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PROPERTY

A Contemporary Approach

SECOND EDITION

By

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University of the Pacific
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and

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To Gail, Tom, and Doug

J.G.S.

Para Minha Familia

Mom, Claudia, Sean, and Julian

R.R.C.
Preface

This book is designed for you: the twenty-first century law student. Property has been part of the first-year curriculum for decades. Perhaps as a result, property casebooks tend to be somewhat old-fashioned in format and content. You will find that this book is different. It provides a modern approach to the traditional course.

What distinguishes this book?

- It presents the core concepts of property law in a streamlined format that is clear and easy to understand, while maintaining the intellectual challenge of the subject.

- The materials are as engaging and relevant as we could make them. We provide interesting background information about the cases, often in boxes inserted into the text. We also address two areas that are usually omitted from property courses: intellectual property and environmental law.

- And just as today’s lawyer uses both physical books and electronic resources, you have access to both the hard copy of this book and an online version.

The online book provides a wide range of resources not found in standard casebooks. Property is a visual subject. You will often understand the material better if you can see a photograph, a map, or a diagram. Accordingly, there are almost 200 points in the ebook where you can click into a visual resource. It also contains a number of audio clips, ranging from popular songs to oral arguments before the Supreme Court. Finally, the ebook is hyperlinked to cases, statutes, law review articles, and other resources in Westlaw, so you can easily read the full text of all cited materials online, as modern lawyers do every day.

A few words about our subject: Property reflects the choices that each culture makes about how to allocate its resources. Its development is a product of—and a catalyst for—the economic, political, and social forces that shape a society. Many of the most challenging issues that we confront as a nation involve property law, such as encouraging economic development, preventing discrimination, protecting the environment, providing affordable housing, regulating land use, taking private property for public use, and using natural resources wisely.
We wish to thank everyone at West—particularly Louis Higgins and Heidi Boe—for sharing our vision that this book and the other texts in the Interactive Casebook Series represent the future of American legal education. We also thank A. Benjamin Spencer, whose book Civil Procedure: A Contemporary Approach provided the template for the Series. His advice and counsel have been invaluable.

In preparing the second edition, we were benefited by the insights of other colleagues who teach property. We particularly wish to thank Jerry Anderson, McKay Cunningham, Matthew Downs, Josh Eagle, Michael Gottesman, George Gould, James Grimmelmann, Maureen Kordesh, John Minan, Mike Mireles, Thomas Mitchell, Ngai Pindell, Eric Priest, Rachael Salcido, David Sandino, Betsy Schmidt, Charles Sheppard, and Judith Wegner.

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John Sprankling thanks his wife Gail Heckemeyer for her loving encouragement, excellent photography, and careful proofreading, and thanks his son Doug Sprankling for more excellent photography. He thanks Raymond Coletta for his creativity, expertise, and optimism.

Raymond Coletta thanks his partner Claudia Sobral Ramalho for her unwavering encouragement and soft understanding. And his co-author for his patience, collegiality, and superb editing.

We welcome your comments, criticisms, and suggestions. Please write to us at the University of the Pacific, McGeorge School of Law, 3200 Fifth Avenue, Sacramento, CA 95817 or email us at jsprankling@pacific.edu or rcoletta@pacific.edu.

As authors, we own any errors in the text, at least until someone with better title comes along.

JOHN G. SPRANKLING
RAYMOND R. COLETTA

March, 2012
Features of this Casebook

Throughout the book you will find various text boxes on either side of the page. These boxes provide information that will help you to understand a case or cause you to think more deeply about an issue.

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These boxes explain the meaning of special legal terms that appear in the main text. *Black’s Law Dictionary* definitions may be accessed by clicking on the hyperlinked term in the text.

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Look around you. Almost everything you see is owned by someone. In fact, life as we know it would be impossible without property. The book you are reading, the chair you are sitting on, the clothes you are wearing, the land surface underneath you, and the airspace which you occupy—all are governed by property rights.

As you begin to study property law, it is logical to ask three questions:

- Why does our society recognize property?
- What is property?
- How is property acquired?

The answers to these questions are closely intertwined. For example, the reasons why we recognize property influence what we consider to be property and vice versa. We begin to explore these questions in Chapter 1, but they raise fundamental themes that will recur throughout the entire book.

A. Why Recognize Property?

Suppose that a nut tree stands on top of a hill. Who owns the tree? It might be owned by the government as public property like a tree in a national park. It might be private property, that is, property owned by one or more private persons or businesses. Or perhaps the tree is not owned by anyone.

This course focuses on private property, which we will simply call “property.” Our property law system is based on the concept that property is a human invention, not the result of divine gift or natural right. Thus, property exists only to the extent that it is recognized by the government, an approach called legal positivism.
As the English philosopher Jeremy Bentham noted more than 200 years ago: “Before laws were made there was no property; take away laws, and property ceases.” Because property is a human invention, it is necessarily based on reason. The justification for property is important because it determines the scope and extent of legally-recognized property rights. Accordingly, natural law theory—the idea that certain rights naturally exist as a matter of fundamental justice regardless of government action—has little impact on modern property law.

Most people take property for granted, without questioning why it exists. In fact, if someone had asked you last week why our society recognizes private property, you might have had trouble coming up with a convincing answer. So, as a starting point, we will examine five theories that seek to justify the recognition of property rights. We will then explore how these theories apply to two specific cases.

1. Five Theories of Property

a. Protect First Possession

You are probably familiar with the adage: “first come, first serve.” This concept is the heart of our first theory.

Perspective and Analysis

When the question arises as to why some people, rather than others, should own things, one of the issues which comes to mind is the question, “Who had it first?” The notion that being there first somehow justifies ownership rights is a venerable and persistent one….


The first possession approach offers a practical explanation for how unowned things become property. Suppose that our hypothetical nut tree is unowned. A is sitting under the tree when several nuts fall off, and he grabs them. Under this approach, A owns the nuts simply because he was the first person to take possession of them.
In a setting where resources were plentiful but people were few—like the early United States—this first-in-time approach accurately describes how unowned things came to be owned. Particularly during the nineteenth century, property rights in water, oil and gas, wild animals, and other natural resources were often allocated to the first possessor. The first-in-time concept has less relevance today because almost every tangible thing is already owned by someone, but you will see its lingering influence throughout the course. For example, all of us use this principle in everyday life. A parking space on a public street, a seat in a crowded theater, or a place in a long line—all are allocated through an implicit first-in-time system.

Yet most scholars conclude that the first possession approach does not adequately justify property as a general matter. It describes how property rights arose, but not why it makes sense for society to recognize those rights. See, e.g., Carol M. Rose, Possession as the Origin of Property, 52 U. Chi. L. Rev. 73 (1985).

b. Encourage Labor

Writing in the late 1600s, John Locke reasoned that each person was entitled to the property produced through his own labor. Assuming an unlimited supply of natural resources, Locke argued that when a person “mixed” his own labor (which he owned) with natural resources (which were unowned), he acquired property rights in the mixture. Returning to our hypothetical tree, assume that B picks all the nuts off the tree, puts them in a bag, and takes them home to eat. Under the labor theory, the nuts are now B’s property because she acquired them through her labor.

Perspective and Analysis

To Americans [in the 1700s]…the writings of John Locke made a good deal of sense. Locke celebrated the common individual, arguing he possessed natural rights that arose in advance of any social order and trumped even the powers of the King. Preeminent among these individual rights was the right to property, which Locke justified by way of his well-known labor theory. As Locke interpreted the Bible, God originally gave the Earth to humankind collectively, as property in common, yet any individual who wanted could seize a thing from the common stock, including land, and make it his own simply by mixing his labor with it. Before the labor was added, the thing had no value. Once the labor was mixed in, value arose and the thing became private property.
Labor theory has profoundly influenced American property law, as you will see throughout the course. But even at this early stage, you should consider its potential limitations. For example, how does labor theory apply in a modern legal system where almost everything is already owned? Hint: one potential application may be in the realm of newly-created property, such as copyrights and patents.

c. Maximize Societal Happiness

Under traditional utilitarian theory, as developed by Jeremy Bentham, we recognize property in order to maximize the overall happiness of society. Thus, it is a means toward an end. We distribute and define property rights in a manner that best promotes the welfare of all citizens—not simply those who own property. Thus, classic utilitarian theory would say that C owns our hypothetical nut tree not solely in order to benefit C, but because recognizing C's title will promote the welfare of all members of society. For example, if C's ownership is protected, C is able to use the nut tree in a manner that best serves the common good—perhaps harvesting the wild nuts for sale in the local market, using lumber from the tree to make valuable products, or preserving the tree to protect environmental values. Ownership gives C the security that he needs to use the tree effectively.

The law and economics variant of utilitarianism has powerfully affected modern property law scholarship. Under this approach, property is seen as an efficient method of allocating valuable resources in order to maximize one particular facet of societal happiness: wealth, typically measured in dollars.

The law and economics approach, property exists to ensure that owners use resources in an **efficient** manner—that is, in a manner which maximizes economic value defined as a person's willingness to pay. As you would expect, this approach is more complex than we can cover in an introductory section. You will study more aspects of law and economics theory later in the course.

**d. Ensure Democracy**

Civic republican theory posits that property facilitates democracy. During the 1700s, elections to the British House of Commons were still affected by so-called **Perspective and Analysis**

In order for an economy to reach its full potential, that is, to achieve an optimal level of production, there are three basic features which its system of property rights must have: **universality**, **exclusivity**, and **transferability**. The first requirement, universality, means that all valuable, scarce resources must be owned by someone. This requirement becomes obvious when illustrated with an example. Suppose that, as in India, cows were sacred and could not be killed or used for commercial purposes or consumption in any form… An economy which is prevented from using cows and cow by-products certainly would be smaller than the same economy where cows could be so used….

The second requirement is exclusivity. If an owner is unable to exclude others from the use and enjoyment of the property, then the owner has no incentive to improve the property… Suppose an owner owned a piece of property which produces nothing. If the owner worked the land and planted crops, in time the land could produce a great crop of substantial value. But if the owner does not have the right to exclude others from the land, then… marauding opportunists would simply wait until the crop was ready to be harvested, and come and take the fruits of the hard-working owner's land and labor. No owner would make such an undertaking….

The final requirement for an optimal economy is transferability of property…. Suppose that there are two adjoining lots. The first lot has a restaurant which is very popular. The second lot has a small shack where the owner of the second lot lives. The restaurant owner would like to buy or lease the lot from the shack dweller. In a system which only allows exclusive ownership, the shack dweller cannot sell or lease his land. In fact, the shack dweller can never leave, because he cannot buy or rent another dwelling either. Everyone is stuck where they are with what they have. No gains from trade can be made….

“rotten boroughs”—electoral districts that contained only a handful of voters. Typically, these voters were tenants on farm land owned by a local patron who could control their votes, leading to sham elections. In contrast, Thomas Jefferson and others envisioned the new United States as a nation of free yeoman farmers who owned their own lands and could thus exercise the independent political judgment that was vital for true democracy. (In fact, at one time only property owners were eligible to vote in most states.) Under this approach, we would recognize D’s ownership of our hypothetical nut tree and the surrounding land because this provides D with the economic security necessary to make political decisions that serve the common good.

**Perspective and Analysis**

The most fundamental point about the relationship between property and democracy is that a right to own private property has an important and salutary effect on the citizens’ relationship with the state and—equally important—on their understanding of that relationship . . . Personal security and personal independence from the government are guaranteed in a system in which rights of ownership are protected through public institutions.

This theme has played a large role in republican thought. In the republican view, the status of the citizen implies a measure of independence from government power . . . In fact, the republican tradition, read in the light of modern understandings, argues not for an abolition of private property, but instead for a system that attempts to ensure that everyone has some . . .

A central point here is that in a state in which private property does not exist, citizens are dependent on the good will of government officials, almost on a daily basis . . . They come to the state as supplicants or beggars rather than as rightholders. Any challenge to the state may be stifled or driven underground by virtue of the fact that serious challenges could result in the withdrawal of the goods that give people basic security. A right to private property, free from government interference, is in this sense a necessary basis for a democracy . . .

Civic republican theory is less prominent today than it was in the 1700s, in part because most citizens obtain economic security from wages earned at a job, not from farming their own land. Still, many scholars suggest that giving each person a “stake in society” through property ownership will provide political and social benefits to all.

e. Facilitate Personal Development

Based on the work of German theorist Georg Hegel, personhood theory argues that property is necessary for an individual’s personal development. Under this view, each person has a close emotional connection to certain tangible things, which virtually become part of one’s self—such as family photos, love letters, or perhaps a home. Suppose that E's family has owned our hypothetical nut tree for four generations; as a child, E literally grew up under the tree. Thus, E venerates the tree as almost an extension of herself. Under personhood theory, E’s rights in the tree should merit special protection.

Perspective and Analysis

...The premise underlying the personhood perspective is that to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights....

Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house.

One may gauge the strength or significance of someone’s relationship with an object by the kind of pain that would be occasioned by its loss. On this view, an object is closely related to one’s personhood if its loss causes pain that cannot be relieved by the object’s replacement.... For instance, if a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo—perhaps no amount of money can do so....

Once we admit that a person can be bound up with an external “thing” in some constitutive sense, we can argue that by virtue of this connection the person should be accorded broad liberty with respect to control over that “thing.”...

All other things being equal, Professor Radin suggests that a right to personhood property should be given priority over a conflicting claim by the owner of non-personhood property. For example, she argues that a tenant's right to a rented apartment should be seen as personhood property. From the tenant's perspective, the apartment is a home; from the landlord's side, it is typically viewed in non-personhood terms as an investment. Accordingly, Radin advocates expanding the legal rights of residential tenants.

f. Conclusion

All five theories help form the foundation of American property law. But it is important to understand that no one theory is accepted as the only justification for property. Our property law system reflects a blend of different approaches, including these theories and others which you will encounter later in the book. Indeed, even these five theories overlap with each other.

2. Two Stories: The Fox and the Celebrity

We begin over 200 years ago, when the United States was a comparatively new nation, stretching from the Atlantic Ocean to the Rocky Mountains. With development clustered along the Atlantic Coast, over 95% of the country was a vast wilderness. Natural resources were abundant, and the human population was small. As you would expect, these conditions influenced the development of American property law.

Our first case concerns an unlikely dispute, set in the wilderness of early New York. Who owns the fox? And why?

Pierson v. Post

Supreme Court of New York
3 Cai. R. 175 (1805)

This was an action of trespass on the case commenced in a justice's court, by the present defendant against the now plaintiff.

The declaration stated that Post, being in possession of certain dogs and hounds under his command, did, “upon a certain wild and uninhabited, unpossessed and waste land, called the beach, find and start one of those noxious beasts called a fox,” and whilst there hunting, chasing and pursuing the same with his dogs and hounds, and when in view thereof, Pierson, well knowing the fox was
so hunted and pursued, did, in the sight of Post, to prevent his catching the same, kill and carry it off. A verdict having been rendered for the plaintiff below, the defendant there sued out a *certiorari*, and now assigned for error, that the declaration and the matters therein contained were not sufficient in law to maintain an action….

TOMPKINS, J. delivered the opinion of the court.

…The question submitted by the counsel in this cause for our determination is, whether Lodowick Post, by the pursuit with his hounds in the manner alleged in his declaration, acquired such a right to, or property in, the fox, as will sustain an action against Pierson for killing and taking him away?

The cause was argued with much ability by the counsel on both sides, and presents for our decision a novel and nice question. It is admitted that a fox is an animal *ferae naturae*, and that property in such animals is acquired by occupancy only. These admissions narrow the discussion to the simple question of what acts amount to occupancy, applied to acquiring right to wild animals?

If we have recourse to the ancient writers upon general principles of law, the judgment below is obviously erroneous. Justinian’s Institutes, lib. 2. tit. 1. s. 13. and Fleta, lib. 3. c. 2. p. 175. adopt the principle, that pursuit alone vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken. The same principle is recognised by Bracton, lib. 2. c. 1. p. 8.

Puffendorf, lib. 4. c. 6. s. 2. and 10. defines occupancy of beasts *ferae naturae*, to be the actual corporal possession of them, and Bynkershoek is cited as coinciding in this definition. It is indeed with hesitation that Puffendorf affirms that a wild beast mortally wounded, or greatly maimed, cannot be fairly intercepted by another, whilst the pursuit of the person inflicting the wound continues. The foregoing authorities are decisive to show that mere pursuit gave Post no legal
right to the fox, but that he became the property of Pierson, who intercepted and killed him.

It therefore only remains to inquire whether there are any contrary principles, or authorities, to be found in other books, which ought to induce a different decision. Most of the cases which have occurred in England, relating to property in wild animals, have either been discussed and decided upon the principles of their positive statute regulations, or have arisen between the huntsman and the owner of the land upon which beasts *ferae naturae* have been apprehended; the former claiming them by title of occupancy, and the latter *ratione soli*. Little satisfactory aid can, therefore, be derived from the English reporters.

Barbeyrac, in his notes on Puffendorf, does not accede to the definition of occupancy by the latter, but, on the contrary, affirms, that actual bodily seizure is not, in all cases, necessary to constitute possession of wild animals. He does not, however, describe the acts which, according to his ideas, will amount to an appropriation of such animals to private use, so as to exclude the claims of all other persons, by title of occupancy, to the same animals; and he is far from averring that pursuit alone is sufficient for that purpose. To a certain extent, and as far as Barbeyrac appears to me to go, his objections to Puffendorf's definition of occupancy are reasonable and correct. That is to say, that actual bodily seizure is not indispensable to acquire right to, or possession of, wild beasts; but that, on the contrary, the mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since, thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So also, encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labour, have used such means of apprehending them….The case now under consideration is one of mere pursuit, and presents no circumstances or acts which can bring it within the definition of occupancy….

We are the more readily inclined to confine possession or occupancy of beasts *ferae naturae*, within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.
However uncourteous or unkind the conduct of Pierson towards Post, in this instance, may have been, yet his act was productive of no injury or damage for which a legal remedy can be applied. We are of opinion the judgment below was erroneous, and ought to be reversed.

LIVINGSTON, J. [dissenting]

My opinion differs from that of the court. Of six exceptions, taken to the proceedings below, all are abandoned except the third, which reduces the controversy to a single question.

Whether a person who, with his own hounds, starts and hunts a fox on waste and uninhabited ground, and is on the point of seizing his prey, acquires such an interest in the animal, as to have a right of action against another, who in view of the huntsman and his dogs in full pursuit, and with knowledge of the chase, shall kill and carry him away?

This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone, all of whom have been cited; they would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor reynard would have been properly disposed of, and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of Diana. But the parties have referred the question to our judgment, and we must dispose of it as well as we can, from the partial lights we possess, leaving to a higher tribunal, the correction of any mistake which we may be so unfortunate as to make. By the pleadings it is admitted that a fox is a “wild and noxious beast.” Both parties have regarded him, as the law of nations does a pirate...and...the memory of the
deceased has not been spared. His depredations on farmers and on barn yards, have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit. Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career. But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together...pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honours or labours of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit? Whatever Justinian may have thought of the matter, it must be recollected that his code was compiled many hundred years ago, and it would be very hard indeed, at the distance of so many centuries, not to have a right to establish a rule for ourselves. In his day, we read of no order of men who made it a business, in the language of the declaration in this cause, “with hounds and dogs to find, start, pursue, hunt, and chase,” these animals, and that, too, without any other motive than the preservation of Roman poultry....If any thing, therefore, in the digests or pandects shall appear to militate against the defendant in error, who, on this occasion, was the foxhunter, we have only to say tempora mutantur; and if men themselves change with the times, why should not laws also undergo an alteration?

It may be expected, however, by the learned counsel, that more particular notice be taken of their authorities. I have examined them all, and feel great difficulty in determining, whether to acquire dominion over a thing, before in common, it be sufficient that we barely see it, or know where it is, or wish for it, or make a declaration of our will respecting it; or whether, in the case of wild beasts, setting a trap, or lying in wait, or starting, or pursuing, be enough; or if an actual wounding, or killing, or bodily tact and occupation be necessary. Writers on general law, who have favoured us with their speculations on these points, differ on them all; but, great as is the diversity of sentiment among them, some conclusion must be adopted on the question immediately before us....

Now, as we are without any municipal regulations of our own...we are at liberty to adopt...the learned conclusion of Barbeyrac, that property in animals feræ naturae may be acquired without bodily touch or manucaption, provided the pursuer be within reach, or have a reasonable prospect (which certainly existed here) of taking, what he has thus discovered an intention of converting to his own use.

When we reflect also that the interest of our husbandmen, the most useful of men in any community, will be advanced by the destruction of a beast so pernicious and incorrigible, we cannot greatly err, in saying, that a pursuit like the
present, through waste and unoccupied lands, and which must inevitably and speedily have terminated in corporal possession, or bodily seisin, confers such a right to the object of it, as to make any one a wrongdoer, who shall interfere and shoulder the spoil. The justice’s judgment ought, therefore, in my opinion, to be affirmed.

Points for Discussion

a. Why Did Post Sue?

