

Property – Estlund – Spring 2008

Property defines many interests protected by other bodies of law and yet is defined by them as well.

The underlying themes are how the law defines property interests, how these interests can be divided (shared across people and/or time) and the enforcement of property rights.

I. What is Property: Dueling Conceptions – Despotic or Bundle of Sticks?

A) Philosophical Conceptions.

a) Despotic:

- i) Blackstone called it “that sole & despotic dominion... over the external things of the world, in total exclusion of the right of any other individual in the universe”
- ii) L.C. **Jacque** (Sup. Ct. Wi. 1997)
 - (1) Facts: Steenberg Homes crossed across Jacque’s property to deliver a mobile home b/c it was a much shorter route. Jacque had already told them they could not (adamantly protested).
 - (2) PP: J sued for intentional trespass, S conceded at trial, but claimed no compensatory damages had been proven and no punitive damages could be awarded. Jury awarded \$1 nominal damages and \$100,000 in punitive damages. Judge set aside that reward. Ct. of App. Affirmed b/c precedent est. that punitive damages could not be sustained by an award of nominal damages.
 - (3) Issues: 1) can award of nominal dmgs. For intentional trespass support punitive dmgs; (2) whether that law should apply to Steenberg or from here on out; (3) whether the \$100K was excessive.
 - (4) Holdings: Yes, Yes, No.
 - (5) Rtl: You can award punitive damages when the harm was slight if it’s to set an important example. In Wis. Ct has held that in certain situations of trespass, the actual harm is not damage done to land but in the loss of the indiv. Right to exclude. The issue of deterrence is huge.

iii) Notes:

- (1) Someone who commits intentional trespass is subject to liability irrespective of whether they caused any harm. It is a strict liability tort.

b) Bundle of Rights

i) L.C. **Hinman** (9th Cir Ct. App. 1936)

- (1) Facts: Hinman filed suit against two airline cos. Claiming that they invaded and trespassed his land when flying over it (sometimes as low as 100ft.) P. had told Defs. To desist. P. claimed ad coelum and asked for an injunction and \$90K from ea. airline.
- (2) Hldg: Cannot take ad coelum too literally: “cannot shut our eyes to common knowledge or experience of mankind”.
- (3) Rtl: W/out possession, there can be no right in property. Owner only owns as much of the air above as he can use. (*plus there are statutory restrictions, etc.*)

(a) Plaintiff did not claim an actual damage. Whether the proximity is an impairment of his full enjoyment is a ? of fact.

(b) “Any use of such air or space by others which is injurious to his land, or which constitutes an actual interference w/ possession or benefit would be a trespass for which he would have a remedy”

(c) a rule that says landowners own all the way up to the heavens would be impractical, hard to follow/uphold, and is not necessary to protect the rights guaranteed to a landowner by the constitution.

ii) Notes:

(1) Some form of ad coelum is followed everywhere – just pure surface rights would be useless.

(2) Hinman court seems to see property as a bundle of rights, and the right to exclude others depends on a balancing of competing social interests.

c) NUISANCE/TRESPASS DIVIDE

i) L.C. **Hendricks** (S.C. W.Vir. 1989)

(1) Facts: Stalnacker appeals from a decision that the well he installed in his property is a private nuisance to Hendricks. Hendricks’ permit for a septic tank was denied b/c it would have been w/in 100 ft. of Stalnacker’s well.

(2) Hldg: Not a nuisance

(3) Rtl:

(a) The rationale focused on whether the conduct was unreasonable and/or intentionable. It did not think it was reckless, negligent or abnormally dangerous.

(b) Either the septic tank or the well would have caused the same restrictions on each property owner. Thus the balance of interests does not tip in favor of the Hendricks, so its not a nuisance.

(4) Notes:

(a) for a public nuisance, the fair test is whether it is reasonable in relation to its locality.

