Strategies and Techniques for Teaching Property

EDITORIAL ADVISORS

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Paula A. Franzese
Peter W. Rodino Professor of Law
Seton Hall University School of Law

Howard E. Katz
Series Editor

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Strategies and Techniques for Teaching Property

I. The Big Picture

Welcome to Blackacre! You will come to love teaching Property. The subject matter quite literally hits us where we live. Property can resonate with students in some very meaningful ways, whether it is the purchase and sale of a home (apt to be the most significant financial transaction in a person's lifetime); the rights and duties of landlords and tenants (and most of us have been at least tenants at some point); the attempts at avoiding incompatible land uses, whether by private restriction, nuisance law, or zoning (who hasn't bemoaned the presence of an eyesore in a particular place?); adverse possession (could the Occupy Wall Street protesters ever succeed in transforming their possessory interests into rightful ownership?); the various forms of co-ownership (now that we're married, how should we hold our common property?); estates and future interests (what did Grandfather mean when he left me his beloved ranch "so long as alcohol is never served on the premises"?); the law of finders (is that a wallet full of money in the back seat of this taxi?); or the rule of capture (is that why so many species are close to extinction?).

Add to the practical dimensions of the material the vast array of cultural, economic, environmental, and social policy interests at stake—whether in balancing the ownership interests of the few against the perception of a greater collective good, as eminent domain law endeavors to do, or reckoning with the enduring legacy of segregation in housing more than fifty years after *Brown v. Board of Education*, or examining the perpetuation of systems of wealth that leave segments of the population at the margins, literally—and Property takes us inescapably to considerations of entitlement and exclusion. As such, its tapestry is rich, intricate, and fiercely relevant.

That said, Property can be difficult to teach. It presents pedagogical challenges, in part because many of its core rules are antiquated and arcane. In this setting, more so than in others, an ounce of history is worth pounds of logic. As a result, some of Property law's basic precepts will tend to defy students' initial instincts. For that matter, portions of the subject matter are simply counterintuitive. For example, the essentials of estates and future interests lend themselves more to memorization than to rationalization. With this in mind, it is helpful for you, the teacher, to communicate (and frequently reiterate) the big picture, putting history into context and the more unusual trees into the larger forest.

Teaching Property requires a healthy dose of compassion for the struggles that the learning process inspires. First, as you begin to assimilate and then to teach the material, be kind to yourself. Don't "should" yourself, as in "I should have omitted that from the syllabus," or "I should have spent more time on the social policy concerns." Repetition is the parent of mastery, and it takes several semesters (at least) of teaching the course for the teacher of Property to feel that she has hit her stride. For that matter, no professor can cover everything within each unit or topic. Throughout this guide, I have suggested where and how you might choose to abbreviate your scope of coverage.

Second, be mindful of your students' struggles with the subject matter. Sometimes it will feel to them that they have been thrown into an alternate universe, where constructs like seisin, defeasance, and alienability are supposed to be readily comprehensible. They aren't. It is your job, then, as captain of this ship, to dispense frequent doses of reassurance. No, this is not the *Titanic*. This is a wondrous excursion vessel, and you are armed with a road map to its journeys. (A suggested road map, by the way, is set forth later in this book.) With confidence (even if you are faking it until you make it), indicate that you will present a coherent and cohesive approach to the subject matter that will render its more obtuse dimensions accessible and understandable.

It is exceedingly helpful, then, in the Property class, to resist the more traditional inclination to hide the eight ball. In my twenty-five years of teaching the course, I have found it most effective first to make plain the black-letter rules (particularly concerning estates and future interests, concurrent estates, the recording system, and servitudes law). From that platform, the class is able to explore the more subtle and diverse theoretical underpinnings and policy implications of the subject matter. Otherwise, a class unable to figure out how a covenant runs with the land will be too distracted (if not distressed) to engage in the seeming luxury of dialogue on the social utility, and the more insidious downsides, of the use of servitudes as a land use planning device. The latter (and immensely more interesting) discussion depends on basic conversancy with the very definition, creation, and termination of servitudes, their capacity to bind successors, and the essential differences between types of servitudes.

A. COMMON THREADS IN THE PROPERTY TAPESTRY

As you think about the big picture, it is helpful to keep in mind some of property law's recurrent themes. Several overarching considerations inform much of the subject matter's development and provide a backdrop against which contemporary applications of doctrine can be tested and challenged. As the semester unfolds, it is helpful for the Property teacher to identify those guideposts selectively as they come up, and then to reintroduce them when appropriate. Over time, the class will find itself weaving together those common threads as a way to synthesize and assimilate the material. For that matter, those themes often help to render more understandable some of property law's otherwise befuddling or counterintuitive common law precepts.

As a pedagogical technique, in class I ascribe the given theme, once identified, to the student who first sees it or is called on to expand upon it. That student becomes a living guidepost of sorts, and he or she plays a role in reminding the class of the point's continued relevance. For example, early in the semester, we discuss Property as a bundle of sticks. I might call on Joe to tell us about the sorts of rights and duties that comprise that bundle. Thereafter, whenever it is helpful to revisit the metaphor, Joe becomes my point person. I might call on him, or better yet, ask the class, "What would Joe have to say about this?" and, invariably, students will take the prompt to elaborate on the point. Later in the term, when discussing the imperative to avoid waste, I might call on Troy to identify the variations on the waste theme. Subsequently, when the imperative to avoid waste reappears to help explain a given case's outcome, I will return to Troy or invoke "the Troy principle" to cue the class to think about how waste doctrine factors into the calculus. This has proven to be an effective and efficient way to anchor core values.

Set forth below are several of property law's preeminent themes:

- **"The bundle of sticks."** Property is not a "thing," but rather a set of rights and duties that exist with respect to some "thing." That "thing" could be (and in the core Property curriculum most often is) realty or real property. But it could also be personalty, or personal property. It also could be an intangible or a semi-intangible, such as intellectual property. The property interest that exists with respect to the given subject is often referred to as "the bundle of rights," meaning the set of entitlements and relationships that pertain to the object. This conceptualization

requires that students abandon their layperson's sensibilities, which would want to view property not as a legal abstraction but instead as a declarative conclusion. For example, to a layperson, the assertion "This watch is Nadine's property" would mean that the word "property" refers to the watch. Instead, from a legal perspective, the word "property" connotes that bundle of sticks, or the set of rights and duties in connection with the watch. Thus, Nadine has the right to use the watch, to exclude others from use of the watch, to lend the watch to another, to sell the watch, and so on. Conversely, she has the duty to refrain from using the watch to cause harm to others, as well as to protect the watch adequately from protracted usurpation by another (as can occur by adverse possession).

The bundle of sticks metaphor is helpful when considering whether a property interest does (or ought to) reside in less conventional (and stickier) settings, such as body parts, stem cells, or any of a host of emerging technologies. It is especially relevant in the context of intellectual property, or products of the mind. Just how big a stick, for example, is the right to exclude, particularly when the public domain could benefit by sharing? The metaphor resonates when teaching eminent domain, mindful that so much of the jurisprudence on when a government regulation has gone so far as to work a taking essentially asks how many "sticks" in the bundle of property rights have been taken away as a consequence of the intervention, and whether that deprivation triggers the constitutional mandate to provide the affected owner with just compensation.

Invoking the bundle of rights conceptualization also opens the door to meaningful critique of its essential premises. A teacher can ask, "Is it a bundle, or more of a web?" Who gets to decide what those rights and duties are? To what ends? The construct of entitlement can be challenged, and it affords the opportunity for you to introduce the various schools of thought, or lenses, through which to view the Property tapestry. For instance, how might critical legal studies theorists (particularly in the arenas of race and feminist theory) assail the integrity of traditional rights-based allocations? What would proponents of a law and economics model have to say? What of more utilitarian cost/benefit balancing tests? How might the bundle be reconstituted on the

basis of evolving social norms? What role do social norms play in determining the allocation of rights and duties? How are norms different from rules? Which should property law rely on most often, and why?

- **Possession is nine-tenths of the law.** The rights that accrue as a consequence of possession remain a central part of the property landscape. Possessors are rewarded in the law of finders, insofar as a prior possessor defeats a subsequent possessor. Adverse possession allows possessory interests to ripen into title upon completion of certain statutory and judge-made requirements. Easements can be established and even extinguished by prescription. Possession can succeed in putting later buyers on inquiry notice of an earlier taker's claim, thereby denying that buyer the protections of bona fide purchaser status. Early on, and perhaps most appropriate when beginning the materials on the acquisition of property other than by voluntary transfer, it is productive to engage the class in a discussion of the meaning of possession, and how it could be the same as, but also different from, ownership. Why does the law protect possessors? Should it? What results when possessory interests clash with ownership interests?

- **Property rewards the productive use of land.** Closely related to the construct that property rewards persistent possessors is the perhaps uniquely American conceptualization that places a premium on sweat equity. That archetype exalts enterprise, ingenuity, and hard work. We like to think of ourselves as a nation that prefers those who earn entitlements over those born into means. For that matter, Justice Holmes's oft-cited observation that "if a man sits on his rights, the law will follow his example" has meant that when it comes to the allocation of property rights, if you snooze, you lose. Hence, an adverse possessor who makes productive use of Blackacre while the rightful owner lies sleeping can, over time, succeed in usurping the true owner's interest. Waste is to be avoided. Idle land is land wasted. It is fair to ask, however, whether this paradigm has backfired, mindful of the ills occasioned as a consequence of super-saturation, sprawl, and decimation of natural resources.

- **Property endeavors to honor the parties' reasonable expectations.** This refrain is particularly apt when assessing the allocation of

property rights. It is a unifying strand in the subject matter's cloth, and, for example, ties together traditional justifications for rewarding possessors and allowing earlier possessors to defeat later possessors. Have the class consider from the start how self-serving the imperative to honor reasonable expectations can be. Whose expectations get to carry the day? Why? When are expectations unreasonable? If we can concede that certain expectations ought to enjoy the presumption of reasonableness, why does it follow that the law should honor those? (Here, the class can take up various jurisprudential considerations, including the social and economic utility of a system of laws that enjoys at least the perception of fairness and public confidence.)

