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PROPERTY LAW
Rules, Policies, and Practices

Fifth Edition

Wolters Kluwer
Law & Business

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Preface to the Fifth Edition

As in the past, I have found it 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 a dozen states have abolished the rule against perpetuities altogether. The *Restatement (Third) of Property (Servitudes)* adopted by the American Law Institute in 2000 is beginning to influence the courts. Remarkably, as of the beginning of 2010, five states, as well as some foreign nations, now legally recognize same-sex marriages, creating new issues in family law when those couples travel, divorce, and die. Oregon adopted a law called Measure 37 which prohibited any changes in land use regulation laws that decrease the value of property unless those harms are compensated; the untoward effects of that law led it to be partially overturned through voters' adoption of Measure 49 several years later. A similar law in Arizona is just beginning to be implemented. Since 2001, the Supreme Court has issued an astonishing series of cases in the area of regulatory takings that literally forced me (in the Fourth Edition) to completely reorganize and rewrite my chapter on that subject.

And then there is the subprime mortgage crisis. With shocking suddenness, the housing bubble burst, and we began to witness the heartbreaking rash of foreclosures that have led millions of people to face the loss of their homes. This event, like no other (except perhaps for Hurricane Katrina), has sparked global interest in the intricacies of property law. Mortgages sold to families who could not afford to pay them back (premised on future refinancing and the increased value of the housing itself) were split into tiny pieces through securitization techniques, sold to investors around the world, and then backed up by insurance packages called credit default swaps that were not backed by any security themselves. There are many benefits to creative financial instruments, but this set of property rights, diced and divided and marketed in this way, seems to have been the cause of a world-wide recession. What lessons can we take away from this experience?

The most important lesson is that when two parties create a property right, their transaction may have important effects on others—effects we refer to these days as externalities. Often those effects are good ones, but sometimes they are bad ones. Our property law system regulates the packages of property rights that can be created in an attempt to avoid some of those negative externalities. Some of these regulations protect consumers from

unfair or deceptive practices, while others ensure that the market system works well and efficiently.

A second lesson is a historical one: The subprime crisis is a vivid reminder that the law has historically limited the kinds of property rights that can be created to ensure that property relationships cohere with our form of life. Feudal relations, slavery, racial segregation, religious establishment, and the subjection of women to the control of their husbands and fathers are all outside the bounds of relationships characteristic of a free and democratic society. Property law sets minimum standards for market and social relationships. It creates the floor on which social and economic life proceeds. The subprime crisis may lead us to consider whether we need to patch holes in that floor. Property is a form of infrastructure for our democratic, market-based society. We may well need to rethink the boundaries of allowable packages of property rights, not only to avoid economic inefficiencies but also to better protect homeownership — which, after all, is a core element of the American dream.

The tragedies associated with the subprime crisis led me to reimagine the themes underlying the property law course, both to show the connections between the current crisis and traditional aspects of property law and to continue my practice of including recent cases in order to focus on issues of pressing current importance. I have, in a way, used the subprime crisis as an organizing principle for thinking about property law. As a result, I have reorganized the beginning chapters of the book in this Fifth Edition to enable teachers and students to reflect on and to talk about the implications of the subprime crisis for property law.

Changes in this edition are as follows. First, I have created a new section on subprime mortgages in the Real Estate Transactions chapter (Chapter 12 in this edition). Second, I have created a new chapter (Chapter 2) that explores the connection between the oldest property law rules we have and the newest. That chapter combines an 1852 New York case explaining the implications of the abolition of feudalism for property rights and a 2008 case applying a state consumer protection statute to a subprime mortgage.

Third, for pedagogical reasons, I have changed the order of the introductory chapters. Property casebooks traditionally start with material on original acquisition of property, on the very logical notion that we should begin at the beginning: How are property rights initially established? Such a choice leads to a focus on the concepts of conquest and possession as the most important sources of initial acquisition, followed by the concepts of creation and labor. In recent years, however, an increasing number of property casebooks have begun somewhere else, focusing on materials that enable students to think about the institution of property more broadly. What is property? What can be owned? What does it mean to own property? I am cheered by this change because I have long thought that students will better grasp the meaning of property law by beginning in the middle, considering current disputes over use or control of property. I also believe students will better understand current issues than ones faced long ago in a different social and historical setting. Beginning with familiar issues allows students to more easily understand the competing claims, arguments, and considerations at stake in disputes about property. At the same time, the arguments in favor of teaching the rules governing original acquisition

early in the course have force as well; I have therefore retained those materials in this book in Part I, but moved them away from their place of prominence in the first chapter.

