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"Land Ownership and Use": New Priorities and Property Instruction (Book Review)

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BOOKS

"LAND OWNERSHIP AND USE"*

NEW PRIORITIES FOR PROPERTY INSTRUCTION

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Few sources are likely to prove more fertile for a chronicler of American legal thought than the dominant casebooks of the field and period of his concern. The peculiar alchemy whereby a group of isolated materials is converted into a finished text exposes many of the principal intellectual issues of the day as well as the assumptions then prevalent regarding their resolution. Although textbook authors confront many hard choices in their creative effort, the contours of their final product are etched in large measure by their response to three troublesome questions. Which problems in the field are of sufficient import to justify systematic treatment in the casebook? How can the inquiry be most effectively organized to illuminate the intricacies of the problems and to provide a meaningful framework for their solution? In accordance with which of a large number of competing pedagogical objectives should the text be designed?

These questions constitute a barometer of sorts for gauging the intellectual climate of the period. For the last generation or more, authors of the leading first year property texts have responded to them with notable uniformity. In consequence, first year texts in wide use today remain largely what they were a generation ago. But the last five years have been marked by considerable ferment in property instruction, and have witnessed the emergence of a group of textwriters who have set about to re-examine the first year property course and the remainder of the property curriculum as well. Topics long ignored or of recent vintage are beginning to find their way into the course. Novel techniques for organizing and investigating these topics are slowly taking shape. And a re-evaluation is underway of the pedagogical values that should provide the underpinnings for the first year course.

Land Ownership and Use by Professor Curtis Berger is the latest representative of the new genre of property texts. Berger too seeks a fundamental reorganization of the first year course as one phase of a reappraisal of the priorities of the entire property curriculum. Like other authors of recent texts, he tends to employ certain of the very assumptions that he purports to reject. In freeing himself from existing patterns of thought, moreover, he encounters

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* CASES, STATUTES AND OTHER MATERIALS. By Curtis J. Berger. Boston: Little, Brown and Company, 1968. Pp. 1036. $14.00.

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novel challenges requiring original solutions that are not easily found. He has, nevertheless, succeeded in constructing a text that constitutes a superb vehicle for the first year course and that points the way to a dynamic conception of property instruction and curricular reform that will be with us for many decades.

The publication of *Land Ownership and Use* affords an excellent opportunity to take stock of the state of property instruction over the last generation and to speculate upon where it is likely to be heading in the next. The remaining pages of this review will be devoted to that end. Commencing with a portrayal of the major features of the traditional text, it detours somewhat for a brief consideration of *Property, Wealth, Land: Allocation, Planning and Development* by Professors McDougal and Haber, a first year property text whose appearance some two decades ago was largely ignored, but which has proven extremely influential in the sixties. The principal work of the review —a detailed examination of *Land Ownership and Use*—then follows. The review concludes with a comparative appraisal of the various texts and textbook styles as they relate to problems of contemporary concern in the property field.

I. The Traditional Text

The traditional text ostensibly seeks to illuminate the problems which confront attorneys who represent private clients in the creation and transfer of interests in real estate. Unique among American law school texts for its attention to the historical evolution of the doctrines with which it deals, it devotes numerous pages to Anglo-American norms that date from feudal times. Long sections review the various estates in land, especially future interests, and the gothic complexities of such statutes from the past as *Quia Emptores* and *De Donis Conditionalibus*. The more contemporary dimension of the text is reflected in chapters dealing with the impact of recording acts, title insurance and, possibly, tax considerations upon conveyancing practices. An analysis of the law of landlord and tenant, a sprinkling of bailment, gift and other personal property questions and a terminal chapter touching on governmental control over land use usually round out the text.

With the exception of historical statutes and occasional modern legislation dealing with the creation of property interests, the text proceeds almost exclusively by way of cases and analytical notes. The reasons for organizing the inquiry on this basis stem in part from the substantive focus of the text and in part from its pedagogical objectives.

Substantively, first-year property instruction has largely ignored the important consequences for the private client of the broad-scale involvement of government in land-use control. Nor, apparently, has it recognized that an increasing portion of the business of real estate firms and attorneys is provided

by such groups as developers of large subdivisions, sponsors of governmentally-aided housing, citizens' community improvement bodies, representatives of the various trade associations of the housing industry, and other clients for whom the content of land use, housing and similar legislation is a matter of grave and immediate import. Instead, property instruction has concentrated somewhat formalistically upon the rules governing property transfers. Most of the learning in the latter area, of course, is to be found in the reports. Moreover, student mastery of these rules is more effectively achieved through patient scrutiny of the relevant judicial opinions.

Pedagogically, the traditional text seeks to encourage the development of legal skills necessary to master the authoritative doctrines and practices governing the subject matter of the course and, ultimately, to assist students to become disciplined and effective attorneys. Here again, the case method would seem an effective tool. Cases constitute the fundamental building blocks from which the common law doctrines were fashioned. Most of the legislative innovations in the land transfer area, moreover, employ these doctrines as their point of departure. Rigorous training in the analysis and synthesis of the relevant cases promises to nurture the development of critical skills and, simultaneously, to facilitate the absorption of course materials.

