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Book Review. Land Ownership and Use: Statutes and Other Materials by Curtis J. Berger

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and they are not confined to whites, or to America. But more and more the problems of the Negro are those of economics and education, of class instead of caste. They are not the problems of the evil designs of white men, but of the evil effect of disorganization, destruction of individual pride and incentive, and decreasing responsiveness of the system.

In a push-button society, when we push a button and nothing happens our reflex tends to be to continue pushing the button, not to engage in a grimy examination of the machinery. Since 1954, when the Supreme Court pushed the desegregation button and the machinery refused to function, our reaction has been not to examine the machinery for defects but to create more and more buttons in the form of laws and bills. Few of them are connected to responsive or effective machinery.

As Dr. King points out, it is not only the white man who has taken the easy but ineffective road of talking a good game, but playing little; the Negro is just as guilty. He has been too glib, too reluctant to plunge into the hard work of organization, too quick to accept a gaudy wrapping as indicative of the value of the package.

"As a society becomes more concerned with precedent and custom, it comes to care more about how things are done and less about whether they are done," 3 John Gardner has written. "The rule book grows fatter as the ideas grow fewer." 4 "Most ailing organizations have developed a functional blindness to their own defects. They are not suffering because they can't solve their problems but because they won't see their problems." 5

What the legal profession must ask itself is whether it has not placed too much emphasis on laws and too little on justice, which, presumably, is the sum total of the laws; too much emphasis on the theory of law, and too little on its administration, which is the measure of its effectiveness; too much emphasis on the framework of statutes, and too little on the foundation of reason and logic.

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Teachers of real property have always been a little paranoid about their subject. One has labeled it the "ugly duckling of the law school curricu-

4. Id.
5. Id. at 42.

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lum,” perhaps in reaction to years of watching the basic course pared down to make room for more “relevant” offerings. Development of the subject has suffered because it has failed to attract its fair share of the best qualified people entering the teaching profession. However, during the past few years there has been a revival of interest in the subject, largely in response to the social problems posed by the rapid deterioration of the physical environment. This can be illustrated by two contrasting scholarly examinations of contemporary landlord-tenant problems. In 1960 a 12-page article entitled “Landlord and Tenant Reform” concluded that “there has been no general reform legislation in landlord-tenant law; there has been no need for it. Nor does there seem to be any great need at present, although there is some room for improvement...” Just 6 years later, students at the University of Chicago Law School organized a 2-day conference on the landlord-tenant relationship to emphasize the need for a comprehensive critical reevaluation of existing concepts and the formulation of statutory reforms because of the inability of the present system to contribute effectively to the improvement of housing conditions for low- and moderate-income families. In 1969 almost all would agree that the social costs flowing from the deterioration of the physical environment, urban, suburban, and rural, poses a challenge to the traditional assumptions about the function of the real property curriculum. The question is how law schools can integrate new subject matter into traditional courses without diminishing the analytic training that the future lawyer must have to function in a technocratic society.

This revival of interest has produced several new first-year casebooks, of which Land Ownership and Use by Curtis J. Berger of Columbia University is the latest. The significance of this book can best be appraised in the context of post-World War II debates about the content of the real property curriculum and, more specifically, of the first course. Therefore I would like to digress, before turning to an analysis of Land Ownership and Use, to a review of these debates and the teaching materials they have produced.

In 1947–1948 two major casebooks appeared whose philosophies defined the issues that have dominated thinking about the real property curriculum for the past 20 years. Casner and Leach’s Cases and Text on Property remained faithful to the prevailing conception of the function of legal education but differed sharply from previous casebooks, such as Fraser’s two-

