

A copy of this syllabus (and of everything else that I hand out in class) is available on the web: <http://www.law.harvard.edu/faculty/cdonahue/courses/prop/>. There's a link in your "MyHLS."

PROPERTY SECTION 4
Tentative Syllabus and Assignments—Revised

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I do not allow the use of laptop computers in class. (I may make an exception for those who are seated in seats where they have difficulty seeing the screen, but we should be ok this semester in WCC 2004.) While there are a number of reasons for this, the most compelling from my point of view is that they seem to be a barrier to conversation and thought. For those who are concerned that they might miss something taking handwritten notes, I will have every class recorded, and the recordings will be available online.

1. *Introduction.* Traditionally, property was a six-hour course taught over the entire first year of law school. With the increasing "semesterization" of first-year courses, the tendency is to relegate property to the spring. There are, no doubt, some things about the course that may be a bit easier to understand after one has had a semester of law school; there are also, however, some things about the course that make more sense in the context of the first-semester program. I have taught the course in both the fall and the spring and have found that the advantages and disadvantages of each semester are about evenly balanced.

Property begins at the beginning, at least conceptually and methodologically. It asks some basic questions about legal method, particularly about the analysis of cases, and it introduces us to the basic forms of establishing entitlements in our law of property. It then proceeds to spend about a month on conveyancing and estates in land, about a month on private and public controls on land use, and about a week wrapping up the big ideas. While there are certainly plenty of other topics that we could cover, this coverage manages to introduce most if not all of the major themes in the modern law of property.

2. *Materials.* The book for the course is C. DONAHUE, CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION (tent. 4th ed., multilith, 2012) [DKM4]. The materials are based on C. DONAHUE, T. KAUPER & P. MARTIN, CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION (3d ed., West Publishing Co., 1993) [hereafter DKM3]. You don't have to buy DKM3. You certainly don't have to buy a new copy. All the assigned readings in the course will be in the tentative 4th edition. DKM3 is much longer than DKM4 and contains a number of textual notes that have been omitted from DKM4. It offers a supplement to DKM4, but you may be better off buying the "Gilbert's Outline" of Property (see below).

I urge you to read the Introduction to DKM4 now. The The Table of Contents of DKM4 and the Syllabus also provide a skeletal outline as we go along. Finally, I will distribute outlines of the material as we cover it. (The first one is attached to this syllabus.) All of these attempt to give you the "big picture" of the material, something we tend to lose sight of in class in our effort to figure out who sued whom in the *Jones* case.

Secondary reading. JOSEPH SINGER, PROPERTY LAW, RULES, POLICIES AND PRACTICES (4th ed. 2006) is a relatively new hornbook that covers most of what we will be covering in the course. It is a long book and has not yet stood the test of time, but it is probably the best comprehensive, single-volume hornbook on the market. W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY (3d ed. 2000) is a more traditional hornbook covering much of the same ground. For those seeking more compact coverage J. CRIBBET,

PRINCIPLES OF THE LAW OF PROPERTY (3d ed. 1989), J. SPRANKLING, UNDERSTANDING PROPERTY LAW (2000), and R. BERNHARDT, REAL PROPERTY IN A NUTSHELL (4th ed. 2000) may be more helpful than harmful if properly used. Some students find C. MOYNIHAN & S. KURTZ, INTRODUCTION TO THE LAW OF REAL PROPERTY: AN HISTORICAL BACKGROUND OF THE COMMON LAW OF REAL PROPERTY AND ITS MODERN APPLICATION (4th ed. 2005) or T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS (2d ed. 1984) useful for the estates section of the course. For various reasons--one of which is ignorance--I do not recommend any of the other standard student books on property, except for the "Gilbert's Outline" discussed below. You may buy any of the above-cited books (or the Gilbert's) if you wish, but the only required book is DKM4.

This year, I am recommending but not requiring, that students purchase the "Gilbert's Outline" of property. The author, James Krier, is a professor at the University of Michigan, and his knowledge of property is profound. His predecessor, Jesse Dukeminier, was a professor at UCLA and one of the leading property scholars of his generation. My problem is not with the competence of the authors; my problem is with the *genre*. This is something that we should talk about during the semester. I don't always agree with Krier's statement of the rules, and I frequently would be more qualified than he is. The nature of an outline is to oversimplify.

3. *Syllabus*. You will find that the syllabus contains, in addition to page assignments, a brief description of what the class will be about. When a case name or names are given, we will devote much of the class to analysis of that case or those cases. When a case name is not given, we will devote the class to a discussion of problems, doctrine or policy. The fact that a case is not listed in the syllabus does not mean that you should not read the case if it is on the assigned pages; rather the fact that the case name is not mentioned in the syllabus means that I hope you can handle the case by yourselves and will try to put the class emphasis elsewhere. Page references are to DKM4 are indicated by "S," a holdover from the fact that it began life a Supplement to DKM3. Since I'm working on updating DKM4, the pages may get out of whack later in the semester. If they do, I'll issue an updated version of the syllabus.