The traditional casebook is designed to provide a foundation for the advanced property curriculum. Not surprisingly, the latter is decisively oriented towards the problems arising from the transmission of wealth among private parties. Courses in trusts, estates and wills, future interests, estate and gift taxation and various seminars in estate planning dominate that curriculum. What remains is likely to be divided among courses or seminars in real estate transactions, natural resources law and, possibly, land use and urban problems.

II. A Dissenting Text

With a single exception, the orthodox patterns described above have won the assent of at least a generation of authors. In their volume, *Property, Wealth, Land: Allocation, Planning and Development,* however, Professors McDougal and Haber sharply criticized the traditional text as antiquarian and as insensitive to the relationship between property doctrine and community processes and needs. They rejected as "illusion [the view] that property law is peculiarly rigid and unchanging," and endeavored "to take seriously the newer conceptions about the relation of legal doctrine to social fact and, hence, to locate the authoritative doctrines and practices of property in their context in community processes."[1]

The consequences of their shift in focus and technique are evident through-

1. *See, e.g.,* D. Haber and M. McDougal, Property, Wealth, Land: Allocation, Planning and Development, at p. iii (1948).

out the book. Bypassing some 700 years of history, they undertook to probe the impact of various property doctrines upon the social system and, conversely, the role of community processes in the formulation of these doctrines. Feudal and post-feudal rules, so carefully cultivated in the traditional casebooks, are treated briefly or wholly ignored. Though the opening chapters deal with the various estates in land and conveyancing, fully two-thirds of the text explores land use problems arising at the local, state, federal and world levels. The authors stress the decision-making processes associated with the planning, development and allocation of property resources; they view property rules as a relatively fluid component of these processes.

Their shift in focus required a different medium of inquiry than the case method as traditionally understood. This meant employing appropriate non-case materials to detail the expanding role of government in the control of land use activities and to portray the community processes whose scrutiny was a principal objective of the text. Accordingly, they assembled introductory notes and lengthy essays, numerous social science excerpts setting forth necessary economic, political and sociological background, extensive portions of studies by governmental and private agencies, and various legislative extracts.

At the same time, they were prepared to and did make liberal use of cases, which they recognized as enormously fertile, yet compact storehouses of information, doctrine and issues. But it would be erroneous to conclude that McDougal and Haber assumed that the case method offered the most fruitful mode of organizing property inquiry. The cases in their text serve largely as appendages to a set of complex models of social organization and action previously developed by Professor McDougal and others.[2] It is these models and their relation to legal doctrine that provide the framework of inquiry in the text and that account for the relatively subordinate position assigned to the judicial opinions reproduced in it.

A pervasive theme of the textbook is the authors' conviction that lawyers have a special competence and responsibility for insuring that existing property doctrine is compatible with democratic values. This concern is reflected as a major pedagogical preoccupation of the book. McDougal and Haber would presumably endorse the traditionalists' interest in mental discipline and absorption of doctrine. They also expressed the intention, however, that students take the further step of appraising the social impact of property rules and of furnishing alternative prescriptions when the rules impede the realization of democratic values.

As previously suggested, their frontal assault upon traditional conceptions had little impact in the years immediately following the publication of the text. Few teachers adopted the text for use in the classroom. Though containing

2. H. Lasswell & M. McDougal, *Legal Education And Public Policy: Professional Training in The Public Interest*, 52 YALE L.J. 203 (1943).

updated treatments of conveyancing practices, the property casebooks that appeared over the next decade continued to reflect orthodox patterns. Commentators who recognized the novelty and inventiveness of the text tended to adopt a wait-and-see attitude. In concluding his review of the text, for example, Professor Allison Dunham observed:

> As a first attempt to reconsider the law school course in property and to relate the specific rules to the functioning of the whole institution of property, the coursebook is a beacon. Perhaps the authors' function is to serve as a catalytic agent.[3]

The lukewarm response accorded the text deserves careful examination in view of the catalytic role that the text has indeed played in recent years. In part, the response was due to the times. There was little general recognition in the late forties and early fifties of the enormous difficulties that would soon be posed by the housing needs of minority groups and the poor, noxious air and polluted water, parochial or non-existent land use programs for metropolitan and regional areas, creaking mass transit systems, and other environmental problems which, in concert, have assumed crisis proportions today. Consequently, there was not the same impetus then as now to engage in the fundamental reappraisal of economic, social and legal priorities implicit in the McDougal and Haber approach.

In part too, it reflected the hesitancy of lawyers to utilize the concepts and methodologies of other disciplines. Be it healthy scepticism, intellectual parochialism, or some combination of the two, this posture is characteristic of the American legal tradition. The latter applauds what it regards as hard-headed, no-nonsense analysis; it recoils from elaborate terminology, comprehensive theorizing and high-level abstraction.