3. In his article, In Memory of Harold W. Solomon: Comments on Southern California’s Flyer in Legal Education, 41 S. CAL. L. REV. 506, 513 (1968), David Reisman notes with approval that the innovative teachers “have not gravitated toward the glamour subjects, such as international law, but want to redeem, for closer, more humane understanding, the day to day work of the lawyer.”
volume series, by emphasizing commercial real estate transactions and de-emphasizing personal property and the classification of interests. Its major contribution was to begin to separate the study of the transmission of accumulated family wealth from the study of the development of land. The authors envisioned that while the first-year course would serve as an introduction to advanced work in wealth transmission, it would be concerned primarily with the commercial transfer of land and related interests. While the Casner and Leach book was generally hailed as a radical departure from the past, it was a minor revision compared to Property, Wealth, Land: Allocation, Planning and Development, by Myres S. McDougal and David Haber of Yale. This 1213-page book was an implementation of McDougal and Laswell’s famous article, “Legal Education and Public Policy,” which recommended that students be trained in policymaking toward defined social ends. This type of training, McDougal and Laswell had argued, required sources of information and skills other than the traditional meat of legal education, analysis of cases and statutes.

Leach responded to McDougal and Haber’s challenge to traditional legal education in “Property Law Taught in Two Packages.” He accepted the premise of the McDougal and Laswell article that law students should be trained to provide a large proportion of national leadership at all levels of authority, but he totally rejected the means chosen by McDougal and Haber to accomplish this. His basic reason was that “McDougal’s emphasis on sociological and political evaluation will cause his students to be criticizing something they do not understand and as to which they therefore have no proper basis for expressing a judgment.” Leach placed his reliance upon the students mastering a closed doctrinal system designed to settle private disputes and upon the spillover benefits for broader policymaking that this would produce.

While McDougal and Haber’s casebook stirred a great deal of controversy, it was not widely adopted, apparently on the theory that it was “unteachable,” and the more elegant and focused Casner and Leach work became the leading casebook during the 1950’s. Thus, debate over the scope of the property curriculum proceeded from the basic assumptions laid down by Casner and Leach, although McDougal’s ideas were gaining acceptance as the Casner and Leach casebook came under increasing criticism for failing to include material on the public control of land development. The subsequent Cases and Materials on Property, by Cribbet, Fritz, and Johnson,

8. (1948.)
10. Leach, Property Law Taught in Two Packages, 1 J. Legal Ed. 28 (1948).
11. Id. at 38.
in turn became popular because it was considered to have "consolidated the reform initiated by Casner and Leach and pushed it a step further" by paring down the materials on classification of estates and including a chapter on land use controls. Subsequent casebooks such as Browder, Cunningham, and Julin's Basic Property Law have focused even more sharply on land transfer and development but have not varied in their basic approach.

While these casebooks were gaining widespread acceptance, there was a growing recognition that the model of land development implicit in the first-year materials was too static and simplistic. The first major effort to construct a course based on a dynamic perception of the real estate market was Dunham's Modern Real Estate Transactions. This landmark casebook made the most significant contribution since McDougal and Haber joined issue with Casner and Leach, but its utility was somewhat limited because it dealt only with the development of residential housing. It is now likely to be partially supplanted by Professor Krasnowiecki's recently published Housing and Urban Development, which provides a more contemporary treatment of commercial land-development problems.

There is now widespread acceptance of the notion that advanced work should be offered in land development and related public-regulation issues, but there is no agreement on how this ought to be done or in what year of the curriculum it should be placed. Casner and Leach and their progeny are sorely out-dated, not because they are insensitive to the relationship between social and economic change and the legal system but because their model of change no longer raises the critical issues in land development. They focus the student on the interaction between the vestiges of the feudal system and private decisions to transfer wealth or land; their thesis is basically that a more efficient system of land and wealth transfer will result from the elimination of artificial conceptual barriers stemming from the feudal system. This is still true to an extent, but there is danger in exposing the present-day law student to this approach, in that he may come away from the property course with a very static and unrealistic model of land development and not see the complex interrelationship between private money markets and the institutions of public control that structure modern land development. It is true that much of the "law" found in any property case-

17. A. Dunham, Modern Real Estate Transactions (1952).
book is applicable to modern transactions, but unless the student is given a model other than the feudal system to evaluate the doctrines he studies, a course in real property falls far short of its potential. But when the feudal system is removed as an organizing focus without an adequate substitute, what remains is a mechanistic approach that carries with it the high risk of leaving the student without new criteria to evaluate the process he is studying. Thus, one standard by which a new casebook can be judged is the extent to which it combines analytic training with a new model of land development.

