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Property Lost: Property Regained

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One of the most important roles of any law faculty *qua* faculty, perhaps second only to reproducing themselves, is to decide what is worth teaching in the three precious years of a formal legal education. Not too long ago, when life, law and other things that matter were simpler, this decision was not so difficult. Law schools taught the law and that was that -- no law *and* sports, no law *and* sex, no law *and* the global environment, etc. Today, there is so much "law *and*. . ." that we are in danger of losing any common core of knowledge that binds our graduates into a learned profession. This is not a lament for the good old days nor a diatribe against current trends. It is a plea that, in the rush for the trendy new, we do not forget the key strengths of the time-tested old.

Professor Francis A. Allen makes the point with his usual succinctness: "One of the worst things that could happen to legal education is that the law schools should join the already-long procession of university departments engaged in a wistful search for a subject matter. We need not search. Our mission, as it has been for the past eight hundred years in the universities of the Western World, is the study of law and the institutions of the law. Our duty is to make our thought and teaching more effective."[1]

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* Apologies to John Milton, whose conception of Paradise was no less nebulous than the idea of Property. No apology to John Mortimer whose novels *Paradise Postponed* (1986) and *Titmuss Regained* (1990) deal with property matters from freedom of testation to land use controls.

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1. Allen, *Law, Intellect, and Education* in 57 MICHIGAN FACULTY SERIES (1979). This series of essays is an excellent analysis of the strengths and weaknesses of American legal education. Professor Allen speaks to all who believe in an education which is intellectually based and humanistically motivated. He defends with penetrating insight this conception of liberal and professional education, often attacked in recent years.

I suspect we all agree that our end duty *is* to make our thought and teaching more effective; we disagree (as well we should) about the means to reach that end. The subject matter we teach, as distinguished from teaching method, style and technique, is directly related to our graduates' view of law and society. It is this view that concerns me, if the students leave law school with a fragmented, disjointed picture of law and the legal process, understanding the specifics of numerous, unrelated problems but lacking a comprehension of the "seamless web." In a broader sense, my concern is similar to that developed in detail by Floyd W. Matson in *The Broken Image (Man, Science and Society)*.[2] If man's image of himself has been broken by the rapid changes in science and technology, his view of law has been fractured by these same (and other) developments. The reflections in the mirror may or may not be reality but they have a powerful impact on the way we see both ourselves and the law. Is the law all *ad hoc*, power based and economics-driven or is it, at least partially, based on reasoned social norms, with some foundation on underlying, interrelated principles? I do not see it as an either/or proposition and I suspect the law embodies a good bit of both philosophies. The question is how best to make the curriculum reflect these often self-contradictory positions so that the students will leave law school with something of a common heritage rather than a hopelessly fractured image.[3]

Three years is world enough and time for formal legal education, if we use the interval wisely. The "law *and* . . ."

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2. F. MATSON, THE BROKEN IMAGE (MAN, SCIENCE AND SOCIETY) (1964) at vii. ("It is the primary thesis of this book, then, that the historic reliance of the social sciences upon root metaphors and routine methods appropriated from classic mechanics has eclipsed the ancestral liberal vision of 'the whole man, man in person' (to use Lewis Mumford's phrase) -- and has given us instead a radically broken self-image. The tragic history of the breaking of the human image parallels the disintegration of the inner sense of identity, the flight from autonomous conduct to automaton behavior, in the modern world.").

3. It is a truism that no one leaves law school with a closed briefcase of knowledge but he or she should, at least, have a reasonable chart to provide some guidance through the maze.

syndrome is a sensible development for many reasons,[4] provided these advanced courses are based on a common core of knowledge. Ah, there's the rub: is there a common core of knowledge about the law? Clearly, we once thought so and the curricula of nearly every law school reflected that belief. We are less sure today or perhaps, more accurately, we are all sure in a diverse number of ways, reflecting the fractured image. I think we do agree that the first year of law school represents the critical pieces of the jigsaw puzzle.[5] Like every other discipline, the law has its building blocks and one needs to understand them if the entire edifice is to make any lasting sense. Here, I believe the conventional wisdom is correct. Contracts, torts, property, criminal law, civil procedure, and constitutional law comprise the essential core subjects of the all-important first year. Of course, the *content* of those specific subjects has changed over the years and will continue to evolve as society changes but these are the ingredients that should provide the common core of history, principle, and legal reasoning.[6]