But the serviceability of the text as a tool for the first year course is also open to question. Perhaps because of the posture mentioned above, few law teachers possess sufficient familiarity with the social sciences to deal on an informed and critical basis with the specialized vocabulary and complex models of social action employed by the authors. Again, the mastery of these elements by the students—assuming such to be possible from the social science excerpts in the text—threatens to absorb much valuable time that many instructors would prefer to devote to other matters. Moreover, it may be doubted whether the text addresses itself to doctrinal issues with sufficient precision to prove useful for students receiving their first exposure to property law. Nor does it seem realistic to expect that students a few months into law school will possess the skills and background necessary to accomplish the sophisticated appraisal of the social impact of legal norms desired by the authors.

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3. D. HABER & M. MCDOUGAL, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT, *reviewed*, Dunham, 62 HARV. L. REV. 1414, 1420 (1948).

III. Land Ownership and Use

In fashioning his own text, Berger was not fully content with the work of either the traditionalists or McDougal and Haber. His reservations regarding the former are evidenced in his acknowledgment of Professor McDougal as his "first mentor and the man who did so much to liberate property instruction from the grip of the antiquarian."[4] Nor were the techniques and concepts of the social sciences as appealing to him as they were to his mentor. Though reflecting the influence of both casebook styles, therefore, *Land Ownership and Use* bears the unique stamp of its author throughout and arrives as an independent addition to the roster of first year property texts.

Berger's preface constitutes a virtual declaration of war on the traditional text. The *casi belli* are four: the inclusion of extensive conveyancing and future interests materials in the text and its de-emphasis of land use planning and legislative materials. He argues that conveyancing should be postponed until the student has developed a greater familiarity with the tax and financing aspects of the property transaction. His other objections spring from his conviction that the first year property course should emphasize "land in present-day America."[5] Future interests, he feels, should be left for a subsequent course in estate planning because it is primarily a tool for controlling the transmission of wealth. Land use planning, on the other hand, deals directly with the process by which the land resource is allocated and deserves equal billing with the more conventional material on estates in land. In view of the pervasive involvement of government in land use today, he asserts, property law can no longer be treated as the quaint common law subject of yesteryear. Instead, the meagre legislative materials of the traditional text should be expanded to reflect increased governmental intervention in an area that had once been committed largely to private decision-making.

The structure of *Land Ownership and Use* reflects Berger's differences with the traditionalists. The text is divided into three chapters that deal respectively with the institution of property, the formation of interests in land and the allocation and development of land resources. The introductory chapter explores the role of the state in the creation and maintenance of property interests, and provides a brief glimpse of a variety of non-land resources to which these interests attach. Chapter Two treats estates in land and the landlord-tenant relationship. Using less than 175 pages, Berger runs the gamut from the lordly fee simple absolute to the lowly easement, license and profit. The various sources of leasehold rights and the remedies of landlord and tenant upon breach of the lease are then explored in the following 100 pages.

Chapter Three, which comprises almost two thirds of the book, considers

4. P. xi.
5. P. ix.

the allocation and development of land resources through private legal arrangements, the courts and community planning. Under the first subheading, Berger explores such devices as the easement, real convenant, equitable servitude and defeasible estate in terms of their utility for controlling land use. The extremely brief second subsection reviews the judicial application of the doctrines of lateral and subjacent support, waste and nuisance. The final subsection commences with an overview of the urban planning process before concentrating upon zoning, mapping and subdivision regulation. An extensive treatment of eminent domain problems by means of cases, notes and legislation follows. The section and volume conclude with an abbreviated foray into the complexities of urban renewal.

Berger emphasizes contemporary land use issues and the legislative dimension of property law from the outset by opening *Land Ownership and Use* with Title IV of the Civil Rights Bill of 1966 and representative excerpts from the House debates on that bill. *United States v. Willow River*[6] and the reflections of Bentham and Hohfeld on the property concept follow closely behind. Imaginatively employed, these materials constitute effective tools for introducing students to the issues that will perplex and challenge them in a variety of more concrete contexts throughout the book and, indeed, in any fundamental consideration of the property institution. Though covering less than twenty pages, the selections provide especially fertile material for probing the role of government in creating and restricting property interests and the potentialities of language for clarifying or obfuscating property discourse.

The first chapter continues with a potpourri of non-real estate property interests. Securities, personalty and fixtures, patents and copyrights, and the various causes of action that employ the language of both tort and property are explored through constitutional and statutory provisions, law review excerpts, cases and notes. Happily, the most extensive treatment is reserved for the last of these subjects. Berger reproduces the classic exchange among Justices Pitney, Holmes and Brandeis in *International News v. Associated Press*[7] as well as a variety of opinions in which counsel or the court carelessly tangle elements of the torts of unfair competition, libel and invasion of the right to privacy with elements of property doctrine and equitable remedies. After exposure to the merry-go-round of "quasi-property"[8] and to other judicial gaffes, students become more deeply aware of the follies of loose language and of the necessity for discerning contextual analysis as a basis for meaningful generalizations about the institution of property.

