SINGER

PROPERTY LAW
Rules, Policies, and Practices

Fourth Edition

ASPEN PUBLISHERS

ASPEN PUBLISHERS

Property Law

Rules, Policies, and Practices

Fourth Edition

JOSEPH WILLIAM SINGER
Professor of Law, Harvard University

Wolters Kluwer
Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

a Wolters Kluwer business
http://lawschool.aspenpublishers.com

Printed in the United States of America.

2 3 4 5 6 7 8 9 0

ISBN 0-7355-5547-8

Library of Congress Cataloging-in-Publication Data

Singer, Joseph William, 1954-
Property law : rules, policies, and practices / Joseph William Singer. — 4th ed.
p. cm.
Includes bibliographical references and index.
1. Property — United States — Cases. I. Title.

KF560.S56 2005
346.7304 — dc22

2005029888

About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading provider of research information and workflow solutions in key specialty areas. The strengths of the individual brands of Aspen Publishers, CCH, Kluwer Law International and Loislaw are aligned within Wolters Kluwer Law & Business to provide comprehensive, in-depth solutions and expert-authored content for the legal, professional and education markets.

CCH was founded in 1913 and has served more than four generations of business professionals and their clients. The CCH products in the Wolters Kluwer Law & Business group are highly regarded electronic and print resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

Aspen Publishers is a leading information provider for attorneys, business professionals and law students. Written by preeminent authorities, Aspen products offer analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

Kluwer Law International supplies the global business community with comprehensive English-language international legal information. Legal practitioners, corporate counsel and business executives around the world rely on the Kluwer Law International journals, loose-leafs, books and electronic products for authoritative information in many areas of international legal practice.

Loislaw is a premier provider of digitized legal content to small law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

Wolters Kluwer Law & Business, a unit of Wolters Kluwer, is headquartered in New York and Riverwoods, Illinois. Wolters Kluwer is a leading multinational publisher and information services company.

For Martha Minow
who has made all the difference

In memory of
Mary Joe Frug

Property rights serve human values.
They are recognized to that end,
and are limited by it.

Chief Justice Joseph Weintraub
Supreme Court of New Jersey, 1971

Preface to the Fourth Edition

It is surprising how fast the law is changing in an area one might have thought settled in a mature, free market economy. When the first edition of this book was published in 1993, a majority of states still adhered to the old rule that protected landlords from the duty to mitigate damages; almost all states have now changed their law to include such a duty (with the exception of a few notable states such as New York). The Uniform Statutory Rule Against Perpetuities is now the law in more than half the states and more than a few states have abolished the rule against perpetuities altogether, at least as applied to income from trusts of personal property. The *Restatement (Third) of Property (Servitudes)* just adopted in 2000 is beginning to influence the law of property; at the same time, some proposed changes in the law have seen only sporadic acceptance. Several proposed rules in the *Restatement* — such as the right of the servient estate owner to move an easement without the consent of the easement owner — have been accepted by some states and emphatically rejected by others. Several states have adopted laws guaranteeing the right to fly the American flag, regardless of any condominium rules or covenants to the contrary. Massachusetts, as well as some foreign nations, have recognized same-sex marriages, creating new issues in family law when those couples travel, divorce, and die. Oregon has adopted a law called Measure 37 that prohibits any changes in land use regulation laws that decrease the value of property unless those harms are compensated; it thereby may have the effect of freezing current regulatory laws in place. And since 2001, the Supreme Court has issued an astonishing series of cases in the area of regulatory takings that literally forced me to completely reorganize and rewrite my chapter on that subject.

This edition, like the previous editions, seeks to present a contemporary introduction to the law of property, focusing on pressing issues of current concern as well as the basic rules governing the property system. As before, I have attempted to ensure that students and professors can get a clear and accurate picture of the current law, as well as understanding the many disagreements among the states on the applicable rules in force. Some of the rules governing property are arcane and complex and students should be able to learn them without reading a treatise on the side. At the same time, many of the cases have dissents and almost all have policy discussion justifying the approach taken by the court. Where no dissents are present and the states disagree about the law, I have made this clear in the note material. I have also presented problems that place students in real lawyering roles so that they can use the materials in the book (principal cases, subsidiary cases, textual explanation of the doctrine and policy concerns) to make arguments on both sides of hard cases and to learn both to justify their judgments and to criticize the results reached by the courts and legislatures.