- **Property's common law rules are largely the product of an agrarian culture, when land was paramount and structures atop the land were incidental.** Property law is best understood in that historical context and has evolved over time in accordance with changing conceptualizations of land and how we live on that land. Many of Property's common law antecedents make sense only when viewed against that backdrop. That is particularly true in landlord/tenant law where, until the mid-twentieth century, tenants were presumed to have leased an interest in the land itself. Hence, if structures atop the land were destroyed, the lease endured. Landlords were not held to any implied duties to provide inhabitable premises, nor were they responsible if a prior holdover tenant was still in possession at the start of the new tenant's lease. Problems on site were the tenants' problems. After all, landlords were often a considerable distance away from the leased premises, and tenants, who tended to be in leases for the long haul, were best suited (and incentivized) to remediate deficiencies. By the 1970s, the law caught up to the changing realities of modern, mobile, and urban dwellers, and by statute and case law imposed more formidable obligations upon landlords to provide quiet enjoyment and, in the residential setting, ensure premises suitable for basic human dwelling. Still, change in Property law evolves slowly and tends to come more as a consequence of (rather than as an agent for) social change.

- **First in time is first in right.** That bright line asserts itself time and again, and it appears initially during consideration of the rule of capture and the law of finders. The first to render escape

of the fugitive resource a virtual impossibility (whether a fox or natural gas) has captured that resource, to the exclusion of others. With respect to finders, the prior possessor defeats subsequent possessors. In land transactions, the first to record defeats all others pursuant to the terms of a race recording statute, and the first bona fide purchaser to record is the victor in a race-notice state. In allocating water rights, the prior appropriation doctrine confers entitlements based upon priority of beneficial use, and one can acquire an appropriation right simply by being among the first to do so. What salutary purposes do "first in time, first in right" systems serve? Can such regimes work more harm than good? How does placing a premium on being first lead to excessive preoccupation with capture, and to what ends?

- **One should not use one's interest in property in such a way as to injure the property interests of another.** That ancient maxim informs the bundle of rights and, more essentially, the duties to accompany the property interest. It attempts to sustain much of nuisance law and the nuisance test of takings law, as well as the doctrine of waste. It asserts itself as an adjunct to the proposition that property law seeks to avoid incompatible land uses, and it has been invoked to justify all sorts of public and privately imposed restrictions on land, whether via zoning or servitudes law. Ultimately, the maxim rings hollow, if for no other reason than its sheer circularity. If A is compelled to refrain from a certain use simply to avoid working harm to B, then B has worked harm to A.

- **The doctrine of waste applies whenever more than one entity has an interest in Blackacre.** Hence, waste applies to the law of estates and future interests, mindful that the present estate holder will be succeeded by the future interest holder(s). It applies to the law of concurrent estates, where more than one entity shares an ownership interest in Blackacre. It applies to landlord/tenant law, where both tenant and landlord have interests at stake. The doctrine stipulates that a possessor must not do anything to harm another's cognizable interest in the land. Waste can be committed by willful acts of destruction (called "affirmative waste") or by a pattern of neglect (known as "permissive waste"). Even unilateral actions that enhance the value of the premises (referred to as "ameliorative waste") are actionable if they defy the other's reasonable expectations.

- **Impose liability on the cheapest cost avoider.** It is helpful to introduce students to some of the essential tenets of law and economics at the outset of the course, and to return to those themes throughout the rest of the course. In assessing the dynamics of a given land dispute, what are the relevant negative externalities, and how might they have been avoided? Where does the tragedy of the commons find contemporary application? What of the prisoners' dilemma and game theory? When resolving disputes involving land use, who could have averted the harm most efficiently? How do we know that? Should liability be imposed on that entity? How do considerations of efficiency meaningfully coexist with more utilitarian, cost/benefit balancing tests and with other notions of justice?

- **Property law and contracts law are closely aligned.** Students who have had Contracts in the semester before Property will be in good stead, as will those who find themselves taking Contracts at the same time as the Property course. Modern property law draws considerably from contracts' core precepts, such as the statute of frauds, warranties, the duty to disclose, and the unconscionability doctrine. The interplay between contracts and property is seen most dramatically in the context of landlord/tenant law, where the lease today is viewed as a contract. It plays out as well in land transactions, when drafting and interpreting contracts for the sale of land. It applies to privatized land use restrictions, where the important norm of freedom of contract allows parties to consent to all sorts of encumbrances or restrictive covenants on Blackacre, particularly in the context of gated, walled, and planned residential subdivisions that are governed by homeowners' associations.

- **Neighborliness matters.** Being a good neighbor is, to paraphrase Alexis de Toqueville, "self-interest rightly understood." Mindful that property law is all about where we live and how we live, social capital, systems of reciprocity ("I do this for you with the expectation that you will someday do the same for me"), goodwill, and trust are important lubricants of the wheel of rights and duties. To help cross the bridge from the theoretical to the practical and the ethical, I ask the class to consider, again and again, how the given case or controversy could have

been avoided, what the parties might have done differently on the front and back ends of the dilemma, whether the lawyers involved were agents for good or too infected with self-interest to serve their clients' best ends, and how a good faith visit from one of the litigants to the other (accompanied perhaps by a gift basket or a box of muffins) might have led to a more worthy outcome.

II. A Road Map to the Course: Teaching the Core Topics, Determining Irreducible Content, and Sequencing the Material

Set forth in this section are the core topics of the Property course that most professors of the subject matter will cover in a four- or five-credit class. Throughout, I have indicated which areas could become more abbreviated or eliminated (to the extent that the course is only three credits in total), and which could be elaborated upon. I have arranged the topics in the sequence in which I teach them, with an explanation of why I have found that order pedagogically sound. That sequence is followed by the most widely adopted casebooks, and by many Property teachers. It makes particular sense for a new Property teacher to do this because it begins, in the first two units, with materials that are relatively straightforward, fun to teach, and interesting to students. It then follows a progression that is logical and cohesive. I hasten to add, however, that there is neither a right way nor a wrong way to arrange the material.

The scope of coverage presented here will seem ambitious at first. Please take it with a huge grain of salt, mindful that it is the product of my more than twenty-five years spent thinking about and teaching the subject matter. Enhanced familiarity and conversancy with the material, and, hence, the opportunity to cover more in time-efficient ways, comes with experience and the gift of repeated opportunities to teach the course. In the beginning, err in favor of planning to cover less, rather than more. The irreducible content of the Property course comes down to covering the acquisition of property by means other than voluntary transfer (meaning some treatment of the rule of capture and adverse possession of land), the types of estates and their accompanying future interests, the three forms of concurrent

or co-ownership and the rights and duties of co-owners, the four kinds of leasehold interests and the rights and duties of landlords and tenants, the contract for the sale of land, deeds and covenants of title, the recording system and chain of title problems (the wild deed and estoppel by deed), the five types of servitudes (the easement, the profit, the license, the covenant, and the equitable servitude) with some consideration of homeowners' associations and so-called common interest communities, an introduction to zoning fundamentals, and takings law.

When time is on your side, whether by virtue of the class hours allocated to the course (ideally five), your own particular interests and expertise, the efficiency of your casebook or, alternatively, its capacity to cover clearly and comprehensively certain black-letter predicates so that you don't have to take up too much class time to do so, it is desirable and pedagogically exciting (but not strictly necessary) to be able to cover the law of finders, the acquisition of a property interest in products of the mind (intellectual property) and one's persona (the right to publicity), discovery and treasure trove, adverse possession of chattel, discrimination in housing, rent control and rent stabilization, the mechanics of the modern-day real estate closing, the public policy and constitutional constraints affecting the enforceability of servitudes, aesthetic controls and zoning, state and federal environmental restrictions on land use, more of the nuances of the implicit or regulatory takings' jurisprudence, and exactions.

A. WHAT IS PROPERTY?

This is a good basis for the first class discussion (see pp. 38-39, *infra*, for an expanded discussion of the first day of class). It is very helpful to contrast the lay perspective of property (as a thing) with the legal perception of property, as the proverbial bundle of rights and duties that exist with respect to that thing. Here, the class has an opportunity to list the various rights that can attend a property interest, together with the attendant responsibilities of holding property. (To set the stage for coverage of estates and future interests, it is a good idea to note to the class now that in Property, one speaks of "holding" an interest in land. A product of feudalism and the English system of land holding, one is said to enjoy a time, or tenure, with the land.) For example, the holder of a property interest has the right to

use, to exclude, to transfer, and to lend, as well as the duty to refrain from causing harm, to insure adequately where appropriate, to maintain, and to refrain from using for illicit purposes.

The next section of this guide explores pedagogical approaches to the material. There, I note the power of introducing multiple learning modalities that target the traditionally visual as well as auditory and more kinesthetic pathways to learning. Here, for example, I find a student (let's call him Joe) who is wearing a watch, and ask him if I can borrow that watch. The student has always said yes. I then ask why he or she is allowed to oblige my request. The answer: The bundle of rights includes the right to lend or transfer. I hasten to add that the student could have declined my request. Why? The bundle of rights includes the right to exclude. Now that I am in possession of the watch, I ask the class to consider the distinction between my possession and Joe's presumed ownership. (Possession is the exercise of dominion and control. Ownership is title. While possession and ownership are often one and the same, they are also severable. That is the case now that I am in possession of the watch. This distinction helps to lay the foundation for the material soon to come on property law's inclination to protect possessors.)

I then declare: "This watch is Joe's property." I ask the class, "To a layperson, what does the word 'property' refer to?" Invariably, a student will answer, "It refers to the watch." Correct. I then ask, "To a lawyer, what does the word 'property' refer to?" Now, the answer is far more subtle. To a lawyer, "property" refers to the set of legal rights and obligations that exist with respect to the watch. From there, I ask the class to consider what sorts of entitlements come from the legal characterization of this watch as Joe's property. Answers include the right to use, to exclude, to lend, to sell, to store, to repair, and so on. Next, what are the duties that accompany Joe's property interest? Answers include the duty to refrain from using the watch to harm another (whether by throwing it at someone to see time fly, or by having its annoying alarm function go off every ten minutes), to dispose of it properly, to exercise reasonable care in its use and enjoyment, and more. Hence, to conclude that the watch is Joe's property is actually to render a very rich and subtle legal conclusion.