In concluding Chapter One, Berger presumably intended to stimulate student consideration of the relationship of American property doctrine and

6. 324 U.S. 499 (1945).
7. 248 U.S. 215 (1918).
8. The phrase is from Justice Pitney's opinion for the majority in International News v. Associated Press, 248 U.S. at 242.

practices to their counterparts abroad as well as to other legal fields at home. The first objective is well served by the inclusion of material on Soviet housing law[9] liberally annotated by Berger to contrast practices in the Soviet Union with those in the United States. The second objective is pursued through excerpts from Reich's *The New Property*;[10] Reich's argument that the interest of recipients in government largesse should be upgraded to the status of "property" necessitates an examination of important issues that employ the language of both property and administrative law.

Instructors will disagree on the merits of the introductory chapter. Some will be saddened by the disappearance of the customary foxes,[11] fowl[12] and fin-back whales,[13] possibly because they have grown fond of these fabled creatures, but more likely because they would have preferred an opening chapter organized around a relatively narrow, tightly constructed problem in which neophyte students would receive their baptism of fire. They may also question whether the diverse interests dealt with in the chapter can meaningfully be collected under the rubric afforded by the term "property." Others, including this reviewer, will regard the chapter as a challenging but rewarding vehicle for the initial meetings of the property course. Perhaps overzealous in pursuing their own notions of how best to introduce students to the property field, they will appreciate that the materials are of sufficient depth, comprehensiveness and vitality to provide the stuff for a wide variety of individual approaches and to kindle student enthusiasm from the start.

Berger's quarrel with the historical orientation of the traditional casebook confronted him with a dilemma in constructing his own text. Deleting the customary historical and classificatory sections altogether would leave more space for a functional treatment of contemporary issues. But an understanding of the latter requires some familiarity with ancient property learning. Moreover, the advanced property curriculum, as presently structured, presupposes an extensive grasp of this learning, particularly as it bears upon such areas as future interests. To eliminate this material would upset deeply rooted pedagogical patterns and might deprive students of needed background material for many of their advanced property courses.

As developed in Chapter Two, Berger's solution is a compromise. Like the traditionalists, he reviews the litany of property interests from fee simple absolute to license, and examines doctrines of an earlier age. But his discussion of the historical and common law background of these doctrines is skeletal.

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9. Rudden, *Soviet Housing Law*, 12 INT. & COMP. L.Q. 591 (1963).
10. Reich, *The New Property*, 73 YALE L.J. 733 (1964).
11. Pierson v. Post, 3 Cai. R. 175, (N.Y. Sup. Ct. 1805).
12. Keeble v. Hickeringill, 11 East 574; *s.c. sub nom.* Keeble v. Hickeringall, Cas. t. Holt 14, 17, 19; *s.c. sub nom.* Keble v. Hickringill, 11 Mod. 74; *s.c.* Mod. 130; *s.c. sub nom.* Keeble v. Hickeringhall, 3 Salk. 9 (K.B. 1707).
13. Ghen v. Rich, 8 F. 159 (D. Mass. 1881).

The various fee interests are treated in four cases and accompanying notes;[14] very little is said about the contingent and vested remainder and the executory interest.[15] One case and an extensive note are allotted to the complex subject of obtaining fee title through adverse possession against private parties.[16] His stress is upon the recent as well as the ancient: condominiums and cooperatives, statutory tenancies and rent control, tax and accounting considerations and even an analysis of squatter rights in the underdeveloped world receive attention alongside the fee tail male and common recovery.

In choosing the path of compromise, Berger has run the risk that not enough might be too much. Estates in land is an exacting subject, and one not well suited for abbreviated treatment. Indeed, the authors of two other recent property texts have omitted the topic altogether.[17] But this reviewer agrees with Berger that given the present allocation of topics in the property curriculum, some treatment of estates in land is virtually imperative in a text expressly designed for use in the first year. Moreover, Berger has made the best of a bad situation; his encapsulation of the topic and introduction of contemporary materials are skillfully executed. Instructors who desire more detailed treatment will have no difficulty in supplementing the section; those who prefer a deemphasis of the topic can move through the section with dispatch. In truth, however, the problem cannot be resolved within the confines of the first year text alone; its ultimate resolution will require a more rational allocation of subject matter between those property courses dealing principally with real estate and environmental issues and those treating the creation and transmission of wealth in land and other resources.

No compromise was necessary, however, in Berger's treatment of the landlord-tenant relationship in the remainder of Chapter Two. Free of the constraints of the previous section, he has designed an incisive and timely review of leasehold problems. In addition to an exhaustive remedies section, the materials review the rights of the tenant to quiet enjoyment, fitness of the premises and delivery of the same. They feature a model apartment lease which provides a useful, if somewhat unlikely, point of reference for dealing with these and other covenants.[18] Professor Berger has also assembled a number of cases and notes that explore the vexatious issue of the status of the lease as contract or conveyance and the consequences that result from the choice of either label.