For these reasons, this Fifth Edition begins in Chapter 1 with trespass law. This is a useful place to start because most scholars agree that the right to exclude is either the most important, or one of the most important, rights associated with ownership. Beginning this way also focuses attention on the *limits* to property rights. All property rights have limits, even this most central of entitlements. Indeed, one might view all property law as an inquiry into the rights associated with property and the limits to those rights. Consider the right to exclude and exceptions to that right, the freedom to use or develop property and exceptions to that right, the immunity from loss or forced taking and exceptions to that right, and the power to contract about property rights by restricting land use or transferring interests and the limitations to those rights. Trespass law is also a useful starting point because it allows consideration of both common law and statutory regulations of property. Traditional casebooks focus almost exclusively on common law, but lawyers today deal in statutes as much, or probably more, than common law. I have long thought that legal education should reflect this current reality by introducing statutory regulation and statutory interpretation at the heart of the first-year curriculum.

The first chapter on trespass law is followed by the new chapter linking anti-feudal principles to consumer protection laws and the subprime crisis. This chapter serves as an introductory meditation on the role that property law plays in a democratic society. The third chapter contains material that used to be the first chapter in the book—material that is often characterized as methods of "original acquisition" of property, with a general focus on conquest, possession, and creation (by labor or investment). Teachers who want to begin here are free to do so, as they always have. There is something quite logical about beginning a property law course by addressing the way title to land was originally allocated. However, my personal view (explained in several of my scholarly articles)[1] is that it is easier to understand what is implicated in choosing which of the competing parties has the better claim to property if one first understands that all property rights have limitations designed to protect the legitimate interests of other owners, non-owners, and the public as a whole. Thus, granting title to one party may not leave the other party bereft of all legal protection; understanding this may cause one to come to a different conclusion about the appropriate rules governing acquisition of property. In addition, Chapter 3 is no longer titled "Original Acquisition" because most people do not acquire property today by conquest or first possession; rather they acquire property by inheritance, marriage, work, investment, and collaboration with others in business ventures. The entire corpus of property law is part of the legal framework within which property rights are created and acquired today. It is thus somewhat misleading to look to possession as the main source of original acquisition, whether today or in the past. Perhaps more important, the situations considered in Chapter 3 all involve competing claims to ownership;

1. *See* Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society,* 94 Cornell L. Rev. 1009 (2009); Joseph William Singer, *Starting Property,* 46 St. Louis U. L. J. 565 (2002).

indeed, the two sources of original title most often identified by scholars—conquest and first possession—actually contradict each other, and both are part of our historical tradition. First possession is far less important today as a source of title than are family relationships, work, and contracts, and it is those contexts that inform the bulk of the rules considered in this casebook.

I have also brought the materials on intellectual property and property in human beings and human bodies forward to the beginning of the book in chapters 4 and 5. Many teachers skip this material because they lack time to cover it, but those who do cover this material have told me that they find it useful to introduce these issues into the discussion early in the term because they show that property law does not concern only land and buildings and because these topics raise the fundamental problem of defining what can and cannot be owned.

A few additional changes should be noted. I seek to present a contemporary introduction to the law of property, focusing on various pressing issues of current concern as well as the basic rules governing the property system. I have therefore added a fair number of new principal cases to reflect emerging issues. To accommodate these new materials (and the new coverage of subprime mortgages), some material in the Fourth Edition had to be deleted. It remains available on a companion website available to teachers who want to continue using that material. *See www.aspenlawschool.com/books/singer.* In addition, in furtherance of the goal of promoting instruction and learning in statutory interpretation, I have added significant portions of the *Uniform Residential Landlord and Tenant Act* as part of the leasehold materials.

