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Assignment Detail	See attached PDF for purposes of completing the below detailed reading assignment: • Monday, August 14, 2023: pages 19-32. • Wednesday, August 16, 2023: pages 32-55. • Thursday, August 17, 2023: pages 55-67.

Property: An Open-Source Casebook

www.opensourceproperty.org

Build Author: Deidré A. Keller

Build Date: August 2017

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Part I: Foundations

1. Ownership

William Blackstone, *Commentaries on the Laws of England*
vol. 1, pp. 131-136 (1765); vol. 2, p. 2

William Blackstone. Source: 6 CASSELL'S ILLUSTRATED HISTORY OF ENGLAND 582 (1865)

THE third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably founded in nature, as will be more fully explained in the second book of the ensuing commentaries: but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honor and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land….

SO great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In

this, and similar cases the legislature alone, can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.…

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

A. So What *Is* Property?

We began this chapter with Blackstone's strong statement of the "absolute right" of property, and have watched it gradually melt away. We will see courts use a subtle and diverse array of tools to vindicate interests that conflict with a property owner's "absolute" rights. As you consider this material, as yourself, are there any limit to the scope or variety of manipulations courts undertake in deciding property disputes? And if not, how are we ever to say what property *is*?

We might look to two possible foundations for a more resilient concept of property. One foundation might be that property is a particular *cohesive* construct: a package deal. This is, indeed, one common interpretation of the "bundle of rights" metaphor we will encounter in *Jacque*. As such, when we say that a person *owns* something, we might be saying that the person enjoys the various rights of owners we will be studying (the right to exclude, possess, use, alienate, etc.) with respect to that thing. If we could support this interpretation, it really might help to distinguish property in a meaningful way from other private law rights—such as those that arise in contract or tort—and allow us to predict how particular disputes are likely to shake out. The cases we will study—in which courts limit or deny owners' rights depending on the circumstances in which they are asserted—may give us some doubts about our likelihood of success. These legal authorities that are likely to challenge our ability to

think about property as a coherent "bundle" of rights, as opposed to an *ad hoc* and unstable collection of whatever rights and duties we choose to apply in a particular set of circumstances:

- In our unit on the Subject Matter of Property, we will see how some things may be called "property" even though they are not subject to certain of the traditional rights of ownership—particularly the right to alienate.
- In our unit on Concurrent Interests, we will see how the division of ownership rights among *multiple people* similarly cabins the rights to exclude, possess, alienate, and use—at least among co-owners.

So perhaps this approach is not very promising. While there is a menu of rights that appear to be *consistent* with ownership, it appears that the concept or label of "property" does not *necessarily* depend on a particular combination of those rights being present.

A second possible foundation for our conception of property is that property, at the very least, involves some *thing* that is the subject of the right (or rights): that it is a right *in rem*. In particular, it might be intimately tied up with an individual's right to *control some thing*—principally but not only by excluding others from access to that thing. Again, the requirement of intermediation by some *thing* might also help distinguish property from contract and tort—which may but need not involve competing claims to a *thing*.

We will consider the types of *things* that might qualify as property in our unit on the Subject Matter of Property. But before doing so, we ought to consider whether thinking of property in this way—as a relationship between people and things—is sound, or useful. Consider the following scholarly treatments of these ideas.

Wesley Newcomb Hohfeld, ***Some Fundamental Legal Conceptions as Applied in Judicial Reasoning***

23 YALE L. J. 16, 28-30, 31-33, 45-46, 55 (1913)

One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to "rights" and "duties," and that

these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests, such as trusts, options, escrows, "future" interests, corporate interests, etc. Even if the difficulty related merely to inadequacy and ambiguity of terminology, its seriousness would nevertheless be worthy of definite recognition and persistent effort toward improvement; for in any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression. As a matter of fact, however, the above mentioned inadequacy and ambiguity of terms unfortunately reflect, all too often, corresponding paucity and confusion as regards actual legal conceptions. That this is so may appear in some measure from the discussion to follow.

The strictly fundamental legal relations are, after all, *sui generis;* and thus it is that attempts at formal definition are always unsatisfactory, if not altogether useless. Accordingly, the most promising line of procedure seems to consist in exhibiting all of the various relations in a scheme of "opposites" and "correlatives," and then proceeding to exemplify their individual scope and application in concrete cases. An effort will be made to pursue this method:

jural opposites	rights	privilege	power	immunity
	no-rights	duty	disability	liability
jural correlatives	right	privilege	power	immunity
	duty	no-right	liability	disability

. . .

Recognizing, as we must, the very broad and indiscriminate use of the term, "right," what clue do we find, in ordinary legal discourse, toward limiting the word in question to a definite and appropriate meaning. That clue lies in the correlative "duty," for it is certain that even those who use the word and the conception "right" in the broadest possible way are accustomed to thinking of "duty" as the invariable correlative. . . .

In other words, if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place. If, as seems desirable, we should seek a synonym for the term "right" in this limited and proper meaning, perhaps the word "claim" would prove the best. . . .

As indicated in the above scheme of jural relations, a privilege is the opposite of a duty, and the correlative of a "no-right." In the example last put, whereas X has a *right* or ***claim*** that Y, the other man, should stay off the land, he himself has the *privilege* of entering on the land; or, in equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off. As indicated by this case, some caution is necessary at this point, for, always, when it is said that a given privilege is the mere negation of a *duty,* what is meant, of course, is a duty having a content or tenor precisely *opposite* to that of the privilege in question. Thus, if, for some special reason, X has contracted with Y to go on the former's own land, it is obvious that X has, as regards Y, both the privilege of entering and the *duty of entering.* The privilege is perfectly consistent with this sort of duty,—for the latter is of the *same* content or tenor as the privilege;—but it still holds good that, as regards Y, X's privilege of entering is the precise negation of a duty *to stay off.* . . .

Passing now to the question of "correlatives," it will be remembered, of course, that a duty is the invariable correlative of that legal relation which is most properly called a right or claim. That being so, if further evidence be needed-as to the fundamental and important difference between a right (or claim) and a privilege, surely it is found in the fact that the correlative of the latter relation is a "no-right," there being no single term available to express the latter conception. Thus, the correlative of X's right that Y shall not enter on the land is Y's duty not to enter; but the correlative of X's privilege of entering himself is manifestly Y's "no-right" that X shall not enter. . . .

The nearest synonym [for power] for any ordinary case seems to be (legal) "ability,"--the latter being obviously the opposite of "inability," or "disability." . . .

Many examples of legal powers may readily be given. Thus, X, the owner of ordinary personal property "in a tangible object" has the power to extinguish his own legal interest (rights, powers, immunities, etc.) through that totality of operative facts known as abandonment; and—simultaneously and correlatively—to create in other persons privileges and powers relating to the abandoned object—e, *g.,* the power—to acquire title to the later by appropriating it. *Similarly,* X has the power to transfer his interest to Y,-that is, to extinguish his own interest and concomitantly create in Y a new and corresponding interest. . . . The creation of an agency relation involves, *inter alia,* the grant of legal powers to the so-called agent, and the creation of correlative

liabilities in the principal. That is to say, one party P has the power to create agency powers in another party A,—for example, . . . the power to impose (so-called) contractual obligations on P, the power to discharge a debt, owing to P, the power to "receive" title to property so that it shall vest in P,and so forth. . . .

Perhaps it will also be plain, from the preliminary outline and from the discussion down to this point, that a power bears the same general contrast to an immunity that a right does to a privilege. A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative "control" over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or "control" of another as regards some legal relation.

A few examples may serve to make this clear. X, a landowner, has, as we have seen, power to alienate to Y or to any other ordinary party. On the other hand, X has also various immunities as against Y, and all other ordinary parties. For Y is under a disability *(i. e.,* has no power) so far as shifting the legal interest either to himself or to a third party is concerned . . . .

Wesley Newcomb Hohfeld, ***Fundamental Legal Conceptions as Applied in Judicial Reasoning***

26 YALE L. J. 710, 713-745 (1917)

The phrases *in personam* and *in rem*, in spite of the scope and variety of situations to which they are commonly applied, are more usually assumed by lawyers, judges, and authors to be of unvarying meaning and free of ambiguities calculated to mislead the unwary. The exact opposite is, however, true; and this has occasionally been explicitly emphasized by able judges whose warnings are worthy of notice….

A … right *in personam* … is either a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is one of a *few* fundamentally similar, yet separate, rights availing respectively against a few definite persons. A … right *in rem* … is always *one* of a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person (or single group of persons) but availing respectively against persons constituting a very large and indefinite class of people.

Probably all would agree substantially on the meaning and significance of a right *in personam*, as just explained; and it is easy to give a few preliminary examples: If B owes A a thousand dollars, A has an *affirmative* right *in personam*, … that B shall transfer to A the legal ownership of that amount of money. If, to put a contrasting situation, A already has title to one thousand dollars, his rights against others in relation thereto are … rights *in rem*. In the one case the money is *owed* to A; in the other case it is *owned* by A. If Y has contracted to work for X during the ensuing six months, X has an *affirmative* right *in personam* that Y shall render such service, as agreed. Similarly as regards all other contractual or quasi-contractual rights of this character….

In contrast to these examples are those relating to rights, or claims, *in rem*…. If A owns and occupies Whiteacre,[1] not only B but also a great many other persons—not necessarily all persons—are under a duty, e.g., not to enter on A's land. A's right against B is a … right *in rem*, for it is simply one of A's class of *similar*, though separate, rights, actual and potential, against *very many* persons. The same points apply as regards A's right that B shall not commit a battery on him, A's right that B shall not alienate the affections of A's wife, and A's right that B shall not manufacture a certain article as to which A has a so-called patent….

…[I]t seems necessary to show very concretely and definitely how, because of the unfortunate terminology involved, the expression "right *in rem*" is all too frequently misconceived, and meanings attributed to it that could not fail to blur and befog legal thought and argument. Some of these loose and misleading usages will now be considered in detail, it being hoped that the more learned reader will remember that this discussion, being intended for the assistance of law school students more than for any other class of persons, is made more detailed and elementary than would otherwise be necessary.