Joseph William Singer
Cambridge, Massachusetts
5766/2006

A Guide to the Book

What Is Property?

Property rights concern relations among people regarding control of valued resources. Property law gives owners the power to control things, and it does this by placing duties on non-owners. For example, owners have the right to exclude non-owners from their property; this right imposes a duty on others not to enter property without the owner's consent. Property rights are relational; ownership is not just power over things but entails relations among people. This is true not only of the right to exclude but of the privilege to use property. An owner who operates a business on a particular parcel may benefit the community by creating jobs and providing needed services, and she may harm the community by increasing traffic or causing pollution. Development of a subdivision may affect drainage patterns and cause flooding on neighboring land. Property use makes others vulnerable to the effects of that use, for better or for worse. Power over things is actually power over people.

Property rights are *not absolute.* The recognition and exercise of a property right in one person often affects and may even conflict with the personal or property rights of others. To give one person an absolute legal entitlement would mean that others could not exercise similar entitlements. Property rights are therefore limited to ensure that property use and ownership do not unreasonably harm the legitimate, legally protected personal or property interests of others. The duty to exercise property rights in a manner compatible with the legal rights of others means that *owners have obligations as well as rights.*

Owners of property generally possess a *bundle of entitlements.* The most important are the privilege to use the property, the right to exclude others, the power to transfer title to the property, and immunity from having the property taken or damaged without your consent. These entitlements may be disaggregated — an owner can give up some of the sticks in the bundle while keeping others. Landlords, for example, grant tenants the right to possess their property in exchange for periodic rental payments while retaining the right to regain possession at the end of the leasehold. Because property rights are limited to protect the legitimate interests of others and because owners have the power to disaggregate property rights, entitlements in a particular piece of property are more often shared than unitary. It is almost always the case that more than one person will have something to say about the use of a particular piece of property. Property law therefore cannot be reduced to the rules that determine ownership; rather, it comprises rules that allocate particular entitlements and define their scope.

Property is owned in a *variety of forms.* An infinite number of bundles of rights can be created from the sticks in the bundle that comprise full ownership. However, some bundles are widely used and they comprise the basic forms or models of ownership. Some forms are used by individuals while others are used by couples (married or unmarried) or families. Other forms are used by groups of unrelated owners. Differences exist between

forms that give owners management powers and those that separate ownership from management. Further distinctions exist between residential and commercial property and between nonprofit organizations and for-profit businesses. Within each of these categories are multiple subcategories, such as the distinction between partnerships and corporations or between male-female couples and same-sex couples. Particular models of property ownership have been created for different social contexts and types of property. Each model has a different way of bundling and dispersing the rights and obligations of ownership among various persons. Understanding property requires knowledge both of the individual sticks in the bundle of property rights and the characteristic bundles that characterize particular ownership forms.

Property is a *system* as well as an *entitlement.* A property right is a legal entitlement granted to an individual or entity but the extent of the legal right is partly determined by rules designed to ensure that the property system functions effectively and fairly. Many property law rules are geared not to protecting individual entitlements, but to ensuring that the environment in which those rights are exercised is one that maximizes the benefits of property ownership for everyone and is compatible with the norms underlying a free and democratic society. Some rules promote efficiency, such as the rules that promote the smooth operation of the real estate market. Other rules promote fairness or distributive justice, such as the fair housing laws that prohibit owners from denying access to property on the basis of race, sex, religion or disability.

Tensions Within the Property System

In 1990, roughly a year after his nation was freed from Soviet domination, the foreign minister of Czechoslovakia, Jiri Dienstbier, commented that "[i]t was easier to make a revolution than to write 600 to 800 laws to create a market economy."[1] If anything, he understated the case. Each of the basic property entitlements is limited to ensure that the exercise of a property right by one person is compatible with the property and personal rights of others. The construction of a property system requires property law to adjudicate characteristic core tensions in the system.

