material to cover Chapter 10 (easements and covenants) before the land transfer material (Chapters 7 and 8). This gives the students a better understanding of the concept of defects of title as it applies to the material both pre- and postclosing as discussed in Chapters 7 and 8.

The second organizational problem I have with the material in Chapters 7 and 8 on the land transfer process is that, although the material moves methodically and logically through the various issues that may arise during the land transfer process, the material lacks any over-arching themes. At the detailed level, the material is excellent, but the students tend to become overwhelmed by all the rules that are presented without a sense of context. The students tend to lose the forest for the trees. The linear approach to the land transfer process

46. DUKEMINIER & KRIER, supra note 3, at 779-940.
provides some context, but not enough in light of the numerous potential overlaps.

I have tried to provide some overarching themes by encouraging the students to keep the linear approach in mind but to couple it with two simple questions. Following the linear approach of the material, first divide the material into the preclosing and the postclosing time frames. Preclosing, the issue typically is going to be "can I get out of the contract?" As a practical matter, it is usually the purchaser who will be asking the question and trying to get out of the contract. The overwhelming majority of the preclosing doctrines relate directly to that over-arching theme.

If a problem develops postclosing, it typically involves a claim of a superior property interest as compared to the title that the purchaser thought he or she had purchased. Analytically, the logical analysis is (1) whose claim of a superior property interest trumps (which goes to the doctrines inherent in the title assurance material in chapter 8); and (2) does the party who loses have a claim against the seller of the property interest (which typically goes to the warranties of title in the deed material in Chapter 7). This simple analytical scheme provides a set of overarching themes to the material which gives it a more logical structure for the students.

Because the authors organize the material based on the linear approach to the steps inherent in the land transfer process, the deed is covered at the preclosing/postclosing juncture.47 This is also the time that the authors have chosen to cover the warranties of title.48 Analytically, covering the warranties of title at that point arguably is premature. For the most part, the warranties of title are not an issue until one determines whether the claimed superior property interest is, in fact, superior.49 This requires the students to analyze the title assurance issues first. For the most part, only after completing that analysis does the issue of warranties of title arise.

Although I have some problems with the organization of the material in Chapter 7, I have no problems with the material methodologically, doctrinally or theoretically. The material is interesting, challenging the students, once again, on all three levels. The cases are

47. Id. at 600.
48. Id. at 605-06.
49. Obviously this is an overstatement, particularly with respect to the warranties of sellers to defend the purchaser against claims of a superior title interest. This relatively minor exception, however, does not appear to justify presenting the whole section on the warranties of title before the title assurance material. The analytical organizational scheme appears more logical in the land transaction section than in the linear organizational scheme.
engaging and require close and careful reading. By this point in the year, the students should be further along in their reading and analytical skills, and they must carefully analyze the material in the land transfers sections of the book. This is especially true of the material in Chapter 8.

Chapter 8 covers the legal doctrines designed to give title assurance to a purchaser of real property. The chapter focuses primarily on the recording system, the different recording acts, and the problems that typically arise as a result of the mechanics inherent in searching the recording system. I have some doubts as to whether the material in the book does an adequate job of conveying to the students the importance of the mechanics. Don’t get me wrong—the discussion of how to perform a title search is legally complete and accurate, but it fails to take into account the students’ complete unfamiliarity with the process. I spend almost a whole day on just those two pages. I bring in a set of books that I alter to look like record books, one set for the grantor’s index and one set for the grantee’s index, and ask students to come up and use the books to perform a simulated title search. We do a number of hypothetical situations to make sure that visually the students have in their heads an image of how one would actually perform a title search. Understanding the mechanics of a title search is indispensable to understanding the recording act problems and cases that follow. My suggestion is to include some additional problems after the title search material to make sure the students have a good grasp of the nature of the search.

As for the title search cases, although I love them, students hate them. The reason is that each of the cases the authors selected to demonstrate a typical recording act problem has an interesting wrinkle on the basic scenario which makes them more challenging. The authors implicitly acknowledge this by providing a number of examples in the note material before and after the cases. The examples represent the typical scenario in which the recording act problem in question arises. Each case selected is a variation on the typical situation.

