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Rules, Policies, and Practices

NINTH EDITION

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To contact Customer Service, e-mail customer.service@aspenpublishing.com, call 1-800-950-5259, or mail correspondence to:

Aspen Publishing
Attn: Order Department
1 Wall Street
Burlington, MA 01803

eISBN 979-8-8941-0256-6

Library of Congress Cataloging-in-Publication Data

Names: Singer, Joseph William, 1954- author. | Berger, Bethany R., author. | Davidson, Nestor M., author. | Peñalver, Eduardo M., 1973- author.

Title: Property law: rules, policies, and practices / Joseph William Singer, Bussey Professor of Law, Harvard Law School; Bethany R. Berger, Allan D. Vestal Professor of Law, University of Iowa College of Law; Nestor M. Davidson, Professor of Real Estate, Harvard University Graduate School of Design; Eduardo Moisés Peñalver, President and Professor of Law, Seattle University.

Description: Ninth edition. | Burlington: Aspen Publishing, 2025. | Series: Aspen casebook series | Includes index. | Summary: "Casebook on property law that includes notes, questions, and problems"— Provided by publisher.

Identifiers: LCCN 2025021436 (print) | LCCN 2025021437 (ebook) | ISBN 9798894102542 (hardcover) | ISBN 9798894102566 (epub) | ISBN 9798894102559 (epub)

Subjects: LCSH: Property—United States. | LCGFT: Casebooks (Law)

Classification: LCC KF560 .F56 2025 (print) | LCC KF560 (ebook) | DDC 346.7304—dc23/eng/20250502

LC record available at <https://lcn.loc.gov/2025021436>

LC ebook record available at <https://lcn.loc.gov/2025021437>



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*For Martha Minow,
who has made all the difference*

JWS

*For Caleb Berger,
who because of this project has been flipping through
property books since before he could talk*

BB

*For Clare Huntington,
who always keeps me climbing higher, the more so every year*

NMD

*For my grandmother, Yolanda Grave de Peralta Peñalver,
whose loss of property first
sparked my interest in the subject*

EMP

In memory of
Mary Joe Frug
ד"ר

*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

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PREFACE TO THE NINTH EDITION

This Ninth Edition has been updated to reflect significant changes in the law of property over the last few years. Those include important U.S. Supreme Court decisions in *Tyler v. Hennepin County* and *Sheetz v County of El Dorado*; *City of Grants Pass v. Johnson*, holding that the Eighth Amendment does not prevent the prosecution of homeless people for sleeping on the streets; and the Supreme Court's most recent attempt to grapple with Fair Use in Copyright in the 2023 case of *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*. For an area one might have thought settled in a mature, market economy, these developments provide powerful evidence that property law continues to change with surprising regularity.

As in the earlier editions, we 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, we have made this clear in the note material.

In this edition, as in the past, we have included statutory and regulatory text as principal readings throughout the book. It is critical for first-year students to understand that the law is as much a creature of legislatures and agencies as it is of courts, and this is as true in property as in other areas of the law. We 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.

For some of the principal cases, we 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, and Google Earth has other features as well. Some of us project satellite images on a screen in the front of the classroom as we 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.

Note that cases throughout the book have been edited for succinctness and to focus students on the most relevant discussions. Some deletions of text within cases are noted by an ellipsis (. . .), but the bulk of our elisions in the text, as well as 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.

As with any new edition, especially one as thoroughly updated as this one has been, some mistakes surely have crept in. We 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 we welcome future suggestions from users of the Ninth Edition. Feel free to write to us at bethany-berger@iowa.edu; nestor_davidson@gsd.harvard.edu; eduardo@seattleu.edu; and jsinger@law.harvard.edu.

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A GUIDE TO THE BOOK

ORGANIZATION OF THE BOOK

The book is organized around six broad themes. In [Part One](#), we introduce a basic framework for understanding the balance of rights, limitations, and duties inherent in ownership, using the example of tensions between the right to exclude and the right of access. We then address the primary justifications that have traditionally been invoked to justify property rights, including sovereignty, reward for labor, distributive justice, efficiency, recognition of relationships, possession, and personhood. This part also explores the outer boundaries of ownership by examining how the legal system mediates a variety of resources other than real estate and personal goods, notably ideas, culture, human beings, and human bodies. Many of the most important doctrines in property law focus on relationships between neighbors, and [Part Two](#) explores adverse possession, nuisance, zoning, and private agreements between owners (called servitudes) as examples. In [Part Three](#), we explore the myriad ways the law allows property to be divided and shared, both concurrently and over time. These forms of ownership in common include concurrent tenancies, family property, corporate and other entity property, leaseholds, as well as the complex system of estates and future interests we have inherited from early English law. [Part Four](#) explores two fundamental aspects of the market for real estate, the role of property law and property lawyers in sales and financing, and the importance of antidiscrimination law. Finally, the book concludes in [Part Five](#) highlighting the fundamental tension between the role of the state in

both defining and defending property rights. The constitutional law of property, most notably under the takings clause, is a fitting way to return to the themes explored throughout these materials. In all of this, we 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.

