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Book Review

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BOOK REVIEW

REAL PROPERTY. By *Paul Goldstein*. Mineola: The Foundation Press, Inc. 1984. Pp. xxxix, 1362. \$30.00.

*Reviewed by George P. Smith, II**

The rules of the common law in respect to real property are exceedingly difficult and complex. They are deeply imbued with the mystified ignorance of the scholastic ages. The doctrines of uses and trusts, of remainders and executory devises, are beyond the comprehension of any mind which has not been long drilled and disciplined in the school of legal science. Indeed many of these doctrines have been elaborated to such a degree of metaphysical refinement, that they *sometimes* elude the grasp of the most profound and discriminating lawyer.¹

In George Orwell's *1984*² Winston Smith, while writing in his diary (in April of 1984), wondered whether he could communicate his vital message to future readers—subsequently, he realized that the answer hinged upon whether he could translate “Oldspeak” into “Newspeak.”³ In his new casebook (released coincidentally in April of 1984), Professor Paul Goldstein of Stanford University makes a bold and innovative effort to restate the Oldspeak of traditional property law into language intelligible to readers in this era of legal Newspeak.⁴

Whether Winston Smith succeeded in his efforts is a question I leave to the reviewers of Orwell's masterpiece. In this review I address Professor Goldstein's answer to the problem which he faced: how he explicates and decodes the important yet often arcane principles of American property law (no small feat in itself); and, how future students, teachers, and practitioners shall benefit from his efforts.

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1 Lorillard, *Property, Power, and Pride*, in *THE GOLDEN AGE OF AMERICAN LAW* 448, 449 (C. Haar ed. 1965) (emphasis added).

2 G. ORWELL, 1984 (Signet Classics ed. 1984).

3 *Id.* at 10 *passim*. See generally *id.* at 246-56.

4 Professor Guido Calabresi of Yale University recently asserted that we are now witnessing the golden age of “synthetic scholarship”—a scholarship which, he promises, will soon “seem dull.” Calabresi, *Grant Gilmore and the Golden Age*, 92 *YALE L.J.* 1, 2 (1982). As if in support of Calabresi, many law school administrators at least partially agree with a growing number of their students who argue that legal education has become not only too rigid but also “too uniform, too narrow, too repetitious and too long.” Meyers, *Report of the Chairman, Committee on Curriculum*, 1968 *A. AM. L. SCH.* 7, 8. See *The Law Curriculum in the 1980's*, 21 *J. LEGAL EDUC.* 315 (1982).

One could—in what would amount to a desultory project—laboriously compare Goldstein's work to the many similar publications currently available.⁵ Instead of taking that course I have decided to evaluate Goldstein's casebook by testing the author's stated objective (and its validity) against the actual content and organization of *Real Property*. Furthermore, I conducted this test in the forum (or crucial testing ground) for any property law casebook—an actual first year property law class. The results of this test follow.⁶

The Goldstein casebook, which is adaptable to either a four or six hour property course format, opens with a thought provoking essay on the disintegration of property (pp. 1-6),⁷ and closes with an equally fascinating piece on the decline of private property (pp. 1329-41).⁸ In between these two articles Goldstein presents a very lean and unencumbered treatment of the basics of modern property law.

In the preface to *Real Property*, Professor Goldstein states that the two unifying purposes of real property law are (1) "to assure that land is put to its most productive use," and (2) "to assure that land is put to its most humane use" (p. xxi). He then proceeds to state the modest purpose of his casebook: to provide an introduction to the fundamentals of real property law (p. xxi). The means by which Goldstein achieves his objective not only include covering the traditional topics and cases of the first year property course, but also involve a liberal use of notes and other materials (presented always in a succinct and often in a provocative manner) which transcend the basic rules of property law by delving into the fields of economics, history, and political science in order to evaluate the *reasons* for the rules. Goldstein's purpose: "to expose both the theoretical and historical foundations of the real property system as

5 Including the casebook under review, the Summer-Fall 1984 Catalog of The Foundation Press lists ten books under "Basic Property" and three under "Advanced Property." The July 1984 Catalog of West Law School Publications lists fourteen entries under the heading "Property," and five under "Real Estate Transactions." The 1984 catalog of law school books published by Little, Brown & Company lists five "Property" entries, while Michie-Bobbs-Merrill lists three and Matthew Bender one.

