

A Casebook for Teaching Teachers: Jesse Dukeminier and James E. Krier, *Property*

PROPERTY, 4th Edition. By Jesse Dukeminier[†] and James E. Krier.[‡]
New York, New York: Aspen Publishers, Inc., 1998. Pp. xiii,
1247.

*Reviewed by Daniel B. Bogart**

I. INTRODUCTION

I began teaching nine years ago. That first day, I faced ninety-six students in a class titled “Modern Real Estate Transactions.” Although many of those students were only a year or two out of college, a surprising number were not; they were often older than I was and possibly wiser.

I do not entirely remember how I began that class. I do remember what I felt, however. I stood there, a few minutes before the class began, buttoning and unbuttoning my jacket, and straightening my tie. I stared out at the expectant faces—all with “now show me what you’ve got” expressions—and I began to speak.

Then, about a minute into class, I looked over at the door to the classroom and wondered: *when will the real professor show up?* After all, how would I exit when he entered? It was a surreal feeling, similar to what I experienced at my wedding.

That first day as a full-time law professor was especially difficult because, prior to my first class, I had no training in teaching technique or pedagogy. Some individuals enter legal academia with teaching experience from law school fellowships, or simply from teaching in another discipline in their prelawyer lives. But most law professors—and I fall squarely into this group—put on the trappings of law teacher without any formal training in the art of teaching. We practice law, and then we teach. No transition.

† Maxwell Professor of Law, University of California, Los Angeles.

‡ Earl Warren DeLano Professor of Law, University of Michigan.

* Professor of Law, Chapman University School of Law. B.A., Duke University, 1982; M.A. (Economics), Duke University, 1986; J.D., Duke University, 1986.

Our failure to learn the craft of teaching before taking on the job full time differs from the experience of teachers in other schools. Often, a new political science or biology professor will have already spent many semesters as a teaching assistant, drafting and grading quizzes and exams, teaching small section discussion groups or laboratory classes. These young teachers will have received at least some guidance on the teaching styles most appropriate to the subject matter. But law professors often enter the fray with what they remember of their own professors' styles and not much more.

And it is not simply teaching methods, styles, and pedagogy that new law professors sometimes lack, but knowledge of the *substantive law* they are assigned to teach. Most professors teach four classes, often representing four different areas of the law. (A new professor may sometimes have a reduced teaching load the first semester, but they then pick up a fourth course the following year.)¹ It is rare that a new professor has practiced—and rarer still, practiced *intensely*—in the substantive areas associated with all four of that professor's courses.

Indeed, even when a professor teaches courses in the areas in which he practiced, it is still unlikely that the professor knows or has practiced in every one of the subtopics that makes up the course. First-year Property is a perfect example. I practiced in the area of commercial real estate. Certainly this background is valuable in the day to day as I teach my first year property course. That said, first-year Property covers a huge array of issues and general themes. These include, from time to time: the history of property law and its feudal origins; the basics of economic analysis; rules governing acquisition of personal property; basic intellectual property concerns; tort law, including nuisance; regulatory law, including zoning; and a focus on residential property law developments, especially in the area of landlord-tenant law. My commercial real estate background was not terribly helpful in my presentation of history and economics.

Nor is a commercial/real estate practice particularly good preparation for teaching Constitutional Law. Yet, some of the issues covered by property teachers are constitutional in nature, at least as they are presented to first-year students. Zoning would be the best example. I sometimes tell my class that zoning is the most *local* of all property practices—where networking skills often count for more than legal acumen. My private practice zoning experience, such as it was, was not especially helpful to teaching the constitutional foundations of this section of the property course.

1. I would not generalize this point too much, however.

Many of us, it seems to this writer, enter the profession of law teaching with much to learn. The question naturally arises, where do we pick up the needed information? How do lawyers transform themselves into law teachers? To some extent we do so on the job, and in the classroom, by reading law reviews and by discussing our classes, the substantive law, and teaching methods with our colleagues. These are all parts of the informal methodology by which lawyers become law professors. Still, most law schools do not have formal programs for teaching new law professors their trade.²

Given the absence of explicit training in teaching effectiveness, the single most important tool for teaching law professors is the casebook. This may surprise students, who reasonably expect that textbooks are vehicles for *their* instruction. But the fact is that I initially learned what I needed for teaching property from the first-year casebook that I chose: Dukeminier and Krier, *Property*.³

This essay will evaluate the Dukeminier and Krier Property casebook from this perspective: just how good a text is it for teaching new law teachers? The answer, it seems to me, is that their book is very well suited to this goal. Given that I have used the Dukeminier and Krier casebook (D&K casebook) for nine years now, my answer should not surprise the reader. Indeed, I think it is this aspect of the book (and perhaps a general inclination of teachers not to fix what ain't broke) that accounts for the extraordinary loyalty that many professors give to this book.

This essay will examine how the D&K casebook presents a discrete set of issues and themes that, in this writer's opinion, would be especially important to the beginning teacher. These issues and themes include, the order of materials presented by the casebook (Part II), History (Part III), Economics (Part IV), Future Interests and the Rule Against Perpetuities (Part V), Basic Analysis of Case Law (Part VI), and the incorporation of problem sets and practical lawyering materials (Part VII).

Teaching any course for the first time is difficult, and this is especially true for new teachers. Each course contains especially

2. This should be compared to tenure and review processes, which are formal and institutionalized. The fact is, faculties do review their own work, but typically not with an eye towards mentoring, but weeding.

3. JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* (4th ed. 1998) [hereinafter DUKEMINIER & KRIER]. I am not the only teacher who has reviewed and evaluated the D&K casebook. See June Carbone, *Dukeminier and Krier as Narrative: The Stories We Tell in the First Year*, 32 HOUSTON L. REV. 723, 725 (1995) (examining the narrative qualities of the D&K casebook, and "calling attention to the dramatic techniques that make their account compelling").

troubling elements—sections that routinely confuse students and frustrate new teachers attempting to cover these sections. And courses such as first-year Property cover issues and materials that are not part of the routine of practicing lawyers, such as economics, history, and esoteric future interests. This essay will therefore examine the aid that the D&K casebook gives to teachers when preparing for and confronting these particular issues and subjects in class.

One final note before I begin this short essay in earnest. When I refer to the D&K casebook, I include the teacher's manual that accompanies the actual textbook.⁴ At times I will discuss the manual specifically. A new teacher should look at the complete package when comparing casebooks. After a time, teacher's manuals, even good ones like that which Dukeminier and Krier have produced, become less helpful as the teacher learns the cases and the techniques that are effective in delivering them. But in the first year or two, the manual is an undoubtedly useful resource.

II. ORDER OF MATERIALS

New teachers invariably confront an initial question: How should one structure the syllabus and the order of materials? Significant casebooks such as the one produced by Dukeminier and Krier cover so many cases and so much material that it would be impossible to cover the entire book in even a six hour course. What then should the teacher throw out and what should be kept? And perhaps more importantly, in what order should the material be covered?

