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CASEBOOK CRITERIA: ON FIRST LOOKING INTO HAAR AND LIEBMAN'S *PROPERTY AND LAW*

*Samuel Bassett Abbott**

PROPERTY AND LAW. By *Charles M. Haar* and *Lance Liebman*. Boston: Little, Brown. 1977. Pp. xxviii, 1144. \$22.00.

This is a review of a recently published property casebook. Why it would interest anyone other than property teachers unhappy with their current materials or prospective teachers of property, I cannot think—unless I can say something more generally relevant to first-year instruction or the use of written materials with the case method.

I proceed by setting forth several commonplace criteria regarding property (or any) casebooks, explicate them a little, and then evaluate *Property and Law* by means of them.

1. *A casebook is not a telephone book.* The average first-year law student must spend anywhere from six to twelve hours a week between the covers of his property casebook. Some of our law-book publishers condemn the student to an unrelieved monotony of small type, ugly typefaces, and narrow columns without maps or illustrations. Maps are especially helpful in property cases, in which a complex verbal description of the premises only beclouds the student mind. Illustrations are generally thought a luxury. I would concede that a photograph of a portrait of Oliver Wendell Holmes, Jr., may not add much to one's understanding of his opinion in *Pennsylvania Coal Co. v. Mahon*.¹ But the cumulative impact of picturing parties and judges, as well as the geography of the case, reminds the student that behind rules of law and legal hypotheticals are human judgments in a historical context about the problems of real people. This reminder is worthwhile.

Haar and Liebman—and Little, Brown, their publisher—win high praise in this respect. The book is attractively designed, readable, and dotted with photographs and maps which the student eye can rest upon and the student mind can ponder. I should add that Little, Brown's designs set a standard for other casebook publishers.

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1. 260 U.S. 393 (1922), reprinted in C. HAAR & L. LIEBMAN, *PROPERTY AND LAW* 971 (1977).

2. *The selection and organization of materials must be coherent, must be progressive, and must illuminate the basic questions facing any system of property rules.* This is the heart of the matter. I have yet to see a table of contents for a property casebook which was a self-evident justification for the order or selection of topics. Sometimes topics are arranged historically, beginning with estates in land and ending with zoning. But the principle—whatever its justification—is not consistently applied. I am not arguing that there is, necessarily, one correct order for topics in a first-year property course. I am arguing instead that an arbitrary or random ordering demoralizes the beginning student and leaves him unassured that the basics have been covered when the course ends with one-third of the casebook unassigned and undiscussed. To the extent that developing skills rather than covering the subject matter is the primary task of the first-year curriculum, topics should be organized to accomplish that purpose.

Haar and Liebman have divided their book into six parts: private property, estates and the landlord-tenant estate, controlling the future, land in commerce, shared use, and public property. The first part belongs first, as it deals with concepts like sovereignty, possession, appropriation, and prescription which are basic to establishing any private property system. The premise is presumably that one should begin a property course with private property. This is surely defensible—given our legal system and the student's perceptions of it. Beyond Part One, however, it does not seem to matter which part comes next, and the parts themselves are internally incoherent. The "estates and landlord-tenant estate" is chiefly concerned with the development of the implied warranty of habitability, rent control, and public housing.² "Shared use" includes concurrent estates, non-possessory interests, and zoning. "Public property" turns out not to be public at all; it treats the taking clause of the fifth amendment, copyright, and procedural due process. The introductions to each part make no real effort to locate the student in a meaningful progression or to explain how what is to follow builds on what has gone before. Nor could they, for the parts themselves are loose aggregations of material that develop various answers to the question, "What is property?"³

The matter of selection of materials is equally important and

2. 129 out of 209 pages in this part are devoted to these topics.