6 After utilizing excerpts from a photocopied, prepublication version of *Real Property* during the three law school terms prior to the April 1984 hard cover release, I approached the fall 1984 term, during which I first used the text under review, with highly positive expectations. Not only were my expectations met, in many respects *Real Property* surpassed these expectations. Goldstein's book fully satisfied the needs of both teacher and students. Student evaluations uniformly praised the work, and ranged from such comments as: "An excellent and thoroughly modern book" to "Dispelled totally student rumors about the dullness of the subject" to "Now I know where the beef is!"

7 Grey, *The Disintegration of Property*, in PROPERTY: NOMOS XXII 69 (1980).

8 Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983).

well as the more worldly, day-to-day practice of lawyers engaged in structuring real property transactions for their clients" (p. xxi).

Drawing upon the insights which accompany many years of teaching property law, Goldstein argues that "theory and principle should play a substantial role in guiding the evolution of real property law" (p. xxi). He also relies upon the practical wisdom he has gained from practicing law when he advises "policymakers [to] attend closely to the practicalities of real property arrangements before proposing changes in real property law" (p. xxi).

Analyzed as a whole, Professor Goldstein's text provides the property law instructor with a course book that refutes the argument that ours is a world of mere synthetic scholarship,⁹ and, more specifically, the conclusion that the subject of property law falls under the specter of rigidity, repetition, and unmanageable length.¹⁰ The one thousand, three hundred and sixty-two pages of Goldstein's text provide students with an exciting program. With intellectual agility, stamina, and discernment, Goldstein unveils contemporary property law, unearths its varied historical roots, and uncovers all of its hidden interstices.

Within the well organized chapters of his casebook, Goldstein challenges his readers to reconcile traditional premises of property law with the changes and ferment prevalent in modern legal analysis. The student undertakes this experiment—a call to challenge both the law and himself—within a casebook which provides vivid and exciting examples of how modern property law functions. Goldstein, thus, provides the student with a unique opportunity not only to be challenged by the study of real property law but also to challenge himself, traditional concepts of property law, and his previous understanding of the phenomenal changes and adaptations to which the law is subject.

Perhaps the most revolutionary change addressed by the author is his initial premise that one purpose of real property law is to *guarantee* that land be used in a *humane* manner (p. xxi). While some might disagree with this noble—perhaps visionary—statement of purpose, Goldstein gives both students and teachers ample opportunities to explore and to challenge this proposed goal of property law. Never are they told to accept it as one would sacred dogma.

Judge Richard Posner has stated that he finds no basic or fundamental level of inconsistency between morality and efficiency.¹¹ "Moral principles—honesty, truthfulness, trustworthiness (for example, keeping promises), selflessness (for example, consideration

9 See note 4 *supra*.

10 *Id.*

11 R. POSNER, *ECONOMIC ANALYSIS OF LAW* 185 (2d ed. 1977).

of others), charity, neighborliness, avoidance of negligence and coercion—serve in general,” according to Posner, “to promote efficiency.”¹² When first I encountered this argument I puzzled over it; for I—quite frankly—had never considered that such an observable consistency existed. Even now I still wonder about its validity. Yet, when I began to analyze Goldstein’s first premises, I decided to determine whether Judge Posner’s point might be a concordant, rather than discordant, complement to Professor Goldstein’s position on the humane use of land.

In order to begin aright I went to the *Oxford English Dictionary* so as to obtain a precise definition of “humane.” There I learned that the primary meaning of humane is “[g]entle or kindly in demeanour or action; civil, courteous, friendly, obliging.”¹³ Undaunted, I read on. Humane’s secondary meaning is as follows: “[m]arked by sympathy with and consideration for the needs and distress of others; feeling or showing compassion and tenderness toward human beings . . . ; kind, benevolent.”¹⁴ This secondary meaning appears *related* to Posner and Goldstein’s premises.