(a) *A right in rem is not a right "against a thing":* … Any person, be he student or lawyer, unless he has contemplated the matter analytically and assiduously, or has been put

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[1] [The study of property law was, for much of its history, mainly the study of land. As such, many teachers' and judges' hypotheticals required the identification of some fictional parcel of land. By tradition, these parcels take the name "Whiteacre," "Blackacre," "Greenacre," and so on.—*eds.*]

on notice by books or other means, is likely, first, to translate right *in personam* as a right *against a person*; and then he is almost sure to interpret right *in rem*, naturally and symmetrically as he thinks, as a right *against a thing*. … Such a notion of rights *in rem* is, as already intimated, crude and fallacious; and it can but serve as a stumbling-block to clear thinking and exact expression. A man may indeed sustain close and beneficial *physical* relations to a given *physical thing:* he may *physically* control and use such thing, and he may *physically* exclude others from any similar control or enjoyment. But, obviously, such purely *physical* relations could as well exist quite apart from, or occasionally in spite of, the law of organized society: physical relations are wholly distinct from jural relations. The latter take significance from the law; and, since the purpose of the law is to regulate the conduct of human beings, all jural relations must, in order to be clear and direct in their meaning, be predicated of such human beings.…

What is here insisted on, —i.e., that all rights *in rem* are against persons, —is not to be regarded merely as a matter of taste or preference for one out of several equally possible forms of statement or definition. Logical consistency seems to demand such a conception, and nothing less than that. Some concrete examples may serve to make this plain. Suppose that A is the owner of Blackacre and X is the owner of Whiteacre. Let it be assumed, further, that, in consideration of $100 *actually paid* by A to B, the latter agrees with A never to enter on X's land, Whiteacre. It is clear that A's right against B concerning Whiteacre is a right *in personam*…; for A has no similar and separate rights concerning Whiteacre availing respectively against other persons in general. On the other hand, A's right against B concerning Blackacre is obviously a right *in rem*…; for it is but one of a very large number of fundamentally similar (though separate) rights which A has respectively against B., C, D, E, F, and a great many other persons. It must now be evident, also, that A's Blackacre right against B is, *intrinsically considered*, of the same general character as A's Whiteacre right against B. The Blackacre right differs, so to say, only *extrinsically*, that is, in having many fundamentally similar, though distinct, rights as its "companions." So, in general, we might say that a right *in personam* is one having few, if any, "companions"; whereas a right *in rem* always has many such "companions."

If, then, the Whiteacre right, being a right *in personam*, is recognized as a right against a *person*, must not the Blackacre right also, being, point for point, intrinsically of the

same general nature, be conceded to be a right against a *person?* If not that, what is it? How can it be apprehended, or described, or delimited at all? …

(b) *A … right in rem is not always one relating to a thing, i.e., a tangible object:* …[A] right *in rem* is not necessarily one *relating to*, or *concerning*, a thing, i.e., a tangible object. … The term right *in rem* … is so generic in its denotation as to include: 1. …[R]ights, or claims, relating to a definite *tangible object*: e.g., a landowner's right that any ordinary person shall not enter on his land, or a chattel owner's right that any ordinary person shall not physically harm the object involved, —be it horse, watch, book, etc. 2. …[R]ights (or claims) relating neither to definite tangible object nor to (tangible) person, e. g., a patentee's right, or claim, that any ordinary person shall not manufacture articles covered by the patent; 3. …[R]ights, or claims, relating to the holder's *own person*, e. g., his right that any ordinary person shall not strike him, or that any ordinary person shall not restrain his physical liberty, i.e., "falsely imprison" him; 4. …[R]ights residing in a given person and relating to *another* person, e. g., the right of a father that his daughter shall not be seduced, or the right of a husband that harm shall not be inflicted on his wife so as to deprive him of her company and assistance; 5. ..[R]ights, or claims, not relating directly to either a (tangible) person or a tangible object, e. g., a person's right that another shall not publish a libel of him, or a person's right that another shall not publish his picture, the so-called "right of privacy" existing in some states, but not in all.

It is thus seen that some rights *in rem*…relate fairly directly to *physical objects*; some fairly directly to *persons*; and some fairly directly *neither to tangible objects nor to persons*….

Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?* [2]

111 YALE L. J. 357, 357-365 (2001)

It is a commonplace of academic discourse that property is simply a "bundle of rights," and that any distribution of rights and privileges among persons with respect to things can be dignified with the (almost meaningless) label "'property.'" By and large, this view has become conventional wisdom among legal scholars: Property is a

[2] Reproduced by permission of Henry E. Smith.

composite of legal relations that holds between persons and only secondarily or incidentally involves a "thing." Someone who believes that property is a right to a thing is assumed to suffer from a childlike lack of sophistication—or worse.

… In other times and places, a very different conception of property has prevailed. In this alternative conception, property is a distinctive type of right to a thing, good against the world. This understanding of the in rem character of the right of property is a dominant theme of the civil law's "law of things." For Anglo-American lawyers and legal economists, however, such talk of a special category of rights related to things presumably illustrates the grip of conceptualism on the civilian mind and a slavish devotion to the gods of Roman law.

Or does it? In related work, we have argued that, far from being a quaint aspect of the Roman or feudal past, the in rem character of property and its consequences are vital to an understanding of property as a legal and economic institution.[7] Because core property rights attach to persons only through the intermediary of some thing, they have an impersonality and generality that is absent from rights and privileges that attach to persons directly. When we encounter a thing that is marked in the conventional manner as being owned, we know that we are subject to certain negative duties of abstention with respect to that thing-not to enter upon it, not to use it, not to take it, etc. And we know all this without having any idea who the owner of the thing actually is. In effect, these universal duties are broadcast to the world from the thing itself….

Property rights historically have been regarded as in rem. In other words, property rights attach to persons insofar as they have a particular relationship to some thing and confer on those persons the right to exclude a large and indefinite class of other persons ("the world") from the thing. In this sense, property rights are different from in personam rights, such as those created by contracts or by judicial judgments. In personam rights attach to persons as persons and obtain against one or a small

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[7] Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000)…; Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001)….

number of other identified persons. A number of historically significant property theorists have recognized the in rem nature of property rights and have perceived that this feature is key because it establishes a base of security against a wide range of interferences by others….

… Blackstone perceived that property rights are important because they establish a basis of security of expectation regarding the future use and enjoyment of particular resources. By establishing a right to resources that holds against all the world, property provides a guarantee that persons will be able to reap what they have sown…. In other words, property is important because it gives legal sanction to the efforts of the owner of a thing to exclude an indefinite and anonymous class of marauders, pilferers, and thieves, thereby encouraging development of the thing.

… In contrast, the role of property emphasized in modem economic discussions—providing a baseline for contractual exchange and a mechanism for resolving disputes over conflicting uses of resources—was at most of secondary importance in these traditional accounts. … Early in the twentieth century, Wesley Hohfeld provided an account of legal relations that proved to be especially influential in transforming the underlying assumptions about property rights in Anglo-American scholarship. … Hohfeld noted … that in personam rights are unique rights residing in a person and availing against one or a few definite persons; in rem rights, in contrast, reside in a person and avail against "persons constituting a very large and indefinite class of people."

Significantly, however, Hohfeld failed to perceive that in rem property rights are qualitatively different in that they attach to persons insofar as they have a certain relationship to some thing. Rather, Hohfeld suggested that in personam and in rem rights consist of exactly the same types of rights, privileges, duties, and so forth, and differ only in the indefiniteness and the number of the persons who are bound by these relations. To use a modern expression, Hohfeld thought that in rem relations could be "cashed out" into the same clusters of rights, duties, privileges, liabilities, etc., as are constitutive of in personam relations.

Hohfeld did not use the metaphor "bundle of rights" to describe property. But his theory of jural opposites and correlatives, together with his effort to reduce in rem rights to clusters of in personam rights, provided the intellectual justification for this

metaphor, which became popular among the legal realists in the 1920s and 1930s. Different writers influenced by realism took the metaphor to different extremes. For some, the bundle-of-rights concept simply meant that property could be reduced to recognizable collections of functional attributes, such as the right to exclude, to use, to transfer, or to inherit particular resources. For others, property had no inherent meaning at all. As one pair of writers put it, the concept of property is nothing more than "a euphonious collocation of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth."[36]

Notwithstanding these variations, the motivation behind the realists' fascination with the bundle-of-rights conception was mainly political. They sought to undermine the notion that property is a natural right, and thereby smooth the way for activist state intervention in regulating and redistributing property. If property has no fixed core of meaning, but is just a variable collection of interests established by social convention, then there is no good reason why the state should not freely expand or, better yet, contract the list of interests in the name of the general welfare. The realist program of dethroning property was on the whole quite successful. The conception of property as an infinitely variable collection of rights, powers, and duties has today become a kind of orthodoxy. Not coincidentally, state intervention in economic matters greatly increased in the middle decades of the twentieth century, and the constitutional rights of property owners generally receded.

Henry E. Smith, *Property as the Law of Things*[3]

125 HARV. L. REV. 1691, 1696-98, 1700-08 (2012)

As an analytical device, the bundle picture can be very useful. It provides a highly accurate description of who can do what to whom in a legal (and perhaps nonlegal) sense. It provides an interesting theoretical baseline: how would one describe the relation of a property owner to various others if one were writing on a blank slate and doing the description in a fully bottom-up manner, relation by relation, party by

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[36] Walton H. Hamilton & Irene Till, *Property*, *in* 12 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 528, 528 (Edwin R.A. Seligman ed., 1934).

[3] Reproduced by permission of Henry E. Smith.

party? In this, the Hohfeldian world is a little like the Coasean world of zero transaction costs—a useful theoretical construct.

The resemblance is no accident. Like the zero-transaction-cost world, no property system ever has or will build up legal relations smallest piece by smallest piece. Interestingly, in a zero-transaction cost world, one could do just that, and any benefit to be secured by parsing out relations in a fine-grained manner could be obtained at zero cost. That is not our world.

The problem with the bundle of rights is that it is treated as a theory of how our world works rather than as an analytical device or as a theoretical baseline. In the realist era, the benefits of tinkering with property were expressed in bundle terms without a corresponding theory of the costs of that tinkering. Indeed, in the most tendentious versions of the picture, the traditional baselines of the law were mocked, and the idea was to dethrone them in order to remove them as barriers to enlightened social engineering. In this version of the bundle picture, Hohfeldian sticks and potentially others are posited to describe the relations holding between persons; the fact that the relations hold with respect to a thing is relatively unimportant or, in some versions, of no importance. "Property" is simply a conclusory label we might attach to the collection. In its classic formulation, the bundle picture puts no particular constraints on the contents of bundles: they are totally malleable and should respond to policy concerns in a fairly direct fashion. These policy-motivated adjustments usually involve adding or subtracting sticks and reallocating them among concerned parties or to society. This version of the bundle explains everything and so explains nothing.

. . . In recent times, various commentators have argued that property is not fully captured by the bundle picture. Going beyond the bundle usually involves emphasizing exclusion or some robust notion of the right to use. It can be motivated by analytical jurisprudence, natural rights, or information cost economics. The bundle theory can incorporate some of these perspectives. Consider, for example, the recent resurgence of interest in the *numerus clausus;* this principle that property forms come in a finite and closed menu can be added onto the bundle theory as a "menu" of collections of sticks. Bundle theorists can accommodate this development. But they are being reactive in this regard. . . .

In this Article, I present a theory that aims higher. At the most basic level, the extreme bundle picture takes too little account of the costs of delineating rights. . . .