3. On the other hand, *within* chapters the organization is much more helpful. Chapter 17, chiefly on real covenants, and chapter 18 on zoning are very illuminating developments of these topics.

especially critical to a first-year property course. John Humbach surveyed 500 property teachers in 1976 and concluded:

The basic property course as taught across the country is in reality a rather hugely diverse collection of highly different courses. Apart from teaching the Estate System (half of the instructors using less than five hours for this), landlord-tenant and the law of servitudes of various kinds, they have little consistently in common other than that their subject matters deal more or less with interests in things. The approach to treating the fundamentals of the law with respect to things, the question which aspects are fundamental, or even whether the first-year course should be largely devoted to fundamentals at all appear to be subjects of very basic disagreement.

Perhaps there is a place in the first-year required curriculum for presenting a miscellany of laws dealing with a particular socially relevant phenomenon—such as property, or for that matter transportation, energy or the environment. Perhaps there is not. Perhaps the “fundamental” and “general” part of property law can be covered in a small fraction of the time given to the basic property course. Perhaps it cannot. This survey will not answer these questions and this report of the survey should not attempt to. But the survey does, I think, raise these questions, and credible answers to them must be forthcoming if a future role for the basic property course is to be justified.⁴

The “very basic disagreement” about “the fundamentals of the law with respect to things” which require “credible answers” “if a future role for the basic property course is to be justified” sounds ominous. One readily imagines property banished to an elective status for students preparing to be estate planners or real estate lawyers because of its quarrelsome instructors and lack of pedagogical integrity as an introductory required course. This possibility will become realistic if pressures toward specialization intensify and militate against a required first-year curriculum, or if advocacy-skills training courses like legal methods, legal writing, or moot court begin to demand more credit hours in the first year.

But curricular politics are a secondary problem for property teachers. The controversy about what is fundamental to a property course is caused, in my judgment, by a failure to develop property theory to the level of the metalegal. To search for property theory is to search for underlying concepts, recurrent questions, and basic social functions of property and to order them so

4. Jumbach, *What Is Taught in the First Year Property Course?*, 29 J. LEGAL EDUC. 459, 469 (1978).

that property will have the coherence of a contracts course built around a paradigm of bargained-for exchange or a torts course built around concepts of personhood, harm, causation, fault and compensation. Haar and Liebman are not much help in this search. They have elected a smorgasbord approach to coverage and include chapters on trusts, wills, water rights, public housing, land finance, intellectual property, and the "new property" interests protected by the due process clause. Given this eclecticism, several omissions are striking. The rule against restraints on alienation is not mentioned, despite its current relevance to condominium law (which is mentioned). Questions of eminent domain law other than the taking problem are omitted (What is a public purpose? What is just compensation?). Nuisance law was apparently deleted just prior to publication. (A discussion that never took place is referred to in a chapter introduction,⁵ and *Boomer v. Atlantic Cement Co.* is cited in the table of cases to a page on which no reference to it appears.)⁶ It is important to compare nuisance law with real covenants, zoning, and conditional fees as land use controls. Again, I argue not that a property course properly grounded in theory cannot be taught without these topics, but that the book's general inclusiveness and atheoretical character make the omission puzzling and inexplicable.

What Haar and Liebman obviously intend is that the student make a beginning in every area of property law to which advanced courses relate. Either that, or they intend to leave the question of selection (and sequence) entirely to the teacher. This decision is costly, for, as noted *infra*, the interdisciplinary materials are merely excerpts and some case editing is severe. Some of the coverage is necessarily thin. A sixty-page chapter such as "Financing the Land Transaction" can hardly hope to impart competence to the future practitioner. It does not seem justified for exposing the students to theoretical questions not raised elsewhere or affording practice in an analytical skill, such as statutory analysis, which is peculiarly relevant to these materials.⁷ Instead the authors justify it as "basic background."⁸ But why use a casebook to provide "basic background"? Why not assign collateral reading?

5. C. HAAR, & L. LIEBMAN, *supra* note 1, at 703.

6. 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). The page on which it does not appear is page 933.

7. The authors seek to pull together the land finance materials with a problem, the "Sutton Town House Case." The problem approach is, of course, adaptable to other parts of the course.