Nevertheless, I am unable, at least at this point in time, to declare without equivocation that Posner and Goldstein’s principles are complementary in purpose and effect, nor (more significantly) that they correctly describe the current state of the law. But I do see a *potential* relationship between their views and the law. Moreover I believe students and teachers should be glad for these perspectives on the law—the validity of which they should test more completely in the future. Although I do concede that with the wide adoption of the warranty of habitability in residential landlord-tenant disputes an admixture of humanity and morality is evident, I cannot accept, at least not blanketly, that property law does (or should) seek to *guarantee* that all property be used humanely.¹⁵

Professor Goldstein has divided his casebook into three parts: “The Real Property System” (pp. 1-466); “Private Arrangements for Possession and Use” (pp. 467-1073); and “Public Control of Ownership and Use” (pp. 1074-1341). After the initial essay on disintegration, Goldstein begins his well orchestrated composition with the fundamental property issues of trespass (pp. 8-24, 60-89), adverse possession (pp. 24-60), nuisance (pp. 90-126), and lateral

12 *Id.*

13 OXFORD ENGLISH DICTIONARY 444 (1970).

14 *Id.*

15 The purpose of the law in our capitalistic society may well be to guarantee *only* that land is governed by a principle of maximum economic efficiency. Furthermore, I have not found this fundamental consistency between morality and efficiency in the marketplace—a hoped for consistency to be sure, but not one which anyone has heretofore demonstrated exists.

and subjacent support (pp. 126-51). Throughout these sections one recognizes a strong organizational case development with Goldstein focusing upon contemporary applications.¹⁶

In the note materials, Goldstein analyzes the strong economic underpinnings of property law with care and insight.¹⁷ The reader gleans historical perspective from these notes, as well as from an excellent selection of principal and supporting cases. (Supporting case discussions are generously sprinkled throughout the already strong note sections.) Although teachers might wish for more comprehensive development of certain personal property concepts (such as the law of finders, trusts, and bailments), no one can quarrel with Goldstein's concise yet clear treatment of the various doctrines of personal property—analyzed and compared with their counterpart doctrines in real property—in his note sections.

A highlight of *Real Property*, Professor Goldstein's section on the law of nuisance fully explores the interplay between property law and economic analysis. The ancient maxim, *sic utere tuo ut alienum non laedas* (use your property so as not to injure another's), provides the foundation for the well established rule that no one may make an *unreasonable* (i.e., *uneconomic*) use of his own premises to the material injury of his neighbors. Judge Posner has shown, with convincing clarity, that the root issue in many legal controversies is how the court ought to allocate resources in order to maximize overall efficiency.¹⁸ According to Posner, "the character of common law litigation virtually compels a confrontation with economic issues."¹⁹

With Coase's article on social cost in 1960,²⁰ and Calabresi's seminal piece on risk distribution in tort law in 1961,²¹ legal scholars began to develop (and to challenge) a new—and often controversial—application of economic analysis to law. No longer reserved for antitrust cases and related problems of trade regulation, this "new" law and economics approach, expanded in scope and broadened in application, has penetrated not only the common law fields of tort, contract, property, civil, and criminal law; it also has found a home in administrative law, legislative theory, criminal enforcement, and judicial administration as well.²²

16 See, e.g., *Cheek v. Wainwright*, 246 Ga. 171, 269 S.E.2d 443 (1980) (REAL PROPERTY at 37-39); *Joiner v. Janssen*, 85 Ill. 2d 74, 421 N.E.2d 170 (1981) (REAL PROPERTY at 43-47); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (REAL PROPERTY at 70-84).

17 See, e.g., REAL PROPERTY at 89, 99-104, 121-26, 146-51.

18 See POSNER, *supra* note 11, at 399.

19 *Id.* at 181.

20 Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

21 Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

22 POSNER, *supra* note 11, at 16.

Beginning with the landmark 1907 case of *McCarty v. National Carbonic Gas Co.*,²³ and continuing in the accompanying notes,²⁴ Goldstein proceeds to craft a "launching pad" from which the dynamic law of nuisance—with its inextricably connected passenger, economics—takes off. Here Goldstein shows that in determining whether an unreasonable (uneconomic) use of property exists (and, thus, should be abated), courts utilize a cost-benefit analysis—balancing the gravity of the economic harm which the defendant's use inflicts upon the plaintiff against the utility of the economic good that will result if the defendant is allowed to continue his use unabated (pp. 99-104).²⁵ And it is here—in his discussion of nuisance—that Goldstein reveals to the reader the "heart" of real property law in action.