(b) For a private nuisance it’s a balancing test between the property seeking protection and the nature of the interference.

d) Property & Equity

i) Bakers case

(1) Facts: fox hunting club repeatedly trespassed onto Baker’s property

(2) Repeated trespasses – granted an injunction.

(3) No pt. in granting damages. Injunction allows for bargaining.

ii) Pile v. Pendrick, Golden Press

(1) Pile – a small encroachment underground was upheld as illegal and the encroacher had to take down the entire wall, although costs were split. Extreme rule, but a mandatory injunction was issued.

(a) The policy behind this as well, is that now they can bargain and negotiate for access (barring bad blood, ill will and large financial barriers).

- (b) Ex post, this rule leads to harsh outcomes. However, ex-ante this allows for parties to negotiate around injunctions.
- (2) Golden Press – small encroachment above ground was not given an injunction.
 - (a) The “de minimis” theory was applied: Good faith intrusion plus a weighing of the circumstances. (if bad faith, then injunction, is implied)
 - (b) Ct. wants to avoid exhortion.
 - (c) Ex post this allows for more fairness. However, ex ante this doesn’t really do much to prevent ppl. From encroaching.

II. ACQUIRING PROPERTY

- Title is relative – who has better or superior title?
 - First in time is one way of determining that.

A) By Capture/Occupancy

a) Wild Animals

- i) **Pierson** (fox case): Ferae naturae wild animals belong to no one. Common Law says mere pursuit is not sufficient to establish ownership – must show **OCCUPANCY** which in this case is shown by capture.
 - (1) Could have deprived animal of its liberty – putting it in “certain control”, i.e. mortal wounding, ensnaring in nets.
- ii) **Keeble** – duck pond case where the guy shoots ducks to interfere: action brought for an injury done to his use of his land.
 - (1) Holding: “interference” must be by wrongful means, not just mere competition.
 - (a) **Ways to interpret between unfair comp. and malicious practice:**
 - (i) Ex-post : what do the parties deserve, what have they earned.
 - (ii) Ex-ante: what is best for society?
 - (2) Use this by talking about an investment made (i.e. creation of duck pond) and useful trade – guy made his living off catching the ducks.
 - (a) Can distinguish hobbies, etc.
 - (3) **Shadows a huge development that trade or business is protected against interference AND the distinction between actionable interference w/business and non-actionable competition.**
- iii) **Ghen v. Rich** (whaler case): whaler shot whale, it died 3 days later far away, someone else sold it. Ct. held it belonged to whaler.
 - (1) If this came under “rule of capture” juris, then we say that the whaler did exercise “certain control” / “constructive poss’n” b/c that’s all he could do. It’s the nature of the whaling industry. Fox hunters, could do more.
 - (2) Also, whaling – a worthwhile venture – would not exist if ppl. Could not depend on these rules.
- iv) Order:
 - (1) True Owner
 - (2) Land Owner wins over trespasser
 - (3) Prior Captor wins over Captor
 - (4) Captor wins over Hunter

(5) Hunter wins over Malicious Interferor

b) Inanimate Objects

- i) **Eads** (shipwreck case): Ct. held that Brazelton did not gain occupancy, did not possess or constructively possess the boat.
 - (1) He doesn't need to hold it in his hands, but he needs to establish as much as he could as the situation permitted
 - (a) Purpose is to encourage diligent pursuit, and effective communication.
 - (2) Once again, what counts as poss'n depends on the nature of the thing.
 - (a) Less strict than Ghen (do all possible) BUT still must be moving diligently towards that end.
 - (3) We can also look at it as who put in the most investment acquiring the things v. who is free-riding.
- ii) Oil & Gas
 - (1) Mineral ferae natural – are considered as belonging to the owner of the land (surface estate) as long as they are on it, in it or subject to the owner's control.
 - (a) If a co. starts drilling and pulling gas from out under my home, it's not stealing, b/c no one owns the gas until its captured.
 - (b) Slant drilling though, would be trespass.
 - (2) **Hammonds** (gas co. put the gas back into a reservoir under her land): she sued for trespass.
 - (a) Ct. held no trespass b/c once gas put back in its' natural state, its' ferae naturae – no one owns it.
 - (b) Follows the Rule of Capture.
 - (c) Policy: See policies about oil and gas if it comes up 1/28 notes.