The easiest response for any new teacher would be to take material as it appears in the book and in the order the authors choose. Then, that teacher may simply pare down chapters and cases to fit within the hours allotted. The best choice for a new teacher would therefore be a book that provides a good initial order and does not require the teacher to rearrange the order of chapters and sections. I am probably not alone in occasionally assigning chapters of casebooks out of order. Yet the less one has to do this, the better. Fortunately, the D&K casebook provides a largely accessible and logical order and one that by its very nature informs both students and teachers of the important connections between topic areas.

The order of the D&K casebook is instructive for the teacher as well as the student. The book begins with a discussion of the methods in which property may be acquired. In the real world of real estate

4. JESSE DUKEMINIER & JAMES E. KRIER, *TEACHER'S MANUAL, PROPERTY* (4th ed. 1998) (hereinafter *TEACHER'S MANUAL*).

practice, these methods of acquisition (capture, adverse possession, discovery, conquest, lost and found, and others) pale in significance when compared to acquisition by sale and deed. Yet these substantive subtopics develop basic concepts of possession and first in time, as well as afford an opportunity to discuss the rationale behind these concepts.

That said, I tend to make a change in the order of the material at the beginning of the course. Dukeminier and Krier rightly place the rules governing acquisition of property and rights in property at the beginning of the course. After all, before the teacher and students can grapple with one person's rights to use property (and limitations on its use), it is necessary to establish an understanding of who owns it. But even more critical, I think, at the very beginning of the course should be a discussion of the nature of property itself. One can only establish a superior right in that which is ultimately determined to be property. Unfortunately, the D&K casebook confronts this issue several classes into the course with its presentation of *Cheney Bros. v. Doris Silk Corp.*⁵ and *Moore v. Regents of California*.⁶ Those cases come in the section that Dukeminier and Krier devote to acquisition of property rights by creation.

I think the definition of property itself is simply too foundational to wait, even until this early point in the semester. For this reason, I begin the semester with the Supreme Court case of *United States v. Willow River Power Co.*⁷ *Willow River* is a fascinating case for many reasons, but I think primarily because it questions the very concept of "property." In *Willow River*, a small power company claimed that the

5. 35 F.2d 279 (2d Cir. 1929), reprinted in DUKEMINIER & KRIER, *supra* note 3, at 60-61. In *Doris Silk*, the Second Circuit was confronted with the question of whether the creator of a silk design, which is not otherwise protected by federal trademark, copyright, and patent law, had any sort of property or "quasi" property right in the material. DUKEMINIER & KRIER, *supra* note 3, at 61. The court decided that the designer did not. *Id.* In short, the silk design, although having a real economic value, was not property. *Id.* *Doris Silk*, discussion of that case, and excerpts of other similar cases appear on pages 60-66.

6. 51 Cal. 3d 120 (1990), reprinted in DUKEMINIER & KRIER, *supra* note 3, at 66-79. In *Moore*, doctors working for a university hospital took blood and tissue samples in the course of a patient's treatment. DUKEMINIER & KRIER, *supra* note 3, at 66. Without the knowledge of the patient, the doctors and university cultured the samples, and later made them available for sale and use. *Id.* The patient brought suit to recover the value of this material. *Id.* at 66-67. The question was thus raised: is the cultured tissue material property? *Id.* at 70-72.

7. 324 U.S. 499 (1945). I reprint a copy of this case in a supplement that I provide to students prior to the first day of class. The supplement I use was based on a set of materials kindly provided to me by Professor David McCord of the Drake Law School. Professor McCord passed on to me the job of teaching Property when I began in the profession nine years ago, freeing him to spend more time in the areas of criminal law and evidence. I have changed that reading supplement by adding and deleting materials over the years. But Professor McCord's influence remains.

federal government had “taken” its property by destroying its ability to generate hydroelectric power from a dam that emptied into an important navigable river.⁸ The U.S. Government “in pursuance of a congressional plan to improve navigation” raised the level of the St. Croix River.⁹ In doing so, it destroyed the ability of the Willow River Power Company to generate hydroelectric power from its dam on the Willow River which empties into the St. Croix.¹⁰ In essence, the government eliminated three feet of “headwater” between the two rivers necessary to adequately turn the turbines.

The *Willow River* case provides an apt introduction to property law by raising the question: Did the Power Company own a property interest that should receive the benefit of protection by courts? The wonderful thing about this case is that it tests most of the definitions of property important to a first-year Property course. Is the three feet—a distance—really something we should call property? To adequately present this case, a teacher would discuss the basic “bundle of sticks” that we call property rights: tangibility, transferability, economic value, describability, etc. On these grounds, the quest of the Power Company would have seemed doomed to failure. But the Court then informs the student, and just as importantly, the teacher, of the *real* definition of property in our legal system. *Property is whatever a court is willing to enforce as property rights.* The Court states:

It is clear, of course, that a head of water has value and that the Company has an economic interest in keeping the St. Croix at the lower level. But not all interests are “property rights”; only those economic advantages are “rights” which have the law in back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion.¹¹

One of the clear implications of the opinion in *Willow River* is that, under other circumstances, the Supreme Court might well have described the head of water as a property right.¹²

8. *Id.* at 501.

9. *Id.*

10. *Id.*

11. *Id.* at 502-03.

12. The Court distinguishes an earlier case, *United States v. Cress*, 243 U.S. 316 (1916), on very fine factual grounds. The Court noted that in *Cress*, the dam generating electric power was not at the mouth of the nonnavigable river. *Willow River*, 324 U.S. at 506. Therefore, the head of water destroyed by the federal government in that case was located entirely within and upon the nonnavigable river. *Id.* at 506-07. For this reason, the Court determined that there was less of a federal value at stake in that case. *Id.* The Court in *Willow River* plainly states that it is not overruling *Cress*, but simply distinguishing it. And in *Cress*, the Court determined the headwater

One might choose from any number of cases that address the same basic question: What is property? But this conceptual issue needs to be addressed early precisely because these issues arise to some extent in each of the sections of the book to follow.

With a discussion of the nature of property in place, however, the remainder of the order of the D&K casebook makes excellent sense. The book continues with chapters covering, respectively, estates in land; landlord tenant law; conveyancing; and finally, land use controls. The latter topic includes nuisance, servitudes, zoning and takings. These areas of the law are logically grouped together. A thoughtful presentation of property law nearly requires teachers to make connections between these different approaches to solving the problem of conflicting land uses.

III. HISTORY

First-year law school courses have distinct personalities. Contract law, by its very nature, demands the careful and orderly presentation of hypotheticals to flesh out the rules and exceptions to forging valid contracts. Civil Procedure, by contrast, is statutory and introduces students to the routines and mindset that make for good statutory analysis. Property has an undeniably historical bent. No matter how forward thinking, it would be impossible for a property professor to separate himself from the fact that property law to a large degree comes to us from medieval minds. This law has evolved considerably since early times, to be sure, but it is ancient in origin nonetheless.¹³ It is because of the basic integration of history that property law invites a discussion of the changes in the law over time, of policy, of economics and other more reflective discussions.