Naturally, there will be widespread disagreement as to the subjects which should comprise the first-year common core and some will argue that it is unwise to approach the curriculum in this way at all.[7] Given bright students and an able faculty, almost any mix will produce the right result. The common thread of knowledge will be picked up, almost by osmosis, out of the three-year blend. Or so the counter argument runs. Since I do not believe in thaumaturgic formulas that will save the world (legal or otherwise) these arguments may be sound but I think even the best students need a more organized approach to the life-long study and

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4. For example, these courses allow in-depth coverage of fairly specific subject matter, they provide the opportunity to work in a large amount of important non-legal material, they can utilize a wide range of teaching techniques and materials, and they tend to stimulate student interest in the advanced years because students can self select on the basis of subject matter, etc.

5. There are numerous reasons for this uneasy agreement and there is no point in footnoting the obvious except to stress the important fact that the students are fresh, untainted by legal knowledge, and interested in a way most of them will never be again.

6. Notice I am not writing about *how* these materials are presented -- socratic method, lectures, small group discussion and papers, etc. -- but about *what* is placed on the students' intellectual table.

7. One thing is clear: every faculty should re-examine this issue at periodic intervals and reach a consensus on how best to resolve the idea of a common core of knowledge.

practice of the law. In a very real sense, most of the curriculum could be thought of as a series of special courses in one of the basic subject matter areas. If this is even partially true, a convincing case can be made for full consideration of the fundamental material before launching into the more specialized aspects of the subject matter. It is not my purpose here to build a case for each of the suggested core courses, but rather to concentrate on one subject to illustrate my point. I have chosen property not only because I know that area best but because it is a subject that once reigned supreme, fell from grace, and may be ascending once again.

I. PROPERTY LOST

Prior to World War II, the subject matter of property was in its law school "hey-day." Examine almost any catalogue of that era and you will see that about a third of the courses were property or property related. There were many reasons for this, not least of which was that the great legal explosion which began with the New Deal had yet to make its influence felt in the law schools' curricula. Moreover, it reflected what lawyers did and a large percentage of them "did" property in one or another of its manifestations. This is not to say that property played that large a role in the core curriculum. Typically, personal property and estates in land or landlord and tenant law made it into the promised land, but the courses were fragmented, scattered throughout the three years, and tended to lack any unifying principle. The pressure for new courses, and the changing role of law generally, forced faculties to take a fresh look at the student diet and to concentrate many existing courses into new and smaller packages in order to free time for administrative law, taxation, family law and on and on. In the property area, Professors Casner and Leach of Harvard led the way with the most popular property casebook of that era.[8] They combined the subject matter of six separate courses -- personal property, estates in land, landlord and tenant, rights in the

8. J. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY (1st ed. 1947).

land of another, commercial transfers of land, and an introduction to land use controls -- into a single volume which was designed for a two-semester, six-hour course and for enthronement in the pantheon of the core curriculum. At about the same time, Professors McDougal and Haber of Yale presented a quite different set of materials which was built around the use of land.[9] The latter book was never widely adopted as a teaching tool but it was influential in the already developing field of land use controls. The former casebook was widely adopted and set the pattern for property teaching materials in the decades to follow.

This was also the era of the great, multi-volume treatises and the American Law of Property[10] and Powell on Real Property[11] cornered the market on this genre of legal research and scholarly writing. In a curious sense, these casebooks and treatises contributed to the sense of "property lost." Like the old masters in painting, they were so well done that the younger scholars and teachers felt there was not much worthwhile left to be accomplished in property and they turned their attention to impressionistic works or to other areas entirely. If there was not much excitement left in property research, then perhaps the subject matter was not so basic after all (a *non sequitur*), and interest in property teaching flagged to a certain extent.