. . . Here, I present an alternative to the bundle picture that I call an *architectural* or *modular* theory of property. This theory responds to information costs—it conceives of property as a law of modular "things." . . .

Because it makes sense in modern property systems to delegate to owners a choice from a range of uses and because protection allows for stability, appropriability, facilitation of planning and investment, liberty, and autonomy, we typically start with an *exclusion* strategy—and that goes not just for private property but for common and public property as well. "Use" can include nonconsumptive uses relating to conservation. The exclusion strategy defines a chunk of the world—a thing—under the owner's control, and much of the information about the thing's uses, their interactions, and the user is irrelevant to the outside world. Duty bearers know not to enter Blackacre without permission or not to take cars, without needing to know what the owner is using the thing for, who the owner is, who else might have rights and other interests, and so on. But dividing the world into chunks is not enough: spillovers and scale problems call for more specific rules to deal with problems like odors and lateral support, and to facilitate coordination (for example, covenants, common interest communities, and trusts). These *governance* strategies focus more closely on narrower classes of use and sometimes make more specific reference to their purposes, and so they are more contextual.

The exclusion-governance architecture manages complexity in a way totally uncaptured by the bundle picture, and importantly, the former is modular while the latter is not. The exclusion strategy defines what a thing is to begin with. A fundamental question is how to classify "things," and, hence, which aspects of "things" are the most basic units of property law. Many important features of property follow from the semitransparent boundaries between things. Boundaries carve up the world into semiautonomous components—modules—that permit private law to manage highly complex interactions among private parties. . . .

The modular theory explains property's structure, which includes providing some reason why those structures are not otherwise. In a zero-transaction-cost world, we could use all governance all the time, whether supplied by government or through

super fine-grained contracting among all the concerned parties. That is not our world, and the main point of exclusion as a delineation strategy is that it is a *shortcut* over direct delineation of this more "complete" set of legal relations. Analytically, it might be interesting to think of property as a list of use rights availing pairwise between all people in society, but actually creating such a list would be a potentially intractable problem in our world. On the other hand, exclusion is not the whole story either. Causes of action like trespass implement a right to exclude, but the right to exclude is not *why* we have property. Rather, the right to exclude is part of *how* property works. Rights to exclude are a means to an end, and the ends in property relate to people's interests in using things.

. . . Exclusion is at the core of this architecture because it is a default, a convenient starting point. Exclusion is not the most important or "core" value because it is *not a value at all*. Thinking that exclusion is a value usually reflects the confusion of means and ends in property law: exclusion is a rough first cut—and only that—at serving the purposes of property. It is true that exclusion piggybacks on the everyday morality of "thou shalt not steal," whereas governance reflects a more refined Golden-Rule, "do unto others" type of morality in more personal contexts. It may be the case that our morality itself is shaped to a certain extent by the ease with which it can be communicated and enforced in more impersonal settings. I leave that question for another day. But the point here is that the exclusion-governance architecture is compatible with a wide range of purposes for property. Some societies will move from exclusion to governance—that is, some systems of laws and norms will focus more on individuated uses of resources—more readily than others, and will do so for different reasons than others.

At the base of the architectural approach is a distinction that the bundle theory—along with other theories—tends to obscure: the distinction between the interests we have in using things and the devices the law uses to protect those interests. Property serves purposes related to use by employing a variety of delineation strategies. Because delineation costs are greater than zero, which strategy one uses and when one uses it will be dictated in part by the costs of delineation—not just by the benefits that correspond to the use-based purposes of property. . . .

The traditional definition of property is a right to a thing good against the world—it is an in rem right. The special in rem character of property forms the basis of an information-cost explanation of the *numerus clausus* and standardization in property. In rem rights are directed at a wide and indefinite audience of duty holders and other affected parties, who would incur high information costs in dealing with idiosyncratic property rights and would have to process more types of information than they would in the absence of the *numerus clausus*. Crucially, parties who might create such idiosyncratic property rights are not guaranteed to take such third-party processing costs into account. There is thus an information-cost externality, and the *numerus clausus* is one tool for addressing this externality. Other devices include title records and technological changes in communication. . . .

Modularity plays a key role in making the standardization of property possible. First, modularity makes it possible to keep interconnections between packages of rights relatively few, thus allowing much of what goes on inside a package of property rights to be irrelevant to the outside world. Second, property rights "mesh" with neighboring property rights and show network effects with more far-flung property rights. The outside interfaces make this possible at reasonable cost. Third, the processes of property are simple enough that they *can feed into themselves*. Many modular structures are hierarchical in that they have modules composed of other modules. . . . In this respect, property forms are like a basic grammar or "pattern language" of property.

Notes and Questions

1. Note that Hohfeld's decomposition of *in rem* rights into a collection of *in personam* rights could provide a new interpretation of the "bundle of rights" metaphor. Rather than being a collection of different rights held by one person with respect to a thing (the right to exclude, possess, alienate, etc.), perhaps the "bundle" really is a reference to the various rights an owner has against the "large and indefinite class of people" with whom she might come into conflict with respect to the *res*. Does this distinction matter? Which sense of the metaphor do you think is being used in *Jacque*? Which do you think is being used by Merrill and Smith?

2. Recall the questions in Notes 1 and 2 on page 31 (following *Jacque*). They may lead us to another way of framing the distinction between the two interpretations of the "bundle" metaphor. Consider this: if I ask you: "Does A have a property right in Whiteacre," how confident are you that you will be able to answer the question without knowing the answer to a different question: "A right against whom?"

3. Are you persuaded by Merrill's and Smith's critique of Hohfeld? Is their model of *in rem* rights compatible with Hohfeld's analysis, or are the two necessarily inconsistent with each other?

4. Consider the following two propositions:

   - "Property" is a relationship between a person and a thing.
   - "Property" is a set of rights and obligations among people with respect to things.

   Do you think either of these propositions adequately describes what we mean by the word "property"? Do you think these two propositions are meaningfully different from one another? If so, what is the difference? Do you think the difference might have an effect on the outcome of legal disputes? If so, what effect? And if not, does the difference matter?

5. Are you persuaded by Merrill's and Smith's claim that treating property as an *in rem* right makes it more resistant to interference and degradation by the state? What feature(s) of their *in rem* conception might give rise to this resistance? If rejection of the *in rem* conception and weakening of private property rights have in fact gone hand in hand, which account do you find more plausible: that lawyers' and scholars' rejection of the *in rem* conception of property facilitated increased state interference with property rights, or that state interference with property rights rendered the *in rem* conception untenable? Put another way, do you understand Merrill and Smith to be making an argument about what property *is* (or *was*), or about what it *should be*? If the latter, do you agree? Why or why not?

6. Hohfeld observes that, when it comes to property rights, "thing" doesn't necessarily mean "tangible thing in the physical world." Indeed, legal authorities identify property rights in all sorts of intangible things, as well as in admittedly physical substances that resist the label of "thing"—like animals, or even human beings. We will discuss this complication of the notion of property as a legal right in "things" in our unit on the Subject Matter of Property.

B. Rights of Ownership

The United States Supreme Court has noted that the right to exclude is "universally held to be a fundamental element of the property right," *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979), and "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard,* 512 U.S. 374, 384 (1994). But property owners typically enjoy a number of additional rights, which is one source of the "bundle of rights" metaphor referred to in *Dolan*. Among these are:

- The right of **possession** (sometimes called a "possessory" right);
- The right of **use** (sometimes called a "usufructary" right);
- The power of **alienation**—i.e., the right to or transfer ownership to someone else—which can be further decomposed into
    - The power to make a gratuitous transfer, *i.e.*, a **gift** (sometimes called a "donative" right)
    - The power to transfer in exchange for valuable consideration (sometimes called the right to "**sell**" or "vend," or the right of "market-alienation")
    - The power to dispose of property owned during life after death **by will** (sometimes called the "**testamentary**" right, or the right to "devise")

As with the right to exclude, each of these rights may be limited, particularly when they have the potential to conflict with competing rights or interests.

We will study the law's protection of possession (and the limits of that protection) in our units on Allocation, Found and Stolen Property, and Adverse Possession. We will make an extensive study of the right to alienate in our units on Gifts, Estates and Future Interests, Co-Ownership, and Land Conveyancing. And we will return to limits on the right of use, and in particular the *sic utere tuo* principle, in our chapter on Nuisance. But for now let us consider one example of how these other rights of ownership may be ambiguous, and subjected to limits in the face of competing interests:

Eyerman v. Mercantile Trust Co.
524 S.W.2d 210 (Mo. Ct. App. 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.

The area involved is a "private place" established in 1902 by trust indenture which provides that Kingsbury Place and Kingsbury Terrace will be so maintained, improved, protected and managed as to be desirable for private residences. The trustees are empowered to protect and preserve "Kingsbury Place" from encroachment, trespass, nuisance or injury, and it is "the intention of these presents, forming a general scheme of improving and maintaining said property as desirable residence property of the highest class." The covenants run with the land and the indenture empowers lot owners or the trustees to bring suit to enforce them.

Except for one vacant lot, the subdivision is occupied by handsome, spacious two and three-story homes, and all must be used exclusively as private residences. The indenture generally regulates location, costs and similar features for any structures in the subdivision, and limits construction of subsidiary structures except those that may beautify the property, for example, private stables, flower houses, conservatories, play houses or buildings of similar character.

On trial the temporary restraining order was dissolved and all issues found against the plaintiffs.

…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 $39,350.33 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.

…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." Further, this power of the state is one of inherent sovereignty which allows the state to "say what becomes of the property of a person, when death forecloses his right to control it." *McClintock v. Guinotte*, *supra* at 808, 809. 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.

In the early English case of *Egerton v. Brownlow*, 10 Eng.Rep. 359, 417 (H.L.C. it is stated: "The owner of an estate may himself do many things which he could not (by a condition) compel his successor to do. One example is sufficient. He may leave his

land uncultivated, but he cannot by a condition compel his successor to do so. The law does not interfere with the owner and compel him to cultivate his land, (though it may be for the public good that land should be cultivated) so far the law respects ownership; but when, by a condition, he attempts to compel his successor to do what is against the public good, the law steps in and pronounces the condition void and allows the devisee to enjoy the estate free from the condition."…

[The Restatement, Second, of Trusts, Section 124, states:] "Although a person may deal capriciously with his own property, his self interest ordinarily will restrain him from doing so. Where an attempt is made to confer such a power upon a person who is given no other interest in the property, there is no such restraint and it is against public policy to allow him to exercise the power if the purpose is merely capricious." The text is followed by this illustration: "A bequeaths $1,000.00 to B in trust to throw the money into the sea. B holds the money upon a resulting trust for the estate of A and is liable to the estate of A if he throws the money into the sea." … It is important to note that the purposes of [Mrs. Johnston's] trust will not be defeated by injunction; instead, the proceeds from the sale of the property will pass into the residual estate and thence to the trust estate as intended, and only the capricious destructive condition will be enjoined.