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 facilitate 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 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 overnight. 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. The Census Bureau reports that the share of total income going to the top fifth of American households increased from 43.6 percent in 1967 to 51.9 percent in 2023.⁴ Within the top fifth of the population, the bulk of this increase was obtained by those at the very top. Between 1979 and 2021, the incomes of the top 1 percent of families rose 326 percent, whereas the bottom 60 percent of families saw increases of 73 percent.⁵

The distribution of income also varies according to race, gender, and age. The median income of households in the United States was \$80,610 in 2023; 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 \$89,050 in 2023, the median income for African American households was only \$56,490 and that of Latino households was \$65,540. The median annual household income of American Indians and Native Alaskan households for 2023 was \$61,061.⁶

Poverty is similarly unequally distributed by race. While 11.1 percent of all persons were poor by federal standards in 2023, only 7.7 percent of non-Hispanic whites were poor; by comparison, 17.9 percent of African Americans and 16.6 percent of Latinos fell below the poverty line, as did 21.2 percent of American Indians and Native Alaskans.⁷

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 2023, men who worked full time earned \$66,790 at the median, while the median earnings for women who worked full time was only \$55,240, or 82.7 percent of male earnings.

Children are more likely to be poor than adults, and some children are very likely to be poor. Although 11.1 percent of the population fell below the poverty line in 2023, 15.3 percent of children did so; moreover, 29 percent of African American children, 30 percent of American Indian/Alaska Native, and 22 percent of Hispanic children were living in poverty.⁸ As to family composition, while only 5.2 percent of children in families of married couples were poor in 2023, 12.4 percent of children in male-headed families and 23.6 percent of children living in female-headed households were poor.

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, and relatively few elderly persons are 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.⁹ In 2023, the poverty rate for those 65 and older was 9.7 percent compared to 10 percent for those between 18 and 64.

Wealth data show even greater inequality than income data. Far more than income, wealth determines financial security and economic prospects in the United States. In 2024, the top 1 percent of U.S. households owned 30.8 percent of U.S. family net wealth while the top 10 percent owned nearly 67.3 percent of all net wealth.¹⁰ The bottom 50%, meanwhile, had just one percent of the nation's wealth.¹¹ The racial disparities are also stark. In 2022, the median net worth of Black households was only 16 percent that of non-Hispanic White households, while the median net worth of Hispanic households was only 22 percent.¹²

Individual versus shared ownership. Property may be owned and controlled by individuals; the history of the development of land law in England, for example, may be described as a shift from control over property by feudal lords and family inheritance restrictions to control by individual owners. But shared ownership continues to characterize property, perhaps increasingly so. In marriages and other intimate relationships, for example, ownership of homes and bank accounts is typically in the name of both partners. The assets of Americans, moreover, increasingly consist of

investments in corporate stocks and ownership of condominiums or other common interest developments, both forms of property in which ownership and control are shared with many individuals. In addition, because ownership rights affect others, both statutory and common law recognize rights in the community to control property to some degree. The recognition of shared rights in property may differ in different cultures and legal systems. Compared to U.S. property law, for example, continental European systems may do more to recognize and facilitate common ownership, while English and Scottish legal systems recognize greater rights in the community to traverse and enjoy private lands.¹³

One persistent conflict between shared and individualist conceptions of property concerns American Indian nations, the original possessors of land in the United States. With over 570 federally recognized tribes and scores of unrecognized tribes, it is difficult to generalize about Indigenous land use systems, either in the past or the present. Nonetheless, many Native peoples recognized shared and community ownership more explicitly than did European American settlers. Native individuals and families did own property and land was bought and sold, but Indigenous property systems often had a robust concept of shared use rights. While a particular family might use a piece of land to plant crops, for example, this would not preclude other tribal members from entering or gathering nonagricultural food on such lands. Much land, moreover, was considered to be owned by a tribe in common, and open to hunting, fishing, or the like by the tribe as a whole. (Note, however, that this sense of shared rights is not so different from rights of villagers to graze on common or uncultivated lands in early England, discussed in [Chapter 7](#), §2.1, or the “right to roam” on unfenced land recognized for much of American history, discussed in [Chapter 1](#), §1.)

More radically, for most Indigenous peoples, land was not fungible — it could not simply be replaced with similar land elsewhere. Rather, specific areas were deeply connected to the history and spiritual identity of a tribe. For many Native peoples even today, particular areas may be “the source of spiritual origins and sustaining myth which in turn provides a landscape of cultural and emotional meaning. The land often determines the values of the human landscape.”¹⁴ The community, therefore, could not be excluded from such areas without doing violence to the tribe and its identity. These differences in emphasis on shared versus individual rights in U.S. and

Indian property systems were the source of much conflict, as well as repeated efforts by the federal government to inculcate a love of individual property as a tool to encourage tribal assimilation and dissolution.¹⁵

NORMATIVE APPROACHES

How should courts and legislatures adjudicate conflicting property claims? Various approaches can be used to conceptualize property rights and to adjudicate conflicts among property claimants.¹⁶ Here are brief descriptions of the most common approaches.¹⁷

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.¹⁸ 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.”¹⁹ 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”²⁰ 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.”²¹

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.²² This approach was adopted by legal realist

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