Other factors contributed to the sense of "property lost" as well. Chief among these was the changing nature of law itself and the feeling that property had lost its own central core. No one expressed this idea better than Professor E. F. Roberts of Cornell who, in 1971, announced the death of property law, complete with a well thought out obituary.[12] He turned to Blackstone for the memorial on the tombstone: "The law of real property in this country . . . is now formed into a fine artificial system, full of

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9. M. McDOUGAL & D. HABER; PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT (1948). The book was subtitled Selected Cases and Other Materials on The Law of Real Property, An Introduction.

10. J. CASNER, AMERICAN LAW OF PROPERTY (Casner ed. 1952) -- seven volumes.

11. R. POWELL, THE LAW OF REAL PROPERTY (1949) -- seven volumes.

12. *See* Roberts, *The Demise of Property Law*, 57 CORNELL L. REV. 1, 3 (1971) (pronouncing the reasons property law was losing its importance as a core requirement in law school).

unseen connexions and nice dependencies; and he that breaks one link of the chain, endangers the dissolution of the whole."[13] Professor Roberts then proceeded to cede portions of the newly partitioned Blackacre to other fiefdoms. Personal property would gravitate to commercial law, landlord-tenant to contracts, the sale of land would become "just another aspect of the merchandizing syndrome which typifies this society"[14] and land use would belong to local government, or to constitutional and administrative law. As Professor Roberts put it: "Where does all this leave traditional property law? *Kaputt.*"[15]

Professor Roberts' thesis was well reasoned and, in many ways, persuasive. This was particularly true of his lengthy discussion of the burgeoning field of land use regulation. Here, he appeared to agree with R. F. Babcock, one of the leading theorists and practitioners in the subject: "Zoning law is public law . . . . The treatment of zoning law as a branch of local real estate law rather than as a branch of constitutional law . . . is largely due to the unwillingness of the United States Supreme Court to see zoning as regulations affecting people and not just as regulations affecting land."[16] Professor Roberts was apparently announcing the demise of property as a separate core course in the Casner-Leach mold, not the death of property itself. The many important issues that he discussed must be covered somewhere in law school and it becomes a matter of the most effective packaging of teachable units. Others, however, have argued that the concept itself is dead.

Professor James E. Krier of Michigan has confronted this latter argument recently in a short piece, "The (Unlikely) Death of Property."[17] "Is property dead? Thomas Grey has argued that it is. If he is right, we have an answer to the principal question of this symposium panel, which asks whether regulation and property

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13. *Id.* (citing Perrin v. Blake (Ex. 1772), *reprinted in*, 1 F. Hargrave, A Collection of Tracts Relative to the Law of England 487, 498 (1787)).

14. Roberts, *supra*, note 12, at 3.

15. *Id.* (emphasis in original).

16. R. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES 15 (1966).

17. Krier, *The (Unlikely) Death of Property*, 13 HARV. J. L. & PUB. POL'Y 75 (1990). Krier's essay was part of a Symposium on Law and Public Policy of the National Federalist Society, entitled Property: The Founding, The Welfare State, and Beyond.

are allies or enemies. If Professor Grey is right, they are neither -- because property no longer exists. If he is wrong (as I believe he partly is), then, I argue, regulation and property are allies and enemies alike, and will remain so."[18] Professor Krier concludes: "Speaking generally, sheer uncertainty makes it difficult to imagine a world without ideology. Speaking particularly, the ideology of property can for this reason alone hardly be thought to have passed. Announcements of its death are premature. Property will continue to serve, though with ups and downs, as a vital symbol of appropriate relationships between the individual and the state."[19]

The pattern that emerges from the late 'forties to the late 'eighties is not so much of property lost as it is of property mislaid or abandoned. It was mislaid in the crunch of so much new doctrine for the legal mill. It was abandoned in the sense that the doctrines appeared to be so well settled that one need not till deeply in the ancient soil. Many of these doctrines were complex and confusing but they were not *new* and they did not change overmuch. They were still worth teaching, but did they merit a place in the core curriculum? Did they lack any central core of their own so that they were simply disparate threads drawn together to create the illusion of something called property? If the answers to these questions were no and yes respectively, then property (the course) was indeed lost. Oddly enough, it is land use (but is that really property at all?) that has rekindled the spark in property lost. Why? It *is not* because land use controls or land use planning, as separate advanced courses in the curriculum, are "true" property courses. In fact, these courses are a combination of constitutional law, administrative law, local government, social policy and real property. It *is* because these materials raise fundamental questions about the nature of property and its place in society. They force us to re-examine our views about the concept of private property, the limits of state regulation and the importance of a "moderate and