In *Colonial Trust Co. v. Brown et al.*, 105 Conn. 261, 135 A. 555 (1926) the court invalidated, as against public policy, the provisions of a will restricting erection of buildings more than three stories in height and forbidding leases of more than one year on property known as "The Exchange Place" in the heart of the City of Waterbury. The court stated:

> "As a general rule, a testator has the right to impose such conditions as he pleases upon a beneficiary as conditions precedent to the vesting of an estate in him, or to the enjoyment of a trust estate by him as cestui que trust. He may not, however, impose one that is uncertain, unlawful or opposed to public policy." [*Colonial Trust Co.*, 135 A. at 564.]

…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); *Brawner v. Brawner*, 327 S.W.2d 808, 812 (Mo. banc 1959).

Public policy may be found in the Constitution, statutes and judicial decisions of this state or the nation. 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). In the absence of guidance from authorities in its own jurisdiction, courts may look to the judicial decisions of sister states for assistance in discovering expressions of public policy.

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.

Having thus decided, we do not reach the plaintiffs' contentions regarding enforcement of the restrictions in the Kingsbury Place trust indenture and actionable private nuisance, though these contentions may have merit.[5] …

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[5] The dissenting opinion suggests this case be decided under the general rule that an owner has exclusive control and the right to untrammeled use of real property. Although Maxims of this sort are attractive in their simplicity, standing alone they seldom suffice in a complex case. None of the cited cases pertains t[o] the qualified right of testatrix to impose, post mortem, a condition upon her executor requiring an unexplained destruction of estate property…. Each acknowledges the principle of an owner's 'free use' as the starting point but all recognize competing interests of the community and other owners of great importance. Accordingly, the

DOWD, P.J., concurs.

CLEMENS, Judge (dissenting).
I dissent.
…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 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 court has resorted to public policy in order to vitiate Mrs. Johnston's valid testamentary direction. But this is not a proper case for court-defined public policy.

…The leading Missouri case on public policy as that doctrine applies to a testator's right to dispose of property is *In re Rahn's Estate*, 316 Mo. 492, 291 S.W. 120 [1, 2] (banc 1927), cert. den. 274 U.S. 745, 47 S.Ct. 591, 71 L.Ed. 1325. There, an executor refused to pay a bequest on the ground the beneficiary was an enemy alien, and the bequest was therefore against public policy. The court denied that contention: "We may say, at the outset, that the policy of the law favors freedom in the testamentary disposition of property and that it is the duty of the courts to give effect to the intention of the testator, as expressed in his will, provided such intention does not contravene an established rule of law." And the court wisely added, "it is not the function of the judiciary to create or announce a public policy of its own, but solely to determine and declare what is the public policy of the state or nation as such policy is found to be expressed in the Constitution, statutes, and judicial decisions of the state or nation, . . . not by the varying opinions of laymen, lawyers, or judges as to the demands or the interests of the public." And, in cautioning against judges declaring public policy the court stated: "Judicial tribunals hold themselves bound to the

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general principle of 'free and untrammeled' use is markedly narrowed, supporting in each case a result opposite that urged by the dissent in the case at bar.

observance of rules of extreme caution when invoked to declare a transaction void on grounds of public policy, and prejudice to the public interest must clearly appear before the court would be warranted in pronouncing a transaction void on this account." In resting its decision on public-policy grounds, the majority opinion has transgressed the limitations declared by our Supreme Court in *Rahn's Estate*.

…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. *Mississippi Valley Trust Co. v. Ruhland*, 359 Mo. 616, 222 S.W.2d 750(2) (1949). 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. Plaintiffs have not shown that such impairment will arise from the mere presence of another vacant lot on Kingsbury Place….

Notes and Questions

1. What right of ownership is at issue in *Eyerman*? Is it a right of use? Of alienation? Of testation? A distinct right to destroy? If the latter, is such a right among the rights of property owners?

2. Could we understand Mrs. Johnston's instruction to raze her house to the ground as an exercise of the right to exclude, extended in time to after her death? Is this a useful way to think about her instruction? Either way, should we allow owners to continue to control resources *forever*—even long after their deaths—if they so choose? (We will revisit this concern in our unit on Estates and Future Interests).

3. If Mrs. Johnston had attempted to raze her house to the ground during her lifetime, could anyone legally prevent her from doing so? If not, why can she be prevented from ordering the destruction of her house by will?

C. The Right to Exclude

Jacque v. Steenburg Homes, Inc.

563 N.W.2d 154 (Wis. 1997)

WILLIAM A. BABLITCH, Justice.

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 … 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. … On the morning of delivery, … 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. …

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 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. … Mr. Jacque 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.

The Jacques commenced an intentional tort action in Manitowoc County Circuit Court, Judge Allan J. Deehr presiding, seeking compensatory and punitive damages from Steenberg. …[Q]uestions of punitive and compensatory damages were submitted to the jury. The jury awarded the Jacques $1 nominal damages and $100,000 punitive damages. Steenberg filed post-verdict motions claiming that the

punitive damage award must be set aside because Wisconsin law did not allow a punitive damage award unless the jury also awarded compensatory damages. Alternatively, Steenberg asked the circuit court to remit the punitive damage award. The circuit court granted Steenberg's motion to set aside the award. Consequently, it did not reach Steenberg's motion for remittitur….

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 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. … 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….

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 property." *Dolan v. City of Tigard,* 512 U.S. 374, 384, 114 S.Ct. 2309, 2316, 129 L.Ed.2d 304 (1994). 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) (holding that the victim of an intentional trespass should have been allowed to take judgment for nominal damages and costs). 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….

The nature of the nominal damage award in an intentional trespass to land case further supports an exception to [the compensatory damage requirement]. Because a legal right is involved, the law recognizes that actual harm occurs in every trespass. The action for intentional trespass to land is directed at vindication of the legal right. … 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 [the compensatory damage requirement]. 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.

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. … [O]ne 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. … 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 [$30] forfeiture, is not more profitable than obeying the law? Steenberg Homes plowed a path across the Jacques' land and dragged the mobile home across that path, in the face of the Jacques' adamant refusal. A $30 forfeiture and a $1 nominal damage award are unlikely to restrain Steenberg Homes from similar conduct in the future. An appropriate punitive damage award probably will.

In sum, as the court of appeals noted, the [compensatory damage] 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 … 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. Intentional trespass to land causes actual harm to the individual, regardless of whether that harm can be measured in mere dollars. Consequently, the [compensatory damage] rationale will not support a refusal to allow punitive damages when the tort involved is an intentional trespass to 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. … Accordingly, we reverse and remand to the circuit court for reinstatement of the punitive damage award.

Reversed and remanded with directions.

Notes and Questions

1. Would (or should) the result in *Jacque* have been different if, instead of a mobile home seller making a scheduled delivery to a customer, the defendant had been an ambulance company responding to a call of a suspected heart attack? Of a broken leg? What if the snow-covered private road had instead been a recently collapsed bridge? What if Steenberg had tried to take the road despite the risks, and the truck had accidentally tipped and fallen onto the Jacques' land?

2. Would (or should) the result in *Jacque* have been different if, instead of steadfastly refusing to permit Steenberg's delivery truck to cross their land, the Jacques had demanded a large sum of money as a condition of permitting the crossing, which Steenberg refused to pay? Would the ultimate monetary award have been different? If so, what incentive does this case give property owners facing requests from third parties for the use of their otherwise idle resources? Would Steenberg have been better off not asking permission in the first place?

3. Blackstone's description of "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" is one of the most famous—and quotable—definitions of property ever written in English. But is also widely acknowledged to be hyperbolic to the point of falsity. Can you see why? What aspects of Blackstone's own discussion of the "absolute right" of property are inconsistent with the "total exclusion of the right of any other individual in the universe"?

4. Would we really want our system of property to give private owners such "sole and despotic dominion…over the external things of the world"? The kind of dominion exercised by the Jacques? No matter what? Consider this:

what kinds of problems could a motivated and unscrupulous property owner armed with such awesome power cause?

Marsh v. State of Alabama

326 U.S. 501 (1946)

Mr. Justice BLACK delivered the opinion of the Court.

In this case we are asked to decide whether a State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management. The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. Except for that it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

Appellant, a Jehovah's Witness, came onto the sidewalk we have just described, stood near the post-office and undertook to distribute religious literature. In the stores the corporation had posted a notice which read as follows: 'This Is Private Property, and

Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted.' Appellant was warned that she could not distribute the literature without a permit and told that no permit would be issued to her. She protested that the company rule could not be constitutionally applied so as to prohibit her from distributing religious writings. When she was asked to leave the sidewalk and Chickasaw she declined. The deputy sheriff arrested her and she was charged in the state court with violating Title 14, Section 426 of the 1940 Alabama Code which makes it a crime to enter or remain on the premises of another after having been warned not to do so. Appellant contended that to construe the state statute as applicable to her activities would abridge her right to freedom of press and religion contrary to the First and Fourteenth Amendments to the Constitution. This contention was rejected and she was convicted. The Alabama Court of Appeals affirmed the conviction, holding that the statute as applied was constitutional because the title to the sidewalk was in the corporation and because the public use of the sidewalk had not been such as to give rise to a presumption under Alabama law of its irrevocable dedication to the public. The State Supreme Court denied certiorari, and the case is here on appeal….

Had the title to Chickasaw belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company-town it would have been clear that appellant's conviction must be reversed. …[N]either a state nor a municipality can completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks and public places or make the right to distribute dependent on a flat license tax or permit to be issued by an official who could deny it at will. We have also held that an ordinance completely prohibiting the dissemination of ideas on the city streets can not be justified on the ground that the municipality holds legal title to them. And we have recognized that the preservation of a free society is so far dependent upon the right of each individual citizen to receive such literature as he himself might desire that a municipality could not without jeopardizing that vital individual freedom, prohibit door to door distribution of literature. From these decisions it is clear that had the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners together could not have set up a municipal government with sufficient power to pass an ordinance completely barring the distribution of religious literature. Our

question then narrows down to this: Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town? For it is the state's contention that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, enforceable by a state statute, to abridge these freedoms.

We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We can not accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation….

Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.

Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason

for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government by free men" and we must in all cases "weigh the circumstances and appraise * * * the reasons * * * in support of the regulation of (those) rights." Schneider v. State, 308 U.S. 147, 161, 60 S. Ct. 146, 151, 84 L.Ed. 155. In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute. Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand. The case is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

[Concurring opinion of Justice FRANKFURTER omitted.]

Mr. Justice REED, dissenting.

Former decisions of this Court have interpreted generously the Constitutional rights of people in this Land to exercise freedom of religion, of speech and of the press. It has never been held and is not now by this opinion of the Court that these rights are absolute and unlimited either in respect to the manner or the place of their exercise. What the present decision establishes as a principle is that one may remain on private property against the will of the owner and contrary to the law of the state so long as the only objection to his presence is that he is exercising an asserted right to spread there his religious views. This is the first case to extend by law the privilege of religious exercises beyond public places or to private places without the assent of the owner.