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14. Pp. 113-38.
15. Pp. 120-21.
16. Pp. 244-53.
17. G. Lefcoe, LAND DEVELOPMENT LAW, CASES AND MATERIALS (1966); D. Mandelker, MANAGING OUR URBAN ENVIRONMENT (1966).
18. Pp. 294-99. The model lease was prepared by the Committee on Real Property of the Bar Association of the City of New York. Berger notes that the New York Real Estate Board has preferred to use its own form which is substantially more favorable to the lessor. P. 294 n.26.

This section deals perceptively with the manner in which legislative and judicial developments have supplemented or modified the traditional common law remedies. It contains relevant provisions of the housing codes of California and New York and of the rent abatement legislation from the latter state, and probes their impact through significant recent cases and studies. It also recounts the crusading, if somewhat confused reasoning of Brooklyn Civil Court Judge Morrit to expand the common law doctrine of partial eviction to permit low income tenants to remain in their defective apartments without paying rent. ("It's pure Cardozo," Judge Morrit explains).[19] Looking to the landlord's side, it reviews the New York summary proceedings statute and its application by local judges in two recent, seemingly incompatible decisions.

At the same time, Berger's selection of materials fails to afford an accurate picture of problems and prospects of the slum tenant. Students might well conclude from the section that the housing problems of the urban poor are attributable solely to the greed of absentee slumlords, and that their solution lies in improving code enforcement and rent abatement procedures. But these problems are the product of an entire network of factors including such additional elements as the reluctance of institutional lenders to enter the ghetto, the structure of federal and local tax policies, the unprofitability of slum properties, and the effect on the urban housing market of the radical demographic shifts of the last thirty years. The absence of at least a comprehensive note dealing with these problems weakens the section.

Berger has joined with virtually all of his predecessors in organizing the leasehold section in terms of the various "standard" covenants and remedies. With apologies to Miss Stein, these authors seem to assume that a lease is a lease is a lease. Unfortunately, these covenants do not carry the same import in public housing leases, normal residential leases between private parties, short-term commercial leases with a percentage rental and long-term net commercial leases designed to serve primarily as financing devices. Emphasizing the covenant or remedy independently of the transactional context of the lease in question, therefore, may distort the significance of the covenant or the utility of the remedy. Moreover, this approach masks the remarkable diversity of leasing practices in common use today and the variety of functions that leases now serve. Although extensive treatment of the various leases is both impossible and undesirable in the first year text, a systematic treatment of their differing economic and social roles could be accomplished without difficulty in a number of notes or in a single essay.

The first section of Chapter Three deals with real covenants, equitable servitudes and other devices for controlling land use through private arrangements. Those who have witnessed the utter confusion that plagues even the

19. P. 341.

best of students upon exposure to these devices will agree that the section is indeed a *tour de force*. Thanks to Professor Berger's superb gifts as teacher and legal craftsman, the material is both intelligible and highly stimulating.

Berger has explored the problems associated with the creation, maintenance and termination of these control devices with admirable balance and depth. His treatment of that ogre of the first year property curriculum, the real covenant, is representative of the general quality of the entire section. At first glance, his approach seems decidedly conventional. *Spencer's Case*,[20] *Miller v. Clary*[21] and *Neponsit Property Owner's Assn. v. Emigrant Savings Bank*[22] are hardly unusual selections in a treatment of the real covenant. But closer examination reveals that his effort is distinguished by its lucid commentary and its sensitivity to context and function. The essays and notes in this section, which are among the best in the book, provide helpful analytical models and spark a vigorous re-examination of long-frozen doctrine. Their success in assisting students to work through the maze of the rhetoric and dogma in the cases demonstrates how effectively Berger's time in the classroom has been spent.

Berger renders the formal rules even more vital by viewing real covenants in terms of the functions they serve and the contexts in which they are found. The content of frequently recurring residential covenants,[23] the role of home associations in administering them,[24] their likely bearing on the economic development of residential neighborhoods[25] and their use in the by-laws of condominium developments[26] are only some of the topics considered in the section. These excerpts from the literature, statute books and reports along with Berger's incisive commentary sharpen the student's comprehension of the poorly articulated and often contradictory values in the cases.

The middle section of Chapter Three requires a mere twenty pages, and is apparently designed to highlight the unique contribution of the courts to the land development process. Following a section devoted to private arrangements and preceding one on legislative controls, it rounds out the trilogy of decision-making levels involved in that process. Considerations of symmetry aside, however, it is not clear to this reviewer that the materials are any better adapted to illuminate the role of the judiciary nor less concerned with private volition or legislative edict than those found in the first section of the chapter or in other sections of the book. Perhaps Berger contemplated that the numerous opportunities provided elsewhere for discussing the role of the judiciary in land use decision-making justified the abbreviated review of the issue found in this section.

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20. 5 Co. Rep. 16a, 77 Eng. Rep. 72 (K.B. 1583).
21. 210 N.Y. 127, 103 N.E. 1114 (1913).
22. 278 N.Y. 248, 15 N.E.2d 793 (1938).
23. Pp. 423; 495-97.
24. Pp. 483-84.
25. Pp. 498-505.
26. Pp. 447-48.