The problem is two-fold. First, the typical recording act problem is rather challenging in and of itself. Adding a wrinkle to the situation arguably increases the degree of difficulty exponentially rather than

50. DUKEMINIER & KRIER, supra note 3, at 651-737.
51. Id. at 655-57.
52. In that respect, the material is similar to, and suffers from the same weakness as, the law review article at the beginning of the land transaction section, which provided the students with the relevant legal information, but failed to present the material in a way that the students could understand conceptually. See supra note 50, and accompanying text.
simply arithmetically. Second, by this time in the course, the students have been conditioned to lead with the cases and look for the wrinkles on the doctrine in the note material. The sudden switch is confusing. I have found that if you tell the students upfront of the relationship between the examples in the notes and the cases, the students see how the cases contain an additional wrinkle. The material works much better when the students lead with the examples in the notes and then analyze how the cases are variations on the examples. While this approach is implicit, I think it could be, and should be, made clearer to the students. Clarifying the relationship between the examples in the notes and the cases does not detract in any way from the challenging nature of the chapter.

Although, as expressed above, I have some problems with the organization of the material in the land transfers chapters of the book, at the micro level, I thoroughly enjoy these chapters. The casebook does a good job of moving linearly through the steps in the land transfer process. The pertinent issues that could arise at each step are raised and discussed. The cases used to make the points are interesting and lead to good class discussions of the issues. The material is very challenging and requires the students to relate doctrines to relevant policy concerns.

E. Part V. Land-Use Controls


As noted before, there are only so many class hours in a semester, and property professors have to pick and choose which topics they are going to cover. Based upon informal discussions with my colleagues in the property area, more and more professors are concluding that nuisance is a torts doctrine best left to the torts classes. Torts professors enjoy covering the law of nuisance, and that frees me up to cover other property doctrines that I enjoy. Therefore, I am in no position to review Dukeminier & Krier’s chapter other than to say that it covers the classic cases on the subject.


Chapter 10 is another one of the chapters in the book that works extremely well for the most part. The linear organization works particularly well in this chapter. It starts out with the easement, addressing all of the relevant issues that may arise with respect to easements at each step in their life and then moves on to equitable servitudes and real covenants. The material on equitable servitudes
and real covenants does not work as well as most of the rest of the book. Granted, the law of running covenants is among the most difficult in property, but I think the problem is compounded by the authors' attitude toward this area of the law. The authors talk of "the irrational technical distinctions that pervade this subject." While that may be true, the presentation of the subject appears to be affected by this attitude. While the traditional common law approach can and should be criticized, the students need to understand the common law approach to appreciate the criticisms. Otherwise, the chapter does a good job of raising theoretical and public policy issues with respect to the different doctrines. The material repeatedly asks the students to assess the doctrines in light of the public policy and theoretical considerations at stake. As noted above, however, in teaching I move this whole chapter up to the start of the land transfers section.


Time constraints do not permit me to teach the material in Chapters 11 and 12. This does not bother me because I know that the information covered in these chapters is available to the students in upper level electives should they be interested in pursuing these areas. Not having taught these chapters in class, it would be inappropriate for me to review them.

IV. CONCLUSION

I started out teaching as a legal research and writing instructor. As I look back on this book review, I feel like a legal research and writing instructor again in that, although I think this is the best property casebook on the market, my comments have focused too much on the book's perceived weaknesses and not enough on its strengths. The Dukeminier and Krier property casebook is without a doubt an excellent casebook. Although I think the book could be even better, the book cannot be everything to everybody. Although I have noted some of the weaknesses in the book, primarily in some of its organizational features, a professor can reorganize the material rather easily to suit his or her own interests and approach.

The Dukeminier & Krier casebook does the best job of blending methodology, doctrine, and theory when compared to other property

53. DUKEMINIER & KRIER, supra note 3, at 881.
casebooks. It presents the material in an interesting, engaging, and easy to teach approach, and continues to be the standard against which all other property casebooks are evaluated.