As the rule now announced permits this intrusion, without possibility of protection of the property by law, and apparently is equally applicable to the freedom of speech and the press, it seems appropriate to express a dissent to this, to us, novel Constitutional doctrine. Of course, such principle may subsequently be restricted by this Court to the precise facts of this case-that is to private property in a company town where the owner for his own advantage has permitted a restricted public use by his licensees and invitees. Such distinctions are of degree and require new arbitrary lines, judicially drawn, instead of those hitherto established by legislation and precedent. While the power of this Court, as the interpreter of the Constitution to determine what use of real property by the owner makes that property subject, at will, to the reasonable practice of religious exercises by strangers, cannot be doubted, we find nothing in the principles of the First Amendment, adopted now into the Fourteenth, which justifies their application to the facts of this case.

Both Federal and Alabama law permit, so far as we are aware, company towns…. These communities may be essential to furnish proper and convenient living conditions for employees on isolated operations in lumbering, mining, production of high explosives and large-scale farming. The restrictions imposed by the owners upon the occupants are sometimes galling to the employees and may appear unreasonable to outsiders. Unless they fall under the prohibition of some legal rule, however, they are a matter for adjustment between owner and licensee, or by appropriate legislation.

Alabama has a statute generally applicable to all privately owned premises. It is Title 14, Section 426, Alabama Code 1940 which so far as pertinent reads as follows:

> "Trespass after warning. —Any person who, without legal cause or good excuse, enters into the dwelling house or on the premises of another, after having been warned, within six months preceding, not to do so; or any person, who, having entered into the dwelling house or on the premises of another without having been warned within six months not to do so, and fails or refuses, without legal cause or good excuse, to leave immediately on being ordered or requested to do so by the person in possession, his agent or representative, shall, on conviction, be fined not more than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than three months."

Appellant was distributing religious pamphlets on a privately owned passway or sidewalk thirty feet removed from a public highway of the State of Alabama and remained on these private premises after an authorized order to get off. We do not understand from the record that there was objection to appellant's use of the nearby public highway and under our decisions she could rightfully have continued her activities a few feet from the spot she insisted upon using. An owner of property may very well have been willing for the public to use the private passway for business purposes and yet have been unwilling to furnish space for street trades or a location for the practice of religious exhortations by itinerants. The passway here in question was not put to any different use than other private passways that lead to privately owned areas, amusement places, resort hotels or other businesses….

A state does have the moral duty of furnishing the opportunity for information, education and religious enlightenment to its inhabitants, including those who live in company towns, but it has not heretofore been adjudged that it must commandeer, without compensation, the private property of other citizens to carry out that obligation.… In the area which is covered by the guarantees of the First Amendment, this Court has been careful to point out that the owner of property may protect himself against the intrusion of strangers. Although in Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313, an ordinance forbidding the summonsing of the occupants of a dwelling to receive handbills was held invalid because in conflict with the freedom of speech and press, this Court pointed out … that after warning the property owner would be protected from annoyance. The very Alabama statute which is now held powerless to protect the property of the Gulf Shipbuilding Corporation, after notice, from this trespass was there cited… to show that it would protect the householder, after notice….

Our Constitution guarantees to every man the right to express his views in an orderly fashion. An essential element of "orderly" is that the man shall also have a right to use the place he chooses for his exposition. The rights of the owner, which the Constitution protects as well as the right of free speech, are not outweighed by the interests of the trespasser, even though he trespasses in behalf of religion or free speech. We cannot say that Jehovah's Witnesses can claim the privilege of a license, which has never been granted, to hold their meetings in other private places, merely because the owner has admitted the public to them for other limited purposes. Even

though we have reached the point where this Court is required to force private owners to open their property for the practice there of religious activities or propaganda distasteful to the owner, because of the public interest in freedom of speech and religion, there is no need for the application of such a doctrine here. Appellant, as we have said, was free to engage in such practices on the public highways, without becoming a trespasser on the company's property.

The CHIEF JUSTICE and Mr. Justice BURTON join in this dissent.

State of New Jersey v. Shack

58 N.J. 297, 277 A.2d 369 (1971)

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 supervsion. 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.

I.

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, 66 S.Ct. 276, 90 L.Ed. 265 (1946) [and its progeny.] Those cases rest upon the fact that the property was in fact opened to the general public. 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.…

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 a 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 migrant farmworkers come to New Jersey in substantial numbers.… 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." … As we have said, SCOPE is engaged in a program funded under this section, and CRLS also pursues the objectives of this section although, we gather, it is funded under s 2809(a)(3), which is not limited in its concern to the migrant and other seasonally employed farmworkers and seeks "to further the cause of justice among persons living in poverty by mobilizing the assistance of lawyers and legal institutions and by providing legal advice, legal representation, counseling, education, and other appropriate services."

These ends would not be gained if the intended beneficiaries could be insulated 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; 39 Words and Phrases, "Sic Utere Tuo ut Alienum Non Laedas," p. 335. 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….

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.

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 or 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.

Notes and Questions

1. Why did the property owner win in *Jacque* but lose in *Marsh* and *Shack*? Isn't the property right at issue in each of these cases the same—i.e., isn't it the right to *exclude*?

2. What types of competing principles, policies, or interests will justify a limit on the right to exclude? Who should decide when such a limit is justified, and how? Who decided in *Marsh*? In *Shack*?

3. If we decide an interest is important enough to outweigh an owner's right to exclude in one context, does that mean it should do so in all contexts? Consider the following statutes, and their effects on property owners' right to exclude:

Civil Rights Act of 1964, Title II, Section 201

Codified at 42 U.S.C. § 2000a

Prohibition against discrimination or segregation in places of public accommodation

(a) Equal access

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments

Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment.…

(e) Private establishments
The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.

Americans with Disabilities Act of 1990, Section 302-03
Codified at 42 U.S.C. § 12182-83

§ 302 — Prohibition of discrimination by public accommodations

(a) General rule
No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

§ 303 — New construction and alterations in public accommodations and commercial facilities
(a) Application of term
Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes—

(1) a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection . . .; and

(2) . . ., a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) Elevator

Subsection (a) of this section shall not be construed to require the installation of an elevator for facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a shopping center, a shopping mall, or the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

2. Subject Matter of Property

A. Introduction

In this unit we will consider the various types of things that attract the legal label "property." Let us begin with some examples to pump our intuitions. In light of our discussion of what it means to own something, which of the following things can be usefully thought of as your "property"?

- your home or apartment
- your car or bike
- your computer
- the software on your computer
- the emails stored on your computer
- the emails stored on your cloud-based email service

- your bank account
- the money in your bank account
- the money you lent to your friend that hasn't been repaid
- the money your friend lent to you that you haven't paid back
- the things you bought with the money your friend lent to you that you haven't paid back

- your pet dog
- the rats in your animal research lab
- your dairy cow
- the pig you're raising for meat

- your prescription medications
- your doctor's/pharmacist's/insurance company's records of your prescription medications

- your handwritten diary
- your unpublished novel
- your published novel
- your social media profiles and content
- your password-protected blog

Does categorizing any of these items as "property" or "not property" meaningfully assist in the analysis of any legal problems? Particularly legal disputes that arise over questions of access to or use of any of these things? Why might we choose to recognize (or refuse to recognize) these or other items as "property"?

You may notice there is something of a chicken-and-egg problem here. Is the label "property" a premise or a conclusion? Can we arrive at the label without resorting to circular reasoning? When we say something is a person's property, or that someone has a "property right," is that because we have examined the qualities and characteristics of the thing and its relation to the person, and *determined* that they are all consistent with some coherent notion of property ownership? Or is calling something "property" a mere *assertion*, unconstrained by circumstances, that we make because we want the *consequences* of the label "property" to attach to that thing for independent reasons? Is there a difference? Consider the following classic discussion of this question:

Felix Cohen, ***Transcendental Nonsense and the Functional Approach***
35 COLUM. L. REV. 809, 814-817 (1935)

There was once a theory that the law of trade marks and trade-names was an attempt to protect the consumer against the "passing off" of inferior goods under misleading labels. Increasingly the courts have departed from any such theory and have come to view this branch of law as a protection of property rights in divers economically valuable sale devices. In practice, injunctive relief is being extended today to realms where no actual danger of confusion to the consumer is present, and this extension has been vigorously supported and encouraged by leading writers in the field. Conceivably this extension might be justified by a demonstration that privately controlled sales devices serve as a psychologic base for the power of business monopolies, and that such monopolies are socially valuable in modern civilization.

But no such line of argument has ever been put forward by courts or scholars advocating increased legal protection of trade names and similar devices. For if they advanced any such argument, it might seem that they were taking sides upon controversial issues of politics and economics. Courts and scholars, therefore, have taken refuge in a vicious circle to which no obviously extra-legal facts can gain admittance. The current legal argument runs: One who by the ingenuity of his advertising or the quality of his product has induced consumer responsiveness to a particular name, symbol, form of packaging, etc., has thereby created a thing of value; a thing of value is property; the creator of property is entitled to protection against third parties who seek to deprive him of his property. This argument may be embellished, in particular cases, with animadversions upon the selfish motives of the infringing defendant, a summary of the plaintiff's evidence (naturally uncontradicted) as to the amount of money he has spent in advertising, and insinuations (seldom factually supported) as to the inferiority of the infringing defendant's product.

The vicious circle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected. If commercial exploitation of the word "Palmolive" is not restricted to a single firm, the word will be of no more economic value to any particular firm than a convenient size, shape, mode of packing, or manner of advertising, common in the trade. Not being of economic value to any particular firm, the word would be regarded by courts as "not property," and no injunction would be issued. In other words, the fact that courts did not protect the word would make the word valueless, and the fact that it was valueless would then be regarded as a reason for not protecting it. Ridiculous as this vicious circle seems, it is logically as conclusive or inconclusive as the opposite vicious circle, which accepts the fact that courts do protect private exploitation of a given word as a reason why private exploitation of that word should be protected.

The circularity of legal reasoning in the whole field of unfair competition is veiled by the "thingification" of *property*. Legal language portrays courts as examining commercial words and finding, somewhere inhering in them, *property rights*. It is by virtue of the property right which the plaintiff has acquired in the word that he is entitled to an injunction or an award of damages. According to the recognized

authorities on the law of unfair competition, courts are not *creating* property, but are merely *recognizing* a pre-existent Something.

The theory that judicial decisions in the field of unfair competition law are merely recognitions of a supernatural Something that is immanent in certain trade names and symbols is, of course, one of the numerous progeny of the theory that judges have nothing to do with making the law, but merely recognize pre-existent truths not made by mortal men. The effect of this theory, in the law of unfair competition as elsewhere, is to dull lay understanding and criticism of what courts do in fact.