Two new approaches to property-law teaching are represented respectively by Professor Berger’s casebook and by Professor George Lefcoe’s *Land Development Law.* Both authors are graduates of Yale and former students of Myres S. McDougal. It is probable that future debates about the real property curriculum will no longer revolve around the Harvard-Yale debate of the 1940’s and 1950’s, but on the most effective methods of implementing the models developed by McDougal and Haber in their catalytic casebook. Professor Berger and Professor Lefcoe both have tried to incorporate the insights McDougal shed on the function of property in contemporary society into a set of materials suitable for first-year students. Professor Lefcoe did so by applying the general McDougal model to one industry, the large-scale housing developer, while Professor Berger’s response was less of a break with traditional first-year casebooks.

Lefcoe’s book denies the utility of the traditional concept-oriented property course and instead would introduce the first-year student to a sophisticated model of the land-development process, although the more complex financing materials are also deferred until advanced courses. Professor Heyman has concisely described the thrust of *Land Development Law* and its implications for the property curriculum:

> [Lefcoe’s] major focus is on the development of raw land, primarily for housing in American suburbs. Lefcoe’s book is enormous—1681 pages. Yet it omits many of the topics included in the usual real property course offered in American law schools. There is little of relevance to the transmission of wealth—no estates in land, no trust and life estates, no statute of uses and rule against perpetuities; little on joint ownership (except partition as a potential means for avoiding subdivision regulation); nothing on matrimonial property. Nor does the book seek to develop an inclusive political, doctrinal, or philosophical theory of property by examining, for instance, the control, exploitation and transfer of “non-real” forms of wealth such as copyrights, governmental franchises, or land-related substances such as water and oil.

The book fastens, rather, on the legal structure facing the private housing developer; it investigates with skill and zest his activities and problems (and those as well of his lawyer and of the community in which he operates). The housing

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developer's complex activities, of course, relate to many of the doctrinal problems of "property" often taught to first-year students. Professor Lefcoe's approach, therefore, requires a reorganization of at least the property curriculum. The course offered by his book is not an advanced subject to be added to today's introductory treatment. It is a substitute, at least in part, therefor.\textsuperscript{21}

Berger's thesis, on the other hand, is that a study of commercial land transfers should be deferred until the second or third year because

\[\text{real estate transactions—as they are practiced today—are pregnant with considerations of income taxation, financing and contract. Except possibly for contract, a beginning law student lacks the necessary background in these areas, and if we ignore them, we waste everyone's time.}\textsuperscript{22}

\textit{Land Ownership and Use} has thus reduced the content of the first year to what the author considers its minimum core and added to it a large chunk of the traditional separate course in land use planning. All materials on land transfer are omitted so that they may be covered in an advanced course, for which Professor Berger is now preparing another casebook.

\textit{Land Ownership and Use} is still concept oriented. It is organized into three chapters. Chapter I, "The Institution of Property," is an introduction to the nature of the concept of property à la McDougal and Haber. Chapter II, "Formation of Interests in Land," covers the basic materials on estates in land with emphasis on the landlord-tenant relationship. Chapter III, "Allocation and Development of Land Resources," covers the private, judicial, and administrative methods of controlling land use and constitutes almost half the book. The book thus covers a much narrower range of subjects than is conventionally found in the first-year course and is best suited for a four-unit introductory course followed by a three- or four-unit advanced course in modern real estate transactions.