Right to exclude versus right of access. It is often said that the most fundamental right associated with property ownership is the right to exclude non-owners from the property. If the right to exclude were unlimited, owners could exclude non-owners based on race or religion. Although at one time owners were empowered (and in some states required) to do this, current law prohibits discrimination on the basis of race, sex, national origin, religion or disability in public accommodations, housing and employment. Although individuals are free to choose whom to invite to their homes for dinner, market actors are regulated to ensure that access to property is available without regard to invidious discrimination. Property therefore entails a tension between privacy and free association norms on one side and equality norms on the other. Sometimes the right of access will take precedence over the right to exclude. The tension between these claims is one that property law must resolve.

Privilege to use versus security from harm. Owners are generally free to use their property as they wish, but they are not free to harm their neighbors' property substantially and unreasonably. A factory that emits pollutants into the air may be regulated to prevent

[1] William Echikson, *Euphoria Dies Down in Czechoslovakia*, Wall St. J., Sept. 18, 1990, at A26, 1990 WL-WSJ 56114.

the use of its property in ways that will destroy the individual property rights of others and common resources in air and water. Many uses of property impose "externalities" or spillover effects on other owners and on the community as a whole. Because owners are legally entitled to have their own property protected from pollutants dispatched to their property by others, owners' freedom to use their property is limited to ensure that their property use does not cause such unreasonable negative externalities.

Power to transfer versus powers of ownership. Owners are generally free to transfer their property to whomever they wish, on whatever terms they want. Freedom of disposition gives them the power to sell it, give it away, or write a will identifying who will get it when they die. They are also free to contract with others to transfer particular sticks in the bundle of sticks comprising full ownership to others while keeping the rest for themselves. Owners may even place conditions on the use of property when they sell it, limiting what future owners may do with it. They may, for example, limit the property to residential purposes by including a restriction in the deed limiting the property to such uses.

Although owners are free to disaggregate property rights in various ways, and to impose particular restrictions on the use and ownership of land, that freedom is not unlimited. Owners are not allowed to impose conditions that violate public policy or that unduly infringe on the liberty interests of future owners. For example, an owner could not impose an enforceable condition that all future owners agree to vote for the Democratic candidate for president; this condition infringes on the liberty of future owners and wrongfully attempts to tie ownership of the land to membership in a particular political party. Nor are owners allowed to limit the sale of the property to persons of a particular race. Similarly, restrictions limiting the transfer of property will ordinarily not be enforced, both to protect the freedom of owners to move and to promote the efficient transfer of property in the marketplace. The freedom of an owner to restrict the future use or disposition of property must be curtailed to protect the freedom of future owners to use their property as they wish. The law limits freedom of contract and freedom of disposition to ensure that owners have sufficient powers over the property they own.

Immunity from loss versus power to acquire. Property owners have the right not to have their property taken or damaged by others against their will. However, it is often lawful to interfere with the property interests of others. For example, an owner who builds a house on a vacant lot may block a view enjoyed by the neighbor for many years. A new company may put a prior company out of business or reduce its profits through competition. Property rights must be limited to ensure that others can exercise similar rights in acquiring and using property. In addition, immunity from forced seizure or loss of property rights is not absolute when the needs of the community take precedence. To construct a new public highway or municipal building, for example, the government may exercise its eminent power to take private property for public uses with just compensation.

Recurring Themes

A number of important themes will recur throughout this book. They include the following:

Social context. Social context matters in defining property rights. We have different typical models of property depending on whether it is owned individually or jointly, among family members or non-family members, by a private or a governmental

entity, devoted to profitable or charitable purposes, for residential or commercial purposes, open to public use or limited to private use.

Formal versus informal sources of rights. Property rights generally have their source in some formal grant, such as a deed, a will, a lease, a contract, or a government grant. However, property rights also arise informally, by an oral promise, a course of conduct, actual possession, a family relationship, an oral gift, longstanding reliance, and social customs and norms. Many of the basic rules of property law concern contests between formal and informal sources of property rights. While the law usually insists on formality to create property rights, it often protects informally created expectations over formally created ones. Determining when expectations based on informal arrangements should prevail over formal ones is a central issue in property law.

The alienability dilemma. It is a fundamental tenet of the property law system that property should be "alienable," meaning that it should be transferable from one person to another. Transferability allows a market to function and enables efficient transactions and property use to occur. It also promotes individual autonomy by allowing owners to sell or give away property when they please on terms they have chosen. This suggests that the law should allow owners to disaggregate property rights as they please. However, if owners are allowed to disaggregate property rights at will, it may be difficult to reconsolidate those rights. If property is burdened by obsolete restrictions, it may be expensive or impossible to get rid of them. Similarly, if property is disaggregated among too many owners, transaction costs may block agreements to reconsolidate the interests and make the property useable for current needs. The property may therefore be rendered inalienable.