What courts are actually doing, of course, in unfair competition cases, is to create and distribute a new source of economic wealth or power. Language is socially useful apart from law, as air is socially useful, but neither language nor air is a source of economic wealth unless some people are prevented from using these resources in ways that are permitted to other people. That is to say, property is a function of inequality. If courts, for instance, should prevent a man from breathing any air which had been breathed by another (within, say, a reasonable statute of limitations), those individuals who breathed most vigorously and were quickest and wisest in selecting desirable locations in which to breathe (or made the most advantageous contracts with such individuals) would, by virtue of their property right in certain volumes of air, come to exercise and enjoy a peculiar economic advantage, which might, through various modes of economic exchange, be turned into other forms of economic advantage, e.g. the ownership of newspapers or fine clothing. So, if courts prevent a man from exploiting certain forms of language which another has already begun to exploit, the second user will be at the economic disadvantage of having to pay the first user for the privilege of using similar language or else of having to use less appealing language (generally) in presenting his commodities to the public.

Courts, then, in establishing inequality in the commercial exploitation of language are creating economic wealth and property, creating property not, of course, *ex nihilo*, but out of the materials of social fact, commercial custom, and popular moral faiths or prejudices. It does not follow, except by the fallacy of composition, that in creating new private property courts are benefiting society. Whether they are benefiting society depends upon a series of questions which courts and scholars dealing with

this field of law have not seriously considered. Is there, for practical purposes, an unlimited supply of equally attractive words under which any commodity can be sold, so that the second seller of the commodity is at no commercial disadvantage if he is forced to avoid the word or words chosen by the first seller? If this is not the case, i.e. if peculiar emotional contexts give one word more sales appeal than any other word suitable for the same product, should the peculiar appeal of that word be granted by the state, without payment, to the first occupier? Is this homestead law for the English language necessary in order to induce the first occupier to use the most attractive word in selling his product? If, on the other hand, all words are originally alike in commercial potentiality, but become differentiated by advertising and other forms of commercial exploitation, is this type of business pressure a good thing, and should it be encouraged by offering legal rewards for the private exploitation of popular linguistic habits and prejudices? To what extent is differentiation of commodities by trade names a help to the consumer in buying wisely? To what extent is the exclusive power to exploit an attractive word, and to alter the quality of the things to which the word is attached, a means of deceiving consumers into purchasing inferior goods?

Without a frank facing of these and similar questions, legal reasoning on the subject of trade names is simply economic prejudice masquerading in the cloak of legal logic. The prejudice that identifies the interests of the plaintiff in unfair competition cases with the interests of business and identifies the interests of business with the interests of society, will not be critically examined by courts and legal scholars until it is recognized and formulated. It will not be recognized or formulated so long as the hypostatization of "property rights" conceals the circularity of legal reasoning.

Hinman v. Pacific Air Transport

84 F.2d 755 (9th Cir. 1936)

HANEY, Circuit Judge.

Appellants allege… that they are the owners and in possession of 72 1/2 acres of real property in the city of Burbank, Los Angeles county, Cal., "together with a stratum of air-space superjacent to and overlying said tract * * * and extending upwards * * * to such an altitude as plaintiffs * * * may reasonably expect now or hereafter to utilize,

use or occupy said airspace. Without limiting said altitude or defining the upward extent of said stratum of airspace or of plaintiff's ownership, utilization and possession thereof, plaintiffs allege that they * * * may reasonably expect now and hereafter to utilize, use and occupy said airspace and each and every portion thereof to an altitude of not less than 150 feet above the surface of the land * * * " ….

It is then alleged that defendants are engaged in the business of operating a commercial air line, and that at all times "after the month of May, 1929, defendants daily, repeatedly and upon numerous occasions have disturbed, invaded and trespassed upon the ownership and possession of plaintiffs' tract"; that at said times defendants have operated aircraft in, across, and through said airspace at altitudes less than 100 feet above the surface; that plaintiffs notified defendants to desist from trespassing on said airspace; and that defendants have disregarded said notice, unlawfully and against the will of plaintiffs, and continue and threaten to continue such trespasses…. The prayer asks an injunction restraining the operation of the aircraft through the airspace over plaintiffs' property and for [damages].

Appellees contend that it is settled law in California that the owner of land has no property rights in superjacent airspace, either by code enactments or by judicial decrees and that the ad coelum doctrine does not apply in California. We have examined the statutes of California, …but we find nothing therein to negative the ad coelum formula….If we could accept and literally construe the ad coelum doctrine, it would simplify the solution of this case; however, we reject that doctrine. We think it is not the law, and that it never was the law.

This formula "from the center of the earth to the sky" was invented at some remote time in the past when the use of space above land actual or conceivable was confined to narrow limits, and simply meant that the owner of the land could use the overlying space to such an extent as he was able, and that no one could ever interfere with that use.

This formula was never taken literally, but was a figurative phrase to express the full and complete ownership of land and the right to whatever superjacent airspace was necessary or convenient to the enjoyment of the land.

In applying a rule of law, or construing a statute or constitutional provision, we cannot shut our eyes to common knowledge, the progress of civilization, or the experience of mankind. A literal construction of this formula will bring about an absurdity. The sky has no definite location. It is that which presents itself to the eye when looking upward; as we approach it, it recedes. There can be no ownership of infinity, nor can equity prevent a supposed violation of an abstract conception.

The appellants' case, then, rests upon the assumption that as owners of the soil they have an absolute and present title to all the space above the earth's surface, owned by them, to such a height as is, or may become, useful to the enjoyment of their land. This height, the appellants assert in the bill, is of indefinite distance, but not less than 150 feet.

If the appellants are correct in this premise, it would seem that they would have such a title to the airspace claimed, as an incident to their ownership of the land, that they could protect such a title as if it were an ordinary interest in real property. Let us then examine the appellants' premise. They do not seek to maintain that the ownership of the land actually extends by absolute and exclusive title upward to the sky and downward to the center of the earth. They recognize that the space claimed must have some use, either present or contemplated, and connected with the enjoyment of the land itself.

Title to the airspace unconnected with the use of land is inconceivable. Such a right has never been asserted. It is a thing not known to the law.

Since, therefore, appellants must confine their claim to 150 feet of the airspace above the land, to the use of the space as related to the enjoyment of their land, to what extent, then, is this use necessary to perfect their title to the airspace? Must the use be actual, as when the owner claims the space above the earth occupied by a building constructed thereon; or does it suffice if appellants establish merely that they may reasonably expect to use the airspace now or at some indefinite future time?

This, then, is appellants' premise, and upon this proposition they rest their case. Such an inquiry was never pursued in the history of jurisprudence until the occasion is furnished by the common use of vehicles of the air.

We believe, and hold, that appellants' premise is unsound. The question presented is applied to a new status and little aid can be found in actual precedent. The solution is found in the application of elementary legal principles. The first and foremost of these principles is that the very essence and origin of the legal right of property is dominion over it. Property must have been reclaimed from the general mass of the earth, and it must be capable by its nature of exclusive possession. Without possession, no right in it can be maintained.

The air, like the sea, is by its nature incapable of private ownership, except in so far as one may actually use it. This principle was announced long ago by Justinian. It is in fact the basis upon which practically all of our so-called water codes are based.

We own so much of the space above the ground as we can occupy or make use of, in connection with the enjoyment of our land. This right is not fixed. It varies with our varying needs and is coextensive with them. The owner of land owns as much of the space above him as he uses, but only so long as he uses it. All that lies beyond belongs to the world. … Any use of such air or space by others which is injurious to his land, or which constitutes an actual interference with his possession or his beneficial use thereof, would be a trespass for which he would have remedy. But any claim of the landowner beyond this cannot find a precedent in law, nor support in reason.

…We cannot shut our eyes to the practical result of legal recognition of the asserted claims of appellants herein, for it leads to a legal implication to the effect that any use of airspace above the surface owner of land, without his consent would be a trespass either by the operator of an airplane or a radio operator. We will not foist any such chimerical concept of property rights upon the jurisprudence of this country….

Appellants are not entitled to injunctive relief upon the bill filed here, because no facts are alleged with respect to circumstances of appellants' use of the premises which will enable this court to infer that any actual or substantial damage will accrue from the acts of the appellees complained of.

The case differs from the usual case of enjoining a trespass. Ordinarily, if a trespass is committed upon land, the plaintiff is entitled to at least nominal damages without

proving or alleging any actual damage. In the instant case, traversing the airspace above appellants' land is not, of itself, a trespass at all, but it is a lawful act unless it is done under circumstances which will cause injury to appellants' possession.

Appellants do not, therefore, in their bill state a case of trespass, unless they allege a case of actual and substantial damage. The bill fails to do this. It merely draws a naked conclusion as to damages without facts or circumstances to support it. It follows that the complaint does not state a case for injunctive relief….

Notes and Questions

1. Did the court in *Hinman* "find" the law of property as it applies to the airspace above land? Did it "change" the law in this regard? Or did it—as Felix Cohen argued—"create and distribute a new source of economic wealth or power"?

2. Does the court say that Hinman will never be able to obtain the relief sought? Are there any circumstances in which an injunction to restrict overflights to an altitude of over 150 feet (or any altitude) could be awarded under the court's analysis?

3. The court justified its ruling in *Hinman*, at least in part, by reference to the "practical result" that would follow a finding in the landowner's favor. What would that "practical result" be, and why did the court feel the need to avoid it? Is avoiding such undesirable "practical results" an acceptable basis for making a determination as to whether something is a person's "property"

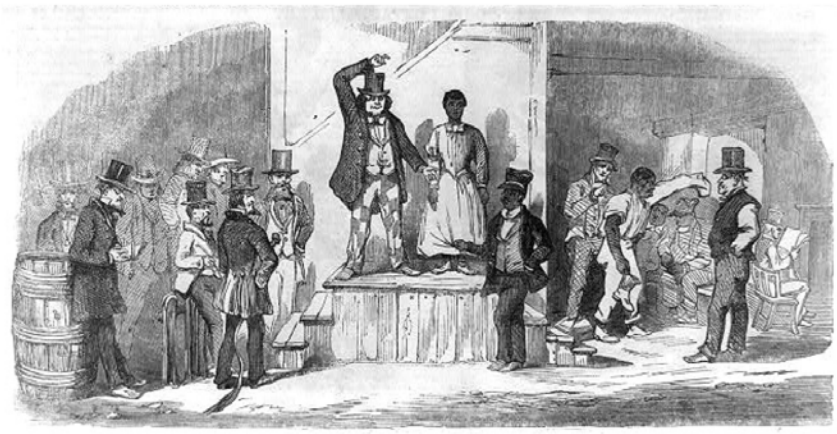
4. **Drones.** The increasing availability of personal aerial robots ("drones") is threatening to bring *Hinman* back into the spotlight. In November of 2014, a hobbyist was flying a custom-built "hexacopter" over his parents' farm in California, when a neighbor's son shot it out of the sky with a shotgun. The neighbor claimed the drone had been flying over his land, though the drone owner disputed this. In any event, the drone owner demanded compensation for damage to the drone, and the neighbor refused. They ended up in small claims court where the neighbor was held liable for $850 in damages and court costs, on grounds that he "acted unreasonably in having his son shoot the

drone down regardless of whether it was over his property or not." Jason Koebler, *The Sky's Not Your Lawn: Man Wins Lawsuit After Neighbor Shotgunned His Drone*, MOTHERBOARD (June 28, 2015), http://motherboard.vice.com/read/the-skys-not-your-lawn-man-wins-lawsuit-after-neighbor-shotgunned-his-drone.