The D&K casebook appropriately begins with grand national themes in *Johnson v. M'Intosh*.¹⁴ That case focuses upon the European conquest of the New World, and North America in particular. Although a new law teacher would hopefully be well read and sensitive to the many issues that arise in this discussion, it is not clear that new property law teachers are historians, and a thorough presentation of this material would require a teacher to do more than simply force a student to recite a solid brief of the case.

to be property. *Id.*

13. It is for this reason, perhaps, that I wondered at first whether I was simply too young to teach property law. I was obviously not someone who was alive at the time of the Statute of Elizabeth.

14. 21 U.S. (8 Wheat.) 543 (1823), reprinted in DUKEMINIER & KRIER, *supra* note 3, at 3-10.

To this end, the D&K casebook provides the teacher with a very healthy basic introduction to the history of this time period and the theories of national expansion extant in the 1700s. Much of this material is provided in the text itself. For example, the authors tell us something about Marshall as an individual in note 5, page 12, in which Marshall writes to Justice Story some years after the decision in *Johnson*. In that letter, Marshall, although still an apologist for the colonial powers, pleads for more generous treatment of the American natives.¹⁵

Johnson, as well as the case that follows it, raises the issue of first in time. This is a core issue in property law, and helping the teacher integrate this notion into class, and to understand the underpinnings of this idea, is a paramount goal of a property book. Dukeminier and Krier do this effectively by adopting a style that is particularly helpful early on, and that style is repeated throughout the remainder of the casebook. The authors provide excerpts from a variety of scholarly sources, such as law reviews, in the text itself, as well as scholarly explanatory citations to still other articles. In some instances, the excerpts are short,¹⁶ and in others, they can be several pages.¹⁷ I have found that, even though assigned, students often breeze through textual reading that is comprised of law review excerpts and similar materials. Students are more likely to carefully read material they believe will be the subject of dialogue with the professor in class—the cases.¹⁸ But a carefully selected group of readings is wonderfully valuable for the new professor. That person ought to read not just the portions excerpted, but at some point the entire article.

Dukeminier and Krier then supplement their use of article excerpts and discussion of scholarship in the text with additional material of this type in the teacher's manual.¹⁹ Taken together, a conscientious new teacher will have a good general introduction to the

15. DUKEMINIER & KRIER, *supra* note 3, at 12, n.5.

16. See, e.g., Carol Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 87 (1985), reprinted in DUKEMINIER & KRIER, *supra* note 3, at 18.

17. See, e.g., Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347-57 (Pap. & Proc. 1967), reprinted in DUKEMINIER & KRIER, *supra* note 3, at 40-47.

18. This is not to say that I do not ask students to explain and understand the important noncase materials in this and other books. But it is just a feature of law school learning that case recitation in the first year occupies much of class time.

19. For example, in the text the authors cite RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 184-85 (5th ed. 1998) at the end of their discussion of *Ghen v. Rich*, 8 F. 159 (D. Mass. 1881), reprinted in DUKEMINIER & KRIER, *supra* note 3, at 26. The cited pages of Judge Posner's article address issues of community custom and its impact on the law. In the teacher's manual, the authors then provide additional information from the same source by carefully parsing through Judge Posner's basic points. See *TEACHER'S MANUAL*, *supra* note 5, at 15.

literature on the subject. (This additional material partly accounts for the girth of the teacher's manual.)

For example, in the textual notes following *Johnson*, the authors introduce the reader to a more theoretical discussion of first in time and possession.²⁰ This is not an intense discussion or one that would satisfy a teacher who intended to spend more than a class on the subject, but it is a rounded and sufficient introduction. Dukeminier and Krier bring the reader's focus to pieces on the subject by Richard Epstein²¹ and Morris Cohen.²² The authors then move forward with a historical note regarding John Locke and the labor theory of value.²³

In the teacher's manual, the authors continue their explanation of these materials with a particularly nice discussion of Epstein. The authors parse out Epstein's basic argument for first possession as a rule of ownership.²⁴ Although the authors could ask the new teacher to read the piece, or they could extract long quotes, the authors instead do the more difficult task of reducing Epstein's argument to its essentials for the teacher's benefit. This is typical of the authors' general presentation of history, philosophy, and theory. Over time, new teachers will read the law review articles, or at least a goodly number of them, on their own. By focusing on a particular work in the text, Dukeminier and Krier inform new teachers of what they consider to be the best and most important work in each area.

It is not possible that going into a career in teaching the average well-read and intelligent new teacher will have time to read through all of the seminal works in a substantive area, and certainly not before the

20. See DUKEMINIER & KRIER, *supra* note 3, at 14-16.

21. Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979), *cited in* DUKEMINIER & KRIER, *supra* note 3, at 15.

22. Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927), *cited in* DUKEMINIER & KRIER, *supra* note 3, at 15.

23. DUKEMINIER & KRIER, *supra* note 3, at 15-17.

24. See TEACHER'S MANUAL, *supra* note 5, at 7, *explaining* Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979). The following is just a portion of the authors' discussion of the Epstein piece provided in the TEACHER'S MANUAL:

[N]eglecting a number of arguments, Epstein's argument, in a nutshell, is as follows: We need a system of property rights as a way to organize the world such that each individual knows the boundaries of his or her conduct. There seems to be only two alternatives: private ownership, or common ownership by all. Given that we need some system, which of these two should it be? Epstein's answer is that a world where all assets are held in common would be unmanageable (for reasons which, if not apparent to your students now, will become so when we examine common ownership and its consequences in connection with our study of the rule of capture in the next section). So private ownership is the better, and first possession a way to start it out, despite its infirmities.

Id.

end of their first year in teaching. While Dukeminier and Krier do not provide Cliff's Notes for law review articles, they do carefully parse out important points, raising questions and concerns along the way. And it is this pattern—citing to relevant articles and raising the difficult questions in the text while providing the “essentials” of the legal scholar's article in the manual—that delivers important information to the harried new teacher.²⁵

History is foundational to property law. One must grapple with it in order to understand, and teach, landlord-tenant law and estates in land. Dukeminier and Krier present basic and thoughtful material in both of these sections of their casebook. This is best seen in the materials immediately at the beginning of estates in land. The authors devote eleven pages to a section they title “Up From Feudalism,” which describes the feudal land system, castes, and terminologies.²⁶ And throughout this chapter, the authors incorporate discrete explanations of the effect of historical events.²⁷

Unfortunately, Dukeminier and Krier do not provide additional reading for the teacher in the manual to supplement that in the text. I have found here, as elsewhere, that it is useful to add to my own base of knowledge and to suggest that students do the same. For example, I have found it helpful occasionally to read to the class from such sources as Barbara Tuchman's *A Distant Mirror*.²⁸ These histories for the layman can make the background real and interesting.