Many rules of property law limit contractual freedom to ensure that particular bundles of property rights are consolidated in the same person — the "owner." Consolidating power in an "owner" ensures that resources can be used for current purposes and current needs and allows property to be freely transferred in the marketplace. We therefore face a tension between promoting alienability by consolidating rights in owners and promoting alienability by allowing owners to disaggregate their rights into unique bundles constructed by them.

Contractual freedom and minimum standards. Individuals want to be free to develop human relationships without having government dictate the terms of their association with others. Having the ability to rearrange property rights to create desirable packages of entitlements will help enable various relationships to flourish. However, there are also bounds to what is acceptable; this is why the law imposes certain minimum standards on contractual relationships. For example, although landlords are entitled to evict residential tenants who do not pay rent, the law in almost every state requires landlords to use court eviction proceedings to dispossess defaulting tenants. These proceedings give tenants a chance to contest the landlord's possessory claim and to have time to find a new place to live, rather than having their belongings tossed on the street and being dispossessed over night. These limitations on free contract protect basic norms of fair dealing and promote the justified expectations of individuals who enter market transactions.

Social welfare. Granting owners power over property ensures that they can obtain resources to satisfy human needs. It also promotes social welfare by encouraging productive activity and by granting security to those who invest in economic projects. Clear property rights facilitate exchange and lower the costs of transactions by clarifying

who owns what. At the same time, owners may use their property in socially harmful ways, and clear property rights may promote harmful, as well as beneficial, actions. Property rights must be limited to ensure that conflicting uses are accommodated to minimize the costs of desirable development on other owners and on the community. Moreover, rigid property rights may inhibit bargaining rather than facilitate it by granting owners the power to act unreasonably, thereby encouraging litigation to clarify the limits on the owner's entitlements. Reasonableness requirements, while less predictable than clear rules, may promote efficient bargaining by encouraging competing claimants to compromise in ways that minimize the costs of property use on others. We need to design rules of ownership and transfer that promote efficiency and social welfare by decreasing the costs of using and obtaining property while maximizing its benefits both to individual owners and to society as a whole.

Justified expectations. In a famous phrase, Jeremy Bentham wrote that "[p]roperty is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it."[2] Owners justifiably expect to use their own property for their own purposes and to transfer it on terms chosen by them. However, because the property use often affects others, it must be limited to protect the expectations of others. Property law protects justified expectations. A central function of property law is to determine what the parties' actual expectations are and when they are, and are not, justified.

Distributive justice. Property rights are the legal form of wealth. Wealth takes many forms, including the right to control tangible assets, such as land and buildings, and intangible assets, such as stocks that give the holder the right to control and derive profit from a business enterprise. In fact, any legal entitlement that benefits the right holder may be viewed as a species of property. The rules of property law, like the rules of contract, family, and tax law, play an enormous role in determining the distribution of both wealth and income.

How well is property dispersed in the United States? One expert has noted that "[b]y several measurements, the United States in the late twentieth century led all other major industrial countries in the gap dividing the upper fifth of the population from the lower — in the disparity between top and bottom."[3]

One indicator of the distribution of property is income. Since 1967, income distribution has become increasingly unequal in the United States. In 1999, the Census Bureau reported that the share of total income going to the top fifth of American households increased from 43.8% in 1967 to 49.4% in 1999.[4] The share of the top 5% climbed from 17.5% in 1967 to 21.5% in 1999. In contrast, the lowest 20% of the population dropped from 4% of income in 1967 to 3.6% in 1999. The second lowest fifth from the bottom received 8.9% of total income in 1999, while the third (middle) fifth received 14.9% and the fourth fifth 23.2%. Together the top two/fifths received 72.6% of total income in 1999.

---

[2] Jeremy Bentham, 1 *Theory of Legislation* 137 (Boston: Weeks, Jordan & Co., R. Hildreth trans. 1840).

[3] Kevin Phillips, *The Politics of Rich and Poor: Wealth and American Electorate in the Reagan Aftermath* 8 (1990).