While the subject of one's property interest is most often land, metaphorically referred to as "Blackacre" thanks to Blackstone's legacy, other subjects of a property interest include personalty or personal property, such as movable goods, and intellectual property or

products of the mind, such as patents, trademarks, copyrights, servicemarks, and licenses. Depending upon how much time you have, you may wish to elaborate in an additional class on the categories of property and introduce students to some of the relatively newer and more exciting applications of the property interest construct to, for example, one's persona or likeness. First Amendment values, together with the right to privacy, can be introduced as the class considers whether the legacy and persona of certain figures, such as Dr. Martin Luther King, Jr., belong to all of us or instead can rightly be deemed the "property" of heirs.

When discussing the categories of property, I introduce only in broad strokes several general principles of intellectual property, describing the basic scope and availability of upper-class electives on the subject matter. I define patents, trademarks, and copyrights, and engage the class in a brief discussion of the competing equities at stake when one acquires a monopoly in certain material. On the one hand, protection of intellectual property incentivizes creative endeavor. On the other hand, monopolies frustrate competition, prevent productive sharing, and inflate prices. I have the class read two cases on point. The first involves whether the "news" can be deemed property, and hence susceptible to application of the bundle of sticks metaphor, and the second concerns property in one's persona. The latter topic tends to inspire enthusiastic discussion because it is innately interesting (how do those Elvis impersonators get to do what they do?) and because students bring to the exchange contemporary applications. For example, last year, several students noted the controversy that emerged when an outdoor apparel company used for their advertising campaign an image of President Barack Obama wearing the company's coat while standing in front of the Great Wall of China.

One cautionary note for the new professor: the Property course's introductory materials can be exceedingly seductive. Resist the temptation to spend too much time on them. Indicate to the class from the outset precisely how much class time is to be allocated to this unit, and move on when time is up. There will be lingering questions, comments, and observations that class members will want to share. Use Blackboard or other group posting devices of your choice to allow the discussion to continue outside of class.

B. THE ACQUISITION OF PROPERTY OTHER THAN BY VOLUNTARY TRANSFER

This unit explores how one might succeed in acquiring a property interest other than by the more traditional means of sale, gift, devise, or descent. It should ideally include coverage of three topics: 1) the rule of capture, 2) the law of finds, and 3) adverse possession. A four- or five-credit Property course typically allocates 10 percent of class coverage to this material. (I teach Property as a one-semester, five-credit course, and I allocate four class sessions to this material.) If time permits, it is interesting to include within this unit some consideration of abandonment and treasure trove (which typically implicates the law of salvage and aspects of maritime or admiralty law, since the cases often involve discoveries made at sea from sunken ships). In the interests of time, I significantly condense class coverage of discovery.

It is helpful to introduce this unit's topics first by noting their essential commonality: possession can lead to ownership. Have the class arrive at a definition of possession (the exercise of dominion and control) and compare and contrast possession with ownership (the acquisition of title). Possession is often referred to as nine-tenths of the law. Consider why it is that the law protects possessors. The answer, in part, rests on considerations of expediency, since possessors are often owners. Protecting possession honors reasonable expectations and promotes social order. The attendant notion that prior possessors defeat subsequent possessors prevents might from making right. Chaos would ensue if a first possessor could be divested of his or her possessions by sheer force.

When the possessor is not the actual owner because he or she came to be in dominion and control as a consequence of find, bailment (the entrusting of goods to another for some limited purpose that does not include the transfer of ownership), capture, or adverse possession, to a certain extent those rationales continue to resonate. There will be, however, significant tension if and when the true owner enters the scene to assert its presumptively paramount rights. The law of finds and adverse possession, in particular, present interesting ways for the class to explore those tensions. Several of the common threads in the Property tapestry that are recounted above present themselves here. In endeavoring to balance the competing interests, courts will attempt to honor reasonable expectations. When deciding, in the law

of finds, between a prior possessor and a later possessor, first in time is first in right. Adverse possession doctrine values productive land use and favors possessors who work the land over owners who sleep on their rights.

I. The rule of capture

The rule of capture rewards the possessor who has succeeded in decimating the given fugitive resource. Coverage typically begins with *Pierson v. Post*, the famous (or infamous) fox case. There, the court ruled that one acquires a property interest in a wild animal by so mortally wounding, maiming, or ensnaring it as to render its escape a virtual impossibility. That oft-cited rendering has led to environmentally disastrous consequences. Many casebooks present coverage of some of those permutations, from the whaling to the fishing to the oil industries. This is a chance, in a five- or six-credit course, to examine more deeply the effects on the planet of the rule of capture, and to consider recent history's attempts, whether by legislation or international treaty, to remediate some of the ills occasioned by excessive reliance on capture technology.

To lighten things up and make the rule of capture come alive, it is fun (and instructive) to include the baseball case, *Popov v. Hayashi*. There, the court was asked to decide which of two competing fans in the stands had succeeded in "capturing" Barry Bonds's record-setting home-run ball. Later in this guide, I discuss various pedagogical techniques that have served me well in presenting the material, pointing to the power of visuals, metaphor, imagery, and story as powerful learning tools. For now, it seems timely to mention that to get to the unpredictable elements of capture, I actually throw a baseball out into the class. Sometimes it is caught readily, but often it goes astray, falling into several hands, or no hands at all. When that is the case, what result when "the furtive resource" (the moving ball) is worth a veritable fortune? In such instances, how easy is it to allow the lesser angels of our nature to run amok? Can the law ever adequately deter such impulses? Are there benefits as well as drawbacks to a bright-line standard of capture?

II. The law of finders

The law of finders rewards possessors of found items, subject to two essential modifiers: 1) prior possessors defeat subsequent pos-

sessors because first in time is first in right, and 2) the rightful owner defeats the possessor, to vindicate reasonable expectations and to discourage thievery, preoccupation with finding things, and overly zealous owner attempts to secure belongings lest rights be stripped at the drop of a hat. I begin this material by writing "Finders keepers, losers weepers" on the board, and ask the class to endorse or challenge that assertion. Mindful of the power of story to give meaning, I tell about my fourth-grade Brady Bunch lunchbox. I treasured this item, and one day, while showing it off to classmates, I inadvertently left it on Nadine Matza's desk. Much to my dismay, when we returned from recess, Nadine was gleefully showing off the lunchbox to her friends, proclaiming, "Look what I found!" I entered the scene and said I was the lunchbox's true owner, to which Nadine replied, "Finders keepers, losers weepers." Before our teacher, Mrs. Guber, arrived to settle the matter (fortunately by reuniting me with my "property"), I found myself thinking, "Surely our system of laws cannot be so draconian as to allow for the triumph of the sort of thuggery that Nadine seemed more than capable of." I ask the class whether I was right about that. For reasons that the vignette makes plain, the law is not finders keepers, losers weepers, but finders do prevail against all but the true owner.

Students enjoy the materials on the law of finders because it feels real. All of them, at some point, have lost belongings, as well as discovered items. Engage the class in a discussion of their experiences in this regard. How did those who lost something feel as a consequence? What was their subsequent course of action? What was their hope? What were their expectations? (Here, lots of poignant narrative often ensues, allowing the subject matter to become more experiential for the students. Those who lost an item of particular worth and/or sentimental value will speak to their heartbreak, as well as the steps taken to recover the item.) Conversely, those who found something can speak to their course of conduct in response. Did they keep the item or turn it in? Did it depend on its value and/or the location of the find? Did the law inform their actions? Did they feel a moral duty? Several instructive commonalities tend to come from this exercise. First, the class will concede that the law's principal imperative ought to be facilitation of return of the lost item to its rightful owner. Second, in this arena, the law is ill equipped to regulate people's behavior in order to ordain that outcome. Norms, rather than rules, and conscience, rather than statutes, may be the best hope.

The limitations of the law are made plain as the material takes up the lost/mislaid doctrine. Traditionally, courts have applied the doctrine when items are found in public or quasi-public places. Lost property (which is accidentally parted with) is awarded to the finder, under the theory that the true owner who has inadvertently lost something will not know the place of the loss and therefore is not apt to be reunited with the item. Mislaid property (which is intentionally placed but unintentionally left behind) is awarded to the keeper of the establishment in which the item was discovered, in trust for the rightful owner who, having quite deliberately set the item down somewhere, is apt to retrace her steps to that scene. The cases suggest that items found on the floor are presumed lost, while items found atop a restroom counter, for example, are presumed mislaid.

To demonstrate the limited utility of the lost/mislaid doctrine, before class I place various objects around the classroom, leaving, for example, an umbrella under a desk, a backpack beneath another desk, and a book atop a different desk. I ask the class to take a look around and notice whether they happen to find in their midst any items not belonging to them. When the finder of the umbrella makes his discovery, I ask what he presumes about that item. Is it lost or is it mislaid? How can he tell? Could it be that the umbrella was quite deliberately placed by its owner on the classroom floor, so as not to wet the desk? Similarly, aren't backpacks, as well as a whole host of objects, routinely and intentionally placed on the floor? Could the book, although found on the desk, initially have been discovered on the floor, only to be placed atop the desk by a passerby? If the lost/mislaid doctrine is less than satisfying, how might a state legislature arrive at a worthy statute to determine the rights and duties of finders? How might the law incentivize ethical behavior, or, when it comes to ordaining moral imperatives, do social norms and internal referents ultimately work best?