Another innovation is that, for some of the principal cases, I have listed the exact or approximate address of the property considered in the case. Here is an example, from *Glavin v. Eckman* in Chapter 1:

> Map: Aquinnah, Martha's Vineyard, Massachusetts

This will allow students and professors to go to an Internet map service, such as Google Maps (*http://maps.google.com*) or Bing Maps (*http://www.bing.com/maps/*) to view the property in question. Both Google and Bing Maps have satellite or aerial views that help give a sense of how the property is situated, as well as the surrounding terrain. I have begun projecting these satellite images on a screen in the front of the classroom as I teach these cases, and it seems to help give students a sense of the lay of the land and the relations among the neighboring parcels. It is particularly helpful in understanding cases that involve land use conflicts among neighbors.

Finally, to help students understand the law not just as an abstract intellectual system but as a practice and a service profession, I have introduced new problems that ask students to think about what advice they would give a client in a particular situation, what options the client should consider, and what facts they need to discover to apply the law and help the client. These problem-solving questions will help students interact with the legal material, not only by trying to see how the law applies to different fact situations, but by using the legal material to help clients achieve their goals within the bounds of the law.

As in the past, I have attempted to ensure that students and professors can get a clear and accurate picture of the current law, as well as a thorough understanding of 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 court's approach. 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. I have introduced new problems that place students in a problem-solving mode—a useful attention to more traditional, litigation-focused inquiries.

Cases have been edited. Deletions of text within cases are noted by an ellipsis (. . .), but most internal case citations and most footnotes have been deleted without notation. When footnotes are retained in cases, they are renumbered so that footnotes are consecutively numbered in each chapter. Citations within cases have generally been modified to accord with the Bluebook form.

As with any new edition, some mistakes surely have crept in. I would be delighted to hear about them or about any other feedback from faculty and students who use this book. Such feedback motivated many of the changes in this edition, and I welcome future suggestions from users of the Fifth Edition. Write me at jsinger@law.harvard.edu.

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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 their 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."[2] 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

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

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 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.[3] 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

3. 1 Jeremy Bentham, *Theory of Legislation* 137 (Boston: Weeks, Jordan & Co., R. Hildreth trans. 1840).

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."[4]

One indicator of the distribution of property is income. Since 1967, income distribution has become increasingly unequal in the United States. In 2008, the Census Bureau reported that the share of total income going to the top fifth of American households increased from 43.8 percent in 1967 to 50.00 percent in 2008.[5] The share of the top 5 percent climbed from 17.5 percent in 1967 to 21.5 percent in 2008. In contrast, the lowest 20 percent of the population dropped from 4 percent of income in 1967 to 3.4 percent in 2008. The second lowest fifth from the bottom received 8.6 percent of total income in 2008, while the third (middle) fifth received 14.7 percent and the fourth fifth 23.3 percent. Together the top two-fifths received 71.5 percent of total income in 2008. It is telling that the share of income going to the bottom fifth of the population fell between 1967 and 2008 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."[6] 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.[7]

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

5. Data in this section come from Carmen DeNavas-Wait, Bernadette D. Proctor & Jessica C. Smith, U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2008* (Sept. 2009), *available at* http://www.census.gov/prod/2009pubs/p60-236.pdf. Data for 2007 come from Alemayehu Bishaw & Jessica Semega, U.S. Census Bureau, *Income, Earnings, and Poverty Data from the 2007 American Community Survey* (Aug. 2008), *available at* http://www.census.gov/prod/2008pubs/acs-09.pdf.

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

7. *Id.*

The distribution of income also varies according to race, gender and age. The median income of households in the United States was $50,303 in 2008; 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 $55,530 in 2008, the median income for African American households was only $34,218 and that of Latino households was $37,913. The median household income of American Indians and Native Alaskan households in 2007 was $35,343.

Although per capita income for all races was $26,964 in 2008, the figure for white, non-Hispanic individuals was $31,313, for Asians, it was $30,292, while that for African Americans was only $18,406 and that for Latinos was $15,674.