Because the book is designed only to introduce the students to a core of basic property concepts, more emphasis is placed on the formulation of a rational basis for rules than on the manipulation of a closed system of doctrine. The student is seldom given two inconsistent cases dealing with the same problem although the extensive notes and questions following most of the cases expose him to implications of the principles he has just seen and to inconsistent decisions. There are, however, several excellent opportunities for observation of the development of a doctrine in a series of related cases so that the student is exposed to the techniques of case synthesis. The section on covenants running with the land,\textsuperscript{23} which is built around a series of New York cases from \textit{Miller v. Clary}\textsuperscript{24} to \textit{Nicholson v. 300 Broadway Realty

\textsuperscript{21} Heyman, Book Review, 77 YALE L.J. 1260 (1968).
\textsuperscript{22} P. ix.
\textsuperscript{23} Pp. 421-505.
\textsuperscript{24} 210 N.Y. 127, 103 N.E. 1114 (1913).
Corp," stands out in this regard. Frequent use is made of secondary sources to delineate basic doctrines, and the author is not reticent about giving his opinions on the principles involved; in fact, the teacher may find that some of his thunder has been stolen from him. The impact of this on the students has both beneficial and nonbeneficial aspects. It reduces the anxiety level that is brought about by trying to find out what the "law" is; but it also has a tendency to induce them to think less critically about the cases than they should.

If one accepts Professor Berger's premises, *Land Ownership and Use* should serve as a fine foundation for advanced work in real property. It makes a clean break with the past and there is none of the mid-Victorian nostalgia that affects much writing in the area. The traditional materials on estates in land, the feudal antecedents of our land law, have been pared to their essential minimum and stripped of much of their unwarranted mysticism. Most topics are either totally omitted or covered in detail, so that there is little in the book that is superficial, with the exception of his treatment of marital property, fixtures, and prescription.

Even if one accepts Professor Berger's assumptions about the function and content of the first-year property course, there are two basic weaknesses in the presentation of his materials. The author's introductory chapter, which poses the question of what is property in the style of McDougal and Haber, provides the wrong organizational focus with which to begin a casebook dealing with the allocation of land. Furthermore, the author's desire, however laudatory, to include information about current and relevant problems in the area—such as the impact of property law on the poor—has led him to include a great deal of descriptive material that does not demand a sufficient analytic response from the student and thus is inappropriate for a first-year casebook.

Berger's first chapter starts with snippets from the hearings on the 1966 Civil Rights Act dealing with open housing, jumps to a navigational servitude decision, moves on to some cases on fixtures and intellectual property, and closes with a long excerpt from Reich's "The New Property" and a description of property law under a socialist legal system. The student comes away from this chapter with little more than the idea that the meaning of property is fluid. This seems to reflect the prevailing assumption that students must be shocked out of their rigid attitudes in the first few weeks of law school. In my opinion it is no longer necessary to do this, and the manner in which the author has chosen to do it neither helps the student to understand problems of land allocation nor allows him to gain much philosoph-

ical insight into the function of the concept of property in contemporary society. The first weeks of an introductory course in property are the worst times to try to focus on the many theories of the concept of property, since the student does not have the intellectual tools to make such an inquiry meaningful and since few law professors, myself included, have the philosophical training to conduct such an exercise successfully. It would be more meaningful and beneficial to focus on the response of one doctrine to specific societal pressures over a period of time. For example, in his first chapter Professor Lefcoe deals with the constitutional aspects of the exercise of the power of eminent domain. His approach gives the student a focused view of one context in which it is necessary to define "property" and provides a better groundwork for meaningful future generalization than does Berger's first chapter. Perhaps Berger could have accomplished the same objective by concentrating on the clash between open housing and the land owner's asserted right of nonassociation rather than merely raising the problem. Alternatively, Berger could have focused on the possible utility of welfare economics as a framework for evaluating property concepts. Such an inquiry is suggested in the first case, United States v. Willow River Power Co., and the note following it, but it is not elaborated.

My second criticism is less severe, but its object is symptomatic of a more widespread and slightly disturbing trend in casebook preparation. Casebooks are becoming more and more personalized, tailored to the author's particular course structure, and are being produced very rapidly. The result often is greater reliance on background and secondary materials and less of an attempt to integrate modern developments into either a new organizational framework or into the traditional conceptual one. Two examples of this stand out in Land Ownership and Use. Considerable materials on the landlord-tenant problems of the poor and new forms of ownership, such as the condominium and cooperative, have been included, but they often convey general information and do not require a sufficient analytical response from the student. The use of the common law to reallocate repair burdens to landlords through reform of established landlord-tenant concepts or the creation of new remedies (such as using housing codes as a source of warranties of fitness or as a basis for constructive eviction) can be an excellent vehicle for studying the limits of the judicial system in bringing about social reform. Nevertheless, the problem must first be put in its economic context to illustrate the simplicity of the deep-pocket theory of slum-