Even the title of the landlord-tenant chapters, “Tradition, Tension and the Change in Landlord-Tenant Law,” suggests that Dukeminier and Krier are closely attuned to the historical nature of this law.²⁹ The authors pick the New York Court of Appeals case of *Garner v.*

25. The authors return to this pattern over and over. The authors rely on this method considerably when introducing the reader to pertinent economic analyses. For example, in the section on nuisance and remedies for nuisance the authors more fully explain the nature of bilateral monopolies that sometimes result when a court grants injunctive relief in private nuisance actions. See TEACHER'S MANUAL, *supra* note 5, at 312-13. As a part of this discussion the authors describe the empirical work and conclusions of Elizabeth Hoffman & Matthew Spitzer, whose work is first mentioned in the text. See DUKEMINIER & KRIER, *supra* note 3, at 764 n.6.

26. DUKEMINIER & KRIER, *supra* note 3, at 187-98.

27. This is not to say that other casebooks fail to treat history, and many devote pages to the basics of feudal estates. See, e.g., JOSEPH WILLIAM SINGER, PROPERTY LAW, RULES POLICIES, AND PRACTICES, 522-38 (2d ed. 1997); GRANT S. NELSON ET AL., CONTEMPORARY PROPERTY, 222-27 (1996). But Dukeminier & Krier do a very nice job of giving the basics quickly.

28. BARBARA W. TUCHMAN, A DISTANT MIRROR: THE CALAMITOUS 14TH CENTURY (1978).

29. DUKEMINIER & KRIER, *supra* note 3, at 419.

*Gerrish*³⁰ as their opener for the landlord-tenant chapter. This case focuses on the historical anachronisms embedded in modern landlord-tenant law and the conflict between contract law and property law.³¹

IV. ECONOMICS

Examination of property law demands that students confront economic analysis and, therefore, that property teachers be able to transmit this material. Some professors may fear that too great an emphasis is nowadays given economics, but there is no denying it: few first-year subjects present as wide a range of opportunities to apply an economic analysis as property law. Again, although some new teachers will enter the academy with considerable background in economic analysis, others most surely will not. It is therefore imperative that Dukeminier and Krier provide at least the core of a discussion. They do so successfully at a variety of points. The teacher's manual supplements the textbook discussion effectively; the economics portions of this book are neither detailed nor graphical, and there are very good supplementary materials to which a teacher can turn.³² The point is not that each of the subareas I have noted (history, economics, etc.) must stand without help forever on their own; rather, my point is that a new teacher will find a strong and clear presentation of these topics and ideas in the book and manual. The D&K casebook may be seen thus as a launching pad for further study and a basis upon which to immediately gather the necessary information to do a credible teaching job.

Dukeminier and Krier reach into economics early in the book during a discussion of acquisition by capture. Two cases—*Pierson v. Post*³³ and *Keeble v. Hickeringill*³⁴—raise a number of issues usually

30. 473 N.E. 223 (1984), *reprinted in* DUKEMINIER & KRIER, *supra* note 3, at 421-24.

31. In *Garner*, a tenant claimed that he had been granted what amounted to a life estate in rental property. The executor of the landlord argued that because the tenant had the right to terminate, the lease must be viewed as a tenancy at will, thus granting the landlord the right to terminate at will as well. The court rejected the landlord's argument, however, and jettisoned property law in favor of a contractual reading of the lease. It was the apparent intent of the parties that the tenant alone had the right to terminate, and the court gave the document this effect. In so doing, the court explained the feudal ceremony of livery of seisin, and reasoned that this ancient ceremony ought to have no legal effect in the modern world. *Id.*

32. *See, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 184-85 (5th ed. 1998); KENNETH G. DAU-SCHMIDT & THOMAS S. ULEN, *LAW AND ECONOMICS ANTHOLOGY* (1998); ROBIN PAUL MALLOY, *LAW AND ECONOMICS, A COMPARATIVE APPROACH TO THEORY AND PRACTICE* (1990); MARK SEIDENFELD, *MICROECONOMIC PREDICATES TO LAW AND ECONOMICS* (1996).

33. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805), *reprinted in* DUKEMINIER & KRIER, *supra* note 3, at 19-23.

framed in economic terms. The value of private property rights, the problem of the common pool, and the Coase Theorem are all relevant to this portion of the material. To this end, Dukeminier and Krier include a substantial excerpt from an article by Harold Demsetz entitled *Toward a Theory of Property Rights*.³⁵ This piece contains the idea that property law, if efficient, will cause parties who control property to internalize the costs of their socially destructive behavior. The authors then supplement the textbook readings, good as they are, with several fine hypotheticals in the teacher's manual. These bring the problem of the common pool and the advantages of private property rights into sharp relief. (And in the middle of this set of examples, the authors improve the teacher's education by noting Garret Hardin, author of *The Tragedy of the Commons*.)³⁶ One significant hypothetical takes forward a set of facts introduced in the book—that of a communal forest and a primitive tribe that makes use of this resource.³⁷ Students should be aware of the facts of the basic hypothetical, but Dukeminier and Krier help the new teacher lead the class into a set of issues not charted by the text by providing a hypothetical jumping off point. This places the teacher in an especially effective position.

Again, however, this is not meant to suggest that the teacher might not, over time, expand beyond the pages of the D&K casebook. I was fortunate to be given a set of supplementary materials in my first year by a colleague.³⁸ Although these materials have now evolved in myriad ways, I have retained a number of items. One such item is an historical account of the slaughter of the buffalo on the American plains.³⁹ The taking of the buffalo exemplifies the terrible waste that can occur when a bad or outmoded property law rule governs rights of acquisition.

In this case, the rule of capture governed. Hunters acquired a right in buffalo as they killed the beasts, not before. Thus hunters were encouraged to take as much as they could, to kill vast numbers of animals even if they only intended to keep the hide.⁴⁰ This is an

34. 11 East 574 (Q.B. 1707), reprinted in DUKEMINIER & KRIER, *supra* note 3, at 30-33.

35. 57 AM. ECON. REV. 347-57 (Pap. & Proc. 1967), portions reprinted in DUKEMINIER & KRIER, *supra* note 3, at 40-47.

36. TEACHER'S MANUAL, *supra* note 4, at 40, citing Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

37. TEACHER'S MANUAL, *supra* note 4, at 28-30.

38. See *supra* note 8.

39. EVAN S. CONNELL, SON OF THE MORNING STAR, 135-39 (1984).

40. Connell recounts one particular episode that shows just how mindless the slaughter of buffalo eventually became. Although originally teeming with massive herds of buffalo, the great

ideal, if sad example, of the theory the book presents in the form of scholarly articles and hypotheticals. Given the decision of the authors to provide *Johnson* at the beginning of the casebook, the example of buffalo slaughter seemed to me to be especially relevant.