B) Property by Creation

- i) Quasi – Property Rights
 - (1) An in personum right against certain ppl., not an in rem right.
 - (a) Limited monopoly rights – limited in time, scope and sometimes defined by statute.
 - (2) As definitions of property expanded, degree of protection became necessarily diluted.
 - (3) Another central debate in quasi prop rights is the idea that a lot of these things are part of our society and culture.
- ii) **INS v. AP** – INS was copying AP's news and forwarding it to West Coast papers. INS wants an injunction.
 - (1) **Barely good law, confined to its facts.**
 - (2) Usually, info, ideas etc. can be freely used, repeated, etc.
 - (3) Under CL, without legislation, copying is okay.
 - (4) Ct. found this to be unfair competition.
 - (5) Now unfair competition is about your property right.
 - (6) Dissent: Worried about the importance of the public's access to the news, especially during war time.
 - (a) Thought the courts should not create new types or property, that is for the legislature to decide.

(7) Central debate: Where do prop rights come from? Nature or legislature? Maj said nature. Brandeis and Holmes said legislature.

- iii) **Midler** – co. used Midler’s back up singer to imitate her voice in a commercial.
 - (1) Miller got an in personam prop right to the use of her voice. It was being used to capitalize on her celebrity, something she spent a long time building up.
 - iv) **Eldred** – Congress’ extension of copyright law.
 - (1) Complaints about how all this is about our culture and these are the building blocks we have to work w/ to make new stuff. The more we extend copyright stuff, the longer we hold things back.
 - v) **Trenton Industries** – patent infringement for an improved version of a folding high chair.
 - (1) Court said Adler did not have a property right in his stuff, it wasn’t a product of genius, just a natural extension.
 - (a) Set a high threshold b/c they don’t want to inhibit inventiveness and improvements.
 - (i) Ppl. Should only get a monopoly when they make a huge improvement.
- C) By Accession, Ad Coelum and Find
- a) Accession: Taking something and using your own skills and/or labor to make it your own.
 - i) **Wetherbee** – cut someone else’s trees in good faith and made barrels out of them. Willing to pay for the cost of trees, but not value of barrels – 300:1.
 - (1) Holdings:
 - (a) First, always ask how much the property and the labor contributed to make the thing what it is.
 - (i) If it is greatly changed then it goes to the maker. (wine from grapes, etc.)
 - 1. Blackstone says this happens no matter what.
 - 2. Most courts think good faith is necessary.
 - (ii) If not so greatly changed, then goes back to TO.
 - (iii) Subjective value is not very important to the law here.
 - (b) Policy:
 - (i) We don’t want to discourage production, development.
 - (ii) Don’t want a rule that lets the owner of the raw materials free ride.
 - (c) Even though the original owner has a property interest, it’s protected by a liability rule – a duty to pay damages – not a property rule.
 - b) Ad Coelum: from ad infernos to ad coelum
 - i) **Edwards** – whether ct. should enforce the trespass onto Edwards’ lands to survey whether the cave goes under Lee’s land.