[4] U.S. Census Bureau, Current Population Reports, P60-209, *Money Income in the United States: 1999* (Sept. 2000) (http://www.census.gov).

It is telling that the share of income going to the bottom fifth of the population fell between 1967 and 1999 while the share going to the top fifth increased. However, it is as important to know that within the top fifth of the population, the bulk of this increase was obtained by those at the very top. A Congressional Budget Office study showed that "between 1979 and 1997, the after-tax incomes of the top 1 percent of families rose 157 percent, compared with only a 10 percent gain for families near the middle of the income distribution."[5] The growth in executive pay has also been nothing short of astounding in the last thirty years. Writing in 2002, Paul Krugman explained:

> Is it news that C.E.O.'s of large American corporations make a lot of money? Actually, it is. They were always well paid compared with the average worker, but there is simply no comparison between what executives got a generation ago and what they are paid today.
>
> Over the past 30 years most people have seen only modest salary increases: the average annual salary in America, expressed in 1998 dollars (that is, adjusted for inflation), rose from $32,522 in 1970 to $35,864 in 1999. That's about a 10 percent increase over 29 years — progress, but not much. Over the same period, however, according to Fortune magazine, the average real annual compensation of the top 100 C.E.O.'s went from $1.3 million — 39 times the pay of an average worker — to $37.5 million, more than 1,000 times the pay of ordinary workers.[6]

The distribution of income also varies according to race, gender and age. The median income of households in the United States was $40,816 in 1999; half of all households received more and half less than that amount. However, differences are substantial along racial lines. While the median income of white, non-Hispanic families was $44,366 in 1999, the median income for African American households was only $27,910. The median income for Latino households was $30,735 while that of American Indians and Native Alaskan households was $30,784.[7] Although per capita income for all races was $21,181 in 1999, the figure for white, non-Hispanic individuals was $24,109, while that for African Americans was only $14,397 and that for Latinos $11,621.

Poverty is similarly unequally distributed by race. While 11.8% of all persons were poor by federal standards in 1999, only 7.7% of non-Hispanic whites were poor; by comparison, 23.6% of African Americans and 22.8% of Latinos fell below the poverty line. Data averaged from 1997 to 1999 show that 25.9% of American Indians and Native Alaskans were poor by official standards.[8] In 2003, the poverty rate had risen to 12.5%, which included 35.9 million people. However, in 2003, the poverty rate for non-Hispanic whites was 8.2%, while the poverty rate for African Americans was 24.4%, for Latinos 22.5%, and for American Indians, 23.2%.[9]

Although the gap in incomes between men and women has narrowed over the last quarter century, men still earn more than women on average. In 1999, men who worked full time earned an average of $36,476 while women who worked full time earned only $26,324, or 72% of male earnings.

---

[5] Paul Krugman, *For Richer*, N.Y. Times Magazine, Oct. 20, 2002, at 62.

[6] *Id.*

[7] This figure masks huge differences within the Indian and Native Alaskan population. Incomes of those living on reservations is much lower than that of off-reservation Indians. Moreover, differences among tribes are large. Although some tribes are wealthy, others are among the poorest groups in the United States.

[8] Joseph Dalaker & Bernadette D. Procter, U.S. Census Bureau, Current Population Reports, P60-210, *Poverty in the United States: 1999* (Sept. 2000)(http://www.census.gov).

[9] U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2003*, at http://www.census.gov/hhes/www/income.html

Children are disproportionately poor in the United States. Although children made up 26% of the total population in 1999, they make up 38% of the poor. Although 11.8% of the population fell below the poverty line, 16.9% of children did so. That figure rose to 17.6% in 2003. In 1999, 37% of African American children were living in poverty. These figures differ greatly for married couples and unmarried female-headed households. Children who live in households without an adult male are extremely likely to be poor.

While only 5.8% of children in families of married couples were poor in 1999, 30.4% of children living in female-headed households were poor. Moreover, half of all children under six living in female-headed households (50.3%) were poor. Although 19.8% of children in white, non-Hispanic female-headed households were poor, 41% of children of African American female-headed households were poor. While the median income of all households in 1999 was $49,940, the median income of married couples with children was $56,827 while the median income of female-headed households was only $26,164 and the median income of male-headed households was $41,838.