American landowners must use their property responsibly; their uses must serve to advance our capitalistic society. Indeed, such responsible utilization of resources is the goal not only of the "Yuppie" but also of *every* citizen. Property law condemns the waste of any resource; it prohibits any unreasonable (uneconomic) use of one's property. And this is consistent with its principle: *sic utere tuo et alienum non laedas*. Property law recognizes that society cannot flourish if its major resource—land—is not used in its most economically productive manner. Indeed the law provides that certain public lands are of such incalculable economic and aesthetic value that the government is commanded to ensure their protection and limit their use.²⁶

In his section on nuisance, Professor Goldstein has captured the undeniable strength of and the inescapable interplay between law and economics. In fact, I believe this to be the finest section in the book—simply because Goldstein's analysis here provides a solid interdisciplinary foundation upon which he builds all subsequent material.

In chapter two (pp. 152-466) Goldstein addresses the manifold complexities—contemporary and historical—of land transfers and their financing. The striking feature of this section is his integrative treatment of the entire system: the obligations of brokers and lawyers (pp. 156-85); contracts of sale (pp. 186-236); closings (pp. 237-60); delivery (pp. 260-79); warranties (pp. 279-95); title (pp. 295-317); recording acts (pp. 317-407); purchase financing (pp. 407-45); and related issues of federal income taxation (pp. 446-66).

Goldstein's treatment of these subjects involves the use of a

23 189 N.Y. 40, 81 N.E. 549 (1907) (REAL PROPERTY at 90-99).

24 See REAL PROPERTY at 99-104.

25 See generally POSNER, *supra* note 11, at 27-44.

26 See Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C.D. L. REV. 185 (1980).

single hypothetical involving the efforts of Robert W. and Mary Ruth Jones to sell a parcel of property located in Amherst, New York to John J. and Katherine Ann Smith. Replete with samples of pertinent documentation (beginning with the broker's exclusive listing agreement (pp. 171-72); continuing with the contract of sale (pp. 186-87), the warranty deed (p. 237), and the title insurance policy (pp. 373-78); and concluding with the mortgage (pp. 409-10)), Goldstein's analysis allows the student to work with the "nuts and bolts" of land transfers while learning the applicable property law. Again, by utilizing modern cases²⁷ buttressed by expansive notes (on topics such as the allocation of the risk of loss under *The Uniform Vendors and Purchasers Risk Act* (pp. 234-36), specific performance (p. 222), and reasonableness, good faith, and marketable title (pp. 205-08)) which include follow up questions to the principal cases, Goldstein covers the area in a clear and tightly organized manner.

Professor Goldstein has designed part two of *Real Property*, entitled "Private Arrangements for Possession and Use" (pp. 467-1076), to enable the student to grasp and apply the law of estates and future interests while considering nonpossessory interests. By opening with an especially strong commentary on (indeed, an excellent synthesis of) the estates system (pp. 467-78), Goldstein so captures and holds the reader's attention that the student of the law is able to see with relative ease the principles of what might otherwise be (and often is) a very difficult area of the law. Goldstein's succinct narrative (which summarizes English and American historical doctrines) enables the student to comprehend the evolutionary beginnings of the law of estates as well as appreciate its modern significance *and* application.²⁸

Goldstein's treatment of the three nonpossessory interests—easements, covenants, and servitudes (pp. 670-815)—is marked by the same creative analysis. The author's exploration, in his notes and questions, of the feasibility (indeed, desirability) of merging these three interests into one, unified interest is especially thought provoking.²⁹

Goldstein's analysis of leasehold estates reflects the modern di-

27 See, e.g., *Forbis v. Honeycutt*, 301 N.C. 699, 273 S.E.2d 240 (1981) (REAL PROPERTY at 173-76); *Conklin v. Davi*, 76 N.J. 468, 388 A.2d 598 (1978) (REAL PROPERTY at 196-99); *Commissioner v. Tufts*, 461 U.S. 300 (1983) (REAL PROPERTY at 453-62).

28 Here, again, Goldstein has provided excellent recent case examples of the law. See, e.g., *White v. Brown*, 559 S.W.2d 938 (Tenn. 1977) (REAL PROPERTY at 479-84); *Long v. Long*, 45 Ohio St. 2d 165, 343 N.E.2d 100 (1976) (REAL PROPERTY at 504-12); *Long v. Short*, 553 S.W.2d 297 (Ky. 1977) (REAL PROPERTY at 518-20). Goldstein, once again, provides the reader with excellent note materials as well. See, e.g., REAL PROPERTY at 520-30, 580-87.

