COMMENTS

The purpose of this department is to afford an opportunity for informal exchange of ideas on matters related to legal education. Typical comments will range from about 1200 to about 3000 words in length, and may either advocate innovations in curriculum or teaching method or respond critically to previously published material.

PROPERTY, THE CASE METHOD, AND McDOUGAL

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Last fall, with the Dean's permission, I adopted McDougal and Haber's controversial casebook[1] for my second-year Property classes (four semester hours),[2] while clinging stubbornly to Blackstone, Bigelow, Powell, and Leach[3] for materials for the freshmen (four semester hours).

The "policy approach" of McDougal and Haber, it seems to me, offers the property student a direct tool in aid of his development of certain legal skills which, under academic pressures, he is bound to neglect unless by this tool or in some other manner his attention is expressly directed to them. Having observed misapprehensions and a little malice in expressions by fellow teachers concerning this policy business, I wish to point out here what I *think* I'm doing.[4]

In the first place, being a post-war newcomer to law teaching and to some extent still on probation, I am very much concerned with doing a good job. A good job implies to me three somewhat grandiose objectives:

1. *First Aim:* I ought to acquaint my students—see to it that they acquaint themselves—with the *language* of the law of property, so that they can talk and write like *lawyers,* not like ignorant laymen, about the subject.

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1 MYRES S. McDOUGAL AND DAVID HABER, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT (1948). See adverse reviews: Bordwell, Book Review, 1 J.LEGAL ED. 326 (1948); Leach, *Property Law Taught in Two Packages,* 1 J.LEGAL ED. 29, 33–39 (1948).

Obviously enough, all the expressions—deliberately oversimplified expressions—in this comment are my own, and are not in any wise chargeable to McDougal and Haber—who, indeed, in their Preface explain their aims upon a much different, broader basis. I may not question whether the editors would disagree with my earthy ideas. They would. They do. Admirations are all mine.

2 We retain at Temple a first-year introductory course in Personal Property and Historical Developments in the Law of Real Property, which we still consider indispensable.

3 Specifically, I RALPH W. AIGLER, HARRY A. BIGELOW AND RICHARD R. POWELL, CASES ON PROPERTY (1942); HARRY A. BIGELOW, INTRODUCTION TO THE LAW OF REAL PROPERTY (3d ed. 1945); Leach, *Perpetuities in a Nutshell,* 51 HARV.L.REV. 638 (1938), and *The Rule Against Perpetuities and Gifts to Classes,* 51 HARV.L. REV. 1329 (1938).

4 Nobody *knows.* Prosser, *Lighthouse No Good,* 1 J.LEGAL ED. 257 (1948).

This is the descriptive skill. They need it for acquiring other skills, and for passing course and bar examinations.

2. *Second aim:* I ought to inculcate in my students an ability—admittedly never possessed by me—to predict what a given judge, administrator, arbitrator, or superior will rule in settling any likely controversy over rights of property. This is the predictive skill. As a minimum, the students should be given whatever training my courses can offer in isolating and appraising *all* the factors that in fact influence official decision, and in using these factors for purposes of persuasion.

3. *Third aim:* I ought to contribute something toward the total social education of my students as members of the bar and the community, ought to aid their capacity for useful total decision, ought to assist toward successful completion their life-long task of becoming important cogs in an American machinery of self-government, business, legislation, adjudication, and philanthropy. This is the prescriptive skill—needed in laying down *good law* for others.

Now, I might be justified in subordinating the third aim, except in so far as it is indispensable to legal understanding, to the better attainment of the first two. While it must be recognized that even the most technical property-concept language has more meaning if studied in the total social context of its practical use than if considered in abstraction, it seems to me that the prescriptive skill in general is not primarily my burden. It might be acquired elsewhere than in my courses—either in other courses or in the hard school of experience. I could "pass the buck." But the feudal vocabularies of seisin can be imparted systematically nowhere if not in the basic Property courses. Aim number one is a must.

What is the best method of teaching for the essential legal skills of description and prediction? I would say that the case method is. So far as I know, that means the analysis and synthesis of authoritative decisions in actual controversies.

In any property case persons are involved who, in their previous dealings and in their instant appeal to the courts, are seeking to do something to their own or to someone else's wealth. Upon the validity of such parties' methods and aims the community, through the court, is compelled to pass judgment. The analysis of the decision in any case ought to seek answers for the following questions: (1) What were the parties trying to do, how, and with what formalities? (2) What interests (for the public's sake or for the sake of affected outside individuals) are furthered or opposed by the devices of the parties? (3) What is the result or judgment, and what worth-while values does the result subtend?