III. Adverse possession

Adverse possession presents the construct that possession, for a statutorily prescribed period of time, can ripen into title if certain elements are satisfied. Here again, the American conceptualization of rewarding those who use land productively comes into play. The elements of the doctrine endeavor to balance the interests of the rightful owner (who is afforded a significant amount of time within which

to reassert his rights in the face of another's visible occupation of his land) against those of the possessor (whose protracted period of uninterrupted use yields certain expectation and reliance interests). Adverse possession resonates with the class, and students tend to be receptive here to role-playing exercises, with some class members serving, for example, as squatters who succeeded over time in restoring a dilapidated building back to health only to now be challenged by the building's rightful owner, played by another student, who wants the building back. What are the competing interests? How can the doctrine of adverse possession best balance those interests?

The scope of coverage here typically includes a case to set forth the black-letter elements of the doctrine. That is, that the possession must be continuous, or uninterrupted for the given statutory period; open and notorious, meaning the sort of possession that the usual owner would make in view of the circumstances; actual, meaning that the possessor's occupation cannot be merely symbolic (as by a letter of intent or mere declaration, for example); and hostile, meaning that the possessor is there without the true owner's consent. For the new professor and for students, adverse possession provides the first real opportunity in the Property course to present clear and concise doctrinal elements. Let this certainty be a source of mutual relief. It comes at a perfect time insofar as it gives students the opportunity to feel that they are "getting" it, and able to apply the law, with some precision, and that their teacher is effectively facilitating that process.

Tacking, whereby to satisfy the given statute of limitations one adverse possessor is permitted to tack onto his time with the land his predecessor adverse possessor's time so long as there is privity (meaning some non-hostile nexus) between them, should be covered, and a case is usually allotted to the point. Summary treatment can be afforded to disabilities statutes, which toll the statute of limitations if the rightful owner is under a legislatively prescribed disability (such as imprisonment, infancy, or insanity) at the start of the adverse possession, and constructive adverse possession, which allows a possessor who has come to the land through a fraudulent deed to succeed upon meeting the elements of adverse possession in acquiring title not just to that part of Blackacre that he physically occupied, but also to the entirety of the parcel as described in that deed.

A mistaken lot case is often included (wherein the possessor believed, albeit mistakenly, that the land that she was occupying was indeed hers), to help elicit discussion on whether the elements

of adverse possession ought to be gauged subjectively (what was this possessor actually thinking?) or objectively (was the possessor acting as a reasonable, similarly situated owner would be expected to act?). The vast majority of states (now with the notable exception of New York) impose an objective standard. By recent legislative enactment, however, New York has determined that adverse possession cannot ripen into ownership unless the possessor had the good-faith, albeit erroneous, belief that the land that she was occupying was indeed hers. In New York, it is considered bad faith, and a bar to a successful adverse possession claim, for the possessor to have known that the land belonged to another. Ask the class why the objective standard is preferred in most jurisdictions. Courts are loath to engage in the sort of clairvoyance invited by inquiries into the possessor's actual state of mind. Moreover, a subjective standard encourages possessors to lie in the attempt to satisfy the requisite legal standard.

Permission defeats hostility. Hence, giving the possessor permission to be there is a surefire way to prevent an adverse possession claim from accruing. To illustrate that notion, as well as the frequency with which boundary mistakes can arise, I tell the story of our swing set. When we moved into our home, we placed a swing set in the backyard, not realizing that we were encroaching four feet over our lot's border. The house next door was vacant at the time, and the encroachment did not become known to us until two years later, when our new neighbors' survey revealed the problem. In what could have been a very awkward conversation, our neighbors told us that we were free to keep the swing set where it was, and that if it ever became a problem, they would let us know. We thanked them immensely, and I then told them (both scientists) that their graciousness did us a great kindness, and it actually succeeded in protecting their interests, too. With their grant of permission, no claim of adverse possession could accrue against them (to the extent that our successors someday were inclined to assert such a claim). Neighborliness is efficient. Moreover, our neighbors' initial impulse toward high-mindedness yielded an enduring friendship.

Coverage of adverse possession typically includes a case to present the difficulties of applying the doctrine's traditional elements to chattel, which, by definition, are freely movable. Hence, it becomes difficult, if not impossible, for the possession to meet the requirement that it be open and notorious, or sufficiently visible to put the rightful

owner on notice of the claim. Cases involving lost or stolen art, in particular, make for interesting class discussion.

C. ESTATES AND FUTURE INTERESTS

Having thought about the ways in which one might acquire a property interest other than by voluntary transfer, this unit begins to consider how people voluntarily dispose of property, particularly when they seek to impose conditions on that transfer, and even strive for some modicum of dead hand control. For students and most new teachers, the topic of estates and future interests is perhaps the most dreaded material in the core course, with some teachers opting to give this unit particularly short shrift, and a few others choosing to include little more than a passing reference. Most Property teachers, however, will give this material its due, and that is a good thing. This unit introduces the class to the ways that land can be held, transferred, devised, and passed by intestacy, providing a basis for students to be able to spot potential issues in their general practice areas when, for example, clients seek to impose restrictions when transferring land by sale, gift, or will. This unit also affords students the opportunity to consider whether estates and trusts might be a worthy specialty area. Perhaps most pragmatically, this material is tested on the bar exam.

I cover estates and future interests at this point in the semester because it makes sense from a sequential perspective, as the class shifts gears and begins to consider the more traditional ways to acquire a property interest— i.e., as a product of another's voluntary transfer. More practically, this is where the casebook that I use puts the material. That said, as a new Property teacher, you may wish to defer coverage of this thorny topic until a bit later in the semester. That might make sense for several reasons. First, this unit will be thoroughly foreign to most students and thus apt to inspire some anxiousness on their part. Therefore, you may want to take it up after you have had even more time to forge a meaningful rapport and bond with the class. Mindful that this segment of the course depends in significant measure on the students' ability to relax and trust you to navigate choppy waters, it could be helpful to allow that trust to be more firmly cemented before rocking the boat. Second, at this point in the traditional scope and sequence of coverage, students are just beginning to get it, typically feeling somewhat empowered

by their understanding of the more accessible materials on adverse possession that the class just finished. You could find that tackling estates here steals some of the flow and confidence that they (and you) have amassed thus far.

Hence, instead of turning to estates just yet, you could take up eminent domain and the law of takings at this point. That makes sense because takings law is yet another manifestation of the acquisition of property (now by the government) other than as a consequence of voluntary transfer. I sometimes have taught eminent domain at this point in the semester, and I have found that the material engaged the class in some exciting ways. Many came to law school with a general awareness of the *Kelo* decision; and instances of government's invocation of its taking powers to make way for a Wal-Mart, or the Nets basketball arena, or Columbia University's expansion, or a new waterfront shopping mall (all in the name of economic revitalization) often command the headlines. Alternatively, you could consider covering landlord/tenant law at this point in the curriculum. Its contours are even more straightforward, and tend similarly to be of interest and also relevance to many students, who are often tenants themselves.

I devote 10 percent of class coverage in the five-credit course to estates and future interests, and begin by putting the estates system into its feudal context. I take twenty minutes or so at the very start to talk about William the Conqueror, and how it came to be that his conquest of England in 1066 yielded a system that still haunts us today. I use a Microsoft PowerPoint presentation with some visuals on the infeudation of England, replete with lords, knights, and serfs (and a passing reference to Medieval Times, a local attraction near the New Jersey Meadowlands). I then fast forward to today, putting the esoteric into the practical world of wills, trusts, and estate planning, explaining how lawyers think about the forms of estate holding when drafting deeds, writing wills, creating trusts, and working with clients to best protect and preserve their intentions. I excerpt portions of actual wills that use the defeasible fee ("I hereby bequest my farm and farmhouse to my sons and their heirs, on condition that the land be maintained in its present condition, and in the event of failure to so maintain, said property is to go to the Township of Cedar Grove") and ask the class to begin to think about whether courts can enforce such restrictions and how modern estate planners might be able to accommodate their clients' interests better through more artful draft-

ing and the use of other devices, such as the trust. (To prepare for this segment, I consult with colleagues who teach estates and trusts, and enlist the help of a local practitioner who specializes in the area.) If time permits, it is interesting to bring in an estate planning lawyer to talk briefly about present-day applications of this subject matter.

The first week with this material is devoted to defining each of the four categories of present possessory or freehold estates: the fee simple absolute, the fee tail, the defeasible fees (of which there are three species), and the life estate. I cover each by asking and answering three basic inquiries. First, what language will create the estate? Second, what are its distinguishing characteristics? Third, is there a future interest to accompany the estate? The initial lecture on the defeasible fees presents a good opportunity to define and discuss restraints on alienation and also how it is that certain types of restrictions can offend public policy (for example, "To Mary, so long as she never marries") and constitutional and statutory guarantees (when, historically, deeds or wills contained racially restrictive conditions that courts were asked to enforce).

The teacher is best advised to lecture about the black-letter predicates before the cases are considered. This material is too intrinsically inscrutable, at least at the outset, for students to be expected to read the cases and get it. Once those predicates are set forth, the rest of the week's class time is spent with the cases on life estates and defeasible fees to explore the shortcomings and benefits of each of the forms of estate holding. The following week is devoted to future interests, again using a straightforward lecture format that includes consideration of the rule against perpetuities and its reform. The rest of the second week is devoted to problem sets. I prepare a supplemental handout of problems and attach the answers. Together, in class, we go over them. For students who wish additional opportunities to practice applying the rules to examples, it is helpful here to recommend to the class a good supplemental study aid. There are many to choose from.

D. CONCURRENT ESTATES

Students will welcome this material with a sigh of relief. The law of co-ownership is more accessible and covers the three forms of concurrent estate (the tenancy in common, the joint tenancy, and the

tenancy by the entirety) and the rights and duties of co-owners. The core curriculum typically allocates about 10 percent of the course to this topic and begins by defining the forms of concurrent estate and the advantages and disadvantages of each. Some students in the class will be married, and most anticipate getting married someday. Hence, tenancy by the entirety is inherently interesting. Many have had joint checking accounts, and students' parents or relatives may be holding property as co-owners.