8. C. HAAR & L. LIEBMAN, *supra* note 1, at 475.

3. *A casebook is not a treatise.* Too many casebooks, especially in subsequent editions, tend to take on some of the characteristics of a treatise. They grow monstrous, so that little more than one-half the material is ever discussed in class. The presentation of statutes and cases becomes weighted down with extensive bibliographies for further reading, summarized "note" cases, and, following a principal case, notes and questions which the authors use not to illuminate that case, but to introduce additional material in the same subject area to which they, or their publishers, could not justify devoting more space. This is a trend to be resisted, because students are paying for material they don't use and are encouraged to rely on the casebook rather than developing their own bibliography and consulting real treatises on difficult or important points.

Happily Haar and Liebman have resisted this trend. For the most part their notes include invariably interesting background materials on the cases, and they are quite willing to leave a case without comment.

4. *Basic skills such as case, statutory, and problem analysis ought to be identified, explained, and practiced.* Graduate students learn better when they understand what they are supposed to be learning. Yet it often comes as a shock to a first-year law student to discover, late in the year, after he has anxiously asked why the class will cover only one-half the materials or will not finish the instructor's own syllabus, that the pedagogical objective is skills training: how "to think like a lawyer," how to analyze a case, parse a statute, unpack a complex problem, make a persuasive argument. Must this be? Casebooks imply a teaching method, the Socratic, and prepare the student for an examination generally requiring an essay response to a complex problem. The skills sought to be imparted in the substantive courses of the first-year curriculum are not controversial. Indeed they are the subject of monolithic agreement, as far as I am aware. Why shouldn't they be identified, explained, and practiced by means of notes, questions, and problems in the casebook itself?

In this respect Haar and Liebman are clearly of another mind. Not only do they eschew any practical discussion of the "How do you read a case?" or "What is a holding?" sort that many a reader may insist on consigning to the legal methods course, but they do not generally follow cases with questions or problems. Perhaps there is some difference between them on this point, for a few questions do appear here and there. When, for example, they have explained conditional fees or the Rule

Against Perpetuities, there are no problems for the student to work to see if he or she has mastered the complexities of the Rule. It is possible, of course, for the teacher to supplement the text with problems. But the absence of questions following the cases would require a major project for any teacher who, like me, wants the classroom discussion to center around a few questions carefully chosen to open up the complexities of the case and permit a thoughtful critique of its reasoning, result, and social impact, and who believes that students should ponder and prepare an answer to these questions as they read the case.

5. *Interdisciplinary materials are necessary for historical understanding and for policy analysis within the framework of a coherent social theory.* If the first-year student is to understand the development of property law, he needs to know some history and philosophy. If he is to understand the function of property law, he needs to know some anthropology, sociology, and economics. If classroom critique of leading cases is to rise above the ventilation of "gut reactions," a common vocabulary for discussion, drawn from other disciplines, must be afforded. The concept of economic efficiency needs careful definition and application. The equities invoked in any property rights system—need, parity, privacy, freedom, security, and conservation of irreplaceable resources (whether cultural or natural)—require clarification and analysis.

As Haar and Liebman point out in their introduction, their materials are historical.⁹ The student reads Blackstone and Kent, Samuel Johnson, Francis Bacon, and Timothy Walker. Interesting notes and footnotes sketch the biographies of these men. Holmes's letters shed light on several of his opinions. Generally the historical materials are well handled and enrich the book. My one cavil is with the use of Blackstone and Kent to provide the feudal background to the concept of estates. Surely legal historians have left them far behind in reconstructing English land law in the twelfth to fifteenth centuries. I am also nervous that the classical formulations by Blackstone or Walker of, for example, fee tails or conditional fees may confuse students as to their status today. The authors have added further notes as needed, but the two-stage presentation may invite trouble in an area that I find, year after year, generates more student anxiety than even real covenants.