If successful, Post would have recovered damages equal to the fair market value of the fox carcass. The carcass was worth perhaps four shillings, but local legend says that the parties spent over 1,000 pounds on the case—more than 5,000 times the amount at issue. Bethany R. Berger, It’s Not About the Fox: The Untold History of Pierson v. Post, 55 Duke L.J. 1089, 1130, 1133 (2006). The dissent’s suggestion that Pierson violated a “custom which the experience of ages has sanctioned” may provide a useful clue. Or perhaps personhood theory is helpful.

b. A Case of First Impression

The principal sources of law in our legal system, in priority, are (1) constitutions, (2) statutes, and (3) reported cases. But neither the majority nor the dissent relies on any of these key sources. The reason for this omission is simple. In 1805, the legal system of the young United States was relatively undeveloped, so there were no binding sources of law that directly resolved this particular case. Rather, it was a case of first impression, a situation where a court has considerably more latitude to reach an appropriate decision. Both the majority and the dissent rely on various treatises—summaries of the law written by venerable legal scholars such as Barbeyrac, Fleta, and Puffendorf—which may be persuasive to a court, but are not binding. Which side uses legal authority most persuasively?

c. First Possession

Pierson is a leading example of the first possession approach to property. Both sides agree that property rights in a wild animal are acquired by the first person to take possession of the animal, a principle called the rule of capture. So what issue did the parties differ on? And would it have made any difference if Post owned the land where Pierson killed the fox? Partly influenced by Pierson, later American courts adopted a first possession approach to allocating property rights in a variety of natural resources. For example, nineteenth century judges reasoned that oil was like a wild animal because it moved underground in unknown ways in response to the laws of nature; therefore, by analogy to cases such as Pierson, ownership in oil should be given to the first person who physically possessed it.
What are the benefits and costs of adopting a first possession approach to ownership of natural resources like wild animals or oil?

d. When Does Labor Matter?

Both Post and Pierson labored to catch the elusive fox: Post chased, and Pierson killed. Note that Post was aided in his chase by “dogs and hounds”—presumably dogs that were specially trained for hunting—so we might say that Post’s labor included his prior investment in hunting technology. How should the case be resolved if we apply Locke’s labor theory? And how much labor is needed? One scholar asks: “If I own a can of tomato juice and spill it in the sea so that its molecules...mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?” Robert Nozick, Anarchy, State and Utopia 175 (1974).

e. A Utilitarian Perspective

Both the majority and the dissent rely to some extent on public policies, which invoke the utilitarian approach. Which side makes the most convincing policy arguments? For example, the majority claims that its rule will benefit society in general by providing certainty. How so? To what extent are clear rules important in property law? See Carol M. Rose, Crystals and Mud in Property Law, 40 Stan. L. Rev. 577 (1988).

f. Civic Republican Theory?

There may be a thin strand of civic republican theory in the dissent’s focus on protecting farmers’ poultry from attacks by foxes. After all, the economic health of Jefferson’s yeoman farmer was viewed by some as the keystone to effective democracy. The dissent argues for a rule that will provide “the greatest possible encouragement to the destruction” of foxes—and thereby promote American agriculture. Is the dissent’s rule more effective than the majority’s approach?

g. Capture Hypotheticals

Using the majority approach in Pierson, who holds title to the animals below?

(1) Post shoots at a deer from a location 200 feet away; the shot grazes the deer’s ear and temporarily stuns it. Pierson immediately snatches the deer and puts it in a large sack. Post arrives on the scene one minute later, while the deer is still stunned.

(2) Motivated by environmental concerns, Post nets a wild rabbit, paints “Property of Post” on it, and then allows it to run free. Pierson shoots and kills the rabbit.
(3) Post’s dogs chase a fox into a shallow cave. But before Post can get to the
cave, Pierson shoots the fox and mortally wounds it. Post arrives at the
cave two minutes later.

(4) Post’s cow strays onto unowned land. Pierson finds the cow, places a
rope around its neck, and leads it back to his own farm. Two days later, Post
discovers the cow on Pierson’s farm.

h. Aftermath of Pierson

Today the “waste land” involved in Pierson is part of Southampton, New
York—one of the nation’s wealthiest resort communities. And although Pierson
and Post are long dead, the famous case that bears their names lives on in Ameri-
can law: “Scholars cite it to illustrate everything from discrimination against
transgendered persons to rights in fugitive home run balls. Outside the ivory
tower, courts and lawyers use it to argue for contested forms of property from
groundwater aquifers to the America’s Cup trophy.” Bethany R. Berger, It’s Not
About the Fox, supra at 1091-92.

Our second dispute concerns Vanna White, co-star of the television game
show Wheel of Fortune. In many ways, White is the antithesis of Pierson. It arises
almost two centuries later, in a high-tech industry located on the opposite side
of the country, and concerns a type of intangible property—a celebrity’s right of
publicity. Yet the same perspectives on property that we explored in Pierson are
key to understanding this quite different case. Is White entitled to control the use
of her name and likeness? Why?

White v. Samsung Electronics America, Inc.

United States Court of Appeals, Ninth Circuit

GOODWIN, Senior Circuit Judge.

This case involves a promotional “fame and fortune” dispute. In running a
particular advertisement without Vanna White’s permission, defendants Samsung
Electronics America, Inc. (Samsung) and David Deutsch Associates, Inc. (Deutsch)
attempted to capitalize on White’s fame to enhance their fortune. White sued,
alleging infringement of various intellectual property rights, but the district court
granted summary judgment in favor of the defendants. We affirm in part, reverse in part, and remand.

Plaintiff Vanna White is the hostess of “Wheel of Fortune,” one of the most popular game shows in television history. An estimated forty million people watch the program daily. Capitalizing on the fame which her participation in the show has bestowed on her, White markets her identity to various advertisers.

The dispute in this case arose out of a series of advertisements prepared for Samsung by Deutsch. The series ran in at least half a dozen publications with widespread, and in some cases national, circulation. Each of the advertisements in the series followed the same theme. Each depicted a current item from popular culture and a Samsung electronic product. Each was set in the twenty-first century and conveyed the message that the Samsung product would still be in use by that time. By hypothesizing outrageous future outcomes for the cultural items, the ads created humorous effects. For example, one lampooned current popular notions of an unhealthy diet by depicting a raw steak with the caption: “Revealed to be health food. 2010 A.D.” Another depicted irreverent “news”-show host Morton Downey Jr. in front of an American flag with the caption: “Presidential candidate. 2008 A.D.”

The advertisement which prompted the current dispute was for Samsung video-cassette recorders (VCRs). The ad depicted a robot, dressed in a wig, gown, and jewelry which Deutsch consciously selected to resemble White’s hair and dress. The robot was posed next to a game board which is instantly recognizable as the Wheel of Fortune game show set, in a stance for which White is famous. The caption of the ad read: “Longest-running game show. 2012 A.D.” Defendants referred to the ad as the “Vanna White” ad. Unlike the other celebrities used in the campaign, White neither consented to the ads nor was she paid.

Following the circulation of the robot ad, White sued Samsung and Deutsch in federal district court under: (1) California Civil Code § 3344; (2) the California common law right of publicity; and (3) § 43(a) of the Lanham Act, 15 U.S.C.
Chapter 1 The Concept of Property

§ 1125(a). The district court granted summary judgment against White on each of her claims. White now appeals.

I. Section 3344

White first argues that the district court erred in rejecting her claim under section 3344. Section 3344(a) provides, in pertinent part, that “[a]ny person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner,…for purposes of advertising or selling,…without such person’s prior consent…shall be liable for any damages sustained by the person or persons injured as a result thereof.”

White argues that the Samsung advertisement used her “likeness” in contravention of section 3344. In Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988), this court rejected Bette Midler’s section 3344 claim concerning a Ford television commercial in which a Midler “sound-alike” sang a song which Midler had made famous. In rejecting Midler’s claim, this court noted that “[t]he defendants did not use Midler’s name or anything else whose use is prohibited by the statute. The voice they used was [another person’s], not hers. The term ‘likeness’ refers to a visual image not a vocal imitation.” Id. at 463.

In this case, Samsung and Deutsch used a robot with mechanical features, and not, for example, a manikin molded to White’s precise features. Without deciding for all purposes when a caricature or impressionistic resemblance might become a “likeness,” we agree with the district court that the robot at issue here was not White’s “likeness” within the meaning of section 3344. Accordingly, we affirm the court’s dismissal of White’s section 3344 claim.

II. Right of Publicity

White next argues that the district court erred in granting summary judgment to defendants on White’s common law right of publicity claim. In Eastwood v. Superior Court, 149 Cal.App.3d 409, 198 Cal. Rptr. 342 (1983), the California court of appeal stated that the common law right of publicity cause of action “may be pleaded by alleging (1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”...The district court dismissed White’s claim for failure to satisfy Eastwood’s second prong, reasoning that defendants had not appropriated White’s “name or likeness” with their robot ad. We agree that the robot ad did not make use of White’s name or likeness. However, the common law right of publicity is not so confined....

The “name or likeness” formulation referred to in Eastwood originated not as an element of the right of publicity cause of action, but as a description of the
types of cases in which the cause of action had been recognized. The source of this formulation is Prosser, Privacy, 48 Cal. L. Rev. 383, 401-07 (1960), one of the earliest and most enduring articulations of the common law right of publicity cause of action. In looking at the case law to that point, Prosser recognized that right of publicity cases involved one of two basic factual scenarios: name appropriation, and picture or other likeness appropriation. 

Even though Prosser focused on appropriations of name or likeness in discussing the right of publicity, he noted that “[i]t is not impossible that there might be appropriation of the plaintiff’s identity, as by impersonation, without the use of either his name or his likeness, and that this would be an invasion of his right of privacy.” …At the time Prosser wrote, he noted however, that “[n]o such case appears to have arisen.” …

Since Prosser’s early formulation, the case law has borne out his insight that the right of publicity is not limited to the appropriation of name or likeness. 

In Midler, this court held that, even though the defendants had not used Midler’s name or likeness, Midler had stated a claim for violation of her California common law right of publicity because “the defendants…for their own profit in selling their product did appropriate part of her identity” by using a Midler sound-alike. Id. at 463-64.

In Carson v. Here’s Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983), the defendant had marketed portable toilets under the brand name “Here’s Johnny”—Johnny Carson’s signature “Tonight Show” introduction—without Carson’s permission. The district court had dismissed Carson’s Michigan common law right of publicity claim because the defendants had not used Carson’s “name or likeness.” Id. at 835. In reversing the district court, the sixth circuit found “the district court’s conception of the right of publicity…too narrow” and held that the right was implicated because the defendant had appropriated Carson’s identity by using, inter alia, the phrase “Here’s Johnny.” Id. at 835-37.

These cases teach not only that the common law right of publicity reaches means of appropriation other than name or likeness, but that the specific means of appropriation are relevant only for determining whether the defendant has in fact appropriated the plaintiff’s identity. The right of publicity does not require that appropriations of identity be accomplished through particular means to be actionable. It is noteworthy that the Midler and Carson defendants not only avoided using the plaintiff’s name or likeness, but they also avoided appropriating the celebrity’s voice, signature, and photograph. 

Although the defendants in these cases avoided the most obvious means of appropriating the plaintiffs’ identities, each of their actions directly implicated the
commercial interests which the right of publicity is designed to protect. As the [*Carson*](#) court explained:

> [t]he right of publicity has developed to protect the commercial interest of celebrities in their identities. The theory of the right is that a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity. If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his "name or likeness" is used. *Carson*, 698 F.2d at 835.

It is not important *how* the defendant has appropriated the plaintiff's identity, but *whether* the defendant has done so.... *Midler* and *Carson* teach the impossibility of treating the right of publicity as guarding only against a laundry list of specific means of appropriating identity. A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth.

Indeed, if we treated the means of appropriation as dispositive in our analysis of the right of publicity, we would not only weaken the right but effectively eviscerate it. The right would fail to protect those plaintiffs most in need of its protection. Advertisers use celebrities to promote their products. The more popular the celebrity, the greater the number of people who recognize her, and the greater the visibility for the product. The identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice....

Viewed separately, the individual aspects of the advertisement in the present case say little. Viewed together, they leave little doubt about the celebrity the ad is meant to depict. The female-shaped robot is wearing a long gown, blond wig, and large jewelry. Vanna White dresses exactly like this at times, but so do many other women. The robot is in the process of turning a block letter on a game-board. Vanna White dresses like this while turning letters on a game-board but perhaps similarly attired Scrabble-playing women do this as well. The robot is standing on what looks to be the Wheel of Fortune game show set. Vanna White dresses like this, turns letters, and does this on the Wheel of Fortune game show. She is the only one. Indeed, defendants themselves referred to their ad as the "Vanna White" ad. We are not surprised.

Television and other media create marketable celebrity identity value. Considerable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit. The law protects the celebrity's sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof....Because White has alleged facts showing that
Samsung and Deutsch had appropriated her identity, the district court erred by rejecting, on summary judgment, White's common law right of publicity claim.…

White v. Samsung Electronics America, Inc.
United States Court of Appeals, Ninth Circuit
989 F.2d 1512 (1993)

KOZINSKI, Circuit Judge…dissenting from the order rejecting the suggestion for rehearing en banc.

I.

...Clint Eastwood doesn’t want tabloids to write about him. Rudolf Valentino’s heirs want to control his film biography. The Girl Scouts don’t want their image soiled by association with certain activities. George Lucas wants to keep Strategic Defense Initiative fans from calling it “Star Wars.” Pepsico doesn’t want singers to use the word “Pepsi” in their songs. Guy Lombardo wants an exclusive property right to ads that show big bands playing on New Year’s Eve. Uri Geller thinks he should be paid for ads showing psychics bending metal through telekinesis. Paul Prudhomme, that household name, thinks the same about ads featuring corpulent bearded chefs. And scads of copyright holders see purple when their creations are made fun of.

Something very dangerous is going on here. Private property, including intellectual property, is essential to our way of life. It provides an incentive for investment and innovation; it stimulates the flourishing of our culture; it protects the moral entitlements of people to the fruits of their labors. But reducing too much to private property can be bad medicine. Private land, for instance, is far more useful if separated from other private land by public streets, roads and highways. Public parks, utility rights-of-way and sewers reduce the amount of land in private hands, but vastly enhance the value of the property that remains.

So too it is with intellectual property. Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new:
Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it’s supposed to nurture.

The panel’s opinion is a classic case of overprotection. Concerned about what it sees as a wrong done to Vanna White, the panel majority erects a property right of remarkable and dangerous breadth: Under the majority’s opinion, it’s now a tort for advertisers to remind the public of a celebrity. Not to use a celebrity’s name, voice, signature or likeness; not to imply the celebrity endorses a product; but simply to evoke the celebrity’s image in the public’s mind. This Orwellian notion withdraws far more from the public domain than prudence and common sense allow….It raises serious First Amendment problems. It’s bad law, and it deserves a long, hard second look….

III.

…The majority isn’t, in fact, preventing the “evisceration” of Vanna White’s existing rights; it’s creating a new and much broader property right, a right unknown in California law. It’s replacing the existing balance between the interests of the celebrity and those of the public by a different balance, one substantially more favorable to the celebrity. Instead of having an exclusive right in her name, likeness, signature or voice, every famous person now has an exclusive right to anything that reminds the viewer of her. After all, that’s all Samsung did: It used an inanimate object to remind people of White, to “evoke [her identity].” 971 F.2d at 1399.

Consider how sweeping this new right is. What is it about the ad that makes people think of White? It’s not the robot’s wig, clothes or jewelry; there must be ten million blond women (many of them quasi-famous) who wear dresses and jewelry like White’s. It’s that the robot is posed near the “Wheel of Fortune” game board. Remove the game board from the ad, and no one would think of Vanna White….But once you include the game board, anybody standing beside it—a brunette woman, a man wearing women’s clothes, a monkey in a wig and gown—would evoke White’s image, precisely the way the robot did. It’s the “Wheel of Fortune” set, not the robot’s face or dress or jewelry that evokes White’s image. The panel is giving White an exclusive right not in what she looks like or who she is, but in what she does for a living.18

18 Once the right of publicity is extended beyond specific physical characteristics, this will become a recurring problem: Outside name, likeness and voice, the things that most reliably remind the public of celebrities are the actions or roles they’re famous for. A commercial with an astronaut setting foot on the moon would evoke the image of Neil Armstrong. Any masked man on horseback would remind people (over a certain age) of Clayton Moore. And any number of songs—“My Way,” “Yellow Submarine,” “Like a Virgin,” “Beat It,” “Michael, Row the Boat Ashore,” to name only a few—instantly evoke an image of the person or group who made them famous, regardless of who is singing…. 
This is entirely the wrong place to strike the balance. Intellectual property rights aren’t free: They’re imposed at the expense of future creators and of the public at large. Where would we be if Charles Lindbergh had an exclusive right in the concept of a heroic solo aviator? If Arthur Conan Doyle had gotten a copyright in the idea of the detective story, or Albert Einstein had patented the theory of relativity? If every author and celebrity had been given the right to keep people from mocking them or their work? Surely this would have made the world poorer, not richer, culturally as well as economically….

The intellectual property right created by the panel here…impoverishes the public domain, to the detriment of future creators and the public at large. Instead of well-defined, limited characteristics such as name, likeness or voice, advertisers will now have to cope with vague claims of “appropriation of identity,” claims often made by people with a wholly exaggerated sense of their own fame and significance…. Future Vanna Whites might not get the chance to create their personae, because their employers may fear some celebrity will claim the persona is too similar to her own. The public will be robbed of parodies of celebrities, and our culture will be deprived of the valuable safety valve that parody and mockery create.

Moreover, consider the moral dimension, about which the panel majority seems to have gotten so exercised. Saying Samsung “appropriated” something of White’s begs the question: Should White have the exclusive right to something as broad and amorphous as her “identity”? Samsung’s ad didn’t simply copy White’s schtick—like all parody, it created something new. True, Samsung did it to make money, but White does whatever she does to make money, too; the majority talks of “the difference between fun and profit,” 971 F.2d at 1401, but in the entertainment industry fun is profit. Why is Vanna White’s right to exclusive for-profit use of her persona—a persona that might not even be her own creation, but that of a writer, director or producer—superior to Samsung’s right to profit by creating its own inventions?...

[I]t may seem unfair that much of the fruit of a creator’s labor may be used by others without compensation. But this is not some unforeseen byproduct of our intellectual property system; it is the system’s very essence. Intellectual property law assures authors the right to their original expression, but encourages others to build freely on the ideas that underlie it. This result is neither unfair nor unfortunate: It is the means by which intellectual property law advances the progress of science and art. We give authors certain exclusive rights, but in exchange we get a richer public domain. The majority ignores this wise teaching, and all of us are the poorer for it…. 
VII.

For better or worse, we are the Court of Appeals for the Hollywood Circuit. Millions of people toil in the shadow of the law we make, and much of their livelihood is made possible by the existence of intellectual property rights. But much of their livelihood—and much of the vibrancy of our culture—also depends on the existence of other intangible rights: The right to draw ideas from a rich and varied public domain, and the right to mock, for profit as well as fun, the cultural icons of our time.

In the name of avoiding the “evisceration” of a celebrity’s rights in her image, the majority diminishes the rights of copyright holders and the public at large. In the name of fostering creativity, the majority suppresses it. Vanna White and those like her have been given something they never had before, and they’ve been given it at our expense. I cannot agree.

Points for Discussion

a. Property Theory Revisited

Consider again the five theories of property discussed earlier in this chapter. To what extent do these theories justify recognizing the right of publicity as a general matter? Notice that although White is a federal case, it relies on state law to define the right of publicity. Why? Under our federal system of government, state law generally determines what constitutes property. (This broad rule is subject, of course, to various exceptions; for example, federal law governs copyrights and patents.) Predictably, states often differ in defining property. For example, almost half of the states do not recognize the right of publicity as property. Why not?

b. How Much Property?

Law and economics theory endorses a property law system where every valuable resource is owned by someone. While agreeing that “private property . . . is essential to our way of life,” Judge Kozinski cautions in his White dissent that “reducing too much to private property can be bad medicine.” To what extent do these views conflict? How do our five theories bear on the question of how much private property is appropriate?

c. Rights in Conflict

Defining the scope of property rights in particular situations is often difficult, as White illustrates. California law clearly recognized the right of publicity as a
general matter. The question was the scope of that right in a specific context—whether it should restrict conduct that merely reminds people of a celebrity. Judge Kozinski’s dissent implies that a decision recognizing White’s right on these facts would injure future creators and the public at large. How do the five visions of property help us define the appropriate scope of White’s right? Which side makes the most convincing arguments here, the main opinion or the dissent?

d. Dead Celebrities: From Einstein to Elvis

In light of the different theories of property, consider what limits should exist on the right of publicity. For example, one question is whether the right of publicity should survive the celebrity’s death. The estates of dead celebrities ranging from Elvis Presley to Marilyn Monroe to Mark Twain have profited from recent agreements allowing advertisers to use these names and likenesses. For example, Elvis’ name and likeness generated $60 million for his estate in 2010, while Albert Einstein’s estate earned $10 million. Lacey Pomerantz, *The Rich and the Dead*, Forbes, Nov. 22, 2010. Is such a post-mortem right of publicity appropriate, considering our five theories? The states that recognize the right of publicity are divided on whether it survives death. Aside from this example, should other limits be placed on the right of publicity?

e. The First Amendment

The First Amendment to the Constitution provides: “Congress shall make no law…abridging the freedom of speech, or of the press….” This provision does restrict the right of publicity—but to what extent? For example, consider this controversy arising out of Tiger Woods’ legendary 1997 Masters golf tournament victory in Augusta, Georgia. Rick Rush, who calls himself “America’s sports artist,” created a painting entitled “The Masters of Augusta” to commemorate the event. It featured three views of Woods in different poses in the foreground, with images of past victors and the Augusta clubhouse in the background. The Sixth Circuit rejected Woods’ right of publicity claim because the painting was an artistic transformation, not a literal depiction of his image: “[W]e conclude that the effect of limiting the right of publicity in this case is negligible and significantly outweighed by society’s interest in freedom of artistic expression.” *ETW Corporation v. Jireh Publishing, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003). In contrast, when a television station broadcast the entire 15-second act of “human cannonball” Hugo Zaccini being fired 200 feet through the air, the First Amendment did not bar Zaccini’s lawsuit. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). In light of these cases, was White wrongly decided?
f. Publicity Problems

Has the right of publicity been violated in the following situations?

(1) A sells a video football game that features virtual players. The jersey number, height, weight, hometown, and playing statistics for each virtual player are the same as a currently-enrolled college player, but the name and the likeness of the actual player are not used.

(2) B writes a book about the impact of Martin Luther King, Jr. on the civil rights movement, which is sold to the public.