Using the board, the class works through the various iterations of each form of co-ownership. For example, "O conveys Blackacre to A, B, and C as joint tenants with the right of survivorship." I ask, what is each co-owner's undivided interest? The answer: Each holds an undivided one-third share, plus the right to use and enjoy the whole. Why? Because of the four unities (joint tenants must take at the same time, by the same instrument, and—relevant here—with identical shares, and the right to possess the whole). A dies. What results? A's share goes to B and C because of the right of survivorship. B and C each hold a one-half interest. B then sells his interest to Samantha. Can he do that? Yes, and even secretly, unless the terms of the parties' private agreement provides otherwise. While neither devisable nor descendible (because of the automatic right of survivorship), a joint tenant can sell or transfer during his lifetime. Unilateral transfer disrupts the four unities. Hence, Samantha and C are now tenants in common, each with a respective one-half share and the right to enjoy the whole. Now C dies, leaving behind her heir, Jake. What results? A tenant in common's interest is devisable and descendible. Hence, Jake now holds one-half with Samantha, who holds one-half. Jake and Samantha are tenants in common. But what if they don't even know each other, or worse, don't even like each other? This is a great segue into the next segment of coverage: the rights and duties of co-owners. (Here, either party can propose a private dissolution of the arrangement, by buyout or otherwise, or bring an action for partition.)

The cases in this unit tend to be intrinsically interesting, and they reveal the entitlements and obligations of co-ownership. They also present the opportunity to get to some of the subtextual agendas and family dramas that controversy in this realm often reflects.

E. LANDLORD/TENANT LAW

I take up landlord/tenant law next because it piggybacks on some of the incidents of co-ownership, which include the right to lease all or part of the property, and because, candidly, the casebook that I used as a new teacher and for many years thereafter puts landlord/tenant law here. It has worked out well, but it also would make sense to take up land transactions at this point—i.e., the purchase and sale of Blackacre—since the deed restrictions that are considered in the preceding materials on estates and the forms of co-ownership often present themselves in the larger context of a transfer of land.

I devote about 15 percent of the course to this material and begin by noting the significant mid-twentieth-century shift from an agrarian conceptualization of the lease as conferring merely an interest in the land itself to the modern and more urban construction of the lease as a contract, imposing rights and duties with respect to some dwelling or structure(s) atop the land. This considerable sea change came on the heels of the civil rights movement and ushered in a host of tenant-protective safeguards. Notwithstanding those, too often decent housing is not available to the working poor, let alone the desperately poor. I give a PowerPoint presentation here on the devastating statistics on poverty and displacement in the United States. I ask the class to think about this throughout the scope of coverage here, and at the conclusion of the assigned materials, we take up the crisis in homelessness as it has been exacerbated by escalating home foreclosures and dwindling stocks of government-subsidized affordable housing. During this last segment, I bring in several public-interest attorneys and a representative from Habitat for Humanity. Mindful that our law school is located in the heart of Newark, I challenge my students to join me in working with Habitat to build a house nearby, whether during spring break or in the summer.

Class coverage of landlord/tenant law should include discussion of the four leasehold interests (the terms of years, the periodic tenancy, the tenancy at will, and the tenancy at sufferance), and then consideration, with the cases, of the landlord/tenant relationship. I put the tenant's duties into three categories: tenant's duty to repair, tenant's duty to refrain from committing waste (here I take up the law of fixtures, insofar as a tenant commits voluntary waste when she removes a fixture), and tenant's duty to pay rent. Discussion then turns to the landlord's duties, cast in terms of four constructs: the

duty to deliver legal and physical possession, the covenant of quiet enjoyment, the implied warranty of habitability, and the doctrine of retaliatory eviction. Thereafter, the class takes up brief consideration of the landlord's tort-based liability, and, finally, the assignment versus the sublease.

Much of my public interest work has been in the arena of landlord/tenant law, as a member of New York City's housing court reform project and then as a tenant advocate. Hence, I pepper discussion of this material with tactical and practical pointers, lessons learned from the trenches, and stories of human interest and human tragedy. To stir the pot of compassion and raise consciousness, I encourage my students to spend just one day at any of New York's regional homeless intake centers. The experience can be life-changing.

If time permits, it is good to include some consideration of rent control, federally subsidized Section 8 housing, rent stabilization, and discrimination in rental housing. At a minimum, I define each of those categories and set forth their governing statutes, with particular emphasis on the Fair Housing Act. I refer the class to the good work of our clinics, where students are given the chance to use the law to fight against the overt as well as more covert forms of exclusion and bias in housing markets.

It is helpful for the Property teacher to have some familiarity with the landlord/tenant statute of her school's home state, to give students some exposure to the statutory mechanics of this practice area. Moreover, many students also will be tenants who happen to have questions relevant to their experiences. I direct the class to our state's legal services website, which has an excellent recitation of the relevant statutory standards, and share with them New Jersey's provisions on security deposits, causes for eviction, and rent control laws.

F. LAND TRANSACTIONS: THE PURCHASE AND SALE OF LAND

In a five-credit course, I allocate 15 percent of class time to the unit on land transactions. The Property teacher can make this material exciting and interesting for the student, particularly since most of the class anticipates acquiring a home at some point. I prepare a set of handouts that include a standard land contract, deed, and title insurance policy, and together we examine those documents to make

real the constructs described in the cases, such as allocation of the risk of loss, marketable title, and deed warranties. Your law librarian or good local practitioner can provide you with the relevant standard forms. At the end of the unit, the class takes up in broad strokes the topic of land finance and mortgages. I spend one class on the very basics of the law of mortgages and, in view of recent events, include in lecture format a thumbnail sketch of the mortgage foreclosure crisis, tracing its causes and effects for the practice of law.

Over the years, I have found it to be helpful, either at the start of this topic or at the end of the unit, when students are conversant with the theoretical and doctrinal frameworks for the modern land transaction, to help the class cross the bridge from theory to practice. With recent emphasis on the need to inculcate more effectively various skill components into the core curriculum, and lawyers' frequently voiced lament that students graduate from law school ill equipped to "do" things, the real estate unit presents a very natural opportunity to consider, briefly, some of the practicalities of the land contract and closing. At a minimum, this whets some students' appetites for upper-course electives on point.

Hence, I devote one class to a walk-through of the mechanics of the real estate transaction. To accomplish this, I invite a real estate lawyer and (if available) a broker, as well as a title insurance company searcher and/or agent, to speak to the class on the process that begins with the buyer's search for the right home and culminates with the closing. The tensions inherent in the broker/attorney relationship usually become apparent here, too, to the extent that the realtor is apt to decry the capacity of lawyers "to slow things down, make matters complicated, and throw monkey wrenches into the process," and lawyers in turn assail brokers' tendencies to engage "in the unauthorized practice of law." Together, we think about ways to anticipate, and then ease, those tensions.

I ask the practitioners to set forth the steps needed to get to contract, and then from contract to closing. The focus here is residential. In the interests of time, I exert somewhat of a heavy hand to guide the discussion and keep the conversation on point. In this regard, it is pedagogically helpful for the professor, as the presenters speak, to use the board to jot down the salient points that are made and to keep the presentation focused. By the end of the class, the board usually looks something like this:

1. *Finding the right house:*
    a. *The role of the broker*
    b. *Broker listing arrangements*
    c. *Broker commissions*
    d. *The caution against the broker's unauthorized practice of law*
2. *Getting to contract:*
    a. *The role of the broker and the role of the lawyer*
    b. *Price and down payment clauses*
    c. *Mortgage contingency clause*
    d. *Standard form inclusions (allocation of the risk of loss, duty to disclose, inspection clauses)*
    e. *Attorney review clause*
3. *The unavoidable gap between contract and closing. Post-contract and pre-closing, buyer must:*
    a. *Secure financing*
    b. *Procure all inspections*
    c. *Obtain title insurance*
4. *The closing:*
    a. *The mortgage closing*
    b. *The title closing*
5. *The attorney's post-closing duties (which include the need to record the deed)*

Do not be daunted if you do not have a practical base of experience in real estate transactions. The scope of coverage here is best rendered in broad strokes, to afford students enough familiarity with the contours of the subject matter to know which questions to ask,

and to better gauge whether this might be a curricular context and practice area worthy of further consideration. I hasten to add that if time is not on your side (either due to lack of credit hours, the need to go at a slower pace, or, understandably, simply too much to cover), drop any transactional component, but do mention the opportunities that are available in your school's upper course curriculum to take this material up more fully.

Case law coverage begins by making plain that every land transaction involves a two-step process:

1. The contract for sale.
2. The closing, where the contract dies and the deed becomes the operative document. We examine the reasons for this inescapable gap in time. (The buyer needs time to inspect and to procure title insurance and financing.)

Within the purview of step 1, we cover the statute of frauds and its exceptions, the problem of risk of loss to the extent that the premises are destroyed through no fault of either party in the interim between contract and closing (here, again, the class contrasts the earlier agrarian conceptualization of land with the more modern-day buyer's expectations), marketable title, and the seller's duty to disclose. The seller's duty to disclose latent, material defects inspires some "spirited" discussion as matters shift from the presence of structural defects to the alleged presence of ghosts. Step 2, the closing, takes us to the deed, where we discuss its lawful execution, delivery, and warranties of title. We then turn to the recording system, identifying the three types of recording statutes, the chain of title, problems with the chain (the dilemma of the wild deed and estoppel by deed), and the shelter rule.

G. SERVITUDES

Servitudes is taken up next as a natural sequel to the materials on land transactions, where encumbrances on Blackacre (such as easements) are considered more indirectly—for example, as impediments to marketable title unless waived by the buyer. I devote close to 15 percent of class coverage to this subject matter and use it as the platform from which to introduce common-interest communities and homeowners associations, where heavy reliance on restrictive

covenants is the norm. Hence, the conclusion of this unit includes discussion of walled, gated, and planned residential subdivisions, where governing declarations of covenants, conditions, and restrictions (CC&Rs) endeavor to regulate all sorts of practices, from the posting of "For Sale" signs to the color of shutters to the permissibility of wok-cooking. This context can provide a basis for some very interesting policy discussions about the propriety of relying on rules rather than norms to control land use, the phenomenon of privatization (or shift from government provision of services to private sector provision of those services), and the politics of exclusion (Who and what are we walling in? Who and what are we walling out?).