V. FUTURE INTERESTS AND THE RULE AGAINST PERPETUITIES

It is not my intention to suggest that the various issues and themes I mention here are the only substantive areas with which teachers will need help. I do believe that most teachers will need the most help with these materials, however. And no section of the course will seem more difficult for the new teacher to present than future interests. This is an area in which new law professors need help coming up to speed substantively as well as guidance on the best teaching approaches. Indeed, pedagogy and a teacher's knowledge of the substantive law collide where future interests are concerned, which is because these materials are so mechanical. The process for teaching (and learning) these materials is to a large degree the substantive law.

Dukeminier and Krier cover future interests in Part II, "The System of Estates (Leaseholds Aside)."⁴¹ As previously mentioned, this Part does a fine job in providing the historical background to the feudal estates. The problem for these authors, as for most writers of property casebooks, is that ultimately students must develop a careful mechanical approach to future interests. It is like no other area of the law to teach. Sometimes I think that learning (and teaching) this area of law is better analogized to teaching a chemistry student to titrate chemicals than, for instance, to teaching a law student to apply a statute. Formulas govern chemistry, and these formulas are immutable. In the end, chemistry students must learn to work with the rules as they are.

The formulas that govern future interests are similar to those of chemistry. They seem to be more of the law of nature than law of men except for one crucial difference: The rules of future interests occasionally make no sense. The best example would be the Rule

plains became barren of these animals as the buffalo neared extinction. He states:

It is said that at the beginning of the twentieth century one buffalo wandered across the prairie not far from a small town in Wyoming. The townspeople hitched up their wagons and rode out to have a look. They drove around the creature and stopped, the wagons forming a circle with the buffalo inside. For a long time they stared at the legendary animal. Then, because they could not imagine what else to do, somebody shot it.

Id. at 136.

41. DUKEMINIER & KRIER, *supra* note 3, at 185-319. This Part also covers marital estates.

Against Perpetuities. This Rule will invalidate future interests other than reversionary interests in the grantor. But the same policy concerns (fears of dead hand control) that prompted the Rule apply to both reversionary and nonreversionary situations. Still, the Rule continues largely as it has existed for hundreds of years, invalidating one species of future interests but not the other.

This Part of the casebook carries an excellent treatment forward by collecting a series of cases that highlight crucial issues. These include the concept of waste (as between a life estate holder and remaindermen),⁴² the legal consequences of defining an estate as determinable rather than a fee simple subject to a condition subsequent,⁴³ valuation⁴⁴ and restraints on alienation,⁴⁵ among other matters of importance. It is easy for a new student to get lost—to miss the forest through the trees—when first encountering estates and future interests. The best thing these or any authors can do for the new teacher is to lay out, in the most basic and straightforward fashion, a discussion of the key issues.

In other areas of first-year property (for example, eminent domain), one may reasonably ask students to cull through the cases and find their own perspective. Here, however, it is better for the teacher and course materials to perform this chore. After all, how will the student manage to keep up with the mechanical application of the rules if still struggling to overcome basic jargon and context? To this end, both in the book and the teacher's manual, Dukeminier and Krier do a fine job. For example, the discussion of waste beginning on page 224 follows an orderly and easy to understand path. The authors first explain the historical origins of the concept.⁴⁶ They then provide explanations of "affirmative" and "permissive" waste, which are the most common categorizations of the concept.⁴⁷

Property professors will have encountered future interests and estates in land *before* teaching, both in law school and on the bar exam.

42. See *White v. Brown*, 559 S.W.2d 938 (Tenn. 1977), reprinted in DUKEMINIER & KRIER, *supra* note 3, at 210-16.

43. See *Marenholz v. Cty. Bd. of Sch. Trustees*, 417 N.E.2d 138 (Ill. App. 1981), reprinted in DUKEMINIER & KRIER, *supra* note 3, at 231-37.

44. *Baker v. Weedon*, 262 So. 2d 641 (Miss. 1972), reprinted in DUKEMINIER & KRIER, *supra* note 3, at 219.

45. See *White v. Brown*, 559 S.W.2d 93 (Tenn. 1977), reprinted in DUKEMINIER & KRIER, *supra* note 3, at 210; *Mountain Brow Lodge No. 28, Indep. Order of Oddfellows v. Toscano*, 27 Cal. App. 2d (Ct. App., 1968), reprinted in DUKEMINIER & KRIER, *supra* note 3, at 240.

46. DUKEMINIER & KRIER, *supra* note 3, at 224, citing RICHARD R. POWELL, *THE LAW OF REAL PROPERTY* ¶¶ 636-47 (rev. ed. 1996).

47. DUKEMINIER & KRIER, *supra* note 3, at 225.

Those teachers who hail from trusts and estates practices will be in particularly good shape to prepare and present this material. Those professors, like me, who were real estate lawyers will have the benefit of a working familiarity, but likely no special expertise.⁴⁸

Yet the weakness, from my perspective at least, does not reside in the authors' presentation of doctrine and the substantive law. Rather the weakness is perhaps that the material is *too* substantive and case oriented. Law school bookstores are filled with commercial study guides and preparation materials devoted to future interests and the Rule. This says something about what casebooks ought to provide and what students demand, year in and year out. Commercial study guides invariably adopt a rigid step-by-step approach to solving future interest problems, particularly in areas involving the Rule Against Perpetuities. These materials offer a multitude of examples and answers and present, in as plain a manner as possible, all possible variations of each future interest and estate problem. Casebooks, however, even those as well crafted as the D&K casebook, simply do not follow this approach.

A casebook certainly should provide more than the basic commercial study guide. Casebooks should force a student to think about history, policy, and doctrine. But for a new teacher particularly, a casebook that limits itself to this traditional approach is lacking. At some point, that teacher will have to train students to do the hard and frustrating mechanical work of future interests. To do so, that teacher will have to present a clear and effective method for dealing with this quixotic set of property law rules.

A new teacher will invariably be asked an endless stream of "what if" questions in this section of material. This becomes frenzied when covering the Rule.⁴⁹ The best thing a casebook might do is provide

48. In practice, I was twice asked to draft deeds explicitly creating defeasible estates; I was told once to draft a deed in fee simple determinable and then later a deed in fee simple subject to a condition subsequent. My firm represented a local school board, and from time to time members of the community would donate property with the restriction that the property be used as a school. These persons usually had some independent legal representation. Few of the lawyers with whom I worked had drafted such beasts, and there were no ready "defeasible fee deed forms." I therefore did the only logical thing: I consulted my bar review book for the magic language and drafted from that source. The fact is, a commercial real estate lawyer might need to see the possibility that the Rule will pop up as a result of some arcane and convoluted transaction, but on a day-to-day basis, such a lawyer will not be dealing with defeasible estates or unusual future interests.