18. *Id.* at 75.
19. *Id.* at 82-83.

sufficient property" to the citizens of a relatively free society.[20] Once we begin to delve deeply into such issues as the "jurisprudence of taking,"[21] it becomes apparent that we need to know more about the entire *institution* of property and the doctrines that control it in the modern world. This has led to a new burst of interest in scholarly research and writing and a concomitant desire to transmit our ideas to the coming generations of lawyers via the classroom.[22]

II. PROPERTY REGAINED

Each of the subjects in the traditional core of the first year was included there because its mastery was thought to be an important foundation for a well-balanced legal education. Property belonged in the pantheon because it dealt with an institution that was vital to all societies both in time and space.[23] For reasons previously discussed, there was some fall from grace but, as it has become apparent that land ownership is one of the most regulated aspects of American society, the centrality of the institution of property has moved front and center once again. It is impossible to comprehend the "big picture" of land use and environmental regulation without an understanding of the institution of property and its role in Anglo-American law. After all, land (including water) is our second most important national asset.[24] This does not mean we

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20. *See* W. LIPPMAN, THE METHOD OF FREEDOM at 100-02 (1934) ("But the issue between the giant corporation and the public should not be allowed to obscure the truth that the only dependable foundation of personal liberty is the personal economic security of private property.").

21. *See* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). This always fascinating topic was given a new twist by the publication of Professor Richard Epstein's provocative book.

22. Without listing the flood of law review articles, monographs, books, etc. in the land use area, I think we can take professorial notice of this development.

23. 1 R. POWELL, POWELL ON REAL PROPERTY 7 (1976) ("The meaning of the term institution deserves attention. It is a term applied to such different things as the church, marriage, the money economy, democracy and property. Perhaps, in generalized language, it can be said that we have an institution whenever we can discover a cluster of social usages from which an individual may depart only at his peril. The result of an institution's existence is the setting of a pattern of behavior and the fixing of a zone of tolerance for some segment of human activity.").

24. I assume that our citizens are our most important asset although we do not always act as if either people or land were overly important.

need a long bath in feudalism or a step by step report on property progression from 1066 to date, but we do need to understand how we arrived at our current destination and have some idea as to how we should move forward into the twenty-first century.

The institution of property rests on a bundle of sticks or, at least, generations of law students have been taught that it does. The sticks in the bundle represent rights, but they also represent duties (and they have done so since feudal times). It is the failure to remember the duty aspect that accounts for some of our current dilemmas. If we view property as primarily a matter of private rights and public regulation as destructive of those rights, we have forgotten the lessons of the past. In keeping the estates doctrine while largely ignoring the obligations of the landowner, perhaps we threw out the baby and kept the bath.[25] In any case, it is a role of the property course to explore the boundary between private and public rights as well as to delineate the rights among the owners of individual interests. Professor Powell stated it perfectly: "So then, the test of goodness must be some mean between the concept of the complete dominance of the individual and the idea of the all-importance of the state."[26] The search for that "test of goodness" has been given new impetus by recent United States Supreme Court decisions[27] in the land use area, but the responsibility of the core property course ends rather than begins with land use controls. It begins with an obligation to underlying concepts, to historical development and to an understanding of how the present system operates.

The bundle of sticks remains a good metaphor to describe property interests. It can be used in a broad, general sense or in a narrower, specific sense. Note how Professor Epstein uses the analogy in the former sense: "Let me first mention what the

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25. Philbrick, *Changing Conceptions of Property in Land*, 86 U. PA. L. REV. 691, 710 (1938) ("The disappearance of any long established social system must involve some losses. And so, in the case of feudalism it is regrettable that there could not have been preserved the idea that all property was held subject to the performance of duties -- not a few of them public.").