But is it always useful to talk of community values and policies in the analysis of cases to which the community is not a party? Even if it is not a litigant, the community is a party to every suit. The community has a major interest in getting its regulative work done as efficiently and as productively as possible in the interest of all individuals. The values of a party to a lawsuit are inextricably intermingled with those of the social community, as well as with those of other individuals. If the right of property is of benefit at all, it is by virtue of the protection against outsiders afforded by an organization of human beings in a governing community. What is

everyone's or anyone's at will belongs to none.[5] Exclusiveness is the ultimate test of the fact of ownership. The qualities of ownership vary with the extent of exclusion by community practices of three several classes of potential intruders: (1) mere adverse individual claimants or trespassers,[6] (2) persons who may interfere under color of special interest or privilege which the community holds itself bound to protect, even against property,[7] (3) the community and its agents.[8]

It is not essential to his comprehension of the *laws* of property that the student shall be equipped with blinders to prevent recognition of the social facts of life. Litigants act to maximize individual values.[9] But in his official

[5] It should be unnecessary to contest the notion that the property right, as such, derives from God—a favorite bromide of one of my own students. In any case, surely God may have delegated to Caesar the actual allotting of interests in mundane things. Compare the *Restatement's* position that property "totality" varies from time to time and place to place with changes in the law. RESTATEMENT, PROPERTY § 5, comment *e* (1936).

[6] Analyses of the community's practices in this respect include the works on "Titles," "Estates," "Rights in Land," "Ejectment," "Waste," and "Trespass." Wherever ownership is put to the test, there is resistance to some fact or threat of invasion of an owner's exclusive prerogatives. "There are rights, privileges, powers and immunities with regard to specific land, or with regard to a thing other than land, which exist only in a particular person. By virtue of the fact that a person has these special interests, other than and in addition to those possessed by members of society in general, he occupies a peculiar and individual position with regard thereto. Interests of this type constitute the chief subject matter of this Restatement, and, when the affected thing is land, are designated herein as 'interests in land.'" RESTATEMENT, PROPERTY § 5, comment *c* (1936).

[7] Plentiful examples recur in the reports. In 1946 the United States Supreme Court, when faced with a conflict between the privilege to distribute religious literature and the privilege of a company property owner to exclude whomsoever it chose from the "street" of the company's town, resolved in favor of the non-owner that: "When we balance the Constitutional right of owners of property against those of the people to enjoy freedom of the press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." Marsh v. Alabama, 326 U.S. 501, 66 Sup.Ct. 276, 90 L.Ed. 265 (1946). Consider also the Court's well-known relation of sacrosanct principles to the convenience of the Tennessee Valley Authority in U. S. ex rel. Tenn. Val. Authority v. Welch, 327 U.S. 546, 66 Sup.Ct. 715, 90 L.Ed. 843 (1946).

[8] Direct intrusions for community purposes are a large category of limitations upon the exclusiveness of property, but workmanlike investigations are missing. The relevant materials remain scattered under such concept tabulations as "Taxation," "Liens," "Zoning," "Municipal Corporations," "Police Powers," "Eminent Domain," "Public Nuisance," and the like. More time is devoted, in actual fact, in the usual law curriculum to the property policies of feudal England than to those of the modern community.

[9] Dession's new casebook on criminal law (CRIMINAL LAW, ADMINISTRATION AND PUBLIC ORDER (1948)) displays an awareness of this truth in the field of criminal law. The Table of Contents shows five chapters specifically concerned therewith:

Chapter III Policy
- Section 1. Protected Interests and Institutions: Values and Patterns for Maximizing Values
- Section 2. Role of Criminal Sanctions: Value Deprivation to Maximize Value
- Section 6. Technique

Chapter IX Offenses against the Person or Reputation: Deprivations of Well-Being and Respect
Chapter X Offenses against Property: Deprivations of Wealth
Chapter XI Offenses against Authority: Deprivations of Power
Chapter XII Offenses against Morality: Deprivations of Rectitude.

capacity, every judge, administrator, or arbitrator—as much as a legislator—is an agent of the community, bound to administer the policies of the community not only in the interest of the parties to a controversy but also in the interest of the community—to maximize community values. Every decision is a policy decision.

One fundamental policy of a common-law community is the principle of stare decisis. There are those who profess to find in the case method of law teaching no other potentiality than the reiteration of that one policy: Ours is a government of *laws* and not of men, it is better for the law to be consistent than merely "right" in any individual case, judges are bound to follow and apply the rules of law laid down for them in previous opinions (such, at least, of these as have not themselves deviated from that same principle, so as to become "ill-advised" or "distinguishable" cases.)