- (1) Hldg: The justification for this trespass is that if the cave does go under Lee's property then he does own a portion of it due to ad coelum.
 - (2) Dissent: Ad coelum is silly – a person should have a prop right ad coelum to things he can take from or get value for on his property.
 - (a) Since no entrance to the cave on Sim's land, he should not own the cave.
 - (3) Policy:
 - (a) We can argue that the cave is close to the ground, ad infernos makes sense.
 - (i) Roman law was aware of minerals and caves underground and it followed ad coelum ad infernos then.
 - (ii) No great loss to the public if Lee gets access to cave.
- c) Sequential Possession Issues:
- i) Notes:
 - (1) Concepts of "First in Time"
 - (a) Present poss'n gives title better than the rest of the world except prior possessor or their successor in title.
 - ii) Armory v. Delamirie: Finder over everyone else (chimney boy & jeweler)
 - (1) Finder has an interest greater than any one else in the world except the true owner.
 - (a) We don't want ppl. To steal; it will be easier for the TO to find it; and we want finders to be able to put things to good use.
 - (2) Clark v. Maloney: First in time finder over next finder (ten pine logs in river)
 - (a) First finder wins – he has better title over everyone but true owner
 - (i) Want to discourage theft.
 - (ii) Still helps TO find the things.
 - (3) Anderson v. Gouldberg (thief 1 v. thief 2)
 - (a) Thief 1 wins.
 - (i) We don't want to tolerate all these forced dispossessions.
 - (ii) Ct. doesn't waste time hearing how T1 got possession.
 - (iii) Jus tertii claims are not permitted – not allowed to boost your claim by bringing in the superior rights of a 3rd party not before the court.
 - 1. This is your lawsuit.
 - (4) CONSTRUCTIVE PRIOR POSS'N
 - (a) A leaves town in a hurry and leaves a note for B saying if you want my bike, it's yours, it's under the tree. C takes bike before B gets there.
 - (i) B wins b/c he had CONSTRUCTIVE PRIOR POSS'N (a legal fiction)
 - (ii) Gets to count A's prior poss'n b/c now has all the rights A had. Not a jus tertii claim.
 - (5) Abandonment
 - (a) A picks up rock, drops it and B picks it up.
 - (i) Burden to prove abandonment is on B. Passage of time helps.
 - (ii) Abandonment require intention.

- (iii) Still hard for A to prove he had it first if he just found it.
- (6) Non-derogation from grant
 - (a) A sells bike to B then sues B.
 - (i) Can't do that. Can't derogate (minimize your grant)
 - (b) A sells to B, C steals. A sues B.
 - (i) Can't do that either, if A's claim to title isn't extinguished, then everyone else before A can claim as well. Too complicated.

D) Competing Principles of Orig. Acqu.

- a) Usually LO wins over finder. 5 exceptions stated in Hannah v. Peel (solider finds brooch).
 - i) Lost/Mislaid
 - (1) Lost usually goes to the finder.
 - (2) Mislaid (i.e. short period of time) goes to LO.
 - (a) Idea is we want TO to be able to retrace steps to where it was mislaid.
 - ii) Lost for a considerable time.
 - (1) TO probably stopped looking for it, give it to Finder.
 - iii) Finder acted in a commendable manner.
 - (1) Give to F.
 - (2) However, Trespasser never gets to keep it (Fisher, bee case)
 - (a) We want to deter trespass. LO has constructive poss'n of stuff on their property w/ respect to a trespasser.
 - iv) Landowner never in Poss'n of premises
 - (1) Hanna v. Peel – the home was requisitioned.
 - (2) IF LO IS IN POSS'N OF HOME, LO GETS POSS'N OF CONTENTS
 - v) LO didn't know of the thing's existence.
 - (1) If LO had known of the thing, then that would have given him suff. Prior poss'n to not make it a finders case.
- b) F > LO unless:
 - i) Thing mislaid
 - ii) F is dishonest, a trespasser or an agent (which eliminates most cases)
 - iii) The thing is in or under the ground or in a private place that is in actual poss'n of LO.