49. There is invariably at least one student in each class who pushes the boundaries of difficult hypotheticals. No matter how clearly a hypothetical is presented and answered in class—and despite the teacher's obvious desire that the class move on to the next hypothetical—this person will find one new loophole or set of facts calling the conclusion into question. This demonstrates a bright and quick mind. The problem is the teacher's, of course, and can

a new teacher with an orderly set of questions and variations on questions to move the class forward. The D&K casebook does provide the basic rules of estates and future interests and a series of hypotheticals within the text.⁵⁰ As far as they go, the treatment is very good and helpful to both students and a new teacher. For example, on page 290 the authors discuss the impact of the abolition of the doctrine of destructibility on contingent remainders. They then provide two hypotheticals based on the following gift: "to A for life, then to such of A's children as attain the age of 21."⁵¹ The authors provide the answers to the hypotheticals in the teacher's manual.⁵²

But the authors do not provide a series of additional problems either in the book or teacher's manual. To the extent that new teachers will convey this material by using hypothetical problems, they will either be limited to the examples in the text, or be forced to create their own. I find that one or even a few hypothetical problems for each important issue in future interests is insufficient. Instead, the material and student questions necessarily force me to present variation after variation. The teacher's manual might provide a carefully thought out series of hypotheticals to help the new teacher carry the class to various logical conclusions.

Now, it is perfectly acceptable to ask teachers, new and experienced alike, to do some of their own work and create problems for a class to work through. There are also many sources a teacher may look to. But this essay focuses on the aid that a casebook gives a new teacher, and it will be hard in the first year for this person to create a rich repository of hypotheticals from which to work. Law professors do this for their students when they create commercial study guides covering this material; certainly they can provide some of the same in teachers manuals to aid their colleagues.

This failure is more evident in the materials on the Rule, which begin on page 291 of the text. As interesting as a history of the Rule may be, and as pertinent to understanding the development of property rights, solving the Rule will be the focus of students. Time spent discussing policy (or lack thereof) behind the Rule and doing cases is time not spent simply overcoming the difficult task of learning to see the world as the Rule demands.

only be solved by learning the material so well that an answer is always available.

50. *DUKEMINIER & KRIER*, *supra* note 3, at 258-74 (covering reversionary interests, remainders, and executory interests—each explanation followed by a short series of problems).

51. *Id.* at 290.

52. *TEACHER'S MANUAL*, *supra* note 4, at 134.

Dukeminier and Krier do provide examples of the Rule in action. These come on pages 291 through 294. The authors provide eight “examples.” Each example creates a basic fact set, questions the effect of the Rule, and *provides an answer*. The authors then present three “problems”—fact sets, but no answers. In class, although a teacher will likely look at the “examples,” many teachers will focus on the problems, *precisely* because no answers are given. Three problems seems inadequate, even though the manual provides answers for the teacher.⁵³

Just as important, although the text is clear, the authors do not provide any strategy for dealing with the Rule. Perhaps they believe that this is too childish or mundane and ought to be left to commercial study guides. But teachers cannot avoid doing something of this sort in class.

I provide in my supplement my “six step method”⁵⁴ to solving these problems, examples and problems included. There are many ways to teach students how to approach the Rule, but I think consistency is the key. My approach is to ask students to phrase each problem involving the Rule as a *question* in a consistent form, with two consistent blanks. Rule problems can be reduced over and over to the same basic question: “Will the [conditional event] necessarily occur, if it is going to occur at all, within 21 years following the death of [X] (the measuring life)?”

For example, assume the following problem: O wills “to my grandchildren who shall reach age 21.” By continually phrasing the Rule as a question, the student is asked, essentially, just to fill in blanks. In this example, the conditional event—the moment at which the gift fully and finally vests—is the attainment of age 21 by the last of O’s grandchildren. This takes care of the first blank. All that is left is to fill in the last blank [X] with the names of persons who are possible measuring lives—those persons alive at the time the gift was made and who might affect the vesting. The question might be asked as follows: “Will the last grandchild of O reach 21 within 21 years following the death of the last surviving child of O?”⁵⁵ I provide a series of hypothetical problems and then ask my class to solve (or better yet, prove) the Rule for each.

Although this is my strategy, it is not the only one that students may successfully use. But Dukeminier and Krier do not provide any

53. *Id.*

54. Apologies to Stuart Smalley.

55. The answer is yes.

strategy. A new teacher will find it difficult to present this material successfully and smoothly without developing his own strategy, but this will be difficult to do the first year. Indeed, it took me several years to decide upon and then hone my handout. During that time, I remember wishing that Dukeminier and Krier provided, in the teacher's manual and casebook, just such an approach.

VI. BASIC ANALYSIS OF CASES

First-year Property takes an important place in the pantheon of law school courses. The reading and cases are often old, and the language can be archaic and even ancient. Certainly, as with other first year courses, facts matter terribly. But perhaps most important, students encounter the difficult routine of making sense of case law. This skill (or set of skills) does not come easily to all, and is often quite different from what even good students encountered at the college level. Whether or not a teacher aims to be aggressively Socratic, or employs a more friendly approach, the fact remains that a Property teacher will be training students to work with cases for the first time.

If learning to read and work with case law is a skill, then so is *training students* to do so. The casebook and teacher's manual, if done right, ought to help the new teacher develop the skill of guiding students through cases. This is the single greatest strength of the D&K casebook and the reason why, I believe, so many professors find this text and its manual appealing.

Three factors contribute to this salutary state of affairs. First, the authors choose cases with distinctive and enjoyable facts. These cases are not always easy to understand, but parsing through the facts to those that matter is precisely what students must learn to do. Not every case contains the humorous element, but many do.⁵⁶

56. My favorite is *Van Valkenburgh v. Lutz*, 304 N.Y. 95 (Ct. App. 1952), reprinted in DUKEMINIER & KRIER, *supra* note 3, at 120-30. In that case, a mean property feud between two families eventually wound its way to the highest court in New York State. It seems clear from the facts that neither party was affluent. In fact, one family, the Lutzes, apparently derived most of their income from the operation of a small garden and selling their produce off the back of a truck. Yet both parties ultimately employed Wall Street law firms. The only thing this case is missing is a shotgun, although there is a well-used crowbar.

*Newman v. Bost*⁵⁷, the primary case in the D&K casebook covering personal gifts, is a gem. In that 1898 case, an old man, who had wanted to marry his young orphan maid (to the dismay of his family) nevertheless attempted in his croaking moments to give his possessions to the woman (Julia).⁵⁸ Students become involved in the discussion in class simply because the players are so well defined (or at least we think we know them.) Although one can not demand of casebook authors that every case be similarly entertaining, many of the cases chosen by these authors meet this criterion. Students follow class discussion and, because of the nature of the case, participate actively.

The second factor that makes this book so useful to teachers leading a class might simply be called "the well crafted follow-up." Dukeminier and Krier make it look easy, but it is not. Cases such as *Newman v. Bost* are inevitably followed by very good questions and often manipulations of the fact set of the case. As the authors provide an answer in the manual for *each and every question in the book* (even in notes and problems in which they ask more than one question), a professor will have a nice blueprint for class efforts during and following the treatment of each case.