(3) C invents a new dance style which reminds some people of the way Elvis Presley danced; C is paid to perform the dance on a television show.

g. Creation as a Source of Property

In Pierson, we saw that property rights may arise from first possession or capture. Note that this concept applies to rights in existing, unowned things. White introduces a different source of property: creation. All other things being equal, the law usually vests title in the person who creates an entirely new thing, such as an invention, a book, or a song. We will explore creation as a source of intellectual property rights in Chapter 4.

h. Aftermath of White

White originally sought $6.9 million in damages, but the jury ultimately awarded her only $403,000. Today Wheel of Fortune is still the most popular syndicated show on television, and White's annual income (including revenue from product endorsements) is estimated to be over $4,000,000.

B. What Is Property?

An ordinary person conceives of property as things. If you were asked what property you own, you might list items such as books, clothes, a computer, and perhaps a car. In law, however, we define property as rights among people concerning things. For example, you hold legally-enforceable rights in your computer, but do not own the thing itself. Thus, property is often described as a bundle of rights or, more informally, a bundle of sticks. The Supreme Court echoed this view in Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979), when it referred to
“the bundle of rights that are commonly characterized as property.” Using this metaphor, the most important “sticks” in the bundle are:

- The right to transfer
- The right to exclude
- The right to use
- The right to destroy

The balance of this chapter will explore these four rights in depth. Note that the bundle of rights metaphor has come under attack in recent years. For an example of this critique, see J.E. Penner, The “Bundle of Rights” Picture of Property, 43 UCLA L. Rev. 711 (1996).

The idea that property consists of rights has important consequences, which we will see throughout the course. If you entered law school thinking about property as things, you will need to reconsider some of your assumptions. For example, take a moment to consider four key implications of the rights approach:

- **Property rights are defined by government:** As noted above, property is defined by government—the basic concept of legal positivism. In other words, A holds property rights in his farm only if and to the extent that they are recognized by government.

- **Property rights are not absolute:** Many people believe that “a person can do anything he wants with his own property.” Not so. Property rights are relative, not absolute. Almost by definition, property rights sometimes conflict. Thus, B’s right to use her land (for example, as a smelly pig farm) may interfere with C’s right to use his adjacent land (for example, as a residence). Much of property law is devoted to reconciling disputes between different owners or between an owner and the community. As one scholar explains: “Some rights in the bundle conflict with other rights in the bundle; the property rights of one person impinge on, and interfere with, both the property and personal rights of others. Absolute property rights are self-defeating.” Joseph William Singer, Rent, 39 B.C. L. Rev. 1, 34 (1997).
Finally, if we define property as rights among people concerning things, does this mean that property owners owe any duties? As one professor notes: “Owners have obligations; they have always had obligations. We can argue about what those obligations should be, but no one can seriously argue that they should not exist.” Joseph William Singer, Entitlement 18 (2000). See also Gregory S. Alexander, The Social-Obligation Norm in American Property Law, 94 Cornell L. Rev. 745 (2009).

1. Right to Transfer

A wants to sell her kidney to B. C’s will devised farm land to D on condition that D never allow commercial development, but D now intends to build a shopping center. E and F, who have used in vitro fertilization to produce ten frozen human embryos from their genetic material, plan to donate one of the embryos to G. These situations share a common question: what is the scope of the right to transfer?

The right to transfer property—technically called alienability—is a cornerstone of the American legal system. As a general rule, any owner may freely
transfer or *alienate* any of her property to anyone. But the scope of this right is sometimes limited for reasons of public policy. Occasionally, the law restricts who can transfer or obtain property; an insane person, for example, can do neither. More commonly, the law regulates what property can be transferred. For instance, some types of property cannot be transferred at all (such as rights to military pensions), while others can be given away but not sold (such as corneas). And, as you would expect, the law usually regulates how property may be transferred in order to avoid fraud, uncertainty, or other problems. For example, in general a will is not effective to transfer property at the owner’s death unless it is in writing, signed by the owner, and appropriately witnessed by two people.

Advocates of the law and economics approach stress that the right to transfer is vital for efficiency in our market economy, because it helps to ensure that property is devoted to its most valuable use. For example, suppose A holds title to a large tract of land where he grows potatoes; the land is worth $2,000 per acre for agricultural use. But suppose that A’s land is worth $50,000 per acre for industrial use, which would benefit society more than farming. If the law prevented A from selling his rights to entrepreneur B, then the land would remain locked into a low-value use.

So if the law favors the free alienation of property as a general matter, the question becomes: under what specific circumstances should alienation be restricted? To answer this question, we must examine the policies that underpin American property law.

The next case—*Johnson v. M’Intosh*—provides an excellent starting point for exploring the scope of the right to transfer and much more. Land speculation was rampant in the American colonies during the 1700s. The Crown officially prohibited private persons from purchasing land west of the Allegheny Mountains from Native American tribes. But this ban was often ignored, as shown by the events leading up to *Johnson*. In 1773, an investor group purchased 23,000 square miles of land in present-day Illinois from the Kaskakia, Peoria, and Cahokia tribes, in exchange for trade goods valued at $24,000. This tract was about the same size as the combined modern states of Maryland and Massachusetts. Two years later, another group purchased an even larger tract of land in present-day Illinois and Indiana from the Piankeshaw tribe in exchange for $31,000 in goods. These two investor groups merged in 1779 to
form the United Illinois and Wabash Land Company. For the next 40 years, the Company lobbied state governments and the federal government to recognize its claimed land titles—without success. During this time, the federal government had acquired title to most of these lands from the same Native American tribes (in exchange for more trade goods), and had sold parcels to various buyers. One of the buyers was an eccentric Scotsman, William M’Intosh. Finally, in 1820, the Company turned to a new strategy: litigation.

**Johnson v. M’Intosh**

Supreme Court of the United States  
21 U.S. (8 Wheat.) 543 (1823)

...This was an action of ejectment for lands in the State and District of Illinois, claimed by the plaintiffs under a purchase and conveyance from the Piankeshaw Indians, and by the defendant, under a [later] grant from the United States. It came up on a case stated, upon which there was judgment below for the defendant….

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

The plaintiffs in this cause claim the land, in their declaration mentioned, under two grants, purporting to be made, the first in 1773, and the last in 1775, by the chiefs of certain Indian tribes, constituting the Illinois and the Piankeshaw nations; and the question is, whether this title can be recognised in the Courts of the United States?

The facts, as stated in the case agreed, show the authority of the chiefs who executed this conveyance, so far as it could be given by their own people; and likewise show, that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.

As the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree,
the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy….
No one of the powers of Europe gave its full assent to this principle, more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to Christian people, and to take possession of them in the name of the king of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title.

[O]ur whole country [has] been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees. In those governments which were denominated royal, where the right to the soil was not vested in individuals, but remained in the crown, or was vested in the colonial government, the king claimed and exercised the right of granting lands, and of dismembering the government at his will….It has never been objected…to any…grant, that the title as well as possession was in the Indians when it was made, and that it passed nothing on that account.

Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American States rejected or adopted this principle?

By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the “propriety and territorial rights of the United States,” whose boundaries were fixed in the second article….It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.

Virginia, particularly, within whose chartered limits the land in controversy lay, passed an act, in the year 1779, declaring her

exclusive right of pre-emption from the Indians, of all the lands within the limits of her own chartered territory, and that no person or persons whatsoever, have, or ever had, a right to purchase any lands within the same, from any Indian nation, except only persons duly authorized to make such purchase; formerly for the use and benefit of the colony, and lately for the Commonwealth.

The act then proceeds to annul all deeds made by Indians to individuals, for the private use of the purchasers.
The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our Courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute title must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.

Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.
The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections, and united by force to strangers….

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.

Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.

That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.
However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice….

It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right….

After bestowing on this subject a degree of attention which was more required by the magnitude of the interest in litigation, and the able and elaborate arguments of the bar, than by its intrinsic difficulty, the Court is decidedly of [the] opinion, that the plaintiffs do not exhibit a title which can be sustained in the Courts of the United States; and that there is no error in the judgment which was rendered against them in the District Court of Illinois.

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**Points for Discussion**

**a. Bundle of Sticks**

According to Marshall, what rights did the Native Americans have before their 1773 and 1775 grants? If the Crown could extinguish the rights of the Native Americans at any time, were they truly “rights”?

**b. Theories of Property**

*Pierson v. Post* introduced a keystone principle of English property law: all things being equal, the law tends to vest title in the first-in-time possessor. The Native Americans were occupying and using the lands in question long before Europeans arrived in North America. Why weren’t the Native Americans entitled to full ownership based on the first-in-time rule? Didn’t they “capture” the land through labor before the Europeans appeared, just like Pierson killed the fox before Post arrived?
c. Marshall’s Rationale

Exactly why didn’t the Native Americans have the right to transfer title? Marshall’s opinion mentions several possible reasons, including (1) prior payment (“they made ample compensation…by bestowing on them civilization and Christianity”), (2) abandonment (“[a]s the white population advanced, that of the Indians necessarily receded”), and (3) undue delay in claiming title (“if the property of the great mass of the community originates in it, it becomes the law of the land”). Are these themes relevant, or does the rationale lie elsewhere?

d. Applying the Johnson Rule

Suppose that you are an attorney for the State of Delaware. You learn that a Native American tribe sold and conveyed over 50,000 acres of tribal land to the state in 1805. Citing *Johnson*, the tribe now argues that the transaction was invalid and sues to obtain title. How would you advise your client?

e. An “Efficient” Approach?

Professor Eric Kades notes that in almost all instances the federal government acquired Native American lands by purchase—though often with the threat of force in the background. Eric Kades, *History and Interpretation of the Great Case of Johnson v. M’Intosh*, 19 Law & Hist. Rev. 67 (2001). So why was the outcome of *Johnson* important? By confirming that the Native Americans could transfer title to only one buyer, the decision ensured low purchase prices. As Kades explains, “it was collectively efficient for Europeans to make their governments the only legal entities empowered to buy Indian land. Single buyers (monopsonists) can drive prices down just as single sellers (monopolists) can drive prices up.” *Id.* at 111. As a result, he concludes that purchase was cheaper than conquest.

f. Fifty Years Later

The Supreme Court decided this case in 1823, 50 years after the first grant in question. Why was the Native Americans’ right to transfer relevant to a case occurring so many years later? Did this 50-year period affect the outcome of the case? Suppose that the Court had ruled in favor of the Johnson group. Marshall says that allowing the Native Americans to remain in possession of their lands would “leave the country a wilderness.” Why is this relevant?

g. Chain of Title

The succession of ownership over time is called a *chain of title*. Each different owner is a different link in the chain. Suppose that A acquires title to a house from B; B had previously obtained title from C, who had earlier received her title from D, and so forth. The chain of title for every parcel of real property in the United States can be traced backwards in time to a point where it was originally
owned by a sovereign entity before being granted to a private owner. Most commonly, the sovereign who began the chain is the United States, as in *Johnson v. M’Intosh;* M’Intosh received his title through a deed from the federal government. However, a chain of title might also originate in the British crown, a state or colony, France, Spain or another foreign country that once claimed territory in the modern United States. The chain of title concept is important because—as a general matter—if two different people have competing title claims to the same property, the person with the better chain of title will prevail. You will study this doctrine in Chapter 8.

Consider the question of property rights in the human body. The Thirteenth Amendment to the Constitution abolished slavery in the United States. As a result, the human body cannot be sold. But what about body parts? If we view you as the “owner” of your body, do you have the right to sell your kidney?

**Moore v. Regents of the University of California**

Supreme Court of California  

PANELLI, Justice.

I. INTRODUCTION

We granted review in this case to determine whether plaintiff has stated a cause of action against his physician and other defendants for using his cells in potentially lucrative medical research without his permission. Plaintiff alleges that his physician failed to disclose pre-existing research and economic interests in the cells before obtaining consent to the medical procedures by which they were extracted. The superior court sustained all defendants’ demurrers to the third amended complaint, and the Court of Appeal reversed. We hold that the complaint states a cause of action for breach of the physician’s disclosure obligations, but not for conversion. . . .
II. FACTS

...The plaintiff is John Moore (Moore), who underwent treatment for hairy-cell leukemia at the Medical Center of the University of California at Los Angeles (UCLA Medical Center). [The defendants included the Regents of the University of California (Regents), Dr. Golde (who treated Moore), and Shirley Quan (a researcher employed by the Regents).]

Moore first visited UCLA Medical Center on October 5, 1976...After hospitalizing Moore and withdrawing “extensive amounts of blood, bone marrow aspirate, and other bodily substances,” Golde confirmed [the] diagnosis. [The defendants were aware that Moore's cells were unique and had substantial value, but did not inform Moore. Specifically, Moore's T-lymphocyte cells (a type of white blood cell) overproduced certain lymphokines, which are proteins that regulate the immune system; this overproduction enabled researchers to locate the genes responsible for those lymphokines. Golde recommended that Moore's spleen be removed to slow down the progress of the disease, and Moore agreed. Portions of the spleen—plus blood, skin, and other tissue removed from Moore during six years of follow-up visits—were used for research without Moore's knowledge. Using genetic engineering, the defendants developed a cell-line from Moore's cells (called the “Mo cell line”), obtained a patent for it (U.S. Patent No. 4,438,032), and entered into a series of commercial agreements for rights to the cell-line and its products. The market potential for these products was estimated to be three billion dollars. Moore sued for damages based on thirteen causes of action, including lack of informed consent, breach of fiduciary duty, and conversion. He alleged that the spleen, blood, and other bodily substances taken by the defendants were “his tangible personal property” and that the defendant’s activities “constitute a substantial interference with plaintiff’s possession or right thereto.” The trial court sustained the defendants’ demurrers, but the Court of Appeal reversed.]

III. DISCUSSION

A. Breach of Fiduciary Duty and Lack of Informed Consent

Moore repeatedly alleges that Golde failed to disclose the extent of his research and economic interests in Moore’s cells before obtaining consent to the medical procedures by which the cells were extracted. These allegations, in our view, state a cause of action against Golde for invading a legally protected interest of his patient. This cause of action can properly be characterized either as the breach of a fiduciary duty to disclose facts material to the patient's consent or, alternatively, as the performance of medical procedures without first having obtained the patient’s informed consent....
B. Conversion

Moore also attempts to characterize the invasion of his rights as a conversion—a tort that protects against interference with possessory and ownership interests in personal property. He theorizes that he continued to own his cells following their removal from his body, at least for the purpose of directing their use, and that he never consented to their use in potentially lucrative medical research. Thus, to complete Moore’s argument, defendants’ unauthorized use of his cells constitutes a conversion. As a result of the alleged conversion, Moore claims a proprietary interest in each of the products that any of the defendants might ever create from his cells or the patented cell line.

[W]e first consider whether the tort of conversion clearly gives Moore a cause of action under existing law. We do not believe it does. Because of the novelty of Moore’s claim to own the biological materials at issue, to apply the theory of conversion in this context would frankly have to be recognized as an extension of the theory. Therefore, we consider next whether it is advisable to extend the tort to this context.

1. Moore’s Claim Under Existing Law

“To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession.... Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.” (Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal.App.3d 593, 610-611, 176 Cal. Rptr. 284, emphasis added....)

Since Moore clearly did not expect to retain possession of his cells following their removal, to sue for their conversion he must have retained an ownership interest in them. But there are several reasons to doubt that he did retain any such interest. First, no reported judicial decision supports Moore’s claim, either directly or by close analogy. Second, California statutory law drastically limits any continuing interest of a patient in excised cells. Third, the subject matters of the Regents’ patent—the patented cell line and the products derived from it—cannot be Moore’s property.

Neither the Court of Appeal’s opinion, the parties’ briefs, nor our research discloses a case holding that a person retains a sufficient interest in excised cells to support a cause of action for conversion. We do not find this surprising, since the laws governing such things as human tissues, transplantable organs,22 blood,

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22 See the Uniform Anatomical Gift Act, Health and Safety Code section 7150 et seq. The act permits a competent adult to “give all or part of [his] body” for certain designated purposes, including “transplantation, therapy, medical or dental education, research, or advancement of medical or dental science.” (Health & Saf. Code, §§ 7151, 7153.) The act does not, however, permit the donor to receive “valuable consideration” for the transfer. (Health & Saf. Code, § 7155.)
fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects sui generis, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property. It is these specialized statutes, not the law of conversion, to which courts ordinarily should and do look for guidance on the disposition of human biological materials.

Lacking direct authority for importing the law of conversion into this context, Moore relies, as did the Court of Appeal, primarily on decisions addressing privacy rights. One line of cases involves unwanted publicity. (*Lugosi v. Universal Pictures* (1979) 25 Cal.3d 813, 160 Cal. Rptr. 323, 603 P.2d 425; *Motschenbacher v. R.J. Reynolds Tobacco Company* (9th Cir. 1974) 498 F.2d 821 [interpreting Cal. law].) These opinions hold that every person has a proprietary interest in his own likeness and that unauthorized, business use of a likeness is redressible as a tort. But in neither opinion did the authoring court expressly base its holding on property law. Each court stated, following Prosser, that it was “pointless” to debate the proper characterization of the proprietary interest in a likeness….For purposes of determining whether the tort of conversion lies, however, the characterization of the right in question is far from pointless. Only property can be converted….

Not only are the wrongful-publicity cases irrelevant to the issue of conversion, but the analogy to them seriously misconceives the nature of the genetic materials and research involved in this case. Moore, adopting the analogy originally advanced by the Court of Appeal, argues that “[i]f the courts have found a sufficient proprietary interest in one’s persona, how could one not have a right in one’s own genetic material, something far more profoundly the essence of one’s human uniqueness than a name or a face?” However, as the defendants’ patent makes clear—and the complaint, too, if read with an understanding of the scientific terms which it has borrowed from the patent—the goal and result of defendants’ efforts has been to manufacture lymphokines. Lymphokines, unlike a name or a face, have the same molecular structure in every human being and the same, important functions in every

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**FYI**

Consider the text of the key statutes cited by both the majority and the dissent:

**Cal. Health & Safety Code § 7153(a):** Only the following persons may become donees of anatomical gifts for the purposes stated: (1) A hospital, physician, surgeon, or procurement organization, for transplantation, therapy, medical or dental education, research, or advancement of medical or dental science;…

**Cal. Health & Safety Code § 7155(a):** A person may not knowingly, for valuable consideration, purchase or sell a part for transplantation, therapy, or reconditioning, if removal of the part is intended to occur after the death of the decedent.
human being's immune system. Moreover, the particular genetic material which is responsible for the natural production of lymphokines, and which defendants use to manufacture lymphokines in the laboratory, is also the same in every person; it is no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin….

The next consideration that makes Moore's claim of ownership problematic is California statutory law, which drastically limits a patient's control over excised cells. Pursuant to Health and Safety Code section 7054.4,

[n]otwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state department [of health services] to protect the public health and safety.

Clearly the Legislature did not specifically intend this statute to resolve the question of whether a patient is entitled to compensation for the nonconsensual use of excised cells. A primary object of the statute is to ensure the safe handling of potentially hazardous biological waste materials. Yet one cannot escape the conclusion that the statute's practical effect is to limit, drastically, a patient's control over excised cells. By restricting how excised cells may be used and requiring their eventual destruction, the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to “property” or “ownership” for purposes of conversion law….

Finally, the subject matter of the Regents' patent—the patented cell line and the products derived from it—cannot be Moore's property. This is because the patented cell line is both factually and legally distinct from the cells taken from Moore's body. Federal law permits the patenting of organisms that represent the product of “human ingenuity,” but not naturally occurring organisms. (Diamond v. Chakrabarty (1980) 447 U.S. 303, 309-310). Human cell lines are patentable because “[l]ong-term adaptation and growth of human tissues and cells in culture is difficult—often considered an art,” and the probability of success is low….It is this inventive effort that patent law rewards, not the discovery of naturally occurring raw materials. Thus, Moore's allegations that he owns the cell line and the products derived from it are inconsistent with the patent, which constitutes an authoritative determination that the cell line is the product of invention….

30 By definition, a gene responsible for producing a protein found in more than one individual will be the same in each. It is precisely because everyone needs the same basic proteins that proteins produced by one person's cells may have therapeutic value for another person….Thus, the proteins that defendants hope to manufacture—lymphokines such as interferon—are in no way a “likeness” of Moore.
2. Should Conversion Liability Be Extended?

…There are three reasons why it is inappropriate to impose liability for conversion based upon the allegations of Moore's complaint. First, a fair balancing of the relevant policy considerations counsels against extending the tort. Second, problems in this area are better suited to legislative resolution. Third, the tort of conversion is not necessary to protect patients’ rights. For these reasons, we conclude that the use of excised human cells in medical research does not amount to a conversion.

Of the relevant policy considerations, two are of overriding importance. The first is protection of a competent patient's right to make autonomous medical decisions. That right, as already discussed, is grounded in well-recognized and long-standing principles of fiduciary duty and informed consent….This policy weighs in favor of providing a remedy to patients when physicians act with undisclosed motives that may affect their professional judgment. The second important policy consideration is that we not threaten with disabling civil liability innocent parties who are engaged in socially useful activities, such as researchers who have no reason to believe that their use of a particular cell sample is, or may be, against a donor's wishes.…

To be sure, the threat of liability for conversion might help to enforce patients’ rights indirectly. This is because physicians might be able to avoid liability by obtaining patients’ consent, in the broadest possible terms, to any conceivable subsequent research use of excised cells. Unfortunately, to extend the conversion theory would utterly sacrifice the other goal of protecting innocent parties. Since conversion is a strict liability tort, it would impose liability on all those into whose hands the cells come, whether or not the particular defendant participated in, or knew of, the inadequate disclosures that violated the patient's right to make an informed decision. In contrast to the conversion theory, the fiduciary-duty and informed-consent theories protect the patient directly, without punishing innocent parties or creating disincentives to the conduct of socially beneficial research.