Nevertheless, the common law changes.[10] On an unequivocal application of the principle of stare decisis—by definition—the law would never change, even if it might "grow." [11]

There are, in fact, other policies than stare decisis. These other policies—tacit and unexpressed though they may be in a given opinion—not infrequently persuade a judge to "qualify," "explain the true meaning of," or even "disapprove" the precedents.[12] There are, of course, some judges—"weak judges," I believe Llewellyn has labeled them[13]—who conscientiously re-decide and re-apply only what has already been decided, regardless of the consequences. But others consider the consequences—sometimes even frankly.[14] These others find or shape authorities to match decisions, paying always fullest verbal tribute to precedent.

What moves a judge who acts that way? Nobody is fooled. How is a student to tell what actually moved a certain judge to follow the rule of *Doe and Roe,* distinguishing or ignoring the case of *Jones and Brown?* Or is that a proper question only for the member of the bar who—at long last—deems it advisable to file a "Brandeis-type brief" in an effort to persuade instead of to *compel* the judge? If such an inquiry is worth while, I think McDougal has indicated where to look for a possible answer.

10 See Philbrick, *Changing Conceptions of Property in Law,* 86 U. OF PA.L.REV. 691 (1938). Consider the applicability of the historic *ad coelum* doctrine to modern problems of property involved in such activities as aviation and artificial rainmaking.

11 "The common law is imbued with reason, sound policy and a capacity for growth." Vinson, J., in *Gertman v. Burdick,* 123 F.2d 924, 931 (App.D.C.1941). (Refusing to hold upon "Brandeis-type" arguments that a trust for accumulation for the full period of the Rule against Perpetuities was void as contrary to public policy.)

12 Compare T. R. Powell's caricature of a judicial manipulation of precedents in his *An Imaginary Judicial Opinion,* 44 HARV.L.REV. 889 (1931).

13 K. N. LLEWELLYN, THE BRAMBLE BUSH (1930).

14 *See* Williams v. Marion Rapid Transit, Inc., 82 Ohio App. 445, 82 N.E.2d 423, 424–425 (1948) (holding that a child after birth can recover for prenatal personal injuries incurred by reason of the negligence of another. Contra: RESTATEMENT, TORTS § 869 (1939). The court, per Jackson, Presiding Judge, says: "The duty of a court, within a limited sphere, should be not so much in extracting a rule of law from the precedents as in making an appraisal and comparison of social values, the result of which may be decisive in determining what rule to apply. Common Law and the United States, Chief Justice Stone, 50 Harvard Law Review (1936–37), 4, 5, 6, 7."

Reported in the advance sheets current at this writing is the case of *Lewis v. Cockrell.*[15] The prayer is for directions as to distributing a trust estate created by a will. The testator devised the residue of his property to his wife (*A*) for her life, and upon her death in trust for his two daughters (*B* and *C*) for their lives, and then, in "Paragraph Fourth," he continued: ". . . and in the event of the death of either or both to the use and benefit of their respective children, the descendants of each child to take the share of the parents should he or she be dead."

It is argued that the law is that the attempted gift to the children of *B* and *C* is void under the Rule against Perpetuities.[15a] *A, B,* and *C* are all dead, daughter *C* having left surviving three children, the grandchildren of the testator.

Faced with such a case, the student wants to know: "What is the rule of law to be found in the case, so that I may learn it?" His unguided point of view is sure to be descriptive purely, and his *aim* is the descriptive skill.

For each of the numerous counsel involved in the case the point of view is primarily predictive. How can each tell in advance *what* (not why!!) the judge is going to decide—so that he can advise his client? This point of view should be important to the law student, too. But it must be forced upon him—sometimes in the very same period as the realization that through merely knowing the *law,* he cannot possibly tell how this judge, or any judge, will or ought to rule. The law has a number of facets, any number of which might be the "controlling factor" in this case.

There is the Rule against Perpetuities and the rule against suspension of the absolute power of alienation—in force by statute in the District of Columbia. But there are a dozen routes to follow to get around that, if the judge is so inclined. Through the specific interpretation of dispositive instruments the rule is as easy to avoid as the veritable Statute of Frauds.[16] In property law, however, and especially in the application of the Rule, judges are notoriously conservative.[17] Will the judge trouble to save this gift, or trouble to kill it? He could do either.

[15] 80 F.Supp. 380 (D.D.C.1948).