The questions themselves, and the answers in the manual, are inevitably thoughtful and often thought-provoking. For example, after *Newman v. Bost*, the authors ask a series of questions, each subtly changing the facts of the case. These questions force students to grapple with the meaning of intent and delivery. How would the case have been decided, given the conservative disposition of the North Carolina Supreme Court, if the disputed property had been placed in a strong box and Julia had been given a key?⁵⁹ How would it have affected the conclusion if the old man had asked his nurse to move a bureau containing an insurance policy into Julia's bedroom?⁶⁰

There is a third crucial aspect of the casebook that makes it very effective at helping new teachers to lead students through case analysis and class discussion: *the teacher's manual from time to time actually and*

57. 122 N.C. 524 (1898), *reprinted in* DUKEMINIER & KRIER, *supra* note 3, at 170-77. The case immediately following *Newman* is similarly fun. That case, *Gruen v. Gruen*, 68 N.Y.2d 48 (1986), *reprinted in* DUKEMINIER & KRIER, *supra* note 3, at 178-84, involved a dispute between a stepmother and her stepson. Both wanted a valuable Klimt painting apparently given to the son by his father during his father's life. Students can easily discern the nature of the emotional conflict of the players. What is more, the case involves an odd series of letters from the father to the son instructing the son to tear up one letter creating the gift because of the feared tax consequences.

58. DUKEMINIER & KRIER, *supra* note 3, at 171.

59. *Id.* at 177.

60. *Id.*

explicitly addresses itself to this goal. In other words, the manual reviews varying approaches to the material being covered in the book, identifies the primary issues on which a teacher might wish to concentrate, and provides an approach that seemed to the authors best suited to the cases. If the authors were to do this, but provide poor advice, I would suggest that a new teacher would be better off on his own. But far more often than not (at least in this writer's experience) the suggestions are on target.

One can find a good example of this in the manual's discussion of the law of lost and found.⁶¹ Not all property teachers will choose to spend much, if any, time on this subject. I do because I think it provides a wonderful opportunity to look at relative ownership rights and other issues. The authors reprint the well-known case of *Armory v. Delamirie*,⁶² and follow *Armory* with well-known, if somewhat obtuse, *Hannah v. Peel*.⁶³ The latter case involves an excellent set of facts in which Lance Corporal Duncan Hannah found an expensive brooch in an English country home where he was recuperating during World War II. The home, although used by the British military, was owned by Major Hugh Edward Ethelston Peel. The "true owner" is nowhere to be found, even after advertisement. The obvious dispute being as between two individuals, neither of whom was aware of the existence of the brooch, nor had prior connection to it, who has superior claim? This case is valuable to student learning because, among other reasons, the court does a less than stellar job of identifying and using case precedent, and because the court does not address the policy goals of rules governing found property.

As with *Newman v. Bost*, the authors follow *Hannah* with a series of good questions.⁶⁴ Because the opinion in *Hannah* refers to and evaluates other cases, and because one ought to teach this section to reveal more important legal truths than just the law of found property, a new teacher may have trouble effectively leading this class discussion. The authors provide a line of attack on pages 60-65 of the teacher's manual, which informs the reader (the teacher) that "this is a delightful classroom case that can occupy several class hours in dissection if you want to teach a lot about possession and legal method out of it."⁶⁵

61. TEACHER'S MANUAL, *supra* note 4, at 103 ("This case can be explored from several perspectives, and not necessarily in the order we use here. . .").

62. King's Bench, 1722, 1 Strange 505, *reprinted* in DUKEMINIER & KRIER, *supra* note 3, at 100.

63. [1945] K.B. 509, *reprinted* in DUKEMINIER & KRIER, *supra* note 3, at 103-09.

64. DUKEMINIER & KRIER, *supra* note 3, at 109-10.

65. TEACHER'S MANUAL, *supra* note 4, at 60.

But how to conduct this class? The authors suggest that the teacher focus on two possible approaches. First the teacher can concentrate on simply forcing students to “phrase the issue”—that is, to determine what “possession” means in a found property case.⁶⁶ The authors call this a “trap” however, because, as they indicate in the manual, it might prevent the most intelligent and socially beneficial solution.⁶⁷ They then suggest that the teacher might also force students to think about the policy goals of found property law.⁶⁸ They list the possible goals in the manual (these include returning property to the true owner, carrying out the expectations of the parties, and rewarding honesty).⁶⁹

Reading this section of the teacher’s manual, a new teacher will have plenty of ammunition for class and a very good and ready approach. I adopted the author’s suggestions, as I suspect many of the followers of the casebook initially have done at the start of their teaching careers. The manual suggests a three-pronged attack: (1) show how malleable the definition of property may be; (2) force students to think of policies the rules might serve; and (3) help students work with precedent cited in case opinion. This last goal is specifically identified in the manual.⁷⁰ The manual does neat work of the cases cited by the opinion in *Hannah*, identifying carefully the weakness of each.⁷¹ Indeed, a new teacher will be in a position to call on students to work with these case precedents and to ask the crucial questions.

The authors provide this kind of help—or, perhaps, “casebook mentoring”—on many occasions.⁷²

VII. SOME LIMITATIONS; NONE FATAL

The authors have created a powerful case opinion-oriented learning tool for both students and new teachers. But this focus is also its greatest limitation. This book would not be accurately described as “problem oriented” or as grounded in the documents and realities of

66. *Id.* at 61.

67. *Id.*

68. *Id.*

69. TEACHER’S MANUAL, *supra* note 4, at 61-62.

70. *Id.* at 62.

71. *Id.* at 103-04.

72. For example, the authors provide key pedagogical guidance in the manual in sections dealing with adverse possession (focusing the discussion of the elements of adverse possession and the policy behind it). See TEACHER’S MANUAL, *supra* note 4, at 71-79, and landlord tenant (assignments of rent and landlord’s consent) *id.* at 708 (“If you want to open up discussion . . .”).

practice. Thus, to the extent a new teacher might learn to apply a problem approach to teaching, that teacher will have to look beyond the confines of this book.

Problem-based books are becoming more common among law school casebooks. One excellent and recent example would be *Real Estate Transactions, Problems, Cases and Materials*, by Professors Robin Malloy and James Smith,⁷³ which covers commercial and residential real estate transactions. Some of the subjects covered by Malloy and Smith are also covered by Dukeminier and Krier in Part IV (Transfers of Land).⁷⁴

A comparison of how basic land transactions are covered in the two books reveals a striking difference in approach: Malloy and Smith are wholeheartedly committed to the problem approach; Dukeminier and Krier are not. There are few areas of the law as appropriate for a problem-oriented approach as real estate transactions. There are myriad possible fact scenarios that actually confront the real estate lawyer on a continual basis. The cases are heavily fact specific, yet there are overriding themes involving disclosure, market changes, executory promises that are breached by one or more parties, etc. Teachers, and certainly new teachers, may want to pull students into this area of law by forcing them to see the law through the eyes of the "players." In the absence of a full-blown simulation, carefully constructed problems, replete with names of parties and dollar amounts, can accomplish much the same.