28. 324 U.S. 499 (1945). The note following the case refers the student to Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law, 80 Harv. L. Rev. 1165 (1967). It is good to refer the student to this seminal rethinking of the meaning of property within the context of public regulation. However, it would have been better if it had served as the focus for the introductory chapter, as I think the discussion of the land use control materials would have been more meaningful to the student. The perspective suggested by the article could well serve as the focus for the introduction to the entire course, but it does the student little good merely to refer him to such a complex article so early in the course.
lordism that lies behind most reforms of the law of landlord-tenant. 29 Professor Berger is to be congratulated for focusing student attention on the plight of those seeking decent housing in the inner-city, but his treatment is too fragmented and does not place sufficient emphasis on the limits of common law reform. For instance, there are no materials on the economics of low-income housing to illustrate the projected impact on various classes of landlords if existing rules of liability are altered, for example through the use of housing codes to extend warranty theories to rental housing. Tenant remedies such as judicial constraints on constructive evictions have recently taken on a constitutional dimension, 30 and although these problems are raised, insufficient case material is included to show the student their complexity. Similarly, the condominium and cooperative apartment present an excellent framework to explore most modern aspects of concurrent ownership, as the student can gain both training in basic analytic skills and insight into the process of legislative modification of the common law, but the casebook does little more than describe these forms of ownership.

*Land Ownership and Use* contains more material on land use planning and control than previous casebooks and could serve as a substitute for a separate course in land use planning. There has been a long debate over the placement of this course in the curriculum. The three basic contentions are that it should be taught in the local government course, in a separate course, or in the property-oriented course. Professor Berger's materials can be used as a substitute for the traditional separate course, although not for a course such as that contemplated by Professor Daniel R. Mandelker's *Managing Our Urban Environment*, 31 which combines the first two suggested approaches by examining the adequacy of the local government structure and the administration of planning controls to cope with physical development. Using a portion of the first-year property course as a substitute for a separate course in land use controls is desirable if one assumes, as I do, that the area has become too complex to be adequately covered in a single survey course in the second or third year. My preference would be to integrate much of what was formerly taught in local government and land use planning into the basic and advanced property courses and spin-off a series of seminars in the second and third years on topics such as the adequacy of existing structures of local government, the tension between planning theory and the administration of land use controls, renewal of the inner-city, and highway planning.

The challenge to the organization and scope of the conventional property curriculum posed by Professor Lefcoe's *Land Development Law* raises the more fundamental question whether the Berger casebook should be considered the new standard introductory casebook or merely as a half-step toward long overdue structural reforms in the first-year curriculum, since it makes no attempt to introduce the student to a systematic model of the land development process. The flaws in *Land Ownership and Use* stem not from its execution, which is excellent, but from the assumptions that control the choice and organization of the material. This assertion of course triggers broader questions about the role of the legally trained person in a changing society and the kinds of skills and information he needs to function effectively. One can either pare down the basic course and defer all important questions and development problems until the second or third year, or one can devise a functional systems-analysis approach that starts in the first year and is carried forward into advanced courses. I would make the latter choice.

This decision is dictated by my view of the functions that future lawyers will perform in this area and the role that law school should assume in training them. These two inquiries are, of course, the subject of much ferment in the law-school world, and I shall make no attempt to explore thoroughly the current thinking coming out of our latest effort to reanalyze our role, except to offer a few generalizations about the future development of the law. We are well into an era in which man is attempting to manage his physical environment. While the effectiveness of current efforts are open to much doubt, there is no evidence that efforts toward more efficient management will abate. In the past decade the implications of population pressures on the physical environment have attracted a substantial number of sophisticated social and physical scientists to work on environmental management both in private industry and in public service. Working with computers and systems-analysis techniques, these planners are suggesting, among other things, new methods for decisionmaking, new techniques for developing land, and new structures of government. If the lawyer is to continue to perform his roles of providing methods for allocating resources and resolving disputes that occur in doing so, it is essential that he understand the planning processes that government and private industry are developing, in order that he be able to discern their implications for his individual clients. This kind of understanding will also be necessary if the lawyer is to become a participant in the process as a new type of planner rather than as an advocate.