I begin the materials on servitudes with a twenty-minute overview of the family of nonpossessory interests, introducing the easement, the profit, the license, the covenant, and the equitable servitude. I briefly discuss the historical antecedents of each, and explain why the web of servitudes became just that. (It was, for instance, the negative easement's limited reach to light, air, support, and streamwater and, in some states, scenic views, that precipitated the need for some other restrictive device to avoid potentially incompatible land uses. Hence, the restrictive covenant came to be.) I use the metaphor of the forest and describe the easement as the mighty oak (the most formidable of servitudes), and its close cousin, the profit, as the maple. I describe the license, by contrast, as the mere sapling (the weakest of servitudes), or Charlie Brown's Christmas tree. The covenant and equitable servitude are different species entirely, with the covenant serving as the moss that sometimes can run with the land and the equitable servitude as the azalea bush, a welcome burst of color when the often difficult elements of an analysis at law (via the covenant) cannot be met.

It is by no means essential that the new Property teacher be thoroughly conversant with the historical antecedents to the law of servitudes. Indeed, it is best not to get too bogged down in the nuances of history here. Rather, it is sufficient simply to note to the students that in servitudes law, as in much of property law, an ounce of history is worth pounds of logic. The teacher then can render, in broad strokes, a bit of background on the historically narrow scope of negative easements, the birth of the covenant as a legal device (thereby accompanied by the remedy at law, meaning money damages), and the advent of the equitable servitude, accompanied by injunctive relief, as the British chancery court's analog to the law's covenant.

Most Property casebooks also will provide this historical narrative by way of background.

For easements, coverage should include consideration of both the affirmative and negative easement, creation of affirmative easements by grant, prescription, implication by quasi-use and necessity, easements appurtenant and in gross, and the scope, transferability, and termination of easements. The case law is effective in setting forth those rudiments. Profits are defined and illustrated, typically by one case. I then lecture on the elements needed for the burden and benefit of a covenant to run with the land, as a precursor to class discussion of the cases on point. We then consider who has the power to enforce the covenant (taking up third-party beneficiary theory). Finally, we get to the equitable servitude, and when it is that equity will bind successors to the promises of their predecessors, noting that this last form of servitude is more malleable and does not involve considerations of privity. Here, we take up the common scheme doctrine and implied equitable servitudes.

I then dispatch a group of students to take pictures of the servitudes that they observe when they are out and about. They come up with a PowerPoint slideshow for the class, entitled "These Are the Servitudes in My Neighborhood." Typically, the visuals include the parked car on the street, the power lines, the gas meter affixed to the side of an apartment building, the billboard on the building, and the like. This presents a lively and interesting way to make the subject matter more accessible to the class.

It is helpful to spend some time on the Restatement (Third) of Servitudes, which endeavors to unify the whole of the subject matter so that there is only one kind of nonpossessory interest in land, called, appropriately, a servitude. Some casebooks now organize the scope of coverage here around the Restatement (Third). I do not recommend this approach. The Restatement (Third), while cited approvingly by a number of state courts, has not replaced the traditional law of servitudes. Further, the bar examiners continue to test on servitudes as traditionally taught and practiced.

The scope of class coverage includes consideration of the public policy restrictions on servitudes (servitudes must not be enforced selectively, must not impose restraints on alienation, must be reasonable, and must not contravene stated legislative policy, such as the deinstitutionalization of the disabled). The constitutional dimensions of the subject matter are explored when, for example, a court is asked

to enforce a restrictive covenant that is allegedly discriminatory or that infringes upon freedoms of speech or religion. The materials conclude, as noted earlier, with an assessment of the phenomenon of privatization, and its Goliath-like manifestation in the form of common-interest communities and their governing homeowners' associations. One in five Americans now lives in a gated, walled, or planned subdivision, subject to a host of restrictive covenants. As a result, the range of individual autonomy is compromised in the name of preservation of property values, orderliness, and predictability.

H. ZONING

Zoning is the public analog to privatized servitudes. It is state and local governments' exercise of police powers to control land use reasonably. Zoning is of significant real-world importance, and many students will find themselves immersed in some of the subject matter's nuances, either because of their chosen practice areas or because they, a colleague, a family member, or a client finds himself or herself forced to seek permission to depart from the strictures of an applicable zoning scheme. Nonetheless, if you determine that you must omit some things, you may wish to make some of those cuts here. In view of applicable time constraints, some Property teachers treat zoning only summarily, and a few elect to drop this unit entirely.

At a minimum, it is helpful for students to be afforded familiarity at least with zoning's fundamentals: classic Euclidean or comprehensive zoning, enabling legislation, the master plan, the zoning ordinance, the variance, the special exception, and the amendment. The case law in this area demonstrates nicely how zoning can work hardships and discusses the potential for abuse as local zoning boards endeavor (or not) to achieve flexibility in zoning, declare previously allowable uses now non-conforming, or impose draconian or arbitrary procedural or substantive constraints.

In a five-credit course, I can allocate 10 percent of class coverage to the topic. This leaves time to get to some of the more interesting dimensions of zoning law, including consideration of the appropriate aims of zoning, exclusionary zoning, and inclusionary zoning techniques. When I can, I allocate half of one class to a guest lecture from a seasoned practitioner in the area of land use and zoning, who speaks to the practical considerations attending the application for a vari-

ance, for example, from submission of the relevant forms to hearing to appeal. The more intriguing aspects of local politics are often discussed here, together with the Not in My Backyard (NIMBY) response that some more controversial proposed uses often inspire and the potential for germs of corruption to infect the relevant process.

If time permits, discussion of the aims of zoning can include consideration of aesthetic controls. This is a component of the material that, while interesting, can be omitted if necessary. To get to the difficulties inherent in developing and then applying aesthetic standards, I have members of the class prepare a multivisual presentation on the advantages and disadvantages of "the beauty police"—i.e., architectural review boards and other arms of zoning that are used to pass on the aesthetic worthiness of a given design or project. On the one hand, aesthetic controls prevent Weird America from carrying the day (whether in the form of the front-lawn sculpture of Lady Liberty made of used milk jugs or Madonna's magenta-colored house in Beverly Hills). On the other hand, aesthetic controls tend to value homogeneity at the expense of artistic freedom and innovation of design. This presentation usually includes depictions of Frank Lloyd Wright's masterful and unusual architecture, Frank Gehry's towering triumphs, and other testaments to the bold and the unique. Would any of those have gone forward under the aegis of a zoning board's careful watch—and if not, what would be the ramifications?

The unit on zoning concludes with an examination of the ways in which zoning can work exclusionary ends, as well as inclusionary aims. Racial steering and, more subtly, minimum lot-size requirements, single-family-use-only restrictions, growth controls, and other zoning strictures advance exclusionary ends, whether intentionally or not. Indeed, it has been decades since *Brown v. Board of Education*, yet in countless vicinages, the United States remains racially segregated in the realms of housing and education. Is it race-based exclusion, is it class-based exclusion, or is it something else? Conceptualizations of "the other," and how we might succeed in widening perceptions of "us," follow. I introduce inclusionary zoning techniques, in broad strokes, and give the students a bibliography of several good law review articles and broader readings on the topic (including Beverly Tatum's *Why Are All the Black Kids Sitting Together in the Cafeteria?* and Walter Benn-Michaels's *The Trouble with Diversity*).

I. EMINENT DOMAIN

Eminent domain is the last unit in the class. It makes sense to consider the topic after the coverage of zoning since both areas involve governmental or public land use controls. Nonetheless, for reasons discussed previously, I have also taken up eminent domain after the conclusion of Unit 2, the acquisition of property other than by voluntary transfer. That, too, is an organizationally sound decision since, like other involuntary transfers, takings essentially allow the government to transfer property to itself without the owner's consent and typically over the owner's objection.

Like zoning, eminent domain is an area that some Property teachers treat more summarily when time constraints require. I allocate 10 percent of coverage to the topic and begin by asking the class to consider justifications for the sovereign's power to take private property. The class then works through the distinctions between explicit acts of governmental condemnation and implicit or regulatory takings. Thereafter, we take up the limited utility of the public use test, beginning with an overview of the U.S. Supreme Court precedents in *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff* to set the stage for *Kelo v. City of New London*.

Kelo is a terrific teaching case. It allows for vibrant discussion of competing conceptualizations of the role and competence of government to accomplish salutary ends on behalf of the public good. I then use a PowerPoint slideshow to describe the recent New York Court of Appeals cases (*Kaur and Goldstein*) that rule, respectively, that New York City's condemnation of portions of West Harlem to make way for Columbia University's expansion and its taking of parts of Brooklyn's downtown to allow for a private developer's construction of an arena for the New Jersey Nets basketball team were constitutional exercises of the takings power for public use. I use state court cases here to get to the virtues and limitations of the U.S. Supreme Court's invitation, in *Kelo*, for states to develop, by statute and case law, their own more private-property-owner-protective constructs.

Implicit or regulatory takings follow. The tests for gauging when a given governmental regulation, while never intended by government to be a taking, nonetheless triggers the takings conclusion begins with *Pennsylvania Coal v. Mahon* (the diminution in value test), and continues with *Penn Central* (the reasonable return test)

and then *Lucas* (the categorical taking test). Exactions (the amenities that government seeks in exchange for granting permission to build) are examined in the context of the *Nollan* and *Dolan* cases, wherein the Court endeavored to impose constitutional safeguards against government overreaching.

III. Preparing to Teach the Class

Begin by selecting a casebook. There are many casebooks to choose from and it is easy (too easy) to become overwhelmed by the sheer quantity of choices. Rather than succumb to the temptation to get lost in the sea of possibilities, I would counsel you to consult with more senior colleagues and to pick a casebook that contains some clear explanatory narratives; relevant black-letter doctrine; elaboration of relevant historical, theoretical, and policy-based considerations; and a good teacher's manual. Such a choice frees you from the heavy burden of having to teach everything in class, and in addition, it gives students the comfort and assurances that a more comprehensively written text affords. A helpful teacher's manual is an invaluable ally as you prepare and then refresh your recollection in anticipation of class.