Research on human cells plays a critical role in medical research. This is so because researchers are increasingly able to isolate naturally occurring, medically useful biological substances and to produce useful quantities of such substances through genetic engineering. These efforts are beginning to bear fruit. Products developed through biotechnology that have already been approved for marketing in this country include treatments and tests for leukemia, cancer, diabetes, dwarfism, hepatitis-B, kidney transplant rejection, emphysema, osteoporosis, ulcers, anemia, infertility, and gynecological tumors, to name but a few…. 
The extension of conversion law into this area will hinder research by restricting access to the necessary raw materials. Thousands of human cell lines already exist in tissue repositories.... At present, human cell lines are routinely copied and distributed to other researchers for experimental purposes, usually free of charge. This exchange of scientific materials, which still is relatively free and efficient, will surely be compromised if each cell sample becomes the potential subject matter of a lawsuit....

[T]he theory of liability that Moore urges us to endorse threatens to destroy the economic incentive to conduct important medical research. If the use of cells in research is a conversion, then with every cell sample a researcher purchases a ticket in a litigation lottery. Because liability for conversion is predicated on a continuing ownership interest, “companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists.” ([U.S. Congress, Office of Technology Assessment, New Developments in Biotechnology: Ownership of Human Tissue and Cells (1987)] at p. 27)....

If the scientific users of human cells are to be held liable for failing to investigate the consensual pedigree of their raw materials, we believe the Legislature should make that decision. Complex policy choices affecting all society are involved, and “[l]egislatures, in making such policy decisions, have the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties present evidence and express their views....”...

For these reasons, we hold that the allegations of Moore’s third amended complaint state a cause of action for breach of fiduciary duty or lack of informed consent, but not conversion....

ARABIAN, Justice, concurring.

... Plaintiff has asked us to recognize and enforce a right to sell one’s own body tissue for profit. He entreats us to regard the human vessel—the single most venerated and protected subject in any civilized society—as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane. He asks much....

It is true, that this court has not often been deterred from deciding difficult legal issues simply because they require a choice between competing social or economic policies.... The difference here, however, lies in the nature of the conflicting
moral, philosophical and even religious values at stake, and in the profound implications of the position urged. The ramifications of recognizing and enforcing a property interest in body tissues are not known, but are greatly feared—the effect on human dignity of a marketplace in human body parts, the impact on research and development of competitive bidding for such materials, and the exposure of researchers to potentially limitless and uncharted tort liability.

MOSK, Justice, dissenting.

...The concepts of property and ownership in our law are extremely broad....

Being broad, the concept of property is also abstract: rather than referring directly to a material object such as a parcel of land or the tractor that cultivates it, the concept of property is often said to refer to a “bundle of rights” that may be exercised with respect to that object—principally the rights to possess the property, to use the property, to exclude others from the property, and to dispose of the property by sale or by gift.... But the same bundle of rights does not attach to all forms of property. For a variety of policy reasons, the law limits or even forbids the exercise of certain rights over certain forms of property. For example, both law and contract may limit the right of an owner of real property to use his parcel as he sees fit. Owners of various forms of personal property may likewise be subject to restrictions on the time, place, and manner of their use.... Finally, some types of personal property may be sold but not given away, while others may be given away but not sold, and still others may neither be given away nor sold.

In each of the foregoing instances, the limitation or prohibition diminishes the bundle of rights that would otherwise attach to the property, yet what remains is still deemed in law to be a protectible property interest.... The same rule applies to Moore's interest in his own body tissue: even if we assume that section 7054.4 limited the use and disposition of his excised tissue in the manner claimed by the majority, Moore nevertheless retained valuable rights in that tissue. Above all, at the time of its excision he at least had the right to do with his own tissue whatever the defendants did with it: i.e., he could have contracted with researchers and pharmaceutical companies to develop and exploit the vast commercial potential of his tissue and its products. Defendants certainly believe that their right to do the foregoing is not barred by section 7054.4 and is a significant property right.... The Court of Appeal summed up the point by observing that “Defendants’ position that plaintiff cannot own his tissue, but that they can, is fraught with irony.”... As noted above, the majority cite no case holding that an individual's right to develop and exploit the commercial potential of his own tissue is not a right of sufficient worth or dignity to be deemed a protectible property interest. In the absence of such authority—or of legislation to the same effect—the right falls within the traditionally broad concept of property in our law....
Our society acknowledges a profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona. The most abhorrent form of exploitation, of course, was the institution of slavery. Lesser forms, such as indentured servitude or even debtor’s prison, have also disappeared. Yet their specter haunts the laboratories and boardrooms of today’s biotechnological research-industrial complex. It arises wherever scientists or industrialists claim, as defendants claim here, the right to appropriate and exploit a patient’s tissue for their sole economic benefit—the right, in other words, to freely mine or harvest valuable physical properties of the patient’s body.

A second policy consideration adds notions of equity to those of ethics. Our society values fundamental fairness in dealings between its members, and condemns the unjust enrichment of any member at the expense of another. This is particularly true when, as here, the parties are not in equal bargaining positions. We are repeatedly told that the commercial products of the biotechnological revolution “hold the promise of tremendous profit.”...In the case at bar, for example, the complaint alleges that the market for the kinds of proteins produced by the Mo cell line was predicted to exceed $3 billion by 1990.

Yet defendants deny that Moore is entitled to any share whatever in the proceeds of this cell line. This is both inequitable and immoral.

The inference I draw from the current statutory regulation of human biological materials, moreover, is the opposite of that drawn by the majority. By selective quotation of the statutes...the majority seem to suggest that human organs and blood cannot legally be sold on the open market—thereby implying that if the Legislature were to act here it would impose a similar ban on monetary compensation for the use of human tissue in biotechnological research and development. But if that is the argument, the premise is unsound: contrary to popular misconception, it is not true that human organs and blood cannot legally be sold.

As to organs, the majority rely on the Uniform Anatomical Gift Act (Health & Saf. Code, § 7150 et seq., hereafter the UAGA) for the proposition that a competent adult may make a post mortem gift of any part of his body but may not receive “valuable consideration” for the transfer. But the prohibition of the UAGA against the sale of a body part is much more limited than the majority recognize: by its terms (Health & Saf. Code, § 7155, subd. (a)) the prohibition applies only to sales for “transplantation” or “therapy.” Yet a different section of the UAGA authorizes the transfer and receipt of body parts for such additional purposes as “medical or...dental education, research, or advancement of medical or dental science.” (Health & Saf. Code, § 7153, subd. (a)(1).) No section of the UAGA...
prohibits anyone from selling body parts for any of those additional purposes; by clear implication, therefore, such sales are legal.23 Indeed, the fact that the UAGA prohibits no sales of organs other than sales for “transportation” or “therapy” raises a further implication that it is also legal for anyone to sell human tissue to a biotechnology company for research and development purposes.

It follows that the statutes regulating the transfers of human organs and blood do not support the majority’s refusal to recognize a conversion cause of action for commercial exploitation of human blood cells without consent. On the contrary, because such statutes treat both organs and blood as property that can legally be sold in a variety of circumstances, they impliedly support Moore’s contention that his blood cells are likewise property for which he can and should receive compensation, and hence are protected by the law of conversion.

[Mosk concluded his dissent by arguing that recognizing a cause of action for nondisclosure was an “illusory” remedy, mainly because of the high burden of proof required.] First, “the patient must show that if he or she had been informed of all pertinent information, he or she would have declined the procedure in question.” The second barrier is still higher…: [the patient] must also prove that in the same circumstances no reasonably prudent person would have given such consent.

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**Points for Discussion**

**a. Bundle of Sticks**

Moore later told an interviewer: “What the doctors had done was to claim that my humanity, my genetic essence, was their invention and their property. They viewed me as a mine from which to extract genetic material. I was harvested.” John Vidal, *Lambs to the Gene Market*, The Guardian, Nov. 12, 1994. Did Moore “own” his cells before he entered the UCLA Medical Center? Note that the majority frames the key issue as whether he “retained an ownership interest in them” after their removal.

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23 By their terms…the statutes in question forbid only sales for transplantation and therapy. In light of the rather clear authorization for donation for research and education, one could conclude that sales for these non-therapeutic purposes are permitted. Scientists in practice have been buying and selling human tissues for research apparently without interference from these statutes. (Note, “She’s Got Bette Davis’s Eyes”: Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses (1990) 90 Colum. L. Rev. 528, 544, fn. 75.)
b. Change in Ownership?

If Moore owned his cells before the operation, then how exactly did (1) he lose ownership and (2) the defendants acquire ownership? In considering these questions, consider the respective positions of the majority and the dissent on statutory interpretation. Who has the stronger argument? And which side has the stronger policy arguments? For an alternative approach to the issue, see Greenberg v. Miami Children’s Hospital Research Institute, Inc., 264 F. Supp. 2d 1064 (S.D. Fla. 2003) (where parents provided samples of tissue and blood from their children afflicted with Canavan disease to researchers who used the material to discover and then patent the disease’s genetic sequence, parents were allowed to sue for unjust enrichment).

c. Right to Transfer

The dissent argues that Moore retained at least one stick in the bundle: the right to transfer his tissue to other researchers, presumably for a profit. Moore certainly had the right to donate his tissue or other body parts for research, transplantation, or other purposes—at least before the surgery—as the majority points out by its citation to California Health & Safety Code §§ 7151 and 7153. So should the majority have resolved this case by holding that Moore retained a limited right to transfer: the right to donate his tissue, but not to sell it? The dissent observes that “some types of personal property may be...given away but not sold....” Property that falls into this category is said to be market-inalienable. See Margaret Jane Radin, Market Inalienability, 100 Harv. L. Rev. 1849 (1987). Setting aside body parts for a moment, what types of property should be market-inalienable?

d. Dueling Property Theories

Who prevails if we apply the first-in-time theory? Or the labor theory? Put another way, if Vanna White is entitled to the publicity value she developed, why isn’t Moore entitled to the tissue that grew in his body? On the other hand, might this case be closer to Johnson v. M’Intosh, in that Moore’s rights in his tissue (like the Native Americans’ rights to land) do not include the unfettered right to transfer?

e. The Cell Line

The majority suggests that even if Moore still owned his cells, he cannot own the cell line, which is “both factually and legally distinct” and the product of
“inventive effort.” The common law doctrine of **accession** provides that when a person uses his own labor or materials in good faith to fundamentally transform another’s property, he acquires title to the final product. For example, suppose K mistakenly believes that he owns a particular log which is actually the property of L; if K uses the log to make baseball bats, K owns the bats but is liable to L for the value of the log. Even if Moore still owned his cells, did the defendants acquire title to the cell line based on accession? If so, they would owe Moore the fair market value of his cells. How would a court determine this value?

### f. Selling Body Parts

People regularly sell their blood, hair, and sperm. Why shouldn’t Moore be allowed to sell his tissue? Our nation faces a chronic shortage of transplantable human organs such as hearts, livers, and kidneys. “In the United States, about 100,000 adults and children are waiting for organ transplants, and 18 people die each day while waiting....” Jenifer Goodwin, *Shortage of Transplant Organs Spurs Proposals But No Solution*, Consumer Health News, May 25, 2010. Economists suggest that the major reason for the shortage is simple: the law generally prohibits the sale of body parts for the purpose of transplantation. Because there is no economic incentive to provide an organ, the supply is small. Should we solve this problem by allowing body parts to be sold?

### g. Moore Problems

Apply the principles from *Moore* in resolving the following hypothetical disputes:

1. A is rendered unconscious in an auto accident, and brought to a hospital where the surgeons remove her tissue as part of an operation to save her life. The surgeons later use her cells to create a valuable cell line. Who owns the cells?

2. B removes his own tissue at home, which he places in a jar on his window sill. A team of rogue doctors enters his yard, takes the jar, and uses the cells to create a valuable cell line. Who owns the cells?

3. C, a law student who has read *Moore* carefully, enters into an agreement to sell her rare cells to a research laboratory in exchange for 5% of the value of any future cell line based on those cells. After the lab uses the cells to create a valuable cell line, it repudiates the agreement and refuses to pay C anything. Who wins the ensuing lawsuit?
h. Legislative Response to Moore?

Suppose you are a member of the state legislature interested in developing a statutory response to Moore. What components would your statute contain? Should scientific researchers be forced to share the profits generated from human tissues? Can you craft a system that overcomes the majority's concern about chilling scientific research?

i. Aftermath of Moore

Moore effectively lost his legal battle when the United States Supreme Court denied his petition for certiorari in 1991, ending his conversion claim. He then resolved his remaining claims in a confidential settlement. It is believed that Moore received between $200,000 and $600,000, though much of this was consumed by legal fees. Moore later became an advocate for patients' rights, testifying before Congress on the use of human biological materials in research and lobbying the European Parliament to reject a proposal to patent life forms. Moore's battle with cancer ended in 2001, when he died at the age of 56.

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2. Right to Exclude

A's toy airplane lands in B's backyard. C, a homeless person on the brink of freezing to death, wants to enter D's vacant mansion. E plans to cross F's ranch to reach her favorite fishing spot. These hypotheticals pose the question: when can an owner exclude others from his land?

Each owner has a broad right to exclude any other person from his property. Indeed, the Supreme Court has characterized the right to exclude “as one of the most essential sticks” in the bundle. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). For example, if you hold title to a tract of land you may—as a general matter—prevent anyone else from entering upon it. In practical terms, a landowner's right to exclude is implemented through the tort doctrine of trespass.

The United States inherited this absolutist view of the right to exclude—along with most of our property law—from England in the 1700s. The trespass doctrine has deep roots in early English common law. But its scope was expanded during the “enclosure movement.” Traditionally, much of the agricultural land in England was held in a form of common ownership, and was farmed on a communal basis. Peasants often held certain special rights in these lands, such as the right to remove wood for fuel or the right to raise livestock. Accordingly, fields were unfenced, and people could walk freely through open, uncultivated lands. During the 1500s, however, changing economic and social conditions led to a
process by which these common lands were “enclosed,” that is, converted to parcels entirely owned by individual owners. The traditional rights that peasants had enjoyed were terminated, and communal farming died away. As a result, the landowner’s right to exclude others from his land—even undeveloped rural property—gained new strength.

In the eighteenth century, Sir William Blackstone endorsed the absolutist view in his famous and popular treatise, Commentaries on the Laws of England.

**Perspective and Analysis**

...Every unwarrantable entry on another’s soil the law entitles a trespass…; …For every man’s land is in the eye of the law, inclosed and set apart from his neighbor’s: and that either by a visible and material fence, as one field is divided from another by a hedge; or, by an ideal invisible boundary, existing only in the contemplation of law, as when one man’s land adjoins to another’s in the same field. Every such entry or breach of a man’s close carries necessarily along with it some damage or other: for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, viz the treading down and bruising his herbage.


Under English common law, any intentional and unprivileged entry onto land in the possession of another person was a trespass. As Restatement (Second) of Torts § 158 reflects, modern American law still follows this approach:

One is subject to liability for trespass, irrespective of whether he thereby causes any harm to any legally protected interest of the other, if he intentionally...enters land in the possession of the other, or causes a thing or a third person to do so….

In this context, the defendant acts intentionally if he voluntarily enters onto the land. It is not necessary to prove that he had a subjective intent to trespass or that he otherwise acted in bad faith. Suppose that G voluntarily walks onto land which he believes is part of a public park, but which is actually private property owned by H. This is a trespass, regardless of G’s good faith.

However, an entry made under a privilege is not a trespass. The most common privilege is consent: if O enters P’s land with P’s consent, no trespass has occurred. A privilege may also arise from necessity. For example, a police officer may enter S’s land in hot pursuit of a fleeing thief. Similarly, the pilot who makes a forced landing on V’s land after his airplane’s engine stops is privileged to enter.
But why do we allow a landowner to exclude others from his land in the first place? Suppose A wishes to cross B's land for an important purpose (for example, to deliver a new home to a family in need of shelter) and can do so without causing any harm to B. Under these circumstances, why shouldn't the law permit A to enter over B's objection?

Jacque v. Steenberg Homes, Inc.
Supreme Court of Wisconsin
563 N.W.2d 154 (1997)

WILLIAM A. BABLITCH, Justice.

Steenberg Homes had a mobile home to deliver. Unfortunately for Harvey and Lois Jacque (the Jacques), the easiest route of delivery was across their land. Despite adamant protests by the Jacques, Steenberg plowed a path through the Jacques’ snow-covered field and via that path, delivered the mobile home. Consequently, the Jacques sued Steenberg Homes for intentional trespass. At trial, Steenberg Homes conceded the intentional trespass, but argued that no compensatory damages had been proved, and that punitive damages could not be awarded without compensatory damages. Although the jury awarded the Jacques $1 in nominal damages and $100,000 in punitive damages, the circuit court set aside the jury’s award of $100,000. The court of appeals affirmed, reluctantly concluding that it could not reinstate the punitive damages because it was bound by precedent establishing that an award of nominal damages will not sustain a punitive damage award.

I.

...Plaintiffs, Lois and Harvey Jacques, are an elderly couple, now retired from farming, who own roughly 170 acres near Wilke’s Lake in the town of Schleswig. The defendant, Steenberg Homes, Inc. (Steenberg), is in the business of selling mobile homes. In the fall of 1993, a neighbor of the Jacques purchased a mobile home from Steenberg. Delivery of the mobile home was included in the sales price.
Steenberg determined that the easiest route to deliver the mobile home was across the Jacques’ land. Steenberg preferred transporting the home across the Jacques’ land because the only alternative was a private road which was covered in up to seven feet of snow and contained a sharp curve which would require sets of “rollers” to be used when maneuvering the home around the curve. Steenberg asked the Jacques on several separate occasions whether it could move the home across the Jacques’ farm field. The Jacques refused. The Jacques were sensitive about allowing others on their land because they had lost property valued at over $10,000 to other neighbors in an adverse possession action in the mid-1980s. Despite repeated refusals from the Jacques, Steenberg decided to sell the mobile home, which was to be used as a summer cottage, and delivered it on February 15, 1994.

On the morning of delivery, Mr. Jacque observed the mobile home parked on the corner of the town road adjacent to his property. He decided to find out where the movers planned to take the home. The movers, who were Steenberg employees, showed Mr. Jacque the path they planned to take with the mobile home to reach the neighbor’s lot. The path cut across the Jacques’ land. Mr. Jacque informed the movers that it was the Jacques’ land they were planning to cross and that Steenberg did not have permission to cross their land. He told them that Steenberg had been refused permission to cross the Jacques’ land….

At that point, the assistant manager asked Mr. Jacque how much money it would take to get permission. Mr. Jacque responded that it was not a question of money; the Jacques just did not want Steenberg to cross their land. Mr. Jacque testified that he told Steenberg to “[F]ollow the road, that is what the road is for.” Steenberg employees left the meeting without permission to cross the land.

At trial, one of Steenberg’s employees testified that, upon coming out of the Jacques’ home, the assistant manager stated: “I don’t give a — what [Mr. Jacque] said, just get the home in there any way you can.” The other Steenberg employee confirmed this testimony and further testified that the assistant manager told him to park the company truck in such a way that no one could get down the town road to see the route the employees were taking with the home. The assistant

A person who occupies another’s land in a hostile manner for a period of time may acquire title to that land under the doctrine of adverse possession, which you will study in Chapter 2. The Jacques lost the earlier adverse possession case only because their attorney answered the complaint one day too late. As a result, they were reluctant to allow Steenberg Homes or anyone else to use their land.
manager denied giving these instructions, and Steenberg argued that the road was blocked for safety reasons.

The employees, after beginning down the private road, ultimately used a “bobcat” to cut a path through the Jacques’ snow-covered field and hauled the home across the Jacques’ land to the neighbor’s lot. One employee testified that upon returning to the office and informing the assistant manager that they had gone across the field, the assistant manager reacted by giggling and laughing. The other employee confirmed this testimony. The assistant manager disputed this testimony.

When a neighbor informed the Jacques that Steenberg had, in fact, moved the mobile home across the Jacques’ land, Mr. Jacques called the Manitowoc County Sheriff’s Department. After interviewing the parties and observing the scene, an officer from the sheriff’s department issued a $30 citation to Steenberg’s assistant manager…..

This case presents three issues: (1) whether an award of nominal damages for intentional trespass to land may support a punitive damage award and, if so; (2) whether the law should apply to Steenberg or should only be applied prospectively and, if we apply the law to Steenberg; (3) whether the $100,000 in punitive damages awarded by the jury is excessive…..

II.

Steenberg argues that, as a matter of law, punitive damages could not be awarded by the jury because punitive damages must be supported by an award of compensatory damages and here the jury awarded only nominal and punitive damages. The Jacques contend that the rationale supporting the compensatory damage award requirement is inapposite when the wrongful act is an intentional trespass to land. We agree with the Jacques…..

The general rule was stated in Barnard v. Cohen, 165 Wis. 417, 162 N.W. 480 (1917), where the question presented was: “In an action for libel, can there be a recovery of punitory damages if only nominal compensatory damages are found?” With the bare assertion that authority and better reason supported its conclusion, the Barnard court said no. The rationale for the compensatory damage requirement is that if the individual cannot show actual harm, he or she has but a nominal interest, hence, society has little interest in having the unlawful, but otherwise harmless, conduct deterred, therefore, punitive damages are inappropriate…..
However, whether nominal damages can support a punitive damage award in the case of an intentional trespass to land has never been squarely addressed by this court. Nonetheless, Wisconsin law is not without reference to this situation. In 1854 the court established punitive damages, allowing the assessment of “damages as a punishment to the defendant for the purpose of making an example.” McWilliams v. Bragg, 3 Wis. 424, 425 (1854). The McWilliams court related the facts and an illustrative tale from the English case of Merest v. Harvey, 128 Eng. Rep. 761 (C.P. 1814), to explain the rationale underlying punitive damages.