29 See REAL PROPERTY at 694-98, 714-18, 785-87, 810-15.

visions found in decisional and statutory law. Thus, the leasehold estates are described in three sections of *Real Property*: the first dealing with general principles of landlord-tenant law (pp. 816-908); the second with the issues of substandard housing (pp. 908-1010); and the third with commercial leases (evaluated within the context of shopping center transactions) (pp. 1010-43). Goldstein analyzes two additional issues of contemporary interest—condominiums and cooperatives—separately (pp. 1044-73).

Real Property focuses upon the second unifying purpose of modern property law—that land should be used and adapted to a humane use (p. xxi)—when Goldstein pinpoints the issues which deal with the implied warranty of habitability in residential leases (pp. 941-73).³⁰ The fact that along with the District of Columbia, forty-one states recognize that residential landlords must provide a habitable dwelling for their tenants adds a good deal of weight to Goldstein's theory that property law has as one of its purposes a principle of humaneness (p. 953).

Denominated "Public Control of Ownership and Use" (pp. 1074-1341); part three of *Real Property* provides both the student and the teacher with a comprehensive presentation of those state police powers which play a substantial role in property law: the power to act in order to promote public health, safety, welfare, and morals (pp. 1077-1146); the public land use planning (or zoning) power (pp. 1147-1286); and eminent domain (pp. 1287-1328). Unquestionably the most fascinating—and creative—aspect of this section is Goldstein's incorporation into the text of an actual case history which clearly reveals the zoning system at work (pp. 1213-72). Entitled "The Zoning System at Work: The 2030 Vallejo Case," this section of the casebook details (complete with pictures (pp. 1244-50)) a major variance proceeding from the developer's initial request for a variance (p. 1220) to the California Supreme Court's disposition of the matter (pp. 1256-63).³¹ Goldstein meticulously details the strategies employed by the participants and carefully reproduces many of the documents generated during the proceedings. Because of Goldstein's detailed analysis, the reader enjoys learning the law. This is the common feature of the entire work.

Finally, I must mention a unique complement to an equally unique casebook: a comprehensive teacher's guide of some four hundred and fifteen pages which, aside from discussing every case in the casebook, presents suggested foci for class discussion as well

³⁰ See, e.g., *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970) (REAL PROPERTY at 941-51).

³¹ *Broadway, Laguna, Vallejo Ass'n v. Board of Permit Appeals*, 66 Cal. 2d 767, 427 P.2d 810, 59 Cal. Rptr. 146 (1967).

as in-depth and challenging hypothetical questions.³² This guide serves as a very practical tool, providing the teacher with illustrations which reveal to students the actual processes of dispute resolution in the real property transaction area of the law.

Concluding Remarks

In *Real Property* Professor Goldstein has synthesized basic property law. He has achieved his objective—to introduce and teach the fundamentals of real property law (p. xxi). *Real Property* is not only an invaluable addition to the literature, it also is groundbreaking in perspective and promises to every student who is able to use it intellectual challenges, innovative analysis, and most importantly, readability. Satisfying to both students and teachers, Professor Goldstein's casebook has a decidedly practical orientation. This book easily survived what I believe to be the ultimate test—it placed a thorough understanding of property law within the grasp of every first year law student. There is so much "treasure trove" within the pages of *Real Property*, this reviewer believes that Goldstein's book raises a clarion call to all law school curriculum committees to expand (if they have not already done so) their class offerings so as to provide for at least six credit hours in basic property. *Real Property* enables the student to acquire as much certainty and conclusiveness as can be gathered from the field—largely forswearing the all too often felt need to purchase the popular over-the-counter study aids. Indeed, the Goldstein book is so comprehensive in its coverage, one of my students observed that since he never felt any need to utilize otherwise popular commercial outlines or hornbooks, he had saved himself considerable money and time. Because of this I felt comfortable encouraging him (and his classmates) to spend time analyzing the supporting cases and law review articles set out by Professor Goldstein in his excellent notes.

Real Property successfully dispels the hallway concerns of first year property students (those who cry out against the vast and turgid complexities of property law); it also answers those professorial naysayers who have politely, but skeptically, questioned (in law school faculty lounges) the modern relevance of real property law. Any teacher who uses this casebook will easily understand why one of my first year students said that Goldstein's *Real Property* is "where the beef is!" Others will acknowledge that this undertaking is a bold and innovative attempt to decode traditional property law into modern property law: *Oldspeak* into *Newspeak*.

32 P. GOLDSTEIN, *TEACHER'S GUIDE FOR REAL PROPERTY* (1984).