As a new teacher, I used *Dukeminier*, and I found its comprehensive narratives and many elaborate notes and explanations to be reassuring and freeing. When time was short, I could have my students simply read the more self-explanatory text and trust that they would find it accessible and understandable without our having to get bogged down in class. Its teacher's manual is similarly comprehensive. (I hasten to add that *Dukeminier* errs in favor of oversaturation, and the Property teacher must take care to be selective when creating the syllabus and list of assigned readings to avoid including too much.) Once I had a mastery and conversancy with the subject matter that could transcend the text, I was able to experiment with other casebook choices, and I could select books that contained less narrative and different focal points, from more critical deconstruction to emphasis on practical considerations and lawyering skills or the public-interest dimensions of Property law.

The following guideposts are helpful as you prepare to teach the class for the first time:

1. **Decide on a casebook.** To narrow down the range of possibilities, talk with more senior faculty to learn about their choices. Sit down with the casebook possibilities and teacher's manuals to get a feel for each one, and allow your instincts to help you to make the call as to which is right for you.

2. **Decide on your scope of coverage.** The irreducible content of the course, recounted in the preceding section of this book, should be covered, but the component parts of each unit's reach and the amount of time allocated to each will vary based upon your preferences.

3. **Prepare your syllabus.** As noted, avoid including too much. Look to colleagues' syllabi for guidance. As you map out your comprehensive plan for the semester, consider where you would like to leave room for guest speakers, skills exercises, or additional role-playing and simulations.

4. **Compile supporting materials.** As you begin to develop your teaching notes for the class, have by your side your casebook and teacher's manual, one good hornbook, one or two student study aids, and a good transactional guidebook that sets forth potential skills-based exercises.

5. **Anticipate in advance which topics are likely to be particularly difficult for your students.** Experience has taught me that the following areas tend to inspire the most initial confusion: estates and future interests, servitudes, and the recording system, with its chain of title problems. Build in some extra time in the syllabus to cover those topics so that you can review and go over problem sets, as well as answer likely student questions. As noted earlier, teaching those thornier topics is best accomplished by resorting to an initial straightforward lecture format, followed by case applications of the black-letter doctrine, problem sets, and the more interesting policy dimensions of the subject matter. Your casebook and teacher's manual should help you to develop lecture materials, as will more seasoned colleagues' class notes. A study aid is actually very helpful here, too, insofar as it sets forth the essentials in a cohesive, well-organized format. In this regard, my own

class notes are condensed into my student guide, *A Short and Happy Guide to Property* (West 2011).

6. **Err in favor of overpreparation.** The success of each class depends in very significant measure on the amount of time you spend preparing for it. As a new teacher, I prepared a transcript of sorts for each class, with questions, possible responses, and follow-up questions scripted in. That sort of detailed recitation helped to give me a clear picture of my goals for coverage and a path for meeting those goals. Just before class, however, I would put the script into my binder so that it would be there if I needed it, and then I would jot down on a larger index card the takeaways that set forth the irreducible content of the day's coverage. When all was said and done, those were the points that needed to be made. This ultimately pared-down approach was freeing, and it helped me to remain present, responsive, and alert during class. Keep in mind, too, that no matter how meticulously well prepared you are, there will be questions that you cannot answer. Nevertheless, you can retain authoritative command by indicating that the question is an excellent one (if it is) and that you will think about the matter more closely for the next class. Then, be sure to follow up next time. Alternatively, if the question is off-topic or too much of a digression, say so, and then ask the student to come see you after class, or ask the student to do some research on the point and then report back to you.

IV. Strategies for Teaching the Class

Property lends itself to the case method, with the proviso that the Property teacher is best advised to explicate core doctrine clearly and to navigate students tenderly through the more difficult waters of estates, future interests, servitudes, and the recording system. In this regard, I have found that repetition is the parent of mastery. Thus, when teaching, I tend to restate key principles and provide reiterations that are aimed at accessing students' alternative neural pathways. I use the spoken word, the written word (through PowerPoint slides, handouts, and problem sets), and then more kinesthetic approaches that have students role-play, literally getting their hands

on a prop, for example, and then manipulating it to demonstrate a given point. For instance, I give a student in the first row a deed and ask her to deliver it to a student in the back row. This can be accomplished literally, by the student walking over to deposit the instrument, but also in more symbolic ways, by some manifestation of the present intent to be bound. I ask the student to communicate those more subtle means to effectuate delivery. To illustrate the chain of title, class members form a human chain, with one student acting out the part of "the wild deed" as we assess the consequences of that disruption in the chain.

As recounted earlier, to illustrate problems with the law of finders, I plant items around the classroom that will be "found" during class. I toss a wayward baseball into the classroom to get to the uncertainties of the rule of capture. To reach students' multiple intelligences better, mindful that adults learn in different ways, I assign members of the class responsibility for coming up with presentations on certain cases or precepts (such as aesthetics in zoning, for example), and I find that the range of their creativity and technological savvy consistently exceeds my expectations. I routinely introduce "You Be the Teacher" segments, where students are asked to assume the professorial role to tell the class the essential teaching points of a given case and the likely cross-referents. "What Are You Sensing?" is another classroom exercise that I have developed to hone students' awareness of the host of important nonverbal cues that certain exercises, such as role-playing, tend to elicit.

To render the material more accessible, I include acronyms, imagery, metaphor, and story. For instance, the remainderman becomes a living personality, as does his sinister distant relative, the executioner (or holder of the executory interest). When relevant, I incorporate client stories from my practice and from my *pro bono* initiatives, both to make points and also to stir the pot of compassion for the struggles of litigants. Since property law quite literally affects us where we live, I draw from the range of my own experiences as a tenant, and then as a buyer of a home.

My pedagogical approach is rooted in two core premises. First, adults learn in different ways, and models for learning advanced in cognitive development (learning by visual, auditory, kinesthetic, and interactive stimuli) have an important place to play in the law school classroom. Second, teaching is a moral craft, requiring that legal educators endeavor in all courses to communicate core values of ethics

and professionalism. Theoretical as well as practically applied considerations of right and wrong, of prudence and fairness, and of the struggles of the people behind the cases play a role (and sometimes take center stage) in the classroom dynamic.

I have spent considerable time thinking about the range of our pedagogical choices, and I have studied aspects of the neuroscience and cognitive psychology that are relevant to generating student engagement. I have concluded that as law teachers, we are best advised to endeavor to access our students' left- and right-brain aptitudes. Traditional law school pedagogy appeals to the so-called left-hemisphere skill sets, rooted in the linear, logical, and analytical. This, of course, is for good reason. Nonetheless, student learning is enhanced also by appealing to right-hemisphere abilities, which are more intuitive, empathic, nonlinear, and holistic. Some cognitive and social scientists have gone so far as to theorize that we are actually in the midst of a paradigmatic shift away from the more linear "information age" to the more innovative "conceptual age," where "the future belongs to those with a right-side mindset— creators, artists, empathizers, pattern recognizers, and meaning makers." (Daniel H. Pink, *A Whole New Mind* (Riverhead Books, 2005).

In Property, to appeal to right-brain pathways, I use story to make the subject matter more experiential, telling the story (or having preassigned students tell the story) of the cases. In this respect, Foundation Press has a *Stories* series that includes a volume on *Property Stories*. During role-playing exercises, I have students imagine the stories and conversations of the parties and counsel, as well as the litigants' and litigators' likely reactions to the given case outcome. This becomes particularly poignant in the context of the exclusionary zoning materials, for example, as well as in the setting of the cases on discrimination in housing, where, for instance, neighbors sought to enjoin the African-American Shelley family from moving into their new home, relying on the terms of a racially restrictive covenant to try to accomplish their aims. Throughout, I ask my students to remain vigilantly mindful of the purposes and promise of the law. There can be no justice without just lawyers, as my colleague and public-interest attorney Shavar Jeffries has said. To teach with meaning, I try to infuse classes with strands of the ethical and moral imperatives that inform justice and build just lawyers.

Referred to in the cognitive science literature as "narrative imagining," the technique of having students tell the stories of cases and

the people behind those cases allows the material to have an emotional impact, thereby helping to anchor the principles at issue and cultivate empathy. At the conclusion of each unit, I devote some class time to weaving together the seemingly divergent strands of analysis, and I ask the class to speak to how the segment that we just concluded fits into the whole of Property and connects to earlier units. This facilitates students' capacity to discern patterns, as well as to appreciate the essential interconnectedness between and among the initially disparate legal and theoretical constructs.

V. More on the First Day of Class

The first day of class presents a powerful opportunity for the teacher to set forth her expectations of the students, the standards of professionalism that she will hold herself and her students to, and the learning objectives for the course. All sorts of important norms as to what is and is not acceptable are established during this first meeting. Hence, it is exceedingly important to state the ground rules clearly and to make plain that you are the captain of this ship. You have thought carefully about the subject matter and the scope of coverage, and you have a conversancy with the material that will render it accessible, understandable, challenging, and fun. (Yes, as already noted, it may seem at first that you are "faking it until you make it." No matter. Proceed with confidence, mindful that you are the most prepared person in the room. You are the teacher, and you are in charge.)

With your introduction, make the subject matter come alive for your students, because Property truly is the story of our lives. Enthusiasm goes a long way, as does the teacher's willingness to demonstrate her compassion for the struggles that the learning process can inspire. From my earliest days as a teacher, it became clear that students don't care how much you know until they know how much you care. On the first day of class, I borrow from Karl Llewellyn and write on the board, "Compassion without technique is a mess. But technique without compassion is a menace." I explain that wisdom and compassion are indivisible. As lawyers, we are not technocrats, automatons, or hired guns. We are problem-solvers, capable of melding precision with empathy.