Berger's differences with the traditionalists appear most clearly in his decision to devote over one third of his book to community planning problems, an area previously reserved for entire texts and advanced seminars. The decision is implemented in the final section of Chapter Three, which is divided into three functional subsections. The first includes the materials on planning, zoning, mapping and subdivision regulation; the second, the materials on eminent domain; and the third, those dealing with the federal urban renewal program.

The initial subsection commences with an abbreviated review of the urban planning process through legislation creating a city planning agency and outlining representative urban plans. Berger then examines the role of zoning as a specific planning tool. He contrasts the changing styles in zoning legislation by placing the 1926 version of the Standard State Zoning Enabling Act back to back with the 1960 version of the San Francisco City Planning Code. The statutes are followed by a series of cases which explore the constitutional basis of the zoning power and its role in defining permissible land uses, regulating the density, appearance and pace of community development and eliminating non-conforming uses. Berger also probes the flexibility afforded the zoning process through the variance, special exception and rezoning procedures.

The mapping and subdivision regulation materials concentrate upon the permissible bounds of governmental intervention in the development process: the former, through an examination of the practice of reserving land for specific uses by appropriate annotations on the official map; the latter, through a consideration of the propriety of municipal exactions of land or payments in kind from developers for parks, schools and other public facilities.

The eminent domain materials review the constitutional requirements of "public purpose" and "just compensation." The public purpose doctrine is appraised in light of the controversy still raging over the construction of the 110-story World Trade Center in Manhattan. The implications of the just compensation requirement are treated through an examination of the doctrine of highest and best use, the criteria establishing the "compensability" of an interest and the allocation of condemnation awards among the owners of various interests in the parcels taken.

In selecting the urban renewal materials, Berger apparently wished to offer a broad view of that process within as few pages as possible. Accordingly, he excerpted relevant portions of various House and Senate reports that accompanied the major housing bills from 1949 to 1966. In short compass, the student is exposed to the initial Title I concept of urban redevelopment (1949), the workable program requirement (1954), the decision to provide housing for the elderly (1961), the emphasis upon code enforcement (1964), the rent supplement program (1965) and, finally, the host of objectives crammed into the Demonstration Cities and Metropolitan Development Act of 1966. Berger

then utilizes cases to explore the constitutional basis of state urban renewal legislation and the role of the judiciary in reviewing agency efforts to define project boundaries and select the project redeveloper. The materials conclude with studies of the limited success of relocation programs for the displaced resident and small businessman.

The most outstanding feature of the community planning section is the fact that it has been included in the book at all. Berger has joined with McDougal and Haber in challenging the dubious priorities of the orthodox text. Indeed, he even suggests that these materials might properly have been placed in the beginning of the book.[27] In addition, his careful organization of the materials enables the students to follow the main lines of inquiry with a minimum of stumbling. His notes on the consequences for metropolis of large lot suburban zoning,[28] on the non-statutory elements controlling the variance process[29] and on the judicial construction of the public purpose doctrine[30] deserve special commendation.

Of particular note is his decision to treat the variance process by tracing the progress of an actual application for a funeral home permit from the hearing stage all the way to an appeal before the highest court of the state. This short section of twenty-two pages[31] is a mini-universe populated with vaguely worded statutes; inarticulate agency and court opinions; the taboos and preferences of the decision-making elite of the community; and the differing perspectives of the various participants in the land development process. Thus presented, the student's grasp of that often turbulent process is concrete and immediate. Berger uses the scenario provided by the World Trade Center controversy with similar success in reviewing the public purpose requirement in the condemnation area.[32]

A delight to teach, the section generates great enthusiasm among the students. The reasons for their spirited response are many. Berger's remarkable ability to stimulate and maintain student interest in the classroom has carried over into the text. Moreover, he expressly set out to write a book that would be responsive to the "interests of the young people we teach."[33] Most importantly, today's students are involved personally and, often, knowledgeably in the various facets of the urban crisis. Unlike the traditional casebooks, *Land Ownership and Use* has not frustrated their desire to explore in depth the legal ramifications of these issues.

In view of the pioneering nature of the section and its many attractive features, it is perhaps ungenerous to ask for more. But the section fails to

27. P. ix.
28. Pp. 685-90.
29. Pp. 780-84.
30. Pp. 860-76.
31. Pp. 758-80.
32. Pp. 860-69.
33. P. ix.

satisfy as fully as it might because Berger holds back from implementing the bold initiatives set forth in his preface and in the essay introducing the section. His treatment of the zoning process affords a case in point. Avowedly, he undertakes to illuminate the structure of the decision-making *process* that governs land development activity and to explore the "non-doctrinal institutions that are being developed to help achieve land use goals."[34] But the choices underlying the assembly and presentation of the zoning materials impede the accomplishment of these laudable objectives.