For example, one might focus upon the treatment of the statute of frauds in both books. Malloy and Smith begin their section with well-written textual and doctrinal discussion.⁷⁵ This discussion occupies a little over three pages and examines the basic rationale of the statute of frauds, the elements of an enforceable writing, and the theory of equitable estoppel.⁷⁶ But Malloy and Smith follow this material immediately with an extensive, realistic and detailed problem.⁷⁷ The problem describes a married couple, Dana and Jim, who contract to sell property that they own as tenants in the entirety.⁷⁸ Unfortunately, Jim signs the contract for sale alone while his wife is

73. ROBIN PAUL MALLOY & JAMES CHARLES SMITH, *REAL ESTATE TRANSACTIONS, PROBLEMS, CASES AND MATERIALS* (1998). Professors Malloy's and Smith's casebook is published by Aspen Law & Business, the same publisher that produces the D&K casebook.

74. DUKEMINIER & KRIER, *supra* note 3, at 549-738.

75. MALLOY & SMITH, *supra* note 73, at 145-50.

76. *Id.* at 147.

77. *Id.* at 149-50, problem 4A.

78. *Id.*

out of town. Jim then discovers that he undervalued his property and that he should have asked from \$50,000 to \$70,000 more than called for by the contract. At closing, Dana refuses to join in the deed. The problem then asks the student how he or she would advise the buyer.⁷⁹ Malloy and Smith follow this first question with two modifications of the fact set and two further questions.⁸⁰

This is an excellent problem and, if done correctly in the classroom, would be both provocative and effective at conveying the substantive law along with a framework for analysis. The problem forces students to see the implication of changes in market values on the behavior of parties and, perhaps just as importantly, how the picayune nature of property law rules provides a potential "out" to disgruntled parties.

Contrast this to the D&K casebook. Again, the authors begin with a well-written textual and doctrinal explanation of the statute of frauds.⁸¹ And, as one would expect, the authors discuss the major exceptions to the statute, including part performance and estoppel.⁸² However, unlike Malloy and Smith, Dukeminier and Krier immediately follow this textual material with a case opinion from the Massachusetts Court of Appeals, *Hickey v. Green*.⁸³ In *Hickey*, a seller attempted to renege on her agreement to sell property that she decided, again after the fact, she had undervalued.⁸⁴ The seller argued that the contract was void under the statute of frauds because there was no written agreement.⁸⁵ The buyer had provided a check that was marked on the back as a "deposit" for the purchase.⁸⁶ The court nevertheless awarded the buyer specific performance on principles of equitable estoppel and detrimental reliance.⁸⁷

This is a fine case, to be sure. A teacher might, in a student's recitation of the case, bring out the most important aspects of this case law. However, this is not a problem to be solved, but a case to be analyzed. Problems, such as those in the Malloy and Smith casebook, follow a different tempo. They take less time to set up in class. And for the new teacher, there is a very pertinent value to the problem

79. MALLOY & SMITH, *supra* note 73, at 149-50, problem 4A.

80. *Id.* at 149-50.

81. DUKEMINIER & KRIER, *supra* note 3, at 561-62.

82. *Id.*

83. 442 N.E.2d 37 (Mass. App. Ct. 1982), *reprinted in* DUKEMINIER & KRIER, *supra* note 3, at 563-66.

84. *Id.* at 563.

85. *Id.*

86. *Id.*

87. *Id.* at 564.

approach: it is easier for the teacher to construct modifications to the fact set and more likely that the casebook authors will do this as well. A teacher may reveal the impact of a change in the law or facts by modifying limited parts of a fact set and asking students to explain the implications of the change. Teachers may accomplish much of this from a purely case opinion orientation. But it will take time, and a repetition of semesters, for a new teacher to become so fluid with the case opinions that he or she provides all the modifications to the fact sets that that teacher ultimately wants. That said, I should note that Dukeminier and Krier do follow the *Hickey* case with a series of questions, at least one of which provides a problem set.⁸⁸ But these problems are not as extensively developed, or as regular in the presentation of materials, as in Malloy and Smith.

However, even though the D&K casebook is not problem oriented, this is by no means fatal. The book covers far more than just real estate transactions and necessarily covers transactions less intensely than in an advanced book devoted to this subject. And Property is a first-year course. Even in the second semester of their first year, law students continue to need help refining case opinion reading and basic analytical skills. A primarily case opinion approach is very well suited to these goals.

The point is not that the D&K casebook is deficient, but that new teachers looking to develop their ability to present a problem method may need to supplement the book or look to casebooks in the other courses they teach to help develop these abilities. It would be unfair to ask one course, and one course book, to help a new teacher in that teacher's quest to perfect all presentation approaches.

The same criticism applies to the relatively thin set of transactional problems and materials in the D&K casebook. There has been of late some significant demand that law school courses incorporate more of the real and practical. Transactional practice has been particularly slighted by law school curricula over the years. Therefore, where opportunities present themselves, some faculty have attempted to bring documentation and skills exercises into the classroom. This material is largely missing from the D&K casebook. In their materials on land transfer, the authors present basic forms of warranty deeds.⁸⁹ But they do not provide a copy of a basic residential purchase contract or lease, or of a mortgage or promissory note. They do not provide a copy of a title insurance policy. Instead, the authors choose, as always,

88. DUKEMINIER & KRIER, *supra* note 3, at 567.

89. *Id.* at 600-02.

a wonderful array of case opinions discussing the basic substantive legal issues that arise in the transaction context.

One may legitimately ask whether a first-year Property course ought to include more than the most basic transactional elements. Indeed, one may argue that there are good reasons to keep this to a minimum. First of all, the curricula of most law schools today typically include at least one course devoted solely to real estate transactions. It would be redundant and not terribly efficient to spend too many hours of a first-year course on material to be covered again later. In addition, doing a transactions course requires a professor to fully incorporate documentation and perhaps even some role playing into a course. This will be difficult to do in a first-year class, given both the sheer amount of substance that teachers must cover and the basic abilities of students. The D&K casebook thus reflects a reasonable compromise: the book includes a very good basic explanation of transactions with a fairly minimal number of cases. In addition to the substantive law covered so well throughout the book, a new teacher is given the tools to prepare students for dedicated courses elsewhere in the curriculum.

VIII. CONCLUSION

A property law professor starting a career today will confront a rich selection of course books from which to choose. Many, if not most, of these books could serve as a fine vehicle for teaching not just the students, but also the teacher. But Dukeminier and Krier have done an especially fine job of softening the ground for neophyte instructors. They have collected cases that are by their nature fun to teach—a boon to new teachers. They cover all the bases (history, economics, and policy) well and some, such as basic doctrine, very well. The time may well come when a loyal user may wish to cast off the D&K casebook in search of some other novel or more rigidly focused book. But I believe that property law teachers who do this after first spending some several years with the D&K casebook are likely to move on as informed and well-rounded professors.