I devote the first class to the consideration of the question "What is property?" and, as recounted earlier in this book, I use a student's

watch to illustrate the point. I also spend part of class introducing the various lenses or schools of thought through which to view the subject matter, such as the law and economics vantage point, the critical legal studies perspective, and the utilitarian balancing calculus. I write each on the board and then ask a volunteer to tell me what he or she knows about that point of view. That student then becomes the point person for that particular construct, which helps to establish a common refrain and frame of reference for the Property symphony that we create together.

Just before this first class, and when every class thereafter comes to a close, I set forth the expectations for the next class. I write down several questions on the board and ask the students to consider them as they read and reread the assigned materials. I use that technique throughout the semester, and I find it very helpful in setting the stage and avoiding unfair surprise. After each class, I spend some time alone to carefully deconstruct the session, think about connections that were made (or not), and determine which points I need to return to in the next class.

I strive very hard to remember my students' names from the very start, and I find that the time spent doing so is wisely invested. I also jot down the point or points that a particular student or students made, as well as the questions that were asked. What can those tell me about what the class took away from the materials? Which points will I reiterate? When did interest sag? When did it pick up? Why? Our students communicate with us in countless ways, both overtly and through a host of nonverbal cues. As teachers, it behooves us to be active listeners too.

VI. Review and Exam

At the end of the semester, I conduct a review session where I present an overview of each unit that we covered and highlight areas of emphasis. I answer questions and endeavor to clear up any lingering confusion or concerns. I allocate one hour for the review, but I find that it usually stretches on a bit longer than that.

Throughout the semester, I encourage the class to make connections between the given unit and those that came before it and routinely introduce fact patterns to make those interconnections more apparent. During the review session, I suggest again the ways in

which the strands of analysis and precedent tie together. For example, estates and future interests coincide with land transactions, where Blackacre might be deeded to another in fee simple determinable. Alternatively, concurrent estates could be implicated in a land transfer problem, where Blackacre is conveyed "to A, B, and C as tenants in common." Adverse possession issues could arise to the extent that one co-owner productively uses the land for a protracted period of time in the absence of the other co-owners, who may have been ousted. The law of finders might intersect with landlord/tenant law to the extent that a tenant makes a find on leased property. Servitudes could collide with eminent domain to the extent, for example, that government demands a public easement in exchange for granting petitioners permission to build. The possibilities are endless, and it is vitally helpful to encourage students to get in the habit of conjuring up the interconnections often.

During the review session, and also, most essentially, throughout the semester, I reinforce the importance of students' capacity to spot relevant issues and then critically apply the governing rule of law to the subtleties of the facts as presented. In class, when students state the black-letter doctrine that a given case or hypothetical sets forth, I encourage them to preface their next observations with the words "here" or "in this case." In this case, how well does the relevant precedent resolve the controversy? Here, do the facts fit within existing doctrine? In this case, should an exception to the rule be crafted? This sort of methodology, which is resorted to often, gets the class in the habit of linking law to facts. This, after all, is what we do as lawyers, and it's what will be expected of students on the final exam. At the review session, I reiterate the importance of linking the law to the facts, and I tell the class that their exam answers should frequently invoke the words "here" and "in this case" to assure that they are resisting the temptation to simply recite a kitchen-sink narrative of legal doctrine for its own sake.

Preparing the exam and then grading it represent two exceedingly important tasks. There are few opportunities for our students (and us) to get feedback, and the final gives us the opportunity to see how we did with our teaching of the material and, of course, gives class members the chance to gauge how well they are doing with their assimilation and mastery of the core subject matter and the legal method of inquiry. Moreover, in gloomy job markets, an awful lot is riding on students' grades when it comes to employment prospects.

The final exam should be fair, and it should be perceived as such by your class. The scope of class coverage should establish its bounds. The exam should not work unfair surprise by including matters that were not taken up in class, and it should be balanced in accordance with the extent of time devoted to each unit. If a particular topic is covered only summarily in class, you could choose to indicate during the review session that it will not be tested or, alternatively, you could include it as part of a larger essay or hypothetical, where other, more major issues appear.

For instance, if time constraints afford the opportunity for only abbreviated coverage of zoning, you could test the material discretely by including it within the fabric of an essay on land transactions. For example, A sells Blackacre to B pursuant to the terms of a general warranty deed and fails to mention that Blackacre is in violation of an applicable zoning ordinance. In addition to the other issues to attend the land transaction, the zoning violation tests students on their ability to discern that the presence of the zoning offense rendered title unmarketable. The implied promise to provide marketable title, however, is a contractual promise that every seller makes. It dies at closing, and the deed becomes the operative document. Thus, does the presence of the zoning violation offend any of the deed's present or future covenants? Could B succeed in obtaining a variance?

Take care to be sure that the exam is not too time-pressured. I draft my exam, and then I actually take the exam, simulating exam conditions. I then multiply the amount of time that it took me to complete it by three. The rule of three has helped me to predict how long students will need to give the questions their due.

Particularly as a new teacher, it is important to state your expectations for the exam clearly and often. I indicate from the first day of class that the exam is closed-book, and in the five-credit course, the exam is four hours in length. I believe that the closed-book exam for Property is actually of greater benefit to students than an open-book exam, since it frees students from the illusion that they will have time during the exam to peruse their outlines and other materials, and it also gives them practice at the skill of committing volumes of information to memory to then recite back in a particular format. This is the skill set that they will be called upon to apply when taking the bar examination.

As a new teacher, you will not have any of your past exams on file for students to look at. To allay students' possible anxiety about

that, decide whether any of your colleagues' past exams are somewhat close to the approach and/or format that you will be embracing, and indicate to the class that students can look at those exams as exemplars. You may wish to collaborate with another colleague to cowrite the exam, giving the same exam to each of your classes, to the extent that the exam schedule is conducive to this. I have never done that, mindful that while the scope of coverage tends to be for the most part quite similar between sections of the same course, each class is different, and the materials emphasized, connections made, and time allocated to each unit will be different, too. Hence, I carefully tailor my exam to what occurred or did not occur in class, to give students a good opportunity to prepare well without the added hardship of surprise.

I give essay exams, and typically I write three longer fact patterns and then include one section devoted to a series of shorter essay questions. I suggest that students allocate one hour to each of the four parts. The shorter essay questions (no more than a paragraph in length) allow me to test the basics of estates and future interests, concurrent estates, servitudes, and chain of title problems. The longer questions include coverage of those topics in the context of larger fact patterns that are based, for example, on a land transaction, a landlord/tenant dispute, or a government taking. I write a new exam every time I teach the course, since students are exceedingly resourceful in tracking down every past exam, and I never take questions from extrinsic sources. The Internet gives students the opportunity to find just about anything and everything.

Before grading, I prepare a master sheet of the issues, legal doctrines, fact-sensitive determinations, and policy-based considerations included within each essay question. Each of those is weighted and given a point value. When all is said and done, I will have given each exam three reads. First, before I begin the actual task of giving and deducting points, I read the entire set of submissions, taking notes on any issues that I had not thought about but that are implicated, and jotting down essential commonalities in the mix, as well as red herrings. Sometimes, no one in the class picked up on a certain issue that was within a question's reach. I throw that issue out, just as I add certain points to the master sheet based upon the discernment of some of the exam answers.

Now, on the second read, I am ready to grade. Grading can be tedious, but it is so very important. I stay alert and focused because

too much is riding on the result (and our students spent too much time in earnest preparation) for me to slack off or find my attention span waning. Hence, I take frequent quick breaks, stay caffeinated, do jumping jacks (really), and regroup as needed. I remind myself often that the exams are giving me a window into the effectiveness of the classroom experience. Students' triumphs on the exam are mine as well. Conversely, the group's shortcomings show me where there were gaps in understanding. As a result, I go back and reconfigure my pedagogical choices for next time.

I append a copy of my master grading grid to each exam and then begin the task of assigning and deducting points according to the issues spotted, the student's treatment of those issues, the capacity of the test taker to link the law to the facts as presented, the inclusion of counterpoints and relevant policy considerations, and the overall tenor. I tell my students that they do not have to mention cases by name, but that if not, they should include references to the case law by saying, for example, "the case that we discussed in class, to consider whether the draftiness of the premises was tantamount to breach of the covenant of quiet enjoyment."

At the conclusion of this second read, I prepare a spreadsheet of the raw scores and then establish the curve. I then place all the As (including pluses and minuses) in one pile, all the Bs in another pile, and so on. For the third read, each of the piles is read together. No matter how mechanically meticulous an exam grader endeavors to be, the grading process involves certain considerations that defy a number. For instance, an exam may be exceedingly cohesive and discerning, entitling it to a bump up in spite of the issues that might have been omitted. Always, it becomes clear on this last read that some fine-tuning needs to be done. For example, an exam that was assigned a B– actually may be a B because it is just like the other Bs. Less frequently (but it has happened), a whole grade category changes, so that a C should be a D+, or a B should be an A–.

This process, albeit time-consuming, is well worth it. First and foremost, it is part of our fiduciary obligation to our students. Second, it is instructive, helping the law professor to know what went right (or perhaps awry) with the teaching exchange. Third, it is an immeasurable help when a class member comes to the teacher, after the grades are posted, to figure out why she earned the grade given. I find that I can be helpful, and certainly well informed, as I debrief students on the caliber of their exam performance. My own careful

consideration of my students' work prepares me to be prescriptive, as I share my observations on how and why they did well in some areas and not so well in others, pointing out how best to maximize exam performance moving forward.

VII. Conclusion

Teaching is a sacred trust. Henry James got it right when he observed that "a teacher affects eternity, and will never know where his influence stops." Each of us has an enduring place in our students' intellectual, ethical, and professional development. As teachers, we are constantly modeling behaviors, both in and out of the classroom. I aim to stay mindful of this power and opportunity. I seek vigilantly to communicate a view of the legal profession that is noble and honorable. I love the law and its capacity to be a force for good, and my teaching strives to make that love visible.

No matter the pathways to learning that the Property teacher chooses, carrots work better than sticks. Students will rise to our levels of expectation, and praise is a great motivator. Each of my students is even better than they know, and I am better because of them.