In Part One, "Private Property," Haar and Liebman ask the

9. *Id.* at xxiv.

student "to create an intellectual context for examining our society's present system of property rules."¹⁰ What interdisciplinary materials are provided? De Tocqueville comments on the expropriation of Indian lands.¹¹ Felix S. Cohen is represented by an excerpt from a dialogue on the need for certainty in the distribution of property.¹² Agnello and Donnelly report the conclusions of their study of the efficiency of private ownership in the oyster industry.¹³ In the chapter on "Property in Land" a portion is entitled, significantly I think, "Notes on the Ideology of Property." What follows are four paragraphs, three edited from the chapter "On Property" of Locke's *The Second Treatise of Government* and a brief excerpt from the early Marx which defines property but includes nothing that explains his critique of private property.¹⁴ Freud is then quoted to answer Marx by criticizing the psychological premises of the communist demand for the abolition of property.¹⁵ And Roger Brown is quoted to suggest that children have a concept of property from an early age.¹⁶ Whether that concept is innate or socialized and what the implications of its early appearance are for communism and socialism are quite unclear. In the chapter on "Property in Water," Haar and Liebman offer useful "Notes on Economic Analysis of Property Rights." Here the severe editing works better, and the concept of efficiency is clarified. Several problems follow to which the student can apply the concept.

But with the exception of economic efficiency, the materials for creating an intellectual context for examining our system of property rules are simply not adequate. The Marxist critique is deferred until much later and even then is not presented with sufficient fullness. Interdisciplinary materials receive summary treatment throughout the book. Ellickson's important critique of zoning is reduced to two paragraphs.¹⁷ A note on the cost of buying and selling real estate summarizes recent federal legislative

10. *Id.* at 2.

11. *Id.* at 13-14 (quoting A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 366-67, 369 (1835)).

12. *Id.* at 31-32 (quoting Cohen, *Dialogue on Private Property*, 9 *RUTGERS L. REV.* 357-66 (1954)).

13. *Id.* at 32-34 (quoting Agnello & Donnelly, *Efficiency in the Oyster Industry*, 18 *J. LAW & ECON.* 521, 522-23 (1975)).

14. *Id.* at 39-41 (quoting K. MARX, *PRE-CAPITALIST ECONOMIC FORMATIONS* 89, 92 (1857)).

15. *Id.* at 41 (quoting S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* 112-13 (1930)).

16. *Id.* at 41 (quoting R. BROWN, *A FIRST LANGUAGE: THE EARLY STAGES* 195-97 (1973)).

17. *Id.* at 850-51 (quoting Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 *U. CHI. L. REV.* 681 (1973)).

history, but on the need for and possibility of reform it cites only two sentences from a speech by Chief Justice Burger to the American Law Institute.¹⁸ The libertarian defense of private property as the guarantor of liberty¹⁹ and the environmentalist jurisprudence on the need for a new relationship between persons and things, including rights for things,²⁰ are perspectives totally ignored.

6. *Institutional analysis must accompany rule analysis.* By institutional analysis I mean exploring the remedies as administered by courts and agencies. These must be evaluated in context before the adequacy of rights created by rules is properly assessed. The evaluation must include the question of institutional competence to ascertain certain facts, make certain judgments, or afford certain forms of relief. The institutional perspective is more important in some parts of a property course than other parts. Title recording systems, zoning, and the enforcement of minimum standards in residential housing come readily to mind as possibilities. The appellate court as an institution and its shaping and reshaping of facts already filtered at trial can be illuminated through a case history of some important appellate opinion. Richard Danzig has already demonstrated the utility of this approach in the contracts area.²¹

Haar and Liebman provide adequate materials on the real actions and the role of equity in enforcing property rights. The zoning materials are a little weak on institutional analysis. Mandelker is quoted on the delegation of power and function in zoning administration²² and *City of Eastlake v. Forest City Enterprises, Inc.*²³ is a principal case. But the tension between giving zoning authorities flexibility and ensuring that judicial review of their decisions uses clear standards is not clearly presented. In the chapter on the implied warranty of habitability in landlord-tenant law the authors include a helpful note on sanctions and institutions. They end the chapter with *Mazzonia v. Washington*,²⁴ a case which presents the problem of the proper

18. *Id.* at 586 (quoting speech by Chief Justice Burger to American Law Institute (May 21, 1974)).