Inequalities of both income and wealth are somewhat alleviated by transfer payments in the form of public assistance. Until the 1970s, elderly persons were more likely to be poor than the non-elderly. By 1990, however, the poverty rate for persons over 65 was less than that for the rest of the population, with the result that, during the 1980s, very few elderly persons were among the homeless and extremely poor. This change in the position of the elderly was the result of public spending in the form of Social Security pensions, Medicare, and housing subsidies.[10] In 1999, the poverty rate for those 65 and older was at an all-time low of 9.7%, rising to 10.2% in 2003.[11]

Wealth data show even greater inequality than that existing for income. In 1986, the top one-half of 1% of U.S. households — the top 420,000 households in the country — owned 26.9% of U.S. family net wealth. The same year, the top 10% of households owned about 68% of the nation's total wealth.[12] The richest 1% of U.S. households increased their share of net worth from 31% of the total in 1983 to 37% in 1989.[13] And in 1995, the share of total household wealth (net worth) belonging to the top 1% went up to 38.5%. The next 4% owned 21.8% of household wealth and the next 5% owned an additional 11.5%. This means that, in 1995, the top 10% of all households owned 71.8% of all household wealth. The top 20% owned 83.9% of all household wealth.[14]

Normative Approaches

How should the courts and the legislatures adjudicate conflicting property claims? Various approaches can be used to conceptualize property rights and to adjudicate conflicts among property claimants.[15] Here is a brief description of the most common approaches.[16]

---

[10] Peter H. Rossi, *Down and Out in America: The Origins of Homelessness* 193 (1989).

[11] U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2003*, at http://www.census.gov/hhes/www/income.html.

[12] Kevin Phillips, *The Politics of Rich and Poor: Wealth and the American Electorate in the Reagan Aftermath* 1-13 (1990).

[13] Joel I. Nelson, *Post-Industrial Capitalism* 9(1995).

[14] Lisa A. Keister, *Wealth in America* 64 (2000).

[15] For collections of scholary approaches to poverty, *see, Perspectives on Property Law* (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman, 2d ed. 1995; *A Property Anthology* (Richard H. Chused, 2d ed. 1997).

[16] Many, if not most, scholars combine various approaches. *See, e.g.*, Stephen R. Munzer, *A Theory of Property* (1990) (adopting a pluralist perspective including justice and equality, desert based on labor, and utility and efficiency); Carol M. Rose, *Property & Persuasion: Essays on*

Traditional American Indian conceptions of property. The original possessors of land in the United States were American Indian nations. With more than 550 federally recognized tribes and scores of unrecognized tribes, it is difficult to generalize about American Indian land use systems, either in the past or the present. Nonetheless, several characteristics of traditional Indian property systems stand out and remain important to this day.

First, land was traditionally regarded as spiritual: All parts of the material universe have a direct relationship with the spirit world or with the Creator. Specific areas are connected to specific tribes by history and spiritual linkages. For example, certain areas are believed to be the place where members of the tribe first came to earth from the spirit world. Given this spiritual bonding, American Indians traditionally believed it was not possible to "own" the land in the sense used by non-Indians. Robert Jim, the Chairman of the Yakima Nation, said, "This high country is our religion. When our souls die, this is where they come. That is why this mountain is sacred to my people."[17] A policy statement issued by the National Indian Youth Council in 1961 explained: "The land is our spiritual mother whom we can no easier sell than our physical mother. We will resist, to the death if necessary, any more of our mother being sold into slavery."[18]

Second, many American Indian nations developed property systems that were far more oriented to sharing than are non-Indian property systems. Property was conceptualized less in terms of ownership than of limited use rights. Individual tribes would have fairly clearly understood borders to their property, much like borders between sovereign nations. The tribe itself would have mechanisms for assigning specific pieces of land to individuals or families, and if needs changed, the tribal government might reallocate assignments. Thus, property was not generally sold in a way that gave as full powers to owners as exist in non-Indian systems. Moreover, property rights were not exclusive; rather, uses of property would overlap. While a particular family might use a piece of land to plant crops, this would not preclude other tribal members from entering to gather nonagricultural food on such lands. Nor did most tribes have any conception of deriving rent from land.[19]