4. *How to Proceed*. At the beginning of each of the numbered sections of the book, I recommend that you skim through the section, getting some sense of its basic organization. It will frequently be helpful to read over the textual notes before you prepare the principal cases, but a reading of the notes (and even more of an outline) should never substitute for a reading of the principal cases. On the other hand, the notes are important. They are designed to provoke your thinking on a given topic and to give you doctrinal background which is frequently important for understanding what is going on in the principal cases.

DKM was designed to be taught out of order. It therefore has more than the usual number of cross-references. Most students find that the cross-references are more useful when they come to review the material than they are when they dealing with the material for the first time.

You will frequently come to questions in the notes for which you cannot provide a simple answer. This should not concern you. You should, however, begin to ask yourself why it is that you cannot give a simple answer to the question, and if this process provokes some thought on the nature of legal materials generally, so much the better. You should feel no compulsion to look up the authorities cited in the notes unless you really want to. You should, however, familiarize yourself sufficiently with legal citation form that you know what it is that is being cited.

5. *Question and Answer Sessions*. Beginning in October (earlier if there is demand), I will schedule weekly question and answer sessions probably on Friday afternoons (they usually last about an hour). These are not extra classes, and I will cover no new material. Indeed, I won't "cover" any material. These sessions

are designed to allow you to ask any questions that you want to ask. Attendance is not required. In the past most students have come to some of them; a few have come to all or none of them. In the last question and answer session in December, I will go over an essay question from an old exam. I will also schedule one during the exam period before the exam.

6. *Office Hours.* My office is in Hauser 512. My assistant is Jane Reader who sits in Hauser 518. My office hours are currently scheduled from 1:00-3:00 on Mondays, or by appointment. There is a sign-up sheet on the door. Signing up for the office hours is usually not necessary at the beginning of the term, but it will be by the end. I don't think that office hours are a particularly good time to ask specific questions about the course. That's what the question-and-answer sessions are for.

7. *Syllabus.* Setting a syllabus for a 1L course is dangerous business. Every class has its own rhythm. I am confident that we will take up the material in this order and that the readings will be no longer than what is given below. I am far less confident that we will take up the material on the specific dates mentioned or that what we will take up will be exactly what is given here. This is the basics; there will probably be variations.

Topic I. ESTABLISHING ENTITLEMENTS

A. *Possession = Ownership?*

Tue., Sep. 04. *Pierson*, pp. S1-S23. (Read the principal case carefully, probably more than once. Then look at the Questions on p. S6. The Notes that follow give you material that you can use in answering the questions. In the first class, we probably will not have reference to the material in Notes 4-6, but we may well have reference to the Problems on pp. S22-22. The Note on the Reception will not be the subject of much discussion.)

Wed., Sep. 05. *Pierson* (cont'd); *Keeble*, pp. S23-S28. (Class will begin with *Keeble* and will then loop back to consider *Pierson*, particularly in the light of Notes 4-6. Neither the Note on Reports nor the Note on the Private Law of Wild Animals Today will be subject of much discussion, unless you want to ask questions about them.)

Mon., Sep. 10. *Agway*, pp. S28-35. (The Note on Game Laws is important.) *Blackstone*, *Maine*, *Locke*, pp. S35-43.

Tue., Sep. 11. *Johnson*, *Percheman*, pp. S43-S59. (We will not cover the Note on Indian Titles in class, unless you want to ask questions about it.)

Wed., Sep. 12. *Maitland*, *Tapscott*, *Winchester*, pp. S43-S72. This is long. Focus on the principal cases. The notes are placed before the cases because they help explain what's going on in the cases. You may, however, want to do it the other way around, i.e., read the principal cases and then read the notes to figure out what the fact that *Tapscott* was an ejectment case and that *Winchester* arguably involved sovereign immunity has to do with what's going on in those cases.

B. *Possession vs. Ownership*

Mon., Sep. 17. Adverse Possession of Land, pp. S59-92. (Class discussion will focus on the questions posed in the notes rather than on the principal cases.)

Tue., Sep. 18. Adverse Possession (cont'd), pp. S92-102. (We will probably not cover the Note on Disability Provisions, though it provides a nice exercise for self-testing. Class discussion will focus on the questions posed on pp. S97-98, making use of the analysis suggested by Hohfeld.)

Wed., Sep. 19. Adverse Possession (review the above assignments). Problem, pp. S102-103. (What we do with the problem on pp. S102-03 is, to a certain extent, up to you.)

C. Possession or Ownership: What is it worth?

Mon., Sep. 24. *Geragosian*, pp. S104-121.

Tue., Sep. 25. *Edwards* (2 cases), pp. S121-35.

Wed., Sep. 26. Review *Edwards* (2 cases), pp. S121-35. Note on Present Value Calculations, pp. S135-37.

D. A Very Brief Introduction to the Property You Can't Touch

Mon., Oct. 01. Introductory Note, *INS v. AP; Feist Publications v. Rural Telephone Service Company*, S137-54.