In Merest, a landowner was shooting birds in his field when he was approached by the local magistrate who wanted to hunt with him. Although the landowner refused, the magistrate proceeded to hunt. When the landowner continued to object, the magistrate threatened to have him jailed and dared him to file suit. Although little actual harm had been caused, the English court upheld damages of 500 pounds, explaining “in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?” McWilliams, 3 Wis. 424 at 428.

To explain the need for punitive damages, even where actual harm is slight, McWilliams related the hypothetical tale from Merest of an intentional trespasser:

Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner, is the trespasser permitted to say “here is a halfpenny for you which is the full extent of the mischief I have done.” Would that be a compensation? I cannot say that it would be....

McWilliams, 3 Wis. at 428. Thus, in the case establishing punitive damages in this state, this court recognized that in certain situations of trespass, the actual harm is not in the damage done to the land, which may be minimal, but in the loss of the individual’s right to exclude others from his or her property and, the court implied that this right may be punished by a large damage award despite the lack of measurable harm.

Steenberg contends that the rule established in Barnard prohibits a punitive damage award, as a matter of law, unless the plaintiff also receives compensatory damages....The Jacques argue that both the individual and society have significant interests in deterring intentional trespass to land, regardless of the lack of measurable harm that results. We agree with the Jacques. An examination of the individual interests invaded by an intentional trespass to land, and society’s interests in preventing intentional trespass to land, leads us to the conclusion that the Barnard rule should not apply when the tort supporting the award is intentional trespass to land.
We turn first to the individual landowner’s interest in protecting his or her
land from trespass. The United States Supreme Court has recognized that the
private landowner’s right to exclude others from his or her land is “one of the
most essential sticks in the bundle of rights that are commonly…characterized as
v. United States, 444 U.S. 164, 176 (1979))….This court has long recognized
“[e]very person[‘s] constitutional right to the exclusive enjoyment of his own
property for any purpose which does not invade the rights of another person.”
Diana Shooting Club v. Lamoreux, 114 Wis. 44, 59, 89 N.W. 880 (1902)….Thus,
both this court and the Supreme Court recognize the individual’s legal right to
exclude others from private property.

Yet a right is hollow if the legal system provides insufficient means to protect
it. Felix Cohen offers the following analysis summarizing the relationship between
the individual and the state regarding property rights:

[T]hat is property to which the following label can be attached:

To the world: Keep off X unless you have my permission, which I may grant or
withhold.

Signed: Private Citizen

Endorsed: The state

Felix S. Cohen, Dialogue on Private Property, IX Rutgers Law Review 357, 374
(1954). Harvey and Lois Jacque have the right to tell Steenberg Homes and any
other trespasser, “No, you cannot cross our land.” But that right has no practical
meaning unless protected by the State. And, as this court recognized as early as
1854, a “halfpenny” award does not constitute state protection.

The nature of the nominal damage award in an intentional trespass to land
case further supports an exception to Barnard. Because a legal right is involved,
the law recognizes that actual harm occurs in every trespass. The action for inten-
tional trespass to land is directed at vindication of the legal right. The law infers
some damage from every direct entry upon the land of another. The law recog-
nizes actual harm in every trespass to land whether or not compensatory damages
are awarded. Thus, in the case of intentional trespass to land, the nominal damage
award represents the recognition that, although immeasurable in mere dollars,
actual harm has occurred.

The potential for harm resulting from intentional trespass also supports an
exception to Barnard. A series of intentional trespasses, as the Jacques had the
misfortune to discover in an unrelated action, can threaten the individual’s very
ownership of the land. The conduct of an intentional trespasser, if repeated, might
ripen into prescription or adverse possession and, as a consequence, the individual landowner can lose his or her property rights to the trespasser. See Wis. Stat. § 893.28.

In sum, the individual has a strong interest in excluding trespassers from his or her land. Although only nominal damages were awarded to the Jacques, Steenberg’s intentional trespass caused actual harm. We turn next to society’s interest in protecting private property from the intentional trespasser.

Society has an interest in punishing and deterring intentional trespassers beyond that of protecting the interests of the individual landowner. Society has an interest in preserving the integrity of the legal system. Private landowners should feel confident that wrongdoers who trespass upon their land will be appropriately punished. When landowners have confidence in the legal system, they are less likely to resort to “self-help” remedies. In McWilliams, the court recognized the importance of “prevent[ing] the practice of dueling, [by permitting] juries […] to punish…insult by exemplary damages.” McWilliams, 3 Wis. at 428. Although dueling is rarely a modern form of self-help, one can easily imagine a frustrated landowner taking the law into his or her own hands when faced with a brazen trespasser, like Steenberg, who refuses to heed no trespass warnings.

People expect wrongdoers to be appropriately punished. Punitive damages have the effect of bringing to punishment types of conduct that, though oppressive and hurtful to the individual, almost invariably go unpunished by the public prosecutor. Kink v. Combs, 28 Wis. 2d 65, 135 N.W. 2d 789 (1965). The $30 forfeiture was certainly not an appropriate punishment for Steenberg’s egregious trespass in the eyes of the Jacques. It was more akin to Merest’s “halfpenny.” If punitive damages are not allowed in a situation like this, what punishment will prohibit the intentional trespass to land? Moreover, what is to stop Steenberg Homes from concluding, in the future, that delivering its mobile homes via an intentional trespass and paying the resulting Class B forfeiture, is not more profitable than obeying the law?...

In sum, as the court of appeals noted, the Barnard rule sends the wrong message to Steenberg Homes and any others who contemplate trespassing on the land of another. It implicitly tells them that they are free to go where they please, regardless of the landowner’s wishes. As long as they cause no compensable harm, the only deterrent intentional trespassers face is the nominal damage award of $1, the modern equivalent of Merest’s halfpenny, and the possibility of a Class B forfeiture under Wis. Stat. § 943.13. We conclude that both the private landowner and society have much more than a nominal interest in excluding others from private land….Accordingly, assuming that the other requirements for punitive damages have been met, we hold that nominal damages may support a punitive damage award in an action for intentional trespass to land….
In conclusion, we hold that when nominal damages are awarded for an intentional trespass to land, punitive damages may, in the discretion of the jury, be awarded. Our decision today shall apply to Steenberg Homes. Finally, we hold that the $100,000 punitive damages awarded by the jury is not excessive. Accordingly, we reverse and remand to the circuit court for reinstatement of the punitive damage award.

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Points for Discussion

a. Why Couldn’t Steenberg Cross?

Steenberg had a legitimate need to cross the Jacques’ field: to deliver a new home to a neighbor with minimal cost and delay. It appears that the crossing caused no damage to the Jacques’ land, which was covered with snow at the time. On these facts, why should the Jacques receive any damages? What policy reasons does the Wisconsin Supreme Court offer in support of the trespass doctrine? Do these policies apply to the facts of this case?

b. The Merest Gentleman

The Jacques court relied upon Merest, an 1814 decision from Great Britain which recounted the hypothetical tale of an intruder who disturbed a “gentleman” during his dinner. If you were counsel for Steenberg during the oral argument in Jacques and the court raised Merest, how would you respond?

c. Why Prohibit Trespass?

Trespassers may interfere with the efficient use of land. For instance, suppose farmer F establishes an apple orchard on his land; he plants young trees, nurtures them, and is finally ready to harvest his first crop. Unless F can exclude other people from his orchard, it is foreseeable that strangers may enter and pick all the apples, leaving F with nothing. As Richard Posner explains, without the right to exclude, a farmer like F has “no incentive to incur [the costs of farming] because there is no reasonably assured reward for incurring them.” Richard A. Posner, Economic Analysis of Law 40 (8th ed. 2011). Posner argues that giving an owner “the unqualified power to exclude everybody else from using the resource” is a necessary step in maximizing economic value. Id. at 41. Of course, we all suffer if farmers lack the incentive to produce food. But should the law prohibit trespass that causes no harm at all, as apparently occurred in Jacques? Or are there good reasons for allowing the Jacques to exclude Steenberg, regardless of whether any damage occurs? In answering these questions, consider the various theories of property discussed earlier in this chapter.
d. The Market Solution

Steenberg’s assistant manager asked Jacque “how much money it would take to get permission” to cross, apparently in an effort to purchase access; Jacque responded that “it was not a question of money.” Why wasn’t Jacque willing to sell Steenberg a temporary right to cross the land? Should Steenberg’s apparent willingness to pay reduce the penalty for trespass (because it tried to buy access) or increase the penalty (because it ignored the owner’s clear refusal)?

e. Legislating the Right to Exclude

Suppose that your state legislature is considering a bill that would give each landowner the absolute right to exclude any other person from her land. Would you favor or oppose such a bill? List (1) three public policies for your position and (2) three policies against your position.

f. (Truly) Punitive Damages

Notice that the jury awarded the Jacques $1.00 in nominal damages. This award follows the general rule that a trespass occurs even if the intrusion does not cause any actual damage. Assuming that Steenberg is liable for trespass, is the $100,000 punitive damages award appropriate on the facts of this case? Would the outcome of this case be different if the trespasser was a fisherman who walked across the Jacques’ property to fish in a publicly-owned river? Why?

g. Trespass in Cyberspace

Suppose X sends spam e-mail to 10,000 people. Is he liable in trespass? The doctrine of trespass to chattels governs liability for interferences with the possession of chattels that are less intrusive than conversion. In CompuServe, Inc. v. Cyber Promotions, 962 F. Supp. 1015 (S.D. Ohio 1997), the court issued an injunction against sending spam e-mail to CompuServe subscribers on this basis; it reasoned that the spam harmed CompuServe by consuming the disk space and processing power of its computers. But see Intel Corporation v. Hamidi, 71 P.3d 296 (Cal. 2003) (finding no trespass to chattels because the spam did not damage or interfere with Intel’s equipment). Today most states have specialized statutes that restrict spam.

Once we recognize the right of a landowner to exclude others from his land as a general matter, the next question is: are there any exceptions?

During the 1960s, the plight of migrant farmworkers became front page news. Farmers in California, Florida, Texas, and other states employed seasonal workers to tend and harvest crops. Typically, these workers lived in temporary labor camps on land owned by the particular farmer who employed them. The
living conditions in many camps were abysmal. For example, farmers in the “Garden State” of New Jersey employed over 12,000 workers each summer, mainly African-Americans who migrated from the south for the season. In an effort to prevent legal aid attorneys, antipoverty workers, and others from entering labor camps to investigate the problems, the New Jersey Farm Bureau distributed 4,000 “No Trespassing” signs to farmers across the state. Does a farmer have the right to exclude under these circumstances?

**State v. Shack**

Supreme Court of New Jersey  
277 A.2d 369 (1971)

The opinion of the Court was delivered by WEINTRAUB, C.J.

Defendants entered upon private property to aid migrant farmworkers employed and housed there. Having refused to depart upon the demand of the owner, defendants were charged with violating N.J.S.A. 2A:170-31 which provides that “[a]ny person who trespasses on any lands…after being forbidden so to trespass by the owner…is a disorderly person and shall be punished by a fine of not more than $50.” Defendants were convicted in the Municipal Court of Deerfield Township and again on appeal in the County Court of Cumberland County on a trial de novo. We certified their further appeal before argument in the Appellate Division.

Before us, no one seeks to sustain these convictions. The complaints were prosecuted in the Municipal Court and in the County Court by counsel engaged by the complaining landowner, Tedesco. However Tedesco did not respond to this appeal, and the county prosecutor, while defending abstractly the constitutionality of the trespass statute, expressly disclaimed any position as to whether the statute reached the activity of these defendants.

Complainant, Tedesco, a farmer, employs migrant workers for his seasonal needs. As part of their compensation, these workers are housed at a camp on his property.

Defendant Tejeras is a field worker for the Farm Workers Division of the Southwest Citizens Organization for Poverty Elimination, known by the acronym...
SCOPE, a nonprofit corporation funded by the Office of Economic Opportunity pursuant to an act of Congress, 42 U.S.C.A. §§ 2861-2864. The role of SCOPE includes providing for the “health services of the migrant farm worker.”

Defendant Shack is a staff attorney with the Farm Workers Division of Camden Regional Legal Services, Inc., known as “CRLS,” also a nonprofit corporation funded by the Office of Economic Opportunity pursuant to an act of Congress, 42 U.S.C.A. § 2809(a)(3). The mission of CRLS includes legal advice and representation for these workers.

Differences had developed between Tedesco and these defendants prior to the events which led to the trespass charges now before us. Hence when defendant Tejeras wanted to go upon Tedesco’s farm to find a migrant worker who needed medical aid for the removal of 28 sutures, he called upon defendant Shack for his help with respect to the legalities involved. Shack, too, had a mission to perform on Tedesco’s farm; he wanted to discuss a legal problem with another migrant worker there employed and housed. Defendants arranged to go to the farm together. Shack carried literature to inform the migrant farmworkers of the assistance available to them under federal statutes, but no mention seems to have been made of that literature when Shack was later confronted by Tedesco.

Defendants entered upon Tedesco’s property and as they neared the camp site where the farmworkers were housed, they were confronted by Tedesco who inquired of their purpose. Tejeras and Shack stated their missions. In response, Tedesco offered to find the injured worker, and as to the worker who needed legal advice, Tedesco also offered to locate the man but insisted that the consultation would have to take place in Tedesco’s office and in his presence. Defendants declined, saying they had the right to see the men in the privacy of their living quarters and without Tedesco’s supervision. Tedesco thereupon summoned a State Trooper who, however, refused to remove defendants except upon Tedesco’s written complaint. Tedesco then executed the formal complaints charging violations of the trespass statute.

The constitutionality of the trespass statute, as applied here, is challenged on several scores.

It is urged that the First Amendment rights of the defendants and of the migrant farmworkers were thereby offended. Reliance is placed on Marsh v. Alabama, 326 U.S. 501 (1946), where it was held that free speech was assured by
the First Amendment in a company-owned town which was open to the public generally and was indistinguishable from any other town except for the fact that the title to the property was vested in a private corporation. There may be some migrant camps with the attributes of the company town in *Marsh* and of course they would come within its holding. But there is nothing of that character in the case before us, and hence there would have to be an extension of *Marsh* to embrace the immediate situation.

Defendants also maintain that the application of the trespass statute to them is barred by the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, and this on the premise that the application of the trespass statute would defeat the purpose of the federal statutes, under which SCOPE and CRLS are funded, to reach and aid the migrant farmworker. The brief of New Jersey State Office of Legal Services, *amicus curiae*, asserts the workers’ Sixth Amendment right to counsel in criminal matters is involved and suggests also that a right to counsel in civil matters is a “penumbra” right emanating from the whole Bill of Rights or is a privilege of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment.

These constitutional claims are not established by any definitive holding. We think it unnecessary to explore their validity. The reason is that we are satisfied that under our State law the ownership of real property does not include the right to bar access to governmental services available to migrant workers and hence there was no trespass within the meaning of the penal statute. The policy considerations which underlie that conclusion may be much the same as those which would be weighed with respect to one or more of the constitutional challenges, but a decision in nonconstitutional terms is more satisfactory, because the interests of migrant workers are more expansively served in that way than they would be if they had no more freedom than these constitutional concepts could be found to mandate if indeed they apply at all.

II.

Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.

Here we are concerned with a highly disadvantaged segment of our society. We are told that every year farmworkers and their families numbering more than one million leave their home areas to fill the seasonal demand for farm labor in
the United States. The Migratory Farm Labor Problem in the United States (1969 Report of Subcommittee on Migratory Labor of the United States Senate Commit-
Jersey in substantial numbers. The report just cited places at 55,700 the number
of man-months of such employment in our State in 1968 (p. 7)….

The migrant farmworkers are a community within but apart from the local
scene. They are rootless and isolated. Although the need for their labors is evident,
they are unorganized and without economic or political power. It is their plight
alone that summoned government to their aid. In response, Congress provided
under Title III-B of the Economic Opportunity Act of 1964 (42 U.S.C.A. § 2701 et
seq.) for “assistance for migrant and other seasonally employed farmworkers and
their families.”…Section 2862(b)(1) provides for funding of programs “to meet
the immediate needs of migrant and seasonal farmworkers and their families,
such as day care for children, education, health services, improved housing and
sanitation (including the provision and maintenance of emergency and temporary
housing and sanitation facilities), legal advice and representation, and consumer
training and counseling.” As we have said, SCOPE is engaged in a program
funded by this section, and CRLS also pursues the objectives of this section…. 

These ends would not be gained if the intended beneficiaries could be insu-
lated from efforts to reach them. It is in this framework that we must decide
whether the camp operator’s rights in his lands may stand between the migrant
workers and those who would aid them…. 

A man’s right in his real property of course is not absolute. It was a maxim of
the common law that one should so use his property as not to injure the rights of
others. Broom, Legal Maxims (10th ed. Kersley 1939), p. 238….Although hardly
a precise solvent of actual controversies, the maxim does express the inevitable
proposition that rights are relative and there must be an accommodation when
they meet. Hence it has long been true that necessity, private or public, may justify
entry upon the lands of another…. 

The subject is not static. As pointed out in 5 Powell, Real Property (Rohan
1970) § 745, pp. 493-494, while society will protect the owner in his permissible
interests in land, yet

[s]uch an owner must expect to find the absoluteness of his property rights curtailed
by the organs of society, for the promotion of the best interests of others for whom
these organs also operate as protective agencies. The necessity for such curtailments is
greater in a modern industrialized and urbanized society than it was in the relatively
simple American society of fifty, 100, or 200 years ago. The current balance between
individualism and dominance of the social interest depends not only upon political
and social ideologies, but also upon the physical and social facts of the time and place
under discussion.
Professor Powell added in § 746, pp. 494-496:

As one looks back along the historic road traversed by the law of land in England and in America, one sees a change from the viewpoint that he who owns may do as he pleases with what he owns, to a position which hesitatingly embodies an ingredient of stewardship; which grudgingly, but steadily, broadens the recognized scope of social interests in the utilization of things.…

To one seeing history through the glasses of religion, these changes may seem to evidence increasing embodiments of the golden rule. To one thinking in terms of political and economic ideologies, they are likely to be labeled evidences of “social enlightenment,” or of “creeping socialism” or even of “communistic infiltration,” according to the individual’s assumed definitions and retained or acquired prejudices. With slight attention to words or labels, time marches on toward new adjustments between individualism and the social interests.

The process involves not only the accommodation between the right of the owner and the interests of the general public in his use of this property, but involves also an accommodation between the right of the owner and the right of individuals who are parties with him in consensual transactions relating to the use of the property. Accordingly substantial alterations have been made as between a landlord and his tenant. See *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 451-453, 251 A.2d 268 (1969).

The argument in this case understandably included the question whether the migrant worker should be deemed to be a tenant and thus entitled to the tenant’s right to receive visitors, or whether his residence on the employer’s property should be deemed to be merely incidental and in aid of his employment, and hence to involve no possessory interest in the realty. These cases did not reach employment situations at all comparable with the one before us. Nor did they involve the question whether an employee who is not a tenant may have visitors notwithstanding the employer’s prohibition. Rather they were concerned with whether notice must be given to end the employee’s right to remain upon the premises, with whether the employer may remove the discharged employee without court order, and with the availability of a particular judicial remedy to achieve his removal by process. We of course are not concerned here with the right of a migrant worker to remain on the employer’s property after the employment is ended.

We see no profit in trying to decide upon a conventional category and then forcing the present subject into it. That approach would be artificial and distorting. The quest is for a fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between the migrant worker and the operator of the housing facility.

**Food for Thought**

The court seeks a “fair adjustment of the competing needs of the parties,” noting that some needs are “legitimate,” while others presumably are not. How would a trial court judge apply this test? How predictable is the outcome of such a test?
Thus approaching the case, we find it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker’s well-being. The farmer, of course, is entitled to pursue his farming activities without interference, and this defendants readily concede. But we see no legitimate need for a right in the farmer to deny the worker the opportunity for aid available from federal, State, or local services, or from recognized charitable groups seeking to assist him. Hence representatives of these agencies and organizations may enter upon the premises to seek out the worker at his living quarters. So, too, the migrant worker must be allowed to receive visitors there of his own choice, so long as there is no behavior hurtful to others, and members of the press may not be denied reasonable access to workers who do not object to seeing them.

It is not our purpose to open the employer’s premises to the general public if in fact the employer himself has not done so. We do not say, for example, that solicitors or peddlers of all kinds may enter on their own; we may assume for the present that the employer may regulate their entry or bar them, at least if the employer’s purpose is not to gain a commercial advantage for himself or if the regulation does not deprive the migrant worker of practical access to things he needs.

And we are mindful of the employer’s interest in his own and in his employees’ security. Hence he may reasonably require a visitor to identify himself, and also to state his general purpose if the migrant worker has not already informed him that the visitor is expected. But the employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens. These rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties.

It follows that defendants here invaded no possessory right of the farmer-employer. Their conduct was therefore beyond the reach of the trespass statute. The judgments are accordingly reversed and the matters remanded to the County Court with directions to enter judgments of acquittal.

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**Points for Discussion**

**a. Exclusion and Ownership**

As you saw in *Jacque*, a landowner has the legal right to exclude others from his private property. So exactly why didn’t farmer Tedesco have the right to exclude Shack and Tejeras? In answering this question, consider the sources of law that the *Shack* court relied upon. Is it accurate to say that the farmworkers acquired a right in Tedesco’s land—a right to allow others to cross the land? If so, how did they acquire that right?
b. The Question of Purpose

The *Shack* court states: “Property rights serve human values. They are recognized to that end, and are limited by it.” What does this mean? Professor Joseph Singer has suggested that in *Shack* and similar cases, “non-owners have a right of access to property based on need or some other important social policy.” Joseph William Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 611, 675 (1988). Under Singer’s approach, when could an owner exclude people from his land?

c. Applying the *Shack* Standard

Based on the standard used in *Shack*, has a trespass occurred in these situations?

1. A, B, and C, farmworkers living on Tedesco’s property, decide to hold a large birthday party for their co-worker D. They invite ten friends from a nearby town, who enter the property to attend the party.