Poverty is similarly unequally distributed by race. While 13.2 percent of all persons were poor by federal standards in 2008, only 8.6 percent of non-Hispanic whites were poor; by comparison, 24.7 percent of African Americans and 23.2 percent of Latinos fell below the poverty line. Data from 2007 show that 25.3 percent of American Indians and Native Alaskans were poor by official standards.

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 2008, men who worked full time earned an average of $46,367 while women who worked full time earned only $35,745, or 77 percent of male earnings.

Children are more likely to be poor than adults, and some children are very likely to be poor. Although 13.2 percent of the population fell below the poverty line in 2008, 19.0 percent of children did so; moreover, 33.6 percent of African American children and 30.3 percent of Hispanic children were living in poverty. Children who live in households without an adult male are extremely likely to be poor. While only 5.5 percent of children in families of married couples were poor in 2008, 43.5 percent of children living in female-headed households were poor. More than half of all children under six living in female-headed households (53.3 percent) were poor. Although 21.5 percent of white, non-Hispanic, female-headed households were poor, 40.3 percent of African American, female-headed households and 40.6 percent of Hispanic, female-headed households were poor. While the median income of married couples was $73,010, the median income of female-headed households was only $33,073, and the median income of male-headed households was $49,186.

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, by 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.[8] In 2008, the poverty rate for those 65 and older was 9.7 percent compared to 11.7 percent for those between 18 and 64.[9]

8. Peter H. Rossi, *Down and Out in America: The Origins of Homelessness* 193 (1989).
9. U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage, supra* note 5.

Wealth data show even greater inequality than that existing for income. In 2001, the top 1 percent of U.S. households owned 32.7 percent of U.S. family net wealth while the top 5 percent owned more than half of all net wealth (57.7 percent). The next 5 percent owned 12.1 percent of wealth while the bottom half of the population owned 2.8 percent of net wealth.[10]

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.[11] Here is a brief description of the most common approaches.[12]

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."[13] 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."[14]

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10. Marco Cagetti & Mariacristina De Nardi, *Wealth Inequality: Data and Models* (Federal Reserve Bank of Chicago Working Paper No. 2005-10, Aug. 17, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=838325. *See also* Lisa A. Keister, *Wealth in America* 64 (2000); Kevin Phillips, *The Politics of Rich and Poor: Wealth and the American Electorate in the Reagan Aftermath* 1-13 (1990).

11. For collections of scholarly approaches to poverty, see *Perspectives on Property Law* (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman eds., 3d ed. 2002); *A Property Anthology* (Richard H. Chused ed., 2d ed. 1997).

12. 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 and Persuasion: Essays on 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).

13. Sharon O' Brien, *American Indian Tribal Governments* 217 (1989).

14. *Id.* at 86.

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.[15]

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.[16] 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."[17] He believed that "this expectation, this persuasion, can only be the work of law. It is only through the 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 . . . ."[18] 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."[19]

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.[20] 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.[21]

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15. William Cronon, *Changes in the Land* (1983).
16. John Austin, *Lectures of Jurisprudence* (1861-1863); H.L.A. Hart, *The Concept of Law* (1961).
17. Bentham, supra note 3, at 138.
18. Id.
19. *Id.* at 139.
20. *See* Oliver Wendell Holmes, *The Path of the Law*, 8 Harv. L. Rev. 1 (1894).
21. Karl Llewellyn, *The Bramble Bush* (1930).

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.[22] 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.[23] 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 adopted by individuals who did not know morally irrelevant facts about themselves, such as their race or sex.[24]

Some theorists focus on *desert*. John Locke argued that labor is the foundation of property. "Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property."[25] Other theorists focus on the role that property rights play in developing individual *autonomy*.[26] Hegel believed that property was a way that human beings constituted themselves as people by extending their will to manipulate the objects of the external

22. 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).

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

24. John Rawls, *A Theory of Justice* (1971). *See also* Thomas M. Scanlon, *What We Owe Each Other* (1998).

25. John Locke, *Second Treatise of Government* 17-18 (Bobbs-Merrill ed. 1952)(originally published in 1960).

26. Richard A. Epstein, *Simple Rules for a Complex World* 53-70 (1995).