[15a] Because the literal wording of "Paragraph Fourth" may designate the testator's two daughters and the descendants of either daughter who dies before the testator's widow as a class of life tenants to follow upon the widow's life interest. Under such interpretation, there is implied then either a gift over to the descendants of such daughters as do outlive the widow, or an intestacy. The possibility that a "descendant" unborn at the testator's death, when the interest was created, might share the daughter's life estate and measure the duration thereof could perhaps render all contingent remainders limited after such estate too remote, since this supposed descendant might outlive all the measuring lives in being at the testator's death. But on the facts the court may well be setting up a straw man, since, as the court itself says, the same parties would have taken by intestacy in any event. See JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 205.2 (4th ed. 1942).

[16] The opinion ruled that, while the provision for grandchildren, read literally, would be obnoxious both to the District statute against suspension of the absolute power of alienation and to the Rule against Perpetuities, "it is necessary to insert the words 'the remainder' in the last clause of Paragraph Fourth," thereby interpreting the gift as one "in fee simple," and not one of income for life. So construed, the bequest to grandchildren was held to be good.

[17] Leach instances one such attitude in his delightful note 67 to *The Rule Against Perpetuities and Gifts to Classes,* 51 HARV.L.REV. 1329, 1353 (1938).

The judge's point of view is the prescriptive. He must lay down the law of the case on behalf of the community in an opinion solidly grounded upon the precedents; but first he must decide who is to win. No one, presumably, knows what goes on in the mind of the judge unless it is himself, but it is a known fact that he is a human being—not an automaton grinding out *law*.[18] He is subject to the pressures of environment and predisposition like anyone else, and his response is a reasonably foreseeable reaction to the interrelated action of those two forces. In the judge's environment are included the fundamental social facts and policies—for maximizing individual and community values—of the civilization in which he acts. He is utterly bound to balance community policies one against another, and to decide in conformity with the ones he finds to be controlling. The application of the law cannot lag long behind the changing patterns of interrelated needs, dependencies, mores, and faith tenets of a people—of which law forms a part. The judge to the best of his ability considers the consequences—the community policy consequences of his decision. If his bent and training is to perceive but one policy, it is a proper function of counsel to call others to his attention. In the case above, some pertinent considerations are:

1. It is desirable almost to the point of compulsion to maintain consistency in the law. This policy may be overobserved to the extent of pretending a verbal and conceptual consistency with wholly outworn, outgrown, and inapplicable feudal doctrines in the field of property—with effects that are expensive and ridiculous and confusing. Such bubble pretenses, because they encourage a total misapprehension of the actual grounds of decision, are, from a teacher's standpoint, *wrong*; and they require his iconoclastic zeal exactly so often as they appear in the opinions. To follow the precedents, however, is a fundamental policy.

2. The American Way heartily favors a maximum of individual freedom in the testate disposition of individual wealth—so long as the testator's attempted exercise of volition does not intrude upon equal or greater privileges accorded by the same policy to other individuals or to the public.

3. The community is interested for reasons of community convenience in encouraging the application of private wealth—other considerations being neutral—to the care and welfare of the natural objects of the owner's bounty.

4. The well-being of the system requires a degree of fluidity and availability to the needs of commerce of the privately owned wealth of the community. Limitations must be applied upon the freedom-favored policy of testate dead-hand control. Here the policy basis of the Rule against Perpetuities.

5. It is worth while to avoid the hit-or-miss results of a mechanical application of rules of law—striking down a disposition which in different words would be perfectly good, while upholding others of equal inconvenience and of identical references in terms of time, person, and event.

It would be naïve to attempt to teach as to a case like that under consideration that the only thing up for discussion is the question whether the

[18] For—among other things—pointing out such unspeakable facts too clearly, the "neo-realists" suffered flagellations in the past decade. See Llewellyn, *Some Realism About Realism*, 44 HARV.L.REV. 1222 (1931).

Rule against Perpetuities does or does not apply. Few self-respecting students and, I suppose, no teacher would want to handle it so. It is not my claim that the policy approach affords a *whole* answer to the teacher's problem, but that it is helpful to afford some insight into the factors—so far as presently they can be labeled and classified—that form the actual bases of decisions, and influence the decision-makers.

But, it is said, the pertinent considerations of policy are implicit and—sufficiently—articulate in "good" case-method instruction with any casebook.[19] Where the advantage of *McDougal and Haber,* particularly?

The answer lies in a matter of emphasis—in the planning, the purposive aspects of the McDougal approach. Materials are selected, arranged, and edited to facilitate the consideration of policy consequences. The advantage, for us run-of-the-mine teachers, is like that enjoyed by other casebooks over the scattered, unedited opinions in the official reports in the library.