19. See, e.g., F. HAYEK, *THE ROAD TO SERFDOM* (1944); M. FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

20. See, e.g., Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 *So. CAL. L. REV.* 450 (1972).

21. R. DANZIG, *THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES* (1978).

22. C. HAAR & L. LIEBMAN, *supra* note 1, at 954-56 (quoting Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 *WASH. U.L.Q.* 60, 61-63).

23. *Id.* at 881-89 (quoting 426 U.S. 668 (1976)).

24. *Id.* at 310-13 (quoting 476 F.2d 915 (D.C. Cir. 1973)).

institutional response to landlord abandonment. The debate on the merits of the Torrens system also raises issues of institutional competence. There are elements of case histories in the notes to several cases, although none are complete, by which I mean they do not include portions of the pleadings, the transcript, the opinion by the trial court, and interviews with parties or their attorneys.

7. *Materials for a required, first-year course must interest both the specialist and the non-specialist.* One non-solution to this problem is to remit portions of the traditional course to advanced courses (future interests, estates and wills, land use planning) and to dwell on the remaining topics with increased intensity. If the objective of required first-year courses is to expose students to the fundamental problems of a basic area of the law and teach them skills, as discussed *supra*, then the requisite depth is a grasp of property theory combined with coherent organization and enough material on a given topic to make evaluation of student mastery of it possible. The competence of a practitioner need not be attained. My hope is that the theoretical depth I speak of would interest both the future specialist who will take advanced property courses and the student resolutely headed for criminal law, family law or personal injury litigation.

Ignoring for the moment my reservations about its organization, its lack of questions and problems, and its handling of interdisciplinary materials, I think Haar and Liebman have put together an interesting book. The use of maps and pictures and the historical background and notes commenting further on the case or the problem it addresses all help to dispel the mustiness that characterizes those property casebooks that dwell on, but do not place in their context, old cases and doctrinal complexities.

8. *Principal cases must be more than hunks of black letter law presented through the mouths of appellate judges.* Of all the obvious things I have said thus far, this is surely the most obvious. A case must also challenge students to develop analytic skills, or provide a marginal fact situation that lays bare the rationale of the applicable rule, or present questions of conflicting values which the judges confront or fail to confront appropriately, or raise issues of institutional capacity, or exemplify as part of a sequence of cases a stage in the historical development of the law. Sometimes a case must be included simply because it is the most

recent authoritative pronouncement on a point, although that doesn't necessarily mean that it should be treated in full if it lacks other recommendations.

What I object to in casebook editing is the inclusion of cases whose point is a direct quote from the *Restatement* or some scholarly article and which represent a judicial ratification of a previously nonauthoritative rule synthesis. I blame the appearance of such cases, often heavily edited so that the student is spared the search for relevance and the disentangling of collateral issues as well as spared considering the arguments of the dissenters, on the pressure for subject matter coverage. Langdell's ghost must bewail such a corruption of the case method.

I cannot offer any opinion on Haar and Liebman's case selection and editing. Some of their cases are the common stock of leading cases of any property casebook. It would be unfair to appraise the unfamiliar cases without adopting the book, which I have not done, and teaching them.

On balance I am disappointed. There are many things to applaud in *Property and Law*, but they seem secondary. I could do without them if I had to. My criticism seems to me basic—I simply could not use this book to teach the sort of property course I am trying to teach. Yet I suspect that neither Haar and Liebman nor their publishers are much interested in supplying the sort of casebook I have in mind. I criticize them under criteria they would not, at least on my interpretation of what those criteria require, accept.

Casebook publishing is big business where required first-year courses are concerned. Would a more theoretical approach with explicit skills training risk small sales because the theory would be controversial and unappealing to the practitioner-teacher and the skills training repellent to the jurist-teacher? Perhaps. Meanwhile, my search continues.