The implications of these generalizations for the real property curriculum are several. First, the notion that there should be a basic course in first-
year property that serves as a foundation for advanced work both in wealth transmission and land development should be abandoned. Almost all of the traditional estate scheme can be taught best in a course in decedent's estates and wealth transmission, however organized. Second, the first course in real property need not be viewed as part of an inalterable constellation of core courses essential to the "basic" first-year education. Contracts, torts, civil procedure, or criminal law are much better vehicles in which to teach case and statutory analysis. These courses have a meaningful conceptual construct, such as the bargain or the injurious act, around which problems can be organized. However, no similar construct exists for property, for the word is used to describe a range of problems that have little or no logical connection with each other. It would be better to view the first property course as an introduction to the study of public intervention in a defined economic market. The course should be organized around a market process. Lefcoe's choice of the suburban developer is one possible model; there are others that can be substituted or added (the urban financier or the slumlord) if one wants to focus more directly on the problems of the poor. The course should be taught in the second semester of the first year or even in the first semester of the second year.

The property course should start with an examination of the process of land transfer. Professor Berger's argument that all considerations of land development should be deferred until the second and third year because they are too complex is only partially valid, especially if property is not viewed as a first-semester first-year course. The Lefcoe materials illustrate that a partial model of the land development process can be constructed through an examination of basic transactions and the effectiveness of public intervention in the market. If the student is introduced to public regulation before he has a working model of the land market, as he is in Land Ownership and Use, the subject takes on an undesirable utopian cast. The student is asked to function as a regulator when he is not sure what he is regulating. For example, it is better to study the impact of subdivision regulations after a preliminary look at the problems of land speculation and rapid development by small developers. It is true that the student will not approach a more complete model until he has examined real estate financing. However, I would argue that Professor Berger's assumption about the complexity of land transactions should not lead to the conclusion that there should be a course built around certain core concepts followed by a functional course in real estate development, but rather to the conclusion that the part of the property curriculum dealing with land and related natural resources should start from a functional perspective and build toward an examination of the more complex problems.

The advantages of this approach are that the student can better under-
stand the functions legal doctrines do and should perform in the real world within a factual rather than conceptual framework. Moreover, nonlegal materials can be more meaningfully integrated into the curriculum than they now are. There is, of course, more danger under the Lefcoe approach that the student will not receive adequate training in doctrinal manipulation: The broad range of topics covered in Land Development Law may lead to superficiality because the student is not given a sufficient doctrinal basis to see the problem as contemporary lawyers and judges do. These problems have recently been described in an exchange of reviews between Professor Roy Prosterman of the University of Washington and Professor Ira Michael Heyman of the University of California at Berkeley. It seems to me that Professor Heyman's conclusion that the difficulties can be avoided is correct.

If one wishes to begin property with a concept-oriented course, I would recommend Land Ownership and Use because it represents the best refinement and revitalization of conventional first-year materials.

If one wishes to restructure the real property curriculum in the first year in an attempt to train lawyers to function effectively in a specialized and planning-oriented society, I would recommend giving Land Development Law a try.


Murray L. Schwartz*

A famous anthropologist once described man as an anthropoid ape trying to live like a termite. Without intragenus physical specialization and, apparently, without much of an instinctual apparatus for acceptance of an assigned role within a larger social unit, man has constantly struggled to accommodate to the necessities of group living and interaction.  

In our time and in our place, this struggle goes by a variety of dualities: freedom versus responsibility, liberty versus order, law versus anarchy. In


34. For a review that does an excellent job of placing the reforms introduced by Professor Berger within the context of the traditional property curriculum see Costonis, "Land Ownership and Use": New Priorities for Property Instruction, 69 COLUM. L. REV. 158 (1969).

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