26. 1 R. POWELL, THE LAW OF REAL PROPERTY, 33 (1977).

27. *See, e.g.*, Nollan v. California Coastal Commission, 483 U.S. 825 (1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, (1987); Keystone Bituminous Coal Association v. De Benedictis, 480 U.S. 470 (1987).

particular sticks in the bundle are . . . . The standard definitions of property -- and these have very broad applications whether one considers legal jargon, constitutional discourse, or the Oxford dictionary -- tend to endow the owner of a particular thing with three rights: possession, use and disposition."[28] In that same vein, Dean Pound propounded six rights:

> According to the civilians, property involves six rights: a *jus possidende* or right of possessing, a right in the strict sense; a *jus prohibendi* or right of excluding others, also a right in the strict sense; a *jus disponendi* or right of disposition, what we should now call a legal power; a *jus utendi* or right of using, what we should now call a liberty; a *jus fruendi* or right of enjoying the fruits and profits; and a *jus abutendi* or right of destroying or injuring if one likes -- the two last also what today we should call liberties. Thus at least half of the content of a right of property is liberty -- freedom of applying as one likes, free of legal restraint.[29]

Basic property courses deal with these rights, but frequently they do so implicitly rather than explicitly so that the student may be unaware of the deeper significance of a simple-appearing case. This is unfortunate because, while the very idea of property is imbedded in these broad rights, they become meaningful only in the light of specific cases and statutes. Since the institution of property is so vital in our (or any) society we need also to relate it to the concept of justice and not see property as some separate, abstract entity with no particular kinship to other discrete areas of law. As Tom Bethell has noted: "Justice is intimately related to the idea of property. I would go so far as to say that without private property there can be no justice. In fact, an important reason for studying law, it seems to me, should be to inquire into the relationships between property and justice."[30]

In the narrower, more specific sense, the complete bundle of sticks translates into the fee simple absolute that can be broken

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28. Epstein, *Property and Necessity*, 13 HARV. J.L. & PUB. POL'Y 2, 3 (1990).

29. R. Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A. J. 993, 996 (197 (1939).

30. Bethell, *Introduction: Property and Justice*, 13 HARV. J.L. & PUB. POL'Y 1 (1990).

down into discrete interests that spread across the property spectrum. This is the stuff of present and future interests, freehold and non-freehold estates, rights in the land of another, surface, subsurface and air rights, natural rights, vendor and purchaser, mortgagor and mortgagee, public rights, etc. Some understanding of this broad range of interests is necessary before one can appreciate the full significance of regulatory takings. For example, does the interference with any one of the sticks in the bundle constitute a taking or should the court look at the effect on the property as a whole in deciding whether the state has gone too far?[31] A study of the sticks in the bundle will reveal that all property interests are subject to regulation by law, indeed are the creatures of law as Bentham so clearly stated.[32] A person may own an easement across the land of another but, in the final analysis, the scope and use of that easement are regulated by legislation or by judicial decision.[33] The ownership of the easement "consists in an established expectation," an expectation based on existing law and one on which the owner has a right to rely. It is this element of reliance that is so important in property law and that lies at the root of much of our disquietude about ever-expanding police power controls. Perhaps a non-land use property case will highlight the problem.

Certainty in the law is an illusion, but the law of property does require a higher degree of stability than most other areas of jurisprudence. It is the basis of planned activity not just a legal response to a given set of circumstances. For example, the Supreme Court of California recently decided *Estate of Propst.*[34] The issue was whether a joint tenancy in *personal* property, such as a joint

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31. *See* Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). The answer to the question helps explain the difference between the majority and minority opinions in Penn Central and its progeny.

32. BENTHAM, THEORY OF LEGISLATION, PRINCIPLES OF THE CIVIL CODE, Part I, at 111-113 (Dumont ed., Hildreth trans. 1864) ("Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases. . . . The idea of property consists in an established expectation . . . .").