Topic II. TRANSFER OF OWNERSHIP OF LAND

A. Conveyancing

Tue., Oct. 02. *Metzger*, Statute of Frauds, *Hayes*, pp. S155-69. Class discussion in the first half of the class will focus on the questions on p. S162. Then we'll move on to *Hayes*

Wed., Oct. 03. *Micklethwait, Hood*, pp. S169-81.

Mon., Oct. 08. Columbus Day (holiday)

Tue., Oct. 09. Fall semester recess begins

Wed., Oct. 10. Fall semester recess ends

B. What You Can Transfer

Mon., Oct. 15. Introduction to Common Law Estates and Future Interests: Present Estates: Fee Simple and Life Estates, pp. S182-86, S193 (a brief introduction to the life estate), Problems 1-5 (p. S186); Present Estates: Fee Tail (introducing the reversion and the remainder), Supplement pp. S186-S88, [we probably will not do Problem 6 (p. S188) in class, but it is a good exercise]; Present Estates: Defeasible Fees, pp. S188-89, Problems 8-10, pp. S189; *Storke*, pp. S189-93; Summary, p. S194.

Tue., Oct. 16. Future Interests: Remainders and Reversions, pp. S194-97; Problems 12 and 13 (p. S197-98 [we will not do Problems 11 and 14 in class; if you want to do them, you need to read the fuller version of the text in DKM3]); *Browning*, pp. S198-204.

Wed., Oct. 17. Future Interests: Executory Interests, pp. S204-08; Problems 15-16 (p. S208); *Abbott*, pp. S208-12.

- Mon., Oct. 22. *The Policy Against Undue Restraints on Alienation*, pp. S212-16, S227-30, S231-43; *Problems*, p. S243-45.
- Tue., Oct. 23. *Ryan*, pp. S245-54; *Brown*, pp. S254-59.
- Wed., Oct. 24. *General Introduction to Concurrent Interests and Marital Estates*, pp. S219-20; *Problem*, p. S221; S221-23; *Problems*, p. S223; S223-27; S263-64; *Holbrook*, pp. S264-73; S279-81. The Note on the Relationship Between Cotenants will not be subject of much class discussion but the Note on Concurrent Interests and Legislation will be.
- Mon., Oct. 29. *Beal*, pp. S273-79. (The note to this case asks you to compare the result in this case with that in *Jezo v. Jezo*; the facts in *Jezo* are given in DKM3, p. 516; I'll get it into DKM4 before we get there.) *Common Law and Community Property*, pp. S282-301. (Note: This is long. I don't expect you to remember the details. What I want you to do is to get some idea of the various ways in which the law deals either positively or negatively with the marital unit.)
- Tue., Oct. 30. *Javins, Lemle*, pp. S216-19, S302-26.
- Wed., Oct. 31. *Pennell, Braschi*, pp. S326-46.

Topic III. PRIVATE AND PUBLIC CONTROL OF LAND USE

A. Private Control

- Mon., Nov. 05. *Boomer, Coase*, pp. S347-66.
- Tue., Nov. 06. *Waldrop, Petersen, Cox*, pp. S366-87.
- Wed., Nov. 07. *Waldrop, Petersen, Cox; Cooke*, pp. S387-90; *Introduction to Covenants*, pp. S391-95.
- Mon., Nov. 12. *Charping, Richmond, Riley*, pp. S395-418.
- Tue., Nov. 13. *Riley (cont'd), Ginsberg, Camelback*, pp. S418-34.

B. Public Control

- Wed., Nov. 14. *Preble*, pp. S435-42; *Euclid*, S442-53; *Pierro, Stoyanoff* pp. S442-66.
- Mon., Nov. 19. *Exclusionary Zoning*, pp. S466-85. (There's an extensive outline of this assignment in the general outline for Topic III, which will be available on the website. We will, however, spend some time on the basic argument in *Mount Laurel I*.)
- Tue., Nov. 20. *Takings and the Constitution*, pp. S486-489; *Penn Central*, pp. S490-500; *Note on 1987*, pp. S500-03.
- Wed., Nov. 21. Thanksgiving recess begins.
- Mon., Nov. 26. *Lucas*, pp. S504-23; *Palazzolo*, pp. S523-33.
- Tue., Nov. 27. *Kelo v. City of New London* (Supplement, pp. S533-59). (Careful; this is long; we really should read one Supreme Court case largely unedited.) (If we finish *Kelo* with some time to spare, I'll try to

say something about *Shelley*, pp. S565-70, which is part of the next assignment.)

Topic IV. THE WHAT AND WHY OF PROPERTY

Wed., Nov. 28. Bentham, Demsetz, *Shelley*, Hegel, *Flemming*, Reich, pp. S560-86.

Mon., Dec. 03. Marx, *Shack*, *PruneYard*, pp. S586-611.

Tue., Dec. 04. Final lecture.

TBD. Final Exam (one hour in-class [short answer questions] followed by take-home for the rest of the day [essay question]).