Imagine that instead of (or in addition to) having his son use the drone for target practice, the farmer had called the police to make a complaint of criminal trespass, or sued the drone owner for trespass. What result? Would it matter how high the drone was flying? Would it matter whether the drone was equipped with a camera? (Recall that the right to exclude is not the only right of owners; trespass may not be our farmer's only recourse. We will consider some analogous factual scenarios in our unit on Nuisance.)

5. Would the "practical result" of a finding for the landowner in *Hinman* necessarily be the same as the "practical result" of a finding in favor of a landowner suing the operator of a drone in the airspace over her land? Again, would it matter how high the drone was flying, or whether it was equipped with a camera?

B. Property in Persons



The Illustrated London News, Sept. 27, Sept. 27, 1856, p. 315. "Slave auction at Richmond, Virginia," 1856. Prints and Photographs Division, Library of Congress. Reproduction Number LC-USZ62-15398

The Amistad

40 U.S. 518 (1841)

STORY, Justice, delivered the opinion of the Court.

[The Amistad was a ship bound from one part of Cuba to another. On board were three Spanish subjects: Captain Ransom Ferrer, Jose Ruiz, and Pedro Montez. Also on board were 53 Africans, recently kidnapped from their home country and transported to Cuba, a Spanish territory, where Ruiz and Montez had purchased them as slaves. Slavery was legal in Cuba at the time, though Spanish law banned the *importation* of slaves from Africa to the Americas. At sea, the Africans rose up, killed Ferrer, and took control of the Amistad, attempting to sail it back to Africa. Instead, they ended up off the coast of Long Island, where they and the ship were taken into custody by the U.S. Navy and brought to port in Connecticut. Ruiz and Montez filed libels—a type of property claim in admiralty law—seeking to recover the Africans and other cargo they had on board. Their claim was backed by both the Spanish crown and the Federal government, both of which cited a treaty between the two countries (discussed by the Court below). The district court denied the Spaniards' claim for the Africans, but granted their claim for the cargo, and the Circuit Court summarily affirmed.]

… [T]he only parties now before the Court on one side, are the United States, intervening for the sole purpose of procuring restitution of the property as Spanish property, pursuant to the treaty, upon the grounds stated by the other parties claiming the property in their respective libels. The United States do not assert any property in themselves…. They simply confine themselves to the right of the Spanish claimants to the restitution of their property, upon the facts asserted in their respective allegations.

In the next place, the parties before the Court on the other side as appellees, are … the negroes, (Cinque, and others,) asserting themselves in their answer, not to be slaves, but free native Africans, kidnapped in their own country, and illegally transported by force from that country; and now entitled to maintain their freedom.

No question has been here made, as to the proprietary interests in the vessel and cargo. It is admitted that they belong to Spanish subjects, and that they ought to be

restored. … The main controversy is, whether these negroes are the property of Ruiz and Montez, and ought to be delivered up; and to this, accordingly, we shall first direct our attention.

It has been argued on behalf of the United States, that the Court are bound to deliver them up, according to the treaty of 1795, with Spain…. The ninth article provides, 'that all ships and merchandise, of what nature soever, which shall be rescued out of the hands of any pirates or robbers, on the high seas, shall be brought into some port of either state, and shall be delivered to the custody of the officers of that port, in order to be taken care of and restored entire to the true proprietor, as soon as due and sufficient proof shall be made concerning the property thereof.' This is the article on which the main reliance is placed on behalf of the United States, for the restitution of these negroes. To bring the case within the article, it is essential to establish, First, That these negroes, under all the circumstances, fall within the description of merchandise, in the sense of the treaty. Secondly, That there has been a rescue of them on the high seas, out of the hands of the pirates and robbers; which, in the present case, can only be, by showing that they themselves are pirates and robbers, and Third, That Ruiz and Montez, the asserted proprietors, are the true proprietors, and have established their title by competent proof.

If these negroes were, at the time, lawfully held as slaves under the laws of Spain, and recognized by those laws as property capable of being lawfully bought and sold; we see no reason why they may not justly be deemed within the intent of the treaty, to be included under the denomination of merchandise, and, as such ought to be restored to the claimants: for, upon that point, the laws of Spain would seem to furnish the proper rule of interpretation. But, admitting this, it is clear, in our opinion, that … these negroes never were the lawful slaves of Ruiz or Montez, or of any other Spanish subjects. They are natives of Africa, and were kidnapped there, and were unlawfully transported to Cuba, in violation of the laws and treaties of Spain, and the most solemn edicts and declarations of that government. By those laws, and treaties, and edicts, the African slave trade is utterly abolished; the dealing in that trade is deemed a heinous crime; and the negroes thereby introduced into the dominions of Spain, are declared to be free. Ruiz and Montez are proved to have made the

pretended purchase of these negroes, with a full knowledge of all the circumstances….

If then, these negroes are not slaves, but are kidnapped Africans, who, by the laws of Spain itself, are entitled to their freedom, and were kidnapped and illegally carried to Cuba, and illegally detained and restrained on board the Amistad; there is no pretence to say, that they are pirates or robbers. We may lament the dreadful acts, by which they asserted their liberty, and took possession of the Amistad, and endeavored to regain their native country; but they cannot be deemed pirates or robbers in the sense of the law of nations, or the treaty with Spain, or the laws of Spain itself; at least so far as those laws have been brought to our knowledge. Nor do the libels of Ruiz or Montez assert them to be such.

…It is also a most important consideration in the present case, which ought not to be lost sight of, that, supposing these African negroes not to be slaves, but kidnapped, and free negroes, the treaty with Spain cannot be obligatory upon them; and the United States are bound to respect their rights as much as those of Spanish subjects. The conflict of rights between the parties under such circumstances, becomes positive and inevitable, and must be decided upon the eternal principles of justice and international law. If the contest were about any goods on board of this ship, to which American citizens asserted a title, which was denied by the Spanish claimants, there could be no doubt of the right to such American citizens to litigate their claims before any competent American tribunal, notwithstanding the treaty with Spain. *A fortiori*, the doctrine must apply where human life and human liberty are in issue; and constitute the very essence of the controversy. The treaty with Spain never could have intended to take away the equal rights of all foreigners, who should contest their claims before any of our Courts, to equal justice; or to deprive such foreigners of the protection given them by other treaties, or by the general law of nations. Upon the merits of the case, then, there does not seem to us to be any ground for doubt, that these negroes ought to be deemed free; and that the Spanish treaty interposes no obstacle to the just assertion of their rights.

…Upon the whole, our opinion is, that the decree of the Circuit Court, affirming that of the District Court, ought to be affirmed, … and that the said negroes be declared to be free, and be dismissed from the custody of the Court, and go without day.

BALDWIN, Justice, dissented.

Notes and Questions

1. James Somerset was an enslaved African man who had been transported from colonial Massachusetts to England. Once in England he escaped, but was recaptured and imprisoned on a ship docked in the Thames, soon to depart for Jamaica. Somerset petitioned the King's Bench for a writ of *habeas corpus* challenging his confinement against his will by the ship's captain. In *Somerset v. Stewart*, 98 Eng. Rep. 499 (1772), Lord Chief Justice Mansfield, noting that slavery was legal in both the North American colonies and Jamaica but had never been formally recognized as legal by the English Parliament, granted the writ, saying:

   "[T]he slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged."

   The result in *Somerset* is, on some level, the same as in *Amistad*—both courts order captured and enslaved human beings to be set free. But the facts that put the question and the justifications for the result are subtly different in each case. Can you articulate the distinction(s) between Lord Mansfield's reasoning and Justice Story's? What are the implications of these distinctions for the law

of property in England and America, respectively, as it applies to property rights in human beings?

2. Is your body your "property"? The English philosopher John Locke, who heavily influenced Blackstone and the Anglo-American legal tradition generally, seemed to think so. In his *Second Treatise on Government*, Chapter V, Section 27, Locke wrote:

> "Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his."

What are the implications of the view of the human body as "property"? If you can own your own body, why can't someone else own it? At the very least, could you sell yourself into slavery? Why don't biological mothers own their children, who are produced from their bodies?

It is not accidental that Locke said that every "man" has a property in his own person; he didn't include women. Currently, the law insists that people are not property, even if the relation between a person and her own body, or her own labor, can be described in property terms.

1. Emancipation and Compensation

Generally, if the government "takes" "property" for its own use, the government has to pay the former owner the fair market value of that property, as we will discuss in the section on takings.

The Constitution, as amended, provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const., amend. XIII. The Thirteenth Amendment, along with its cousins the Fourteenth and Fifteenth Amendments, were designed to embed the results of the Civil War into the Constitution.

Before the Civil War, slavery's defenders considered enslaved people to be property, and many of slavery's opponents conceded that enslaved people were property according to the law of the land. Henry Clay, speaking against abolition, contended: "The total value … of the slave property in the United States, is twelve hundred millions of dollars. … It is the subject of mortgages, deeds of trust, and family settlements. It … is the sole reliance, in many instances, of creditors within and without the slave States …. *That is property which the law declares to be property.*" Was he right? If he was wrong, how are we to determine what is property?

The U.S. did not compensate enslavers upon emancipation; nor did it compensate enslaved people. *But see* Roy E. Finkenbine, *Belinda's Petition: Reparations for Slavery in Revolutionary Massachusetts*, 64 Wm. & Mary Q. 95 (2007) (discussing a rare example of a pension being granted to an aged ex-slave by the Massachusetts legislature, in consideration of her long enslavement). By contrast, in 1833, Britain abolished slavery but also provided for the compensation of enslavers for their lost "property," representing roughly 800,000 enslaved people. The £20 million the government set aside to pay enslavers off represented 40% of the total government expenditure for 1834, and is the equivalent of between £16 and £17 billion, or $26 billion, in 2015 terms. Until the bank bailouts of 2009, this payout – to 46,000 enslavers – was the largest in British history. Moreover, enslaved people were compelled to provide 45 hours of unpaid labor each week for their former masters for a further four years. Many well-known Britons can trace their ancestors – and some fraction of their family wealth – to enslavers. *See* Legacies of British Slave-Ownership.