The editor's help, through his scheme of arrangement, his notes, and his stimulating—more or less—questions, is worth the having, however much entitled to a full quota of profane and witty disparagement in class. I do not say that *McDougal and Haber* is the best possible tool, but merely that so far it is the *only* helpful one—the only one which attempts to give explicit consideration to anything more than language. The teacher, great or small, who could not have done for his own purposes a better job than his editor did, I have yet to meet. Usually, though, he has not done it. I, for one, admit that I appreciate a little more editorial help than a bare tabulation of appellate cases.

The evangelism in a casebook is usually the opposite of detrimental to its effectiveness and usability as a tool for teaching. Leach's documentations in his *Cases and Materials on Future Interests* double, at least, the value. The technique of belaboring what is "wrong, *wrong,* WRONG!!!" is neither

[19] See *Report of the National Law Student Conference on Legal Education,* 1 J. LEGAL ED. 221, 242 (1948), where Professor Harry W. Jones in a closing address is reported to have remarked: "You [the students] are all for the offering of policy-making courses—as if *any* course effectively taught by the case method is not a policy course—and yet you would have such courses offered on an elective basis. Above all, the clearly expressed preference of many of you is for the kind of law teacher who *gives* you, by supplementary lecture and comments, a 'broad over-all view' of particular fields of substantive law. I had thought that no one would have a good word for the professorial *lecture,* at any stage of legal education. If a professor of law feels that he has an introductory comment or a concluding synthesis which will enable you to cover more material more effectively, why shouldn't he write it out, have it mimeographed and distributed, and use the heart-breakingly few available hours of classroom time to go on from that point in free discussion?"

Anticipating this argument previously, "a Yale delegate admitted that a 'great' teacher, 'after giving the tools, broadens the picture by showing their place in society,' but urged that 'we should try to systematically work out methods available to every teacher, every student, and not to rely on a few "great" teachers—intensively bringing in a body of knowledge which makes the whole legal process more understandable and makes for more effective action.'" *Id.* at 92.

Compare Leach in *Property Law Taught in Two Packages, supra* note 1, where at page 35, after remarking that this "public policy" is familiar, he continues: "I breathed in the battle smoke of *Adkins v. Children's Hospital* from Frankfurter, and from him acquired a knowledge of the Brandeis-type brief—both of them items which emphasized the dynamic character of law and its capacity for furthering or crushing particular social values."

new nor exclusively McDougal. Law teachers have been doing it for years,[20] some—everybody admits—with good results.

Is it necessary to gobble up the last "heart-breakingly few" Property classroom hours for a futile re-proving deductively from concept to concept that title is a divisible indivisible unity, that seisin is an obsolescence of possession plus claim (with color) of freehold, that vested subject to utter or partial divestment is and is not vested, that privity is almost identity unless concerned with leasehold or something not in esse, that irrevocable license is a paradox and an easement, that affording lateral support to land is a tort duty and not a property duty, that "charitable or—" is and is not "charitable and—," that children are and are not issue, that delivery is more than but no more than objective intention to deliver, that covenants running create interests which, when unenforceable in any court, are perfectly "valid"? I love a good mellow technicality, always; but there remains another job to do.

Whether law teaching ought to train for leadership and responsibility in the community or for the lawyering skills is grist for the mill of the dean and the curriculum committee; it is a question which does not concern me here.[21] It is my concern that Property teaching may be more effective, with the eyes assisted partially to open to facts about institutional interdependencies in civilized living—and with emphasis shifted from the mere words of prepared deductive exercises onto decisions and their effects.

It is familiar case-teaching technique, after a student has so paraphrased a borderline opinion as to reach an opposite result, to ask him which answer is "right." With some effort toward clarification of his own values and some consideration of the community-expediency foundations underlying the common law, the response need not be entirely visceral.

In any event, are not even the poorest compositions of his own better training in legal syntax for the student than the reverent survey of dozens of masterpieces by others? The former is learning by the case method, the analysis and synthesis of authoritative decisions in actual context, the latter a using of cases as little self-repeating descriptive treatises about law.

[20] I speak with some surety, having breathed battle smoke myself, for the sake of reluctant course credits, at the feet of such spade-a-spade law teachers as Rutledge, Griswold, Prosser, DeMuth, Gulliver—and, of course, McDougal.

[21] For contrasts of ideas, compare Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943), with Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947). See also, Fuchs, *Legal Education and the Public Interest*, 1 J.LEGAL ED. 155 (1948).