Positivism and legal realism. Positivist theories identify law with the "commands of the sovereign" or the rules promulgated by authoritative government officials for reasons of public policy.[20] Those rules may be intended to protect individual rights, promote the general welfare, increase social wealth, or maximize social utility. Judges are therefore directed to apply the law, as promulgated by authoritative government lawmakers, and to exercise discretion where there are gaps, conflicts, or ambiguities in the law while respecting the need for consistency with the letter and spirit of preexisting laws. Jeremy Bentham wrote that the "idea of property consists in an established expectation ... of being able to draw ... an advantage from the thing possessed."[21] He believed that "this expectation, this persuasion, can only be the work of law. It is only through the

---

the History, Theory, and Rhetoric of Ownership (1994)(combining economic analysis, justice-based arguments, and feminist legal theory); Joseph William Singer, *Entitlement: The Paradoxes of Property* (2000)(using both justice and utilitarian considerations, as well as narrative theory, feminism, critical race theory, and critical legal studies).

[17] Sharon O' Brien, *American Indian Tribal Governments* 217 (1989).

[18] *Id.* at 86.

[19] William Cronon, *Changes in the Land* (1983).

[20] John Austin, *Lectures of Jurisprudence* (1861-1863); H. L. A. Hart, *The Concept of Law (1961).*

[21] Jeremy Bentham, *The Theory of Legislation 138* (Boston: Weeks, Jordan & Co., R. Hildreth trans. 1840).

protection of law that I am able to inclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest . . . ."[22] Property exists to the extent the law will protect it. "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."[23]

Positivists separate law and morals; they emphasize that, although moral judgments may underlie rules of law, they are not fully or consistently enforced by legal sanctions. Positivism was adopted by Progressive-era judges and scholars such as Oliver Wendell Holmes, who suggested analyzing legal rules in the way a "bad man" would. Such a person would not be interested in the moral content of the law but would simply want to predict what legal sanctions would be imposed on him if he engaged in prohibited conduct.[24] This approach was adopted by legal realist scholars of the 1920s and 1930s such as Karl Llewellyn, who argued that the law is what officials will do in resolving disputes.[25]

All lawyers are positivists in some sense because the job of advising clients necessarily entails identifying the rules of law that have been explicitly or implicitly adopted by authoritative lawmakers and predicting how those rules will be applied to the client's situation. Judges may also see their jobs as the enforcement of existing law and leave the job of amending law to legislatures. On the other hand, determining whether an existing rule was intended to apply to a particular situation requires judgment, as well as techniques of *statutory interpretation* and analysis of *precedent*, and a conception about the proper role of courts in the lawmaking process.

Justice and fairness. Positivism has been criticized by scholars who argue that ambiguities in existing laws must be filled in by judges, and that judges should not exercise untrammeled discretion in doing so. Rather, they should interpret gaps, conflicts and ambiguities in the law in a manner that protects individual rights, promotes fairness, or ensures justice.

Rights theorists attempt to identify individual interests that are so important from a moral point of view that they not only deserve legal protection but may count as "trumps" that override more general considerations of public policy by which competing interests are balanced against each other. Such individual rights cannot legitimately be sacrificed for the good of the community.[26] Some *natural rights* theorists argue that rights have roots in the nature of human beings or that they are natural in the sense that people who think about human relationships from a rational and moral point of view are bound to understand particular individual interests as fundamental.[27] Other scholars, building on Immanuel Kant, ask whether a claim that an interest should be protected could be *universalized* such that every person in similar circumstances would be entitled to similar protection. Still others build on the *social contract* tradition begun by John Locke and Thomas Hobbes and ask whether individuals would choose to protect certain interests if they had to come to agreement in a suitably defined decision making context. John Rawls, for example, asks what principles of justice would be

---

[22] *Id.*

[23] *Id.* at 139

[24] *See* Oliver Wendell Holmes, *The Path of the Law*, 8 Harv. L. Rev. 1 (1894).

[25] Karl Llewellyn, *The Bramble Bush* (1930).

[26] Ronald Dworkin, *Law's Empire* (1986); Ronald Dworkin, *Taking Rights Seriously* (1978), Charles Fried, *Right and Wrong* (1978); Allan Gewirth, *The Community of Rights* (1996); Jeremy Waldron, *The Right to Private Property* (1998).

[27] *See* Robert Nozick, *Anarchy, State and Utopia* (1974); Judith Jarvis Thompson, *The Realm of Rights* (1990).