Berger relies overwhelmingly upon appellate opinions. It is both paradoxical and unfortunate that one of the most contemporary sections of the book should be cloaked in such conventional garb. As Justice Hall observes in a dissenting opinion reproduced in full by Berger,[35] pitifully few judicial opinions venture beyond the safety of shop-worn phraseology for the hard task of appraising the relevant policy variables that are at stake in a challenged zoning determination. Nor is it fair to expect that cases will usefully communicate the important elements at work in land use controversies given the infrequent resort to judicial remedies by the participants in the development process and the necessarily limited perspective of the reviewing court. Relying on the cases themselves to somehow generate an effective frame of reference for dealing with zoning issues is bootstrapping of a dubious sort. The section would benefit from less reliance on the cases and greater participation by the author in sculpting a framework within which the judicial abstractions can be examined with greater profit.

A more determined effort in this direction might also have remedied Berger's tendency to overlook the fundamental differences in the zoning process as it operates in the central city, in suburbia and at the metropolitan fringe. His decision to treat zoning mechanisms independently of the physical environment in which the development permission is sought parallels his effort to review the "standard" leasehold covenants in isolation from the various types of leasing transactions in which they are used. Whether or not the impact of locational differences merits the star billing that Professor Mandelker has given it,[36] a more explicit treatment of this variable would assist the students in realistically appraising much that presently appears as naked generalization.

Berger's failure to get out from under the cases also results in a presumably undesired emphasis upon conventional zoning rules rather than upon the process of zoning. As Richard Babcock has suggested,[37] however, zoning is more like a game than a compendium of rules. It comes complete with players,

34. P. 392.
35. Vickers v. Township Committee of Gloucester Township, 37 N.J. 232, 181 A.2d 129 (1962). Pp. 664-72.
36. *See* D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT x, 501-996 (1966).
37. R. BABCOCK, THE ZONING GAME (1966).

stakes, referees, strategies and rules. At best, these rules are only one of a group of influential factors in the process. More likely, their impact is substantially diluted or distorted by the imprecision of their goals or draftsmanship, by the partial perspective of the players who seek to manipulate them and by the inadequacy of judicial efforts to oversee their application in particular settings. Realistically viewed, therefore, they seldom perform their supposed normative function in isolation from the other elements in the zoning process; in fact, they often do little more than sum up the manner in which the other elements have meshed in the context of a particular controversy.

Accordingly, any attempt to catch the sweep and movement of the zoning process must address itself in proper measure to each component of the zoning game rather than to zoning doctrine alone. To be sure, Berger has made impressive strides in this direction as the variance materials, many of the notes,[38] and his general sense of the zoning process testify. But the section can be improved by exhuming and highlighting materials presently buried between the cases.[39] More attention might also be given to zoning procedures and remedies. And enough background material on local government law should be provided to illuminate the legal framework within which metropolitan and sub-metropolitan agencies strive for control over decisions affecting their common physical environment.[40]

CONCLUSION

A. *The Traditional Casebook*

The appearance of *Land Ownership and Use* as an alternative to the traditional casebook introduces an element of healthy competition into a field long

38. See notes 28-31 *supra*.

39. For example, the problem of the shift from zoning through pre-set regulation to zoning by administrative review of development applications is dealt with in a short excerpt of an article by Krasnowieki that follows Eves v. Zoning Board of Adjustment of Lower Gwynedd Township, 401 Pa. 211, 164 A.2d 7 (1960). This interstitial treatment hardly seems appropriate in view of the critical importance of that issue today. See note 40 *infra*.

40. The absence of this material accounts for Berger's disappointing treatment of the most important trend in zoning today—the substitution of zoning through administrative processing of development applications for zoning through pre-set regulation. The proponents of this trend question the philosophy underlying the 1926 Standard Zoning Enabling Act that land use should be controlled through detailed legislative prescriptions of indefinite duration. For an account of this movement see, *e.g.*, Krasnowieki, *The Challenge of Planned Unit Development*, Regional Plan Association Zoning Bull. No. 114 (Feb. 1965); Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60. They would de-emphasize the latter and allow local officials much greater flexibility in administering development standards providing that procedural safeguards were appropriately expanded. Their viewpoint raises fundamental issues concerning the relevance of the separation of powers doctrine at the municipal level, the soundness of the zoning mechanisms set forth in the 1926 Act and the manner of insuring procedural regularity in the administration of zoning and subdivision ordinances. But the zoning mechanisms of the 1926 Act, updated to reflect some of the newer techniques, provide the framework for Berger's zoning section, and issues of zoning procedure are largely ignored. In consequence, it is necessary to supplement or otherwise adapt the materials in order to portray this significant development effectively.

monopolized by the orthodox assumptions detailed earlier. The most talented practitioners of the traditional casebook form have shaped it into an elegant, highly burnished vessel filled with the accumulated learning of many centuries and with materials portraying important facets of contemporary transactional problems. Its historical patina and rigorous intellectual demands have attuned a generation or more of lawyers to many of the classical antecedents and intellectual requirements of their profession.