33. *See* Annotation, *Scope of Prescriptive Easement for Access (Easement of Way)*, 79 A.L.R. 4th 604, 645-65 (explaining the scope of prescriptive easements) (1990).

34. 50 Cal. 3d 448, 788 P.2d 628, 268 Cal. Rptr. 114, (Cal. 1990).

bank account, could be severed by the unilateral action of one joint tenant.[35] Under the common law, a joint tenant could so sever either real or personal property, but California had long held that a joint tenant was powerless to defeat the right of survivorship by unilaterally severing a joint tenancy in personal property. The Supreme Court returned to first principles, reversed the special California position and held the new rule would be given retroactive effect unless the party claiming a right of survivorship could prove that the application of the holding would cause that party substantial detriment as a result of the party's reasonable reliance on the prior rule.[36]

The Court's opinion is undoubtedly sound but the retroactive effect raises the kind of question which now concerns us. Justice Broussard, concurring and dissenting, wrote: "When, as here, we reject a well-established rule that lacked a sound theoretical basis but caused little confusion or dispute, we should make every effort not to make the cure worse than the disease. *It is almost as important that property law be predictable as that it be right.* When we break with the past in a retroactive opinion, but make substantial reliance on the old rule an affirmative defense we inevitably engender a far larger volume of litigation than the old rule created. I would prefer to make our opinion take effect prospectively, since I believe this is the only way to cause less disruption and litigation than was caused by the rule we now reject."[37]

Property law does need to be relatively predictable, else how can an owner have a meaningful "established expectation"? The thrust of most branches of property law is in the *direction* of predictability, hence the calculus of estates, the Statute of Frauds, the recording system, etc. Of course, there are no vested rights in the zoning status of a tract of land (nor should there be) but at least an owner should be able to rely on an existing use status until the

35. *Id.* at 451, 788 P.2d at 629, 268 Cal. Rptr. at 115.

36. *Id.* at 462, 788 P.2d at 636, 268 Cal. Rptr. at 122.

37. *Id.* at 467, 788 P.2d at 639, 268 Cal. Rptr. at 125 (Broussard, J., concurring and dissenting) (emphasis added).

local government can show that a change is necessary to satisfy a vital and pressing governmental interest. To the extent that police power controls are exercised in an *ad hoc* fashion with no real relationship to a sensible plan, the law itself falls into disrepute. It is this search for predictability that provides the fodder for much of the land use controversy.

These comments are not meant as an essay on land use. Rather they are intended to show why that subject has revitalized the basic property area and led to property regained. By focusing attention on some of the broader issues inherent in private property, land use has helped clarify why the *institution* of property is so fundamental an aspect of society. Lawyers have many and, indeed, expanding roles in modern America but surely one of them is to continue their historical involvement in the property system. That system can be improved and made to function for the benefit of all of the people only if it is reasonably well understood, warts and all. As Professor Powell has pointed out there is an opportunity and a need for statesmanship in this branch of the law as well as in others.

III. CONCLUSION

It is clear that the legal profession is changing rapidly and that lawyers are playing an ever-increasing role in all of American society. It is likely that the same thing will be true of countries in the communist bloc as they move toward a different property system and a greater infusion of freedom for the individual. This places a greater burden than ever on legal education and creates a special challenge for the current generation of law professors. The law school programs are almost certain to be scrutinized, inside and out, more intensively than ever before. Programs inherited from previous generations will need to be justified anew in the light of the approaching twenty-first century. While I am concerned about the total law school program and have addressed that matter

elsewhere,[38] my comments here are more restrictive. I believe there should be a core curriculum for the all-important first year of law school and that property should be a component of that core. If property has been lost then property has been (or should be) regained. Blackstone was *partially* right. "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property . . . ."[39] Well, at least he was right so far as property professors are concerned!

38. Cribbet, *The Changeless, Ever-Changing University: The Role of the Law School*, 26 ARIZ. L. REV. 241 (1984). This article is from an address delivered for the Isaac Marks Memorial Lecture Series at the University of Arizona Law School while the author was Chancellor of the Urbana-Champaign Campus of the University of Illinois.

39. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND. Book II, Chap. 1, at 2 (15th ed. 1809).