Likewise, in 1825, France, warships at the ready, demanded that its former colony Haiti compensate France for its loss of plantations and enslaved people. Enslavers submitted detailed claims, which were later reduced to 90 billion francs (roughly $14 billion in modern terms) to be paid over thirty years. Haiti took until 1947 to pay off both the original claim to France and the additional interest accrued from borrowing from French banks to meet France's deadlines. Haiti is currently the poorest country in the Americas.

2. Owning Labor

The Thirteenth Amendment is notable, among other things, for its lack of any state action requirement. While the other provisions of the Constitution control what the government may do and how it may do it, the Thirteenth Amendment is a command to everyone: there shall be no slavery in the United States. Why write it this way, rather than as a constraint on government action?

Consider employment contracts that bar employees from competing if they leave, or bar them from working in the same area or the same industry, or bar them from using any information they learned while working for the employer. These restrictive covenants may mean that a person may be unable to work in the only field for which she is trained if she leaves her current employer, which is likely to give her employer substantial leverage in negotiating salary and other terms of employment. Do these attempted contractual restrictions raise any Thirteenth Amendment issues? *See* Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 Texas L. Rev. 789 (2015) (discussing multiple restrictions employers have used to restrict former employees' use of their own knowledge); Dave Jamieson, Jimmy John's 'Oppressive' Noncompete Agreement Survives Court Challenge, Huffington Post, Apr. 10, 2015 (discussing fast food restaurant's noncompete agreement that precludes low-wage employees from working for any competitor).

Separately, consider the Thirteenth Amendment's exception for "involuntary servitude" as punishment for crime. Prison takes away prisoners' liberty and their ability to use their own property, and also coerces their labor. Does this mean that prisoners are property? In 1871, the Virginia Supreme Court declared prisoners to be "slaves of the state." Ruffin v. Commonwealth, 62 Va. 1024 (1871). After the Civil War, African-Americans in the South were routinely arrested for almost any reason, and local governments then sold their labor to white landowners for agricultural work. Prison labor currently produces over $2 billion worth of goods every year, though most production now takes place within prison walls. All able-bodied federal prisoners are required to work, at a pay scale ranging from $0.25 to $1.15 per hour. Texas and Georgia require prisoners to work without any pay.

3. Alternatives To Property

If the relationship between a prisoner and the state, or between a child and a parent, isn't a property relationship, what kind of relationship is it? Can an owner ever have positive duties to take care of property? Can cats be property? What about chimpanzees?

4. Body Parts

State and federal statutes implicitly recognize some kind of property rights in body parts, permitting gifts from both living persons and dead donors and even permitting sales, except for sales for the purpose of transplantation. Thus, Section 301 of the National Organ Transplant Act of 1984, Pub. L. 98-507, 98 Stat. 2339, codified at 42 U.S.C. § 274e, makes it a crime "for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce," while the Uniform Anatomical Gift Act, which as of this writing has been adopted in 47 states and the District of Columbia, permits individuals to make "a donation of all or part of a human body to take effect after the donor's death for the purpose of transplantation, therapy, research, or education." Body parts are therefore alienable – title to them can be transferred – even though they can't be sold in some contexts.

This middle position can lead to some hard line-drawing problems—particularly where other consequences of the "property" label come into play. Thus, in *Moore v. Regents of University of California*, 793 P.2d 479 (Cal. 1990), a leukemia patient sued his doctors who had used cells and tissues gathered during his treatment to create a cell line for research purposes and to obtain a potentially lucrative patent for the production of therapeutic proteins from that cell line. Moore's theory was that the doctors had taken and used his property—i.e., parts of his body that had been removed during his cancer treatment—without his consent. Over multiple dissents, the court held that Moore's property claim must fail because he had no property right in cells excised from his body—but that he could recover in tort against his doctors if they had failed to inform him of their intent to use his cells for research and obtain his consent to such use prior to treating him. Does this distinction in the causes of

action available to Moore make a difference? (Hint: consider Moore's potential claims against *other* researchers who use the cell line derived from his cells.)

Should we allow organs to be fully market-alienable, so that willing sellers could, say, offer up a kidney for compensation? *See, e.g.*, Richard A. Epstein, *The Human and Economic Dimensions of Altruism: The Case of Organ Transplantation*, 37 J. LEGAL STUD. 459, 485-497 (2008); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359 (2000); Julia D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163 (2000).

Consider the following arguments for market-alienability: There is currently a great shortage of transplantable organs such as hearts, lungs, livers, and kidneys, leading to tens of thousands of deaths a year. Each day, 79 people receive transplants, but 22 people die while waiting for a transplant. http://www.organdonor.gov/about/data.html. The U.S. has an opt-in system for organ donation at death, resulting in the fourth-highest organ donor rate (26 donors per million people in the population). Spain has the highest rate, with 35.3 donors per million people. Spain, like several other European countries, in theory has an opt-out regime in which organs will be donated at death in the absence of an opt-out, but in practice doctors will ask relatives for consent regardless, and that consent is often denied.

What if we allowed people to be paid during life for their agreement to be donors at death? What objections or obstacles do you foresee to such a scheme?

What about sales by living donors? People can already sell semen, skin tissue, and blood. Poor people would likely be most of the sellers, but proponents note that using the market to obtain a *supply* of organs doesn't mean that they need to be *distributed* only to those who can pay; Medicaid pays for dialysis, which is quite expensive, and could also pay for a kidney for poor patients. In Iran, which does allow payments for kidney donations to Iranian recipients, 84% of donors are poor, but 50% of recipients are also poor, and Iran eliminated its transplant list of people awaiting kidneys. Ahad J. Ghods & Shekoufeh Savaj, *Iranian Model of Paid and Regulated Living-Unrelated Kidney Donation*, 1 CLINICAL J. AM. SOC. NEPHROLOGY 1136 (2006).

To those who say that such a system would coerce the poor to sell their organs, proponents respond that those sellers would be better off than they are in the present system, where they're still poor and have fewer options for earning money, many of which are equally or more dangerous and unpleasant. Sellers who later suffered kidney failure could get transplants.

Opponents note that there's evidence that donated blood is higher quality than paid-for blood, though the significance of those studies is contested. Donating bodily products, opponents argue, is an altruistic act that improves the human condition and provides a better guarantee of quality. Selling, by contrast, leads to attempts to sell shoddy products – here, unhealthy organs – for gain. Proponents of organ sales respond that poor-quality organs can be screened out. To this, opponents rejoin that there's evidence of "crowding out" of altruistic motives by commercial motives: when money enters a system, people who previously participated out of the goodness of their hearts may withdraw. They don't want to feel like suckers when they aren't getting paid and other people are. Payment, then, might even lead to a reduced supply of organs compared to the present system.

Opponents also argue that organ sales are degrading, reducing a person to the commodified sum of her parts. Proponents respond that dying of a curable illness is also degrading, and that Western societies used to consider surgery, artificial insemination, and autopsies degrading. Life insurance used to be rejected on the ground that it wrongly commodified the value of a human life. It's widely accepted now – did it degrade our humanity? Likewise, people can sell their time and the intellectual products of their minds.

But on this argument, we should be open to selling everything – why not let a living donor sell her heart to provide for her family? Why not let her sell her child? Not reassuringly, some proponents of organ sales believe that these options should at least be considered, with appropriate safeguards. They contend that proper boundaries between market and non-market activity can be maintained even if new aspects of life enter the market. The same society that came to accept life insurance and artificial insemination also eventually outlawed slavery and child labor. In fact, it can be harder to get people to accept markets than it perhaps should be.

Is the language of property helpful in crafting rules and drawing lines regarding permissible uses of the human body? Consider the following anti-propertization argument, applied to rape:

Margaret Radin, *Market-Inalienability*
100 HARV. L. REV. 1849 (1987):

… In some cases market discourse itself might be antagonistic to interests of personhood. [Judge Richard] Posner conceives of rape in terms of a marriage and sex market. Posner concludes that "the prevention of rape is essential to protect the marriage market . . . and more generally to secure property rights in women's persons." Calabresi and Melamed also use market rhetoric to discuss rape. In keeping with their view that "property rules" are prima facie more efficient than "liability rules" for all entitle ments, they argue that people should hold a "property rule" entitlement in their own bodily integrity. Further, they explain criminal punishment by the need for an "indefinable kicker," an extra cost to the rapist "which represents society's need to keep all property rules from being changed at will into liability rules." … [L]ike Posner's, their view conceives of rape in market rhetoric. Bodily integrity is an owned object with a price.

What is wrong with this rhetoric? The risk-of-error argument . . . is one answer. Unsophisticated practitioners of cost-benefit analysis might tend to undervalue the "costs" of rape to the victims. But this answer does not exhaust the problem. Rather, for all but the deepest enthusiast, market rhetoric seems intuitively out of place here, so inappropriate that it is either silly or somehow insulting to the value being discussed.

One basis for this intuition is that market rhetoric conceives of bodily integrity as a fungible object. A fungible object is replaceable with money or other objects; in fact, possessing a fungible object is the same as possessing money. A fungible object can pass in and out of the person's possession without effect on the person as long as its market equivalent is given in exchange. To speak of personal attributes as fungible objects – alienable "goods" – is intuitively wrong. Thinking of rape in market rhetoric implicitly conceives of as fungible something that we know to be personal, in

fact conceives of as fungible property something we know to be too personal even to be personal property. Bodily integrity is an attribute and not an object. …

Systematically conceiving of personal attributes as fungible objects is threatening to personhood, because it detaches from the person that which is integral to the person. Such a conception makes actual loss of the attribute easier to countenance. For someone who conceives bodily integrity as "detached," the same person will remain even if bodily integrity is lost; but if bodily integrity cannot be detached, the person cannot remain the same after loss. Moreover, if my bodily integrity is an integral personal attribute, not a detachable object, then hypothetically valuing my bodily integrity in money is not far removed from valuing me in money. For all but the universal commodifier, that is inappropriate treatment of a person. . . .

C. Intangible Property

This section considers forms of property that cannot be seen with the eye or held in the hand. Such property raises significant conceptual issues, but, simply put, it is too significant for the legal system to ignore. As you read the cases in this section, consider not just whether the things they describe are "property," but also whether they are "things" in the first place. To create a system of property rights, a legal system needs to be able to identify the things that are the subject of those rights, to decide who owns those things, and to be able to say when an owner's rights have been violated. Are these tasks systematically harder for intangibles, and if so, why?

Kremen v. Cohen

337 F. 3d 1024 (9th Cir. 2003)

KOZINSKI, Circuit Judge.

We decide whether Network Solutions may be liable for giving away a registrant's domain name on the basis of a forged letter.

BACKGROUND

"Sex on the Internet?," they all said. "That'll never make any money." But computer-geek-turned-entrepreneur Gary Kremen knew an opportunity when he saw it. The