2. X owns a vacant apartment building in a large city. A group of homeless people enter the building through an unlocked door and begin living there as squatters. X discovers the squatters two months later.

3. M owns the farm that adjoins the Tedesco property. M’s farmworkers live on M’s property. N and O, two union organizers, enter M’s land in order to convince the farmworkers to join a union, and thus improve their wages and living conditions.

4. T operates a casino in Atlantic City; he discovers that gambler G is “counting cards” in order to improve his odds of winning at blackjack. T asks G to “leave and never return.” G enters the casino two days later and begins gambling.

d. Farmworkers as Tenants

The *Shack* court could have decided the case by ruling that the farmworkers were tenants and thus entitled to receive visitors under well-settled principles of New Jersey landlord-tenant law. After all, if you are a tenant, you presumably have the right to have guests come to your apartment without the landlord’s consent. But the court rejected this approach as “artificial and distorting.” Why?

e. Free Speech in Public and Quasi-Public Places

The court also bypassed the *Shack* defendants’ free speech arguments. Just as the First Amendment constrains the power of government to regulate speech on public property, *Marsh v. Alabama*, 326 U.S. 501 (1946) extended this protection to the residents of a company-owned town. Based on state constitutional law, a
number of courts have held that citizens cannot be excluded from privately-owned shopping centers for exercising their free speech rights. See, e.g., *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (upholding California Supreme Court decision based on state constitution). See also *Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150 (2002) (striking down local ordinance that required a permit in order to enter private property to promote any “cause”). Was the farmworker camp in *Shack* comparable to a company-owned town or a shopping center?

f. Aftermath of *Shack*

“We now might as well turn the country over to the Russians,” Tedesco told a reporter after the *Shack* decision. He predicted that the ruling would lead New Jersey’s remaining farmers to “clear out within six months.” Ronald Sullivan, *New Jersey Rules Farmers Can’t Prohibit Visits to Migrants*, N.Y. Times, May 12, 1971. But New Jersey farmers continue to grow vegetables today, mainly for the New York and Philadelphia metropolitan areas. Over 10,000 migrant farmworkers are employed in the region each summer—and many still have concerns about the housing conditions in the farm labor camps.

Consider another possible exception to the landowner’s right to exclude. Suppose A owns 10 square miles of open, undeveloped land in a western state, consisting of natural meadows and forests. Should hiker B be allowed to cross the land without A’s consent?

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**Perspective and Analysis**

At least since Blackstone, property rights discourse has been plagued by absolutism, the notion that the right of property should be defined as the “sole and despotic dominion” over the res, to the “total exclusion of the right of any other individual in the universe.” Property professors and courts generally refer to the collection of rights that private property owners enjoy vis-à-vis other landowners and the public as a “bundle of sticks,” in an attempt to render rather abstract concepts more concrete. The prevailing metaphor, however, lends itself to a formalistic, absolutist conception of these interests, implying that the sticks, such as the right to devise or the right to convey, are things, much like your car or your house; therefore, the composition of the bundle must be an immutable and essential state of affairs….

In contrast, many scholars insist that property rights are neither static nor absolute. The recognition of private property interests involves trade-offs with community values and egalitarian goals; therefore, the exact composition of the bundle of sticks must be recognized as a mediation between these interests. Moreover, the balance struck is always tentative, subject to constant re-evaluation in light of current needs and norms…. 
The United States Supreme Court has furthered a formalistic, absolutist conception of property rights by adopting the bundle of sticks metaphor and placing the landowner’s “right to exclude” at the top of the woodpile. In a series of cases, the Supreme Court has canonized the right to exclude others as “essential” to the concept of private property. Completely absent from the Court’s analysis is recognition that the landowner’s right to exclude involves a balance with the public’s interest in access.

Blackstone’s descendants, in contrast, take a much different view of the balance of interests. Britain’s recent enactment of a “right to roam” in the Countryside and Rights of Way Act 2000 (CRoW) provides a fascinating study of how the right to exclude may be modified to accommodate public needs without unduly impacting the interests of the private landowner. CRoW classifies private land that contains mountains, moors, heath, or downland as “open country,” and requires landowners to allow the public to roam freely across these lands. Thus, CRoW opens up millions of acres of private land to public access, without compensating the landowners for this limitation on their right to exclude. As a result, the law represents a dramatic shift in the allocation of the bundle of sticks.

The impetus for CRoW can be understood fully only by delving into British history and culture. Britons have long valued public access to the countryside, which allows the public to fully enjoy its amenities. The romantic vision of a rural walk is enshrined in English literature, from the poetry of William Cowper, John Clare, Thomas Hardy, and William Wordsworth to the novels of Jane Austen. Numerous public footpaths crisscross private lands, and both the government and private groups such as the Ramblers Association zealously guard these rights-of-way against encroachment. British courts have consistently recognized the public’s continued enjoyment of common rights to certain private lands historically used by the citizenry.

But these rights, as extensive as they may seem to outsiders, have never satisfied the British public, due primarily to class outrage with an historical basis. The enclosure of the commons seems to have been the genesis of a long-running conflict over public access. Enclosure converted communal land into private land, profoundly affecting commoners’ rights and English society in general. Although many public footpaths were preserved by enclosure orders, the public’s access to many areas over which they previously enjoyed a general right to roam was summarily extinguished.

The loss of these “roaming” rights seems to have been chafing at Britons ever since. Public discontent with lack of access resulted in celebrated protests, to which Parliament responded with a gradual shift back to greater access. Rather than a radical nationalization of private property rights, then, CRoW can be viewed as an attempt to regain a balance between public and private rights to land that was upset during the enclosure period.
Chapter 1 The Concept of Property

For Americans, the study of Britain’s right to roam reminds us that there is an important cost to the recognition of an absolute right to exclude. Rather than simply accept the right to exclude as a given, courts should carefully consider the interests it serves and determine whether, in some circumstances, it may be possible to accommodate greater public access without damaging the private owner’s interests. … [T]he new right to roam deserves to be recognized as a landmark, which validates important public interests that have been all but forgotten in the United States. Americans may be able to accommodate those interests in ways that take into account differences in our cultural and legal landscape.


Points for Discussion

a. Evolving Common Law

How would the Jacque court respond to the idea of a “right to roam”? How about the Shack court? Why might their responses differ?

b. An American “Right to Roam”?

Now that Britain has abandoned Blackstone’s rigid view of the right to exclude, should the United States do the same? Should we allow recreational hikers to enter open, rural land without the owner’s consent? Professor Anderson suggests that “in some circumstances, it may be possible to accommodate greater public access without damaging the private owner’s interests.” Under which conditions should this occur? Alternatively, is there less need to recognize a “right to roam” here because publicly-owned lands in the United States are more extensive than those in Britain?

c. Implied License

In many states, the owner of rural, undeveloped land must affirmatively post “No Trespassing” signs in order to exclude hunters. Absent such signs, hunters have an implied right to enter the land. See Mark R. Sigmon, Note, Hunting and Posting on Private Land in America, 54 Duke L.J. 549 (2004). But there is no comparable implied right of access for recreational hikers. Why not?
3. Right to Use

A’s factory emits noise that stops B’s hens from laying eggs. The putrid odor from C’s pig farm wafts into D’s home. The shadow from E’s barn cuts off the sunshine to F’s garden. These examples all raise the same issue: what is the scope of an owner’s right to use land?

Traditionally, a landowner had the absolute right to use his property in any way he wished—as long as he did not harm the rights of others. This concept was embodied in the Latin maxim *sic utere ut alienum non laedas*, broadly translated as: use your own property in a manner that does not injure another person’s property. In practice, the principal limitation on an owner’s right to use was the common law doctrine of *nuisance*, which is discussed in more detail below; some jurisdictions also prohibited the spite fence. And since the early twentieth century, statutes and local ordinances have imposed zoning and other use restrictions on almost all land in the United States, as you will study in Chapter 10.

What explains the traditional rule? In many ways, the right to use property is the core value of ownership. As Sir Edward Coke asked over 400 years ago, “what is the land but the profits thereof[?]” Because the economy of medieval England was based on agriculture, the ability to use land for farming, in particular, was vital. The concept that an owner was entitled to determine how to use his land presumably began as an assumption, evolved into a custom, and eventually emerged as a common law rule.

Of course, as a general matter, it makes sense to recognize the owner’s relatively free right to use her land as she wishes. From a utilitarian perspective, it is fair to assume that the owner of land in an agricultural society knows best how to use it productively for the benefit of all, without any need for governmental interference. A farmer in Iowa, after all, is able to evaluate the soil quality, water needs, climate situation, and other factors that determine which crop is best for his land—far better than a distant official. Other property theories similarly justify a large degree of owner autonomy in land use decisions.

The cases below explore exceptions to the general rule that a landowner is entitled to use her land as she sees fit. Our first decision examines the *spite fence* doctrine. In many jurisdictions, a landowner cannot erect an unusually high fence along his property line for the sole purpose of annoying his neighbor. As Oliver Wendell Holmes, Jr.—a leading figure in American jurisprudence—remarked in *Rideout v. Knox*, 19 N.E. 390, 391 (Mass. 1889), an opinion upholding the constitutionality of a spite fence statute:

> [I]t is plain that the right to use one’s property for the sole purpose of injuring others is not one of the immediate rights of ownership. It is not a right for the sake of which property is recognized by the law.
The Crocker spite fence on San Francisco’s Nob Hill was one of the early controversies that led to such reform legislation. Charles Crocker, a California railroad baron, tried to purchase all of the properties on a particular block in the 1870s, so that his planned mansion could occupy the entire parcel. When one owner refused to sell his three-story home, Crocker built a 30-foot high fence close around it, which effectively shut out the light and air. A local newspaper later called the fence “the most famous memorial of malignity and malevolence in the city.” Famous Spite Fence Has Outlived Its Purpose, S.F. Chron., Nov. 1, 1902.

Sundowner, Inc. v. King

Supreme Court of Idaho
509 P.2d 785 (1973)

SHEPARD, Justice.

This is an appeal from a judgment ordering partial abatement of a spite fence erected between two adjoining motels in Caldwell, Idaho. This action is evidently an outgrowth of a continuing dispute between the parties resulting from the 1966 sale of a motel. See: King v. H. J. McNeel, Inc., 94 Idaho 444, 489 P.2d 1324 (1971).

In 1966 Robert Bushnell sold...[the Sundowner Motel] to defendants-appellants King. Bushnell then built another motel, the Desert Inn, on property immediately adjoining that sold to the Kings.

The Kings thereafter brought an action against Bushnell (H. J. McNeel, Inc.) based on alleged misrepresentations by Bushnell in the 1966 sale of the motel property. In 1968 the Kings built a large structure, variously described as a fence or sign, some 16 inches from the boundary line between the King and Bushnell properties. The structure is 85 ft. in length and 18 ft. in height. It is raised 2 ft. off the ground and is 2 ft. from the Desert Inn building. It parallels the entire northwest side of the Desert Inn building, obscures approximately 80% of the Desert Inn building and restricts the passage of light and air to its rooms.

Bushnell brought the instant action seeking damages and injunctive relief compelling the removal of the structure. Following trial to the court, the district court found that the structure was erected out of spite and that it was erected in violation of a municipal ordinance. The trial court ordered the structure reduced to a maximum height of 6 ft.
The Kings appeal from the judgment entered against them and claim that the trial court erred in many of its findings of fact and its applications of law. The Kings assert the trial court erred in finding that the “sign” was in fact a fence; that the structure had little or no value for advertising purposes; that the structure cuts out light and air from the rooms of the Desert Inn Motel; that the structure has caused damage by way of diminution of the value of the Desert Inn Motel property; that the erection of the structure was motivated by ill-feeling and spite; that the structure was erected to establish a dividing line; and that the trial court erred in failing to find the structure was necessary to distinguish between the two adjoining motels.

We have examined the record at length and conclude that the findings of the trial court are supported by substantial although conflicting evidence. The trial court had before it both still and moving pictures of the various buildings. The record contains testimony that the structure is the largest “sign” then existing in Oregon, Northern Nevada and Idaho. An advertising expert testified that the structure, because of its location and type, had no value for advertising and that its cost, i.e., $6,300, would not be justified for advertising purposes. Findings of fact will not be set aside on appeal unless they are clearly erroneous, and when they are supported by substantial though conflicting evidence they will not be disturbed on appeal….

The pivotal and dispositive issue in this matter is whether the trial court erred in requiring partial abatement of the structure on the ground that it was a spite fence. Under the so-called English rule, followed by most 19th century American courts, the erection and maintenance of a spite fence was not an actionable wrong. These older cases were founded on the premise that a property owner has an absolute right to use his property in any manner he desires….

Under the modern American rule, however, one may not erect a structure for the sole purpose of annoying his neighbor. Many courts hold that a spite fence which serves no useful purpose may give rise to an action for both injunctive relief and damages….

One of the first cases rejecting the older English view and announcing the new American rule on spite fences is Burke v. Smith, 69 Mich. 380, 37 N.W. 838 (1888). Subsequently, many American jurisdictions have adopted and followed Burke so that it is clearly the prevailing modern view….

In Burke a property owner built two 11 ft. fences blocking the light and air to his neighbors’ windows. The fences served no useful purpose to their owner and were erected solely because of his malice toward his neighbor. Justice Morse applied the maxim sic utere tuo ut alienum non laedas, and concluded:
But it must be remembered that no man has a legal right to make a malicious use of his property, not for any benefit or advantage to himself, but for the avowed purpose of damaging his neighbor. To hold otherwise would make the law a convenient engine, in cases like the present, to injure and destroy the peace and comfort, and to damage the property, of one’s neighbor for no other than a wicked purpose, which in itself is, or ought to be, unlawful. The right to do this cannot, in an enlightened country, exist, either in the use of property, or in any way or manner. There is no doubt in my mind that these uncouth screens or “obscurers” as they are named in the record, are a nuisance, and were erected without right, and for a malicious purpose. What right has the defendant, in the light of the just and beneficent principles of equity, to shut out God’s free air and sunlight from the windows of his neighbor, not for any benefit or advantage to himself, or profit to his land, but simply to gratify his own wicked malice against his neighbor? None whatever. The wanton infliction of damage can never be a right. It is a wrong, and a violation of right, and is not without remedy. The right to breath[e] the air, and to enjoy the sunshine, is a natural one, and no man can pollute the atmosphere, or shut out the light of heaven, for no better reason than that the situation of his property is such that he is given the opportunity of so doing, and wishes to gratify his spite and malice towards his neighbor. 37 N.W. at 842.

We agree both with the philosophy expressed in the Burke opinion and with that of other jurisdictions following what we feel is the better-reasoned approach. We hold that no property owner has the right to erect and maintain an otherwise useless structure for the sole purpose of injuring his neighbor. The trial court found on the basis of substantial evidence that the structure served no useful purpose to its owners and was erected because of the Kings’ ill will and enmity toward their neighboring competitor. We therefore hold that the trial court did not err in partially abating and enjoining the “sign” structure as a spite fence….

Points for Discussion

a. Role of Intent

Why does the Kings’ intent matter? Suppose that the Kings had acted in complete good faith in this case, building a sign that “served no useful purpose” but that harmed the owner of the Sundowner Motel. Would the case be decided the same way? If not, why not? As a general rule, one element of proving a spite fence case is to show that the defendant acted out of malice. But other jurisdictions refuse to recognize the doctrine at all. For example, in 44 Plaza, Inc. v. Gray-Pac Land Company, 845 S.W.2d 576 (Mo. Ct. App. 1992), the defendant owner of a fireworks business erected large signs and planted a row of trees for the sole purpose of blocking the public’s view of the plaintiff’s competing business from an interstate highway. The court rejected plaintiff’s spite fence claim, based on the “common law view that motive and intention are not to be considered.” Id. at 580.
b. A “Useless Structure”

Why does it matter that the Kings’ “sign” was a “useless structure”? Would the case have been decided the same way if the sign had at least minor advertising value? If not, why not? Note that the expert testimony on the point is ambiguous. The plaintiffs’ expert said both that (1) the sign had “no value for advertising” and (2) its cost “would not be justified for advertising purposes.” The implication of the second statement is that the sign had some value, but not enough value to justify its construction. Finally, under the Sundowner test, is usefulness determined by an objective standard, that is, whether it is commercially reasonable? Why shouldn’t an owner have the sole and absolute right to decide how her land is used?

c. Natural Law?

The Sundowner court echoes the view from an earlier decision that “[t]he right to breath[e] the air, and to enjoy the sunshine, is a natural one….” What are the implications of this approach for the right to use land?

The world’s supply of oil is dwindling, while concern about global climate change is mounting. Under these circumstances, there is renewed interest in alternative energy sources such as solar energy. Experts predict that solar power could provide up to 69% of the nation’s electricity by 2050. Ken Zweibel et al., A Solar Grand Plan, Sci. Am., Jan. 2008. To what extent should property law accommodate this process? For example, suppose A installs a solar heating system on the roof of his home, only to discover that his neighbor B plans to build his new house in a manner that will cast shadow on the solar collector. How should we resolve the dispute that arises from these conflicting uses?

The common law doctrine of nuisance is the traditional method used to resolve land use conflicts. You will study nuisance law in Chapter 9, but here is a short preview. A private nuisance is an (1) intentional, (2) nontrespassory, (3) unreasonable, and (4) substantial interference with (5) the use and enjoyment of the plaintiff’s land. Usually, the most difficult question is whether the conduct is unreasonable. The modern view is that conduct is unreasonable if the “gravity of the harm outweighs the utility of the actor’s conduct.” Restatement (Second) Torts § 826(a). In effect, the court must determine whether the defendant’s conduct causes more harm than good. Should nuisance law apply to our solar energy dispute?
Chapter 1 The Concept of Property

Prah v. Maretti

Supreme Court of Wisconsin
321 N.W.2d 182 (1982)

ABRAHMSOn, Justice.

This appeal [presents] an issue of first impression, namely, whether an owner of a solar-heated residence states a claim upon which relief can be granted when he asserts that his neighbor’s proposed construction of a residence (which conforms to existing deed restrictions and local ordinances) interferes with his access to an unobstructed path for sunlight across the neighbor’s property. This case thus involves a conflict between one landowner (Glenn Prah, the plaintiff) interested in unobstructed access to sunlight across adjoining property as a natural source of energy and an adjoining landowner (Richard D. Maretti, the defendant) interested in the development of his land.

The circuit court concluded that the plaintiff presented no claim upon which relief could be granted and granted summary judgment for the defendant. We reverse the judgment of the circuit court and remand the cause to the circuit court for further proceedings.

I.

According to the complaint, the plaintiff is the owner of a residence which was constructed during the years 1978-1979. The complaint alleges that the residence has a solar system which includes collectors on the roof to supply energy for heat and hot water and that after the plaintiff built his solar-heated house, the defendant purchased the lot adjacent to and immediately to the south of the plaintiff’s lot and commenced planning construction of a home. The complaint further states that when the plaintiff learned of defendant’s plans to build the house he advised the defendant that if the house were built at the proposed location, defendant’s house would substantially and adversely affect the integrity of plaintiff’s solar system and could cause plaintiff other damage. Nevertheless, the defendant began construction. The complaint further alleges that the plaintiff is entitled to “unrestricted use of the sun and its solar power” and demands judgment for injunctive relief and damages.

See It

Click here to see photographs of: (a) the Prah and Maretti houses; and (b) the shadow that Maretti’s house cast on Prah’s solar collector.
After filing his complaint, the plaintiff moved for a temporary injunction to restrain and enjoin construction by the defendant. In ruling on that motion the circuit court heard testimony, received affidavits and viewed the site.

The record made on the motion reveals the following additional facts: Plaintiff’s home was the first residence built in the subdivision, and although plaintiff did not build his house in the center of the lot it was built in accordance with applicable restrictions. Plaintiff advised defendant that if the defendant’s home were built at the proposed site it would cause a shadowing effect on the solar collectors which would reduce the efficiency of the system and possibly damage the system. To avoid these adverse effects, plaintiff requested defendant to locate his home an additional several feet away from the plaintiff’s lot line, the exact number being disputed. Plaintiff and defendant failed to reach an agreement on the location of defendant’s home before defendant started construction. The Architectural Control Committee and the Planning Commission of the City of Muskego approved the defendant’s plans for his home, including its location on the lot. After such approval, the defendant apparently changed the grade of the property without prior notice to the Architectural Control Committee. The problem with defendant’s proposed construction, as far as the plaintiff’s interests are concerned, arises from a combination of the grade and the distance of defendant’s home from the defendant’s lot line.

The circuit court denied plaintiff’s motion for injunctive relief, declared it would entertain a motion for summary judgment and thereafter entered judgment in favor of the defendant….

III.

...The plaintiff presents three legal theories to support his claim that the defendant’s continued construction of a home justifies granting him relief: (1) the construction constitutes a common law private nuisance; (2) the construction is prohibited by sec. 844.01, Stats. 1979-80; and (3) the construction interferes with the solar easement plaintiff acquired under the doctrine of prior appropriation....

We consider first whether the complaint states a claim for relief based on common law private nuisance. This state has long recognized that an owner of

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4 Under the doctrine of prior appropriation the first user to appropriate the resource has the right of continued use to the exclusion of others. The doctrine of prior appropriation has been used by several western states to allocate water, Paug Vik v Wards Cove, 633 P2d 1015 (Alaska 1981), and by the New Mexico legislature to allocate solar access, secs. 47-3-1 to 47-3-5, N.M. Stats. 1978.
land does not have an absolute or unlimited right to use the land in a way which injures the rights of others. The rights of neighboring landowners are relative; the uses by one must not unreasonably impair the uses or enjoyment of the other. When one landowner's use of his or her property unreasonably interferes with another's enjoyment of his or her property, that use is said to be a private nuisance. *Hoene v. Milwaukee*, 17 Wis.2d 209, 214, 116 N.W.2d 112 (1962).