At the same time, the traditional text is seriously deficient both in its substantive form and in its method of inquiry. The case for the former criticism rests on a postulate that has been implicit throughout this review: the first year property text should play a pivotal role in an over-all property curriculum that itself provides a balanced introduction to the problems confronting the real estate professional. The traditional text falls well short of this mark, even in the hands of a gifted instructor. Its treatment of the area to which it is expressly addressed—the creation and transfer of interests in land among private clients—is partial and uneconomic. Its authors have largely ignored the impact upon property transfers of so-called "public law" in spite of the pervasive influence of that law in shaping the land transaction.[41] Their sallies into the mechanics of pre-modern conveyancing, common law landlord and tenant, and various personal property issues consume weeks of class time with little corresponding value in terms of illuminating contemporary land transfer problems.

The matters to which the traditional text is not addressed constitute an even greater source of concern. There is distressingly little carry-over between what is taught in the first year property course and the tasks performed by the real estate expert in private practice, in government or on the law faculty. Representatives of all three groups are increasingly called upon to contribute their knowledge and skills in resolving a host of land use, housing and other environmental problems that the course ignores. Nor are the content of that course or the relative emphasis of the remainder of the property curriculum responsive to the issues which have led Congress to declare that "improving the quality of urban life" is the "most critical domestic problem facing the United States."[42]

The effectiveness of the case method as a tool for exploring the issues alluded to in the previous paragraph is dubious. That technique functions best when the information constituting the object of the inquiry can be derived from the logical analysis of material within the four corners of the cases. Hence, it provides a satisfactory instrument for probing the requirements of the Rule

41. The illusory nature of the supposed distinction between "public" and "private" land law has been detailed by Professor Lefcoe in the preface to his text, and convincingly demonstrated in the materials that follow. *See* Lefcoe, *supra* note 17, at x to xi.

42. Demonstration Cities and Metropolitan Development Act, 42 U.S.C. § 3301 (Supp. III, 1967).

in Shelley's Case or the doctrinal differences between the vested and contingent remainder. But it is of questionable value in exploring whether large lot suburban zoning or stringent building and housing codes further the "general health, safety and welfare." McDougal and Haber found the case method overly confining precisely because their inquiry extended beyond the authoritative doctrines enunciated by the courts, and required data that could not be extrapolated from judicial opinions. The same problem has confronted the authors of the newer property texts who, while not expanding their inquiry as ambitiously as McDougal and Haber, have nonetheless framed it more broadly than the traditionalists.

B. *Land Ownership and Use*

Although much of the standard first year fare is treated in *Land Ownership and Use*, that text also includes, or at least introduces, many of the issues that provide the grist for contemporary real estate practice. Unlike the traditional text, therefore, it provides an excellent background in the latter problems for students unable to take subsequent courses in land use and urban affairs. In addition, it enables instructors who teach these subjects to attack metropolitan issues on a more sophisticated basis than would otherwise be possible.

Professor Berger has also taken important strides towards devising an adequate technique for exploring the newer problems with which he deals. Focusing upon the contemporary functions served by property doctrines, he has selected a variety of problematic contexts within which these doctrines can be meaningfully examined. His treatment of the real covenant, the public purpose requirement, and the variance process exemplify the effective use of this approach.

The contextual approach differs significantly from those employed by the traditionalists and by McDougal and Haber. The former tend to treat the rule or doctrine as the relevant unit of inquiry and embrace the case method as the instructional device best capable of exposing the process whereby these rules and doctrines are made, unmade or modified. Berger's unit of inquiry, on the other hand, is the problem or context around which rules cluster and from which they derive their function and contemporary meaning. Unlike McDougal and Haber, Berger offers no comprehensive model of social action from which hypotheses about the legal process are derived. Organized on a more modest and inductive basis, his text deals with issues that will be readily recognized by real estate attorneys and governmental officials involved in the land use process. Though concerned with process and policy, Berger prefers to let the student draw his own conclusions on these matters.

In his treatment of metropolitan problems, however, Professor Berger has

not fully succeeded in moving from the case method to the contextual approach. Nor indeed is this transition likely to be achieved soon by any of the authors of the newer property texts. A lengthy period of experimentation and a double measure of creative imagination will be required to identify the major problem areas and to deal with the complication that most areas cannot be effectively explored without some reference to doctrines that run far afield of property law. For the time being at least, Berger and the other authors have tended to settle for a pattern that combines features of the case and contextual approach. But Berger's zoning section indicates that this pattern must be used with balance and care; in emphasizing cases to the detriment of sorely-needed contextual exploration, the section lacks the economy and purposefulness found elsewhere in the book.

* * *

Property instruction over the last generation has been hampered by severe substantive and methodological barriers which have come to full light with the present urban crisis. A trend is now discernible, however, towards re-examining the assumptions that have controlled the content of the first year text and the structure of the entire property curriculum over the last generation. *Land Ownership and Use* evidences the vitality and direction of that trend. Three years' experience in the classroom with preliminary versions of the text have convinced this reviewer that it is a splendid vehicle for the first year property course. Professor Berger has not, of course, eliminated all the accumulated impediments of the past or resolved definitively the novel problems of technique created by his bold initiatives. These tasks must await future editions of *Land Ownership and Use*. In successfully challenging patterns that speak to the priorities of another time, however, he has advanced the day when the law schools will begin to make their full contribution to meeting the challenge of "the most critical domestic problem facing the United States."