The private nuisance doctrine has traditionally been employed in this state to balance the rights of landowners, and this court has recently adopted the analysis of private nuisance set forth in the Restatement (Second) of Torts….

Although the defendant's obstruction of the plaintiff's access to sunlight appears to fall within the Restatement's broad concept of a private nuisance as a nontrespassory invasion of another's interest in the private use and enjoyment of land, the defendant asserts that he has a right to develop his property in compliance with statutes, ordinances and private covenants without regard to the effect of such development upon the plaintiff's access to sunlight. In essence, the defendant is asking this court to hold that the private nuisance doctrine is not applicable in the instant case and that his right to develop his land is a right which is *per se* superior to his neighbor's interest in access to sunlight. This position is expressed in the maxim “cujus est solum, ejus est usque ad coelum et ad infernos,” that is, the owner of land owns up to the sky and down to the center of the earth. The rights of the surface owner are, however, not unlimited. *U.S. v. Causby*, 328 U.S. 256, 260-1 (1946)….

Many jurisdictions in this country have protected a landowner from malicious obstruction of access to light (the spite fence cases) under the common law private nuisance doctrine. If an activity is motivated by malice it lacks utility and the harm it causes others outweighs any social values. This court was reluctant to protect a landowner's interest in sunlight even against a spite fence, only to be overruled by the legislature. Shortly after this court upheld a landowner's right to erect a useless and unsightly sixteen-foot spite fence four feet from his neighbor's windows, *Metzger v. Hochrein*, 107 Wis. 267, 83 N.W. 308 (1900), the legislature enacted a law specifically defining a spite fence as an actionable private nuisance. Thus a landowner's interest in sunlight has been protected in this country by common law private nuisance law at least in the narrow context of the modern American rule invalidating spite fences. See, *e.g.*, *Sundowner, Inc. v. King*, 95 Idaho 367, 509 P.2d 785 (1973); Restatement (Second) of Torts, sec. 829 (1977).

Note that the majority opinion cites *Sundowner, Inc. v. King* to support its position that that law sometimes protects a landowner's interest in sunlight. How persuasive is *Sundowner* in this context? Can you distinguish it from the situation in *Prah*?
This court’s reluctance in the nineteenth and early part of the twentieth century to provide broader protection for a landowner’s access to sunlight was premised on three policy considerations. First, the right of landowners to use their property as they wished, as long as they did not cause physical damage to a neighbor, was jealously guarded.

Second, sunlight was valued only for aesthetic enjoyment or as illumination. Since artificial light could be used for illumination, loss of sunlight was at most a personal annoyance which was given little, if any, weight by society.

Third, society had a significant interest in not restricting or impeding land development. Dillman v. Hoffman, 38 Wis. 559, 574 (1875). This court repeatedly emphasized that in the growth period of the nineteenth and early twentieth centuries change is to be expected and is essential to property and that recognition of a right to sunlight would hinder property development….

Considering these three policies, this court concluded that in the absence of an express agreement granting access to sunlight, a landowner’s obstruction of another’s access to sunlight was not actionable. Miller v. Hoeschler, [126 Wis. 263, 271, 105 N.W. 790 (1905)]. These three policies are no longer fully accepted or applicable. They reflect factual circumstances and social priorities that are now obsolete.

First, society has increasingly regulated the use of land by the landowner for the general welfare. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Just v. Marinette, 56 Wis.2d 7, 201 N.W.2d 761 (1972).

Second, access to sunlight has taken on a new significance in recent years. In this case the plaintiff seeks to protect access to sunlight, not for aesthetic reasons or as a source of illumination but as a source of energy. Access to sunlight as an energy source is of significance both to the landowner who invests in solar collectors and to a society which has an interest in developing alternative sources of energy.

Third, the policy of favoring unhindered private development in an expanding economy is no longer in harmony with the realities of our society. State v. Deetz, 66 Wis.2d 1, 224 N.W.2d 407 (1974). The need for easy and rapid development is not as great today as it once was, while our perception of the value of sunlight as a source of energy has increased significantly.

Courts should not implement obsolete policies that have lost their vigor over the course of the years. The law of private nuisance is better suited to resolve landowners’ disputes about property development in the 1980’s than is a rigid rule
which does not recognize a landowner’s interest in access to sunlight. As we said in *Ballstadt v. Pagel*, 202 Wis. 484, 489, 232 N.W. 862 (1930), “What is regarded in law as constituting a nuisance in modern times would no doubt have been tolerated without question in former times.” We read *State v. Deetz*, 66 Wis.2d 1, 224 N.W.2d 407 (1974), as an endorsement of the application of common law nuisance to situations involving the conflicting interests of landowners and as rejecting per se exclusions to the nuisance law reasonable use doctrine.

In *Deetz* the court abandoned the rigid common law common enemy rule with respect to surface water and adopted the private nuisance reasonable use rule, namely that the landowner is subject to liability if his or her interference with the flow of surface waters unreasonably invades a neighbor’s interest in the use and enjoyment of land. Restatement (Second) of Torts, sec. 822, 826, 829 (1977). This court concluded that the common enemy rule which served society “well in the days of burgeoning national expansion of the mid-nineteenth and early-twentieth centuries” should be abandoned because it was no longer “in harmony with the realities of our society.” *Deetz*, supra, 66 Wis.2d at 14-15, 224 N.W.2d 407. We recognized in *Deetz* that common law rules adapt to changing social values and conditions.

Yet the defendant would have us ignore the flexible private nuisance law as a means of resolving the dispute between the landowners in this case and would have us adopt an approach, already abandoned in *Deetz*, of favoring the unrestricted development of land and of applying a rigid and inflexible rule protecting his right to build on his land and disregarding any interest of the plaintiff in the use and enjoyment of his land. This we refuse to do.

Private nuisance law, the law traditionally used to adjudicate conflicts between private landowners, has the flexibility to protect both a landowner’s right of access to sunlight and another landowner’s right to develop land. Private nuisance law is better suited to regulate access to sunlight in modern society and is more in harmony with legislative policy and the prior decisions of this court than is an inflexible doctrine of non-recognition of any interest in access to sunlight across adjoining land.

We therefore hold that private nuisance law, that is, the reasonable use doctrine as set forth in the Restatement, is applicable to the instant case. Recognition of a nuisance claim for unreasonable obstruction of access to sunlight will not prevent land development or unduly hinder the use of

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**Food for Thought**

The majority suggests that recognition of a nuisance action for “unreasonable obstruction of access to sunlight” will not unduly hinder land development. Do you agree?
adjoining land. It will promote the reasonable use and enjoyment of land in a manner suitable to the 1980’s. That obstruction of access to light might be found to constitute a nuisance in certain circumstances does not mean that it will be or must be found to constitute a nuisance under all circumstances. The result in each case depends on whether the conduct complained of is unreasonable.

Accordingly we hold that the plaintiff in this case has stated a claim under which relief can be granted. Nonetheless we do not determine whether the plaintiff in this case is entitled to relief. In order to be entitled to relief the plaintiff must prove the elements required to establish actionable nuisance, and the conduct of the defendant herein must be judged by the reasonable use doctrine….

CALLOW, Justice (dissenting).

…the majority…concludes that this court’s past reluctance to extend protection to a landowner’s access to sunlight beyond the spite fence cases is based on obsolete policies which have lost their vigor over the course of the years….The majority has failed to convince me that these policies are obsolete….

I firmly believe that a landowner’s right to use his property within the limits of ordinances, statutes, and restrictions of record where such use is necessary to serve his legitimate needs is a fundamental precept of a free society which this court should strive to uphold….

I know of no cases repudiating policies favoring the right of a landowner to use his property as he lawfully desires or which declare such policies are “no longer fully accepted or applicable” in this context. The right of a property owner to lawful enjoyment of his property should be vigorously protected, particularly in those cases where the adjacent property owner could have insulated himself from the alleged problem by acquiring the land as a defense to the potential problem or by provident use of his own property.

The majority concludes that sunlight has not heretofore been accorded the status of a source of energy, and consequently it has taken on a new significance in recent years. Solar energy for home heating is at this time sparingly used and of questionable economic value because solar collectors are not mass produced, and consequently, they are very costly. Their limited efficiency may explain the lack of production.

Regarding the third policy the majority apparently believes is obsolete (that society has a significant interest in not restricting land development), it cites State v. Deetz, 66 Wis.2d 1, 224 N.W.2d 407 (1974). I concede the law may be tending to recognize the value of aesthetics over increased volume development and
that an individual may not use his land in such a way as to harm the public. The instant case, however, deals with a private benefit. I note that this court in Deetz stated: “The reasonable use rule retains...a policy of favoring land improvement and development.” Id. at 20, 224 N.W.2d 407. I find it significant that community planners are dealing with this country’s continued population growth and building revitalization where “[t]he number of households is expected to reach almost 100 million by the end of the decade; that would be 34 percent higher than the number in 1970.” F. Strom, 1981 Zoning and Planning Law Handbook, sec. 22.02[3], 396 (1981). It is clear that community planners are acutely aware of the present housing shortages, particularly among those two groups with limited financial resources, the young and the elderly. While the majority’s policy arguments may be directed to a cause of action for public nuisance, we are presented with a private nuisance case which I believe is distinguishable in this regard....

I believe the facts of the instant controversy present the classic case of the owner of a solar collector who fails to take any action to protect his investment. There is nothing in the record to indicate that Mr. Prah disclosed his situation to Mr. Maretti prior to Maretti’s purchase of the lot or attempted to secure protection for his solar collector prior to Maretti’s submission of his building plans to the architectural committee. Such inaction should be considered a significant factor in determining whether a cause of action exists....

Because I do not believe that the facts of the present case give rise to a cause of action for private nuisance, I dissent.

____________________________________

Points for Discussion

a. Right to Use

Prah and Maretti each wanted to use his lot for a purpose that injured the other. Although the case assumes that Maretti’s conduct is harming Prah, it may be equally valid to characterize the situation as Prah’s conduct harming Maretti. Do you see why? How should the law resolve competing land use claims as a general matter? How strong are the policy arguments used by the majority and the dissent in this particular case?

b. Nuisance Law

The key issue on appeal in Prah was whether nuisance law was applicable to the dispute as a theoretical matter—not whether Maretti’s house was in fact a nuisance. The Wisconsin Supreme Court remanded the case to the trial court to decide this factual question. How would you decide the case, using the Restatement standards set forth above? Note that the dissent’s approach—like all “bright
“line” rules—has the virtues of certainty and predictability, perhaps at the cost of justice in the individual case. If the law requires a case-by-case determination of whether any proposed new home may be a nuisance to existing uses, how will this affect development? If you represented a client who wanted to build a new home on a vacant lot located south of an existing home with a rooftop solar collector, how would you advise her to proceed?

c. A Fundamental Right?

Should a landowner be entitled to build a house on his own land regardless of the wishes of neighbors, as long as the house complies with all laws? The dissent suggests that this is a “fundamental precept of a free society.” What theory of property does this view reflect? In *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five*, 114 So. 2d 357 (Fla. Dist. Ct. App. 1959), the court refused to stop an oceanfront hotel from building a 14-story addition that would cast a shadow on the pool and sunbathing areas of an adjacent hotel. It relied on the “universally held” view that “where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action…under the maxim *sic utere tuo ut alienum non laedas*, even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural state.” *Id.* at 359.

d. The Coase Theorem

The *Coase Theorem* states that the initial allocation of a resource is irrelevant to economic efficiency—in the absence of transaction costs—because the affected parties will reach an efficient allocation through bargaining. See Ronald Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960). In this context, *transaction costs* refer to expenses of reaching and performing an agreement, such as the cost of searching for information, attorney’s fees, and other negotiating costs. Why didn’t Prah and Maretti negotiate a solution to their dispute without the need for litigation? Central to the law and economics approach is the assumption that each person is a *rational maximizer*, that is, one who seeks to rationally maximize his self-interest. Since Prah and Maretti were unable to bargain successfully, should the court have imposed an efficient bargain (e.g., by requiring Prah to pay Maretti in exchange for not blocking the solar collector)?

e. Capturing Sunshine

Did Prah “capture” the sunshine that flows across Maretti’s land in the same way that Pierson captured the fox in *Pierson v. Post*? And wasn’t Prah first-in-time, like Pierson? Or are these arguments inapplicable to the facts in *Prah*? Note that one of Prah’s theories was *prior appropriation*, a doctrine used to allocate water rights in some western states. Under this approach, the first person who both (1) takes water from a river or other surface watercourse and (2) puts that water to
beneficial use (e.g., for irrigating crops) acquires a permanent right to that water. The Colorado Supreme Court explained the policy basis for prior appropriation in the famous decision of *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882): “to encourage the diversion and use of water...for agriculture” to ensure the productive use of land. Should the *Prah* court have adopted a prior appropriation approach to sunshine?

**f. Prah Problems**

How far does *Prah* stretch? In the problems below, should the court apply nuisance law or not?

1. A constructs a windmill in her back yard to generate electricity. B now proposes to build a home on his adjacent lot, which will partially block the flow of wind.

2. C builds a new home with large south-facing windows. The windows function much like a greenhouse, trapping warm air inside and thus reducing C’s home heating bills; they also provide a lovely view of the countryside. D now plans to build a home on her adjacent lot, which will partially block the sunshine from C’s windows (and also block the view).

**g. Aftermath of Prah**

The construction of Maretti’s house was completed before the trial of Prah’s nuisance claim could begin. Maretti later settled the case by a cash payment to Prah. Despite the partial blockage of sunlight caused by Maretti’s house, Prah was still able to use his solar collector system to some extent; Prah later removed the collector from his roof. Ironically, while *Prah* was pending before the Wisconsin Supreme Court, the state legislature adopted a new Solar Access Act in order to encourage the use of solar energy. The act empowering municipalities to grant a solar access permit to a landowner who wishes to install a solar collector system; such a permit restricts the land development rights of neighboring owners. *Wis. Stat.* § 66.0403.

**4. Right to Destroy**

A plans to chop up the world-famous Rembrandt painting she owns. B, a former Supreme Court justice, wants to shred his legal papers before he dies. C’s will directs his executor to demolish his mansion after he dies. Will the law intervene in any of these situations?
It is inevitable that most property will be destroyed. For example, if you ate an apple for lunch this week, you presumably destroyed the apple. After all, the apple was grown in order to be consumed. Or if you own a ramshackle, termite-infested house that has outlived its useful life, you might choose to demolish it in order to build a new one. In this sense, the right to destroy is a logical adjunct to the right to use.

But difficulty arises when an owner seeks to destroy property that retains substantial value, like a renowned painting, historic papers, or a new mansion. Of course, if the owner is insane or otherwise incompetent to handle his affairs—which might be evidenced by senseless destruction of property—a court is empowered to appoint a guardian or conservator to preserve the estate. Short of this extreme situation, however, what is the scope of an owner’s right to destroy?

One important case dealing with the right to destroy arose in a wealthy St. Louis neighborhood known as “Kingsbury Place,” a group of 63 homes located on two city blocks. In 1902, when development began, it was one of the first residential subdivisions in the United States. With homes ranging from mansions to large townhouses, Kingsbury Place has been described as “one of St. Louis’ jewel communities and…one of the world’s premier private places.” Julius K. Hunter, Kingsbury Place: The First Two Hundred Years xiii (1982). Thus, “[t]he homes on Kingsbury Place and the people who built them…represent the finest application of Midwestern wealth to an elegant and sophisticated life-style at the turn of the century.” Id.

Number 4 Kingsbury Place was a two-story Mediterranean villa built in 1922 and owned by Louise Woodruff Johnston. Her will mandated that the home be destroyed after her death. A group of neighbors led by Edward Eyerman (who lived at No. 21 Kingsbury Place) brought suit to stop the demolition.

**FYI**

Famous Kingsbury Place residents have included William Danforth (founder of Ralston Purina), Ben Edwards (co-founder of A.G. Edwards and Sons), Francis Fowler (owner of the liqueur “Southern Comfort”), Saunders Norvell (president of the Remington Arms Company), and Sara Teasdale (American poet).

Number 4 Kingsbury Place was a two-story Mediterranean villa built in 1922 and owned by Louise Woodruff Johnston. Her will mandated that the home be destroyed after her death. A group of neighbors led by Edward Eyerman (who lived at No. 21 Kingsbury Place) brought suit to stop the demolition.

**Eyerman v. Mercantile Trust Co.**

Court of Appeals of Missouri

524 S.W.2d 210 (1975)

RENDLEN, Judge.

Plaintiffs appeal from denial of their petition seeking injunction to prevent demolition of a house at #4 Kingsbury Place in the City of St. Louis. The action
is brought by individual neighboring property owners and certain trustees for the Kingsbury Place Subdivision. We reverse.

Louise Woodruff Johnston, owner of the property in question, died January 14, 1973, and by her will directed the executor “…to cause our home at 4 Kingsbury Place…to be razed and to sell the land upon which it is located…and to transfer the proceeds of the sale…to the residue of my estate.” Plaintiffs assert that razing the home will adversely affect their property rights, violate the terms of the subdivision trust indenture for Kingsbury Place, produce an actionable private nuisance and is contrary to public policy….

Whether #4 Kingsbury Place should be razed is an issue of public policy involving individual property rights and the community at large. The plaintiffs have pleaded and proved facts sufficient to show a personal, legally protectible interest.

Demolition of the dwelling will result in an unwarranted loss to this estate, the plaintiffs and the public. The uncontradicted testimony was that the current value of the house and land is $40,000.00; yet the estate could expect no more than $5,000.00 for the empty lot, less the cost of demolition at $4,350.00, making a grand loss of $39,350.00 if the unexplained and capricious direction to the executor is effected. Only $650.00 of the $40,000.00 asset would remain.

Kingsbury Place is an area of high architectural significance, representing excellence in urban space utilization. Razing the home will depreciate adjoining property values by an estimated $10,000.00 and effect corresponding losses for other neighborhood homes. The cost of constructing a house of comparable size and architectural exquisiteness would approach $200,000.00.

The importance of this house to its neighborhood and the community is reflected in the action of the St. Louis Commission on Landmarks and Urban Design designating Kingsbury Place as a landmark of the City of St. Louis. This designation, under consideration prior to the institution of this suit, points up the aesthetic and historical qualities of the area and assists in stabilizing Central West End St. Louis. It was testified by the Landmarks Commission chairman that the private place concept, once unique to St. Louis, fosters higher
home maintenance standards and is among the most effective methods for stabilizing otherwise deteriorating neighborhoods. The executive director of Heritage St. Louis, an organization operating to preserve the architecture of the city, testified to the importance of preserving Kingsbury Place intact:

The reasons [sic] for making Kingsbury Place a landmark is that it is a definite piece of urban design and architecture. It starts out with monumental gates on Union. There is a long corridor of space, furnished with a parkway in the center, with houses on either side of the street....The existence of this piece of architecture depends on the continuity of the [sic] both sides. Breaks in this continuity would be as holes in this wall, and would detract from the urban design qualities of the streets. And the richness of the street is this belt of green lot on either side, with rich tapestry of the individual houses along the sides. Many of these houses are landmarks in themselves, but they add up to much more....I would say Kingsbury Place, as a whole, with its design, with its important houses...is a most significant piece of urban design by any standard.

To remove #4 Kingsbury from the street was described as having the effect of a missing front tooth. The space created would permit direct access to Kingsbury Place from the adjacent alley, increasing the likelihood the lot will be subject to uses detrimental to the health, safety and beauty of the neighborhood. The mere possibility that a future owner might build a new home with the inherent architectural significance of the present dwelling offers little support to sustain the condition for destruction.

We are constrained to take judicial notice of the pressing need of the community for dwelling units as demonstrated by recent U.S. Census Bureau figures showing a decrease of more than 14% in St. Louis City housing units during the decade of the 60’s. This decrease occurs in the face of housing growth in the remainder of the metropolitan area. It becomes apparent that no individual, group of individuals nor the community generally benefits from the senseless destruction of the house; instead, all are harmed and only the caprice of the dead testatrix is served. Destruction of the house harms the neighbors, detrimentally affects the community, causes monetary loss in excess of $39,000.00 to the estate and is without benefit to the dead woman. No reason, good or bad, is suggested by the will or record for the eccentric condition. This is not a living person who seeks to exercise a right to reshape or dispose of her property; instead, it is an attempt by will to confer the power to destroy upon an executor who is given no other
interest in the property. To allow an executor to exercise such power stemming from apparent whim and caprice of the testatrix contravenes public policy.

The Missouri Supreme Court held in *State ex rel. McClintock v. Guinotte*, 275 Mo. 298, 204 S.W. 806, 808 (banc 1918), that the taking of property by inheritance or will is not an absolute or natural right but one created by the laws of the sovereign power. The court points out the state “may foreclose the right absolutely, or it may grant the right upon conditions precedent, which conditions, if not otherwise violative of our Constitution, will have to be complied with before the right of descent and distribution (whether under the law or by will) can exist.”…

While living, a person may manage, use or dispose of his money or property with fewer restraints than a decedent by will. One is generally restrained from wasteful expenditure or destructive inclinations by the natural desire to enjoy his property or to accumulate it during his lifetime. Such considerations however have not tempered the extravagance or eccentricity of the testamentary disposition here on which there is no check except the courts.…

The term “public policy” cannot be comprehensively defined in specific terms but the phrase “against public policy” has been characterized as that which conflicts with the morals of the time and contravenes any established interest of society. Acts are said to be against public policy “when the law refuses to enforce or recognize them, on the ground that they have a mischievous tendency, so as to be injurious to the interests of the state, apart from illegality or immorality.” *Dille v. St. Luke’s Hospital*, 355 Mo. 436, 196 S.W.2d 615, 620 (1946)....

Public policy may be found in the Constitution, statutes and judicial decisions of this state or the nation. *In re Rahn’s Estate*, 316 Mo. 492, 291 S.W. 120 (1927). But in a case of first impression where there are no guiding statutes, judicial decisions or constitutional provisions, “a judicial determination of the question becomes an expression of public policy provided it is so plainly right as to be supported by the general will.” *In re Mohler’s Estate*, 343 Pa. 299, 22 A.2d 680, 683 (1941)....

Although public policy may evade precise, objective definition, it is evident from the authorities cited that this senseless destruction serving no apparent good purpose is to be held in disfavor. A well-ordered society cannot tolerate the waste and destruction of resources when such acts directly affect important interests of other members of that society. It is clear that property owners in the neighborhood of #4 Kingsbury, the St. Louis Community as a whole and the beneficiaries of testatrix’s estate will be severely injured should the provisions of the will be followed. No benefits are present to balance against this injury and we hold that to allow the condition in the will would be in violation of the public policy of this state....
CLEMENS, Judge (dissenting).

...The simple issue in this case is whether the trial court erred by refusing to enjoin a trustee from carrying out an explicit testamentary directive. In an emotional opinion, the majority assumes a psychic knowledge of the testatrix' reasons for directing her home be razed; her testamentary disposition is characterized as “capricious,” “unwarranted,” “senseless,” and “eccentric.” But the record is utterly silent as to her motives.

The majority's reversal of the trial court here spawns bizarre and legally untenable results. By its decision, the court officiously confers a “benefit” upon testamentary beneficiaries who have never litigated or protested against the razing. The majority opinion further proclaims that public policy demands we enjoin the razing of this private residence in order to prevent land misuse in the City of St. Louis. But the City, like the beneficiaries, is not a party to this lawsuit. The fact is the majority's holding is based upon wispy, self-proclaimed public policy grounds that were only vaguely pleaded, were not in evidence, and were only sketchily briefed by the plaintiffs. …

...The majority opinion bases its reversal on public policy. But plaintiffs themselves did not substantially rely upon this nebulous concept. Plaintiffs' brief contends merely that an “agency of the City of St. Louis has recently designated Kingsbury Place as a landmark,” citing § 24.070, Revised Code of the City of St. Louis. Plaintiffs argue removal of the Johnston home would be “intentional… destruction of a landmark of historical interest.” Neither the ordinance cited in the brief nor any action taken under it were in evidence. Indeed, the Chairman of the Landmarks and Urban Design Commission testified the Commission did not declare the street a landmark until after Mrs. Johnston died. A month after Mrs. Johnston's death, several residents of the street apparently sensed the impending razing of the Johnston home and applied to have the street declared a landmark. The Commissioner testified it was the Commission's "civic duty to help those people."

The majority opinion goes far beyond the public-policy argument briefed by plaintiffs. It suggests the court may declare certain land uses, which are not illegal, to be in violation of the City's public policy. And the majority so finds although the City itself is not a litigant claiming injury to its interests. The majority's public-policy conclusions are based not upon evidence in the lower court, but upon incidents which may have happened thereafter. …

As much as our aesthetic sympathies might lie with neighbors near a house to be razed, those sympathies should not so interfere with our considered legal judgment as to create a questionable legal precedent. Mrs. Johnston had the right during her lifetime to have her house razed, and I find nothing which precludes
her right to order her executor to raze the house upon her death. It is clear that “the law favors the free and untrammeled use of real property.” *Gibbs v. Cass*, 431 S.W.2d 662[2] (Mo. App. 1968). This applies to testamentary dispositions. An owner has exclusive control over the use of his property subject only to the limitation that such use may not substantially impair another’s right to peaceably enjoy his property. *City of Fredricktown v. Osborn*, 429 S.W.2d 17 [2, 3] (Mo. App. 1968).... Plaintiffs have not shown that such impairment will arise from the mere presence of another vacant lot on Kingsbury Place....

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**Points for Discussion**

**a. Property and Autonomy**

In essence, *Eyerman* asks: how much autonomy does an owner have over her property? The majority is concerned about the “waste and destruction of resources” inherent in allowing an owner to demolish property, while the dissent suggests that the only limitation on an owner’s use of property is that “such use may not substantially impair another’s right to peaceably enjoy his property.” Which philosophical approaches to property do these views reflect? Which is closest to your own view?

**b. The Role of Intent**

In this case, there was no evidence about why Johnston wanted her home to be destroyed. Should this matter? Humans ordinarily make rational decisions, assuming that they are mentally competent. Assuming that Johnston was competent, why shouldn’t the court enforce her decision? In *Estate of Beck*, 676 N.Y.S.2d 838, 841 (Sur. Ct. 1998), the court upheld the decedent’s direction that her home be destroyed, noting that “[t]he clearly expressed provisions of a duly executed Will cannot be abrogated based on anemic assertions of vacillating public interest.” If the owner’s motive is relevant, what would be a suitable reason for destroying a house after its owner dies? See, e.g., *National City Bank v. Case Western Reserve University*, 369 N.E.2d 814 (Ohio Ct. Com. Pleas 1976) (suggesting that the decedent’s desire to prevent her home from being desecrated by being turned into a business establishment after her death was an adequate reason to allow its destruction).

**c. Timing of Destruction**

The majority states that a living person may “dispose of his money or property with fewer restraints than a decedent by will.” Why is the timing of destruction relevant? Suppose that Johnston—knowing she was near death— instructed a contractor to bulldoze her home before she died. Would the case have come out differently?
d. Harming Neighbors

How important to the outcome is the fact that the razing of Johnston’s house would lower the value of nearby houses, and thus cause financial harm to neighbors? Does this case stand for the proposition that an owner cannot do anything on her own land that will lower the value of adjacent properties?

e. Historic Preservation Ordinances

The St. Louis landmarks ordinance mentioned in Eyerman was an early—and toothless—historic preservation ordinance, which did not expressly restrict an owner’s ability to destroy. Today, state and local historic preservation ordinances are both widespread and more restrictive. For example, the entire French Quarter of New Orleans and large sections of downtown New York City are subject to such ordinances. The modern ordinance typically provides that the owner of covered property cannot make substantial modifications to the structure without government approval. The New York City landmarks ordinance was unsuccessfully attacked as a “taking” of private property under the Fifth Amendment in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978), which you will study in Chapter 13.

f. Destruction of Animals

Suppose that O owns a healthy and valuable horse, which he decides to destroy for no particular reason. Representing a local animal rights group, you seek an injunction against the destruction, citing Eyerman. Would your argument succeed? A number of courts have refused to enforce provisions in wills that direct the killing of animals. See, e.g., In re Capers Estate, 34 Pa. D. & C.2d 131 (Pa. Ct. Com. Pleas 1964) (dogs) and Estate of Wishart, [1992] 129 N.B.R.2d 397 (horses). But is destruction of animals during the owner’s lifetime a different situation?

In Commonwealth v. Kneller, 999 A.2d 608 (Pa. Super. Ct. 2010), the defendant dog owner convinced a friend to shoot and kill her dog, apparently out of spite. She was later convicted of conspiracy to commit cruelty to an animal, under a state statute which made it illegal for a person to “kill[…]any dog… whether belonging to himself or otherwise.” On appeal, she claimed that the jury should have been instructed that the owner of an animal has a right to destroy her animal. The court upheld the conviction, citing with approval this phrase from an earlier opinion in the same case: “A sweeping policy conclusion that a dog owner can shoot a healthy, happy dog for no reason is not justifiable under the law, does not comport with the legislature’s statutory scheme, is no defense to the crime of Cruelty to Animals, and would replace the call ‘Lassie, come home’ with ‘Lassie, run for your life.’” Id. at 612.
g. Kingsbury Place Today

The Johnston house still stands and is valued at over $1,000,000. Kingsbury Place is still considered to be one of the premier addresses in St. Louis. In 2007, it was listed on the National Register of Historic Places in recognition of its significance to American history, pursuant to 16 U.S.C. § 470a. Although the Johnston house is included in the listing, federal law does not guarantee its preservation. The owner of a listed property has no legal obligation to maintain or restore it, although federal funds may be available to assist the owner’s voluntary preservation effort.

The right to destroy attracted little scholarly attention until the 1990s. One of the most searching explorations is an article by Professor Lior Jacob Strahilevitz, simply titled The Right to Destroy.

Perspective and Analysis

...As a matter of everyday experience, the right to destroy one’s own property seems firmly entrenched. Rational people discard old clothes, furniture, albums, and unsent letters every day. Most of this “junk” is worth little or nothing, so its destruction proves entirely uncontroversial. Indeed, it is difficult to imagine how a modern capitalist economy would function if owners were barred from destroying obsolete refrigerators, unfashionable clothes, or rough drafts of written work. Even in the context of valuable property, popular sentiment seems to tolerate substantial property destruction. For example, American cadavers are frequently buried wearing wedding rings, other jewelry, and expensive clothing. And no one took seriously historic preservationists’ protests when a Chicago restaurant chain spent $113,824 to purchase and destroy the infamous “cursed” baseball that Steve Bartman deflected during game six of the 2003 National League Championship Series....

When asked to resolve cases where one party seeks to destroy her property, courts have reacted with great hostility toward the owner’s destructive plans. Despite the existence of a norm that tolerates the burial of wedding rings, courts might well refuse a decedent’s humble request to wear such jewelry for eternity. If a testator orders her executor to destroy her home upon her death, the law probably will render the executor unable to carry out her wishes. And if a landlord requests the city’s permission to demolish a venerable but badly burned building that has become an eyesore, a teetering hazard, and a financial burden, the government can thwart her wishes. Confronted with arguably hard cases and high stakes, many American courts have rejected the notion that an owner has the right to destroy that which is hers, particularly in the testamentary context....

Those who wish to curtail the right to destroy base their argument almost exclusively on the resource waste that results from property destruction.
Usable resources may be squandered; neighborhoods may empty; and historians may have more difficulty studying artistic, political, or cultural traditions. These are all substantial concerns. But prohibiting people from destroying their property can result in waste too. Historic preservation laws can lock inefficient land uses into place. Rules barring patent suppression can discourage firms from investing in innovations. Rules requiring presidents to preserve all presidential papers can deter them from memorializing controversial or sensitive ideas. Particularly in cases involving high transaction costs, widely held prodestruction norms, or substantial adverse ex ante effects, the cure of preventing destruction is worse than the disease of allowing it.

…Rational people usually do not destroy valuable property intentionally. So where the government witnesses a rational person destroying her valuable property, it should presume that the destructive act furthers expressive objectives. This deferential approach still raises the question of whether expressive interests should trump the usual concerns about wasted resources and associated negative externalities.

Cases that require courts to balance expressive interests against substantial economic or social welfare interests may become very difficult. Courts have an unfortunate tendency to try to make them easier by disregarding the interests on one side of the equation. For example, cases involving the destruction of frozen embryos ignore the interests of infertile couples who would like to have the embryos preserved for implantation. Indeed, in these cases, courts give no thought to the ordinary critiques of property destruction. Similarly, courts generally disregard artists’ substantial First Amendment interests in ensuring that incomplete, inferior, or otherwise disfavored unpublished works in their collections are destroyed upon their passing. That attitude is disturbing. Sane artists should decide which of their works are presented to the world—they have the correct economic incentives and greater familiarity with their own work than anyone else. Disregarding an unambiguous destruction provision in a will raises the specter of compelled speech. Moreover, an antidestruction rule creates perverse incentives for ailing artists to destroy works that they might not be able to finish during their lives and to avoid committing high-risk thoughts to paper until they have fully conceptualized the entire project....


**Points for Discussion**

a. A Qualified Right to Destroy?

Professor Strahilevitz suggests that the government should presume that a destructive act by a rational person “furthers expressive objectives.” In litigation,
normally a presumption can be rebutted by evidence, so the practical effect of his approach would be to force the opponents of destruction to present evidence showing that the owner had a non-expressive intent. What are the benefits and costs of this approach? Suppose that the Eyerman court had adopted this view. Would this have affected the outcome of the case?

b. Eminent Domain

Government has the inherent power to take private property for public use upon payment of just compensation, consistent with the Fifth Amendment’s Takings Clause and similar provisions of state constitutions. This power is known as eminent domain, which you will study in Chapter 12. For example, if the City of St. Louis wanted to preserve Johnston’s house as a public museum, it had the undeniable right to take title to the property—upon payment of fair market value to Johnston’s estate. Items with unique significance to the public in general, such as fine art or historic documents, can be similarly preserved by government purchase. Is eminent domain a better solution to the destruction problem than the approach presented by Professor Strahilevitz?

c. Moral Rights of Artists

The civil law system has long recognized that artists hold “moral rights” in their artwork—apart from copyright law—even after they sell their works. These protections include the right to prevent the current owner from destroying or significantly modifying the artwork. In 1990, Congress enacted the Visual Artists Rights Act (VARA), which provides similar protection. Under VARA, the author of a work of “visual art” created on or after June 1, 1990 has the rights, inter alia, to (1) prevent “any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation” and (2) prevent “any destruction of a work of recognized stature.” 17 U.S.C. § 106A(a)(3). For example, in Martin v. City of Indianapolis, 192 F.3d 608 (7th Cir. 1999), the creator of a large “outdoor stainless steel sculpture” was awarded $20,000 under VARA after the defendant city demolished the sculpture as part of an urban renewal project. The Martin dissent cautioned future purchasers or donees of art to beware: “To avoid being the perpetual curator of a piece of visual art that has lost (or perhaps never had) its luster, the recipient must obtain at the outset a waiver of the artist’s rights under VARA.” Id. at 616. Should an artist be allowed to waive his VARA rights at the

What’s That?

The legal systems of most nations are based either on the civil law or common law traditions. The civil law system originated in Roman law, and generally prevails today in Africa, Asia, Europe, and South America. The common law system, which developed in England, is used in the United Kingdom and former British colonies, including Australia, Canada, and the United States.

d. Presidential Papers

Does the President of the United States have the right to destroy his or her presidential papers? During most of our nation’s history, presidential papers were treated as private property—and were often destroyed by ex-presidents. Concerned that former President Nixon would destroy the infamous White House tapes that led to his resignation, Congress enacted a 1974 statute giving the General Services Administration custody of the tapes and other presidential papers. Nixon challenged the statute as an unlawful taking of his private property, claiming $200 million in damages; the case was eventually settled after his death for $18 million. To avoid similar disputes in the future, Congress adopted the Presidential Records Act of 1978 which specifies that “[t]he United States shall reserve and retain complete ownership, possession, and control of Presidential records….” 44 U.S.C. § 2202. However, this legislation does not affect the property rights of other federal officials.

e. Problems in Destruction

In light of Eyerman and the other materials above, should the law recognize the owner’s right to destroy under the following circumstances?

1. A owns a beautiful, world-famous painting by Claude Monet which, when publicly exhibited, helped millions of people develop a greater appreciation for fine art. A dies, leaving a will that instructs his executor to burn the painting and deposit its ashes in his grave.

2. B owns a 100-acre tract of prize-winning orange groves. On a whim, B decides to cut down the trees with a chain saw, which will reduce the value of the land by 90%.
(3) C sells her Florida home for $2,000,000, and uses all the money to purchase rare stamps. As a “public art project,” C then begins burning the stamps, one by one. C’s four children protest this wanton destruction, but C ignores their pleas.

Summary

• Theories of Property. American property law reflects a blend of different theories, including the first possession, labor, utilitarian, civic republican, and personhood approaches. The law and economics variant of utilitarianism has been a particularly powerful influence in recent decades.

• Legal Positivism. In our legal system, property exists only to the extent that it is recognized by government. Thus, natural law theory has little impact on property law.

• Property as a Bundle of Rights. Property is commonly described as a “bundle of rights.” The concept that property consists of rights rather than things has important consequences that we will study throughout the course. For example, property rights are relative, not absolute. Conflicts often arise between different owners, or between a particular owner and society in general, as the cases in this chapter demonstrate. The law resolves these conflicts by determining the relative scope and extent of each owner’s rights in the particular situation.

• Reasons for Property Rights. The reasons that our society recognizes property are vital, because these reasons define the scope and extent of property rights. As the State v. Shack court explained: “Property rights serve human values. They are recognized to that end, and are limited by it.” Under the utilitarian theory which this passage reflects, we recognize property rights not simply to benefit individual owners, but rather because private property benefits all of society.

• Right to Transfer. Although the law favors the free alienation of property, an owner’s right to transfer is sometimes limited for public policy reasons. The
law regulates what can be transferred, how transfers are made, and who can trans-
fer or obtain property.

- **Right to Exclude.** The law generally protects an owner’s right to exclude
others from his property, subject to privileges such as consent and necessity.
Other exceptions to the right to exclude may exist, depending on the jurisdiction.

- **Right to Use.** An owner is normally entitled to use her property as she
wishes, as long as she does not injure the rights of others. The spite fence and
nuisance doctrines help define the limits of the right to use.

- **Right to Destroy.** The scope of an owner’s right to destroy is unclear. In
practice, the law rarely intervenes to prevent destruction. But concern arises
when an owner seeks to destroy property that has substantial value to society, and
some courts have limited this right.

**For More Information**

For more information about the subjects covered in this chapter, please consult these
sources:

L. Rev. 745 (2009).

- Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 Cornell L. Rev. 531
(2005).


Imagine that you are sitting in the living room of your country house on a
leather chair enjoying the Picasso mounted on your wall and sipping a cool glass
of water. Suppose you inherited your house 25 years ago from your mother,
found the chair by the side of the highway last week, bought the Picasso six years
ago from a friend recently found to be an art thief, and pumped the water from the
well in your back yard. While you are clearly in possession of these things, do you
hold title to any of them? Do you have any property rights at all?

In the United States, we generally divide property into two broad categories:
real property and personal property. Real property consists of rights in land and
things attached to land, such as buildings, fences, and trees. So in the example
above, your country house and the land it sits on are real property. In contrast,
personal property refers to rights in moveable items (such as chairs, pens, and
computers) and intangible things (such as patents and shares of stock). The chair,
the Picasso, and the glass of water are all personal property.

Traditionally, real property was the more important category. Property law
in the United States was profoundly shaped by English law. For centuries, land
constituted the foundation of economic, social, and political power in England.
Accordingly, the real property law that evolved in England was extraordinarily
complex, while personal property law was comparatively simple. Because the
new United States inherited this system, our own vision of property law has long
been dominated by real property principles—as the first-year course in Property
usually reflects. This chapter will begin your study of real property, while Chapter
3 will introduce you to personal property.

The real property law that we inherited from England was based on condi-
tions quite different from those prevailing in the United States. England was a
mature agricultural economy where most land was privately-owned and in pro-
ductive use. In contrast, about 95% of the new United States was undeveloped,
wild land owned by the federal government. The government sought to transfer
these lands to private owners in order to facilitate national development—initially
by allowing land purchases on credit and distributing free land to veterans, and
later through the Homestead Act of 1862. The judicial system also played a role in this process. As the Supreme Court explained in one early case: “The country was a wilderness, and the universal policy was to procure its cultivation and improvement.” Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 145 (1829). Thus, the need to develop land for productive use became a major theme in American property law.

In this chapter, we will examine three aspects of real property law: adverse possession; the vertical limits of ownership; and water law. The law in these areas has evolved over time in response to factors such as geography, technology, economic conditions, and social forces—and this evolution continues today. Each doctrine illustrates the central challenge in American property law: striking the appropriate balance between the rights of the owner and the interests of society in general.

A. Adverse Possession

Suppose A occupies B’s land for 20 years. B never inspects his land, so he does not know about A’s occupancy. Who owns the land? Surprisingly, the answer may be A—based on adverse possession.

Adverse possession is easily the most controversial doctrine in property law. As one authority noted: “Title by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it.” Henry W. Ballentine, Title by Adverse Possession, 32 Harv. L. Rev. 135, 135 (1918). In effect, if A occupies B’s land for a long enough period while meeting certain conditions, A acquires title to the land without B’s consent. Why does the law recognize this doctrine?

Four justifications have been suggested for adverse possession:

- Preventing frivolous claims: Under the dominant view, adverse possession is seen as a special statute of limitations for recovering possession of land. Thus, like any other statute of limitations, it bars lawsuits based on stale, unreliable evidence, thereby protecting the occupant from frivolous claims. It also provides the occupant with security of title, thus encouraging the productive use of land.
As you read the materials in this unit, consider which theory best explains the adverse possession doctrine.

1. Elements of Adverse Possession

In most jurisdictions, an occupant obtains title to land through adverse possession if her possession is: actual, exclusive, open and notorious, adverse and hostile, and continuous for the required period. Typically, the period for adverse possession is established by a statute, while the other elements stem from case law. A handful of jurisdictions also require that the occupant pay the taxes assessed against the land.

How much possession is required? This varies according to the character, nature, and location of the particular land. For example, in order for C to adversely possess a condominium unit in a large city, she would probably have to reside in the unit, because this is how a reasonable unit owner would behave. But
D might adversely possess a tract of rural grassland just by having cattle graze on it occasionally, because this is an appropriate use for such property.

The precise phrasing of the adverse possession standards varies somewhat from state to state. A typical state requires these elements:

- **Actual possession**: The claimant must physically use the land in the same manner that a reasonable owner would, given its character, location, and nature.

- **Exclusive possession**: The claimant’s possession cannot be shared with the owner or with the public in general.

- **Open and notorious possession**: The claimant’s possession must be visible and obvious, so that if the owner made a reasonable inspection of the land, he would become aware of the adverse claim.

- **“Adverse and hostile” possession (some states also require “claim of right”)**: This element is complex, and will be discussed in more detail below. All states agree that possession authorized by the owner does not meet this requirement. Beyond this point, states differ. Some find the element is met only if the claimant believes in good faith that he owns the land. In most states, the claimant’s state of mind is irrelevant. A third view—now rare—requires bad faith, that is, the claimant must intend to take title from the owner.

- **Continuous possession**: The claimant’s possession must be as continuous as a reasonable owner’s would be, given the character, location, and nature of the land.

- **For the statutory period**: The period for adverse possession ranges from 5 to 40 years, depending on the state. The most common periods are 10, 15, and 20 years.