E) Adverse Possession

- a) Did the non-possessor show a better title?
- b) Has the owner been ousted for more than the SOL?
 - i) CL says we need more than just the passage of time – all other elements of adv. possession need to be there.
 - ii) Needs to be actual entry giving exclusive possession:
 - (1) See, Ewing – he was exclusive b/c he allowed & denied ppl. To take sand/gravel (the only thing the lot was good for)
 - iii) Open and Notorious Possession
 - (1) Acts appropriate to what a TO would do
 - (2) Acts giving TO notice that the adv. Possessor is there.
 - iv) Adverse and under a claim of right

- (1) w/out the owner's permission
- (2) Objective test:
 - (a) GF does not matter, all that matters is the actions of the possessor.
- (3) Subjective Test:
 - (a) Possessor must think they actually have title. (Carpenter)
 - (i) Most juris. Don't require a GF belief.
- (4) Color of Title (actually have a piece of paper giving you title, though most juris. Don't require this.)
- v) Continuous and uninterrupted possession
 - (1) Tacking is allowed between ppl. That have privity.
 - (a) Privity means a possessor voluntarily transferred to the next possessor either an estate in land (See Kunto, deed, etc.) or physical possession.
 - (i) Involuntary transfer is not privity.
 - (ii) Idea behind privity is we want to reward adv. Poss'n to people who are conducting themselves meritoriously. Not just random squatters.

VALUES SUBJECT TO OWNERSHIP (OR NOT)

A) Property and Personhood

- a) Some things are so related to your personhood, that we don't want to regard them as property.
- b) B/C property has no single meaning – it is a bundle of sticks given to you State law and sometimes CL – then you have some rights in rem, and some in personum.
- c) Maybe some property should be inalienable.
- d) **Moore lets legislature act.**
- e) **Hecht hints that there are constitutional implications to control over some materials.**
- f) **Newman suggests that legislature doesn't have a free hand in depriving ppl. Of these kinds of property.**
- g) **Moore** (UC Regents, 1990)
 - i) P does not retain a property interest in his cells after they are removed from his body.
 - ii) Doctors keep property interest
 - (1) Policy issues: We don't want to inhibit research in medicine.
 - (2) The development of the medicine was done by the drs. Not Moore.
 - iii) Ct. says it's an issue for the legislatures. BUT, the drs. and pharmaceuticals are in a better position to get what they want out of the legislature.
- h) **Newman** (9th cir 2002)
 - i) Do parents have a property interest in their child's corneas under the due process clause?
 - (1) Ct. says yes.
 - (a) Property rights are created by state law and CL.
 - (b) Several states developed a right of the next of kin to dispose of their relative's dead bodies.

- (c) CA does the same and establishes a statute that gives next of kin exclusive rights to poss'n control and disposition of the corpse.
- (d) SAID CA statute removes appropriate procedural safeguards. Can't do that.
- (e) "Although the substantive interest is created by an independent source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim or entitlement protected by the Due Process Clause".
- i) **Hecht** (CA 1993)
 - i) Holding: Sperm was the property of the decedent and within juris of probate court.
 - (1) Sperm owner had gone through all the trouble of writing out all his desires. He obviously wished to exercise control.
 - (2) There is also a fundamental right to procreate.
 - (3) There aren't too many public policy worries here like in Moore. It only affects this family.

IV. Owner Sovereignty (esp. the right to exclude) & Its Limits

A) Criminal and Civil Trespass Actions

- a) **Shack – limits on rt. To exclude (migrant farm workers)**
 - i) Ct. held that under NJ laws (not constit.) ownership of real property does not include the rt. To bar access to govt. services available to migrant farm workers.
 - ii) No trespass.
 - iii) **Rtl:**
 - (1) Property rights serve human rights AND rights are relative
 - (2) Congress set up Act to help migrant farmworkers. Can't accomplish this goal is landowners keep help away.
 - (3) Some rights are too fundamental to be denied on the basis of an interest in real property.
 - iv) **Shack v. Jacque – standards v. rules**
 - (1) An accommodation of rights of the LO w/ rights of the individuals who are parties w/ him in a consensual transaction re: that property v. the right to exclude.
 - (2) Once you let people onto your property, the law will protect those ppl. And limit your sovereignty.
 - (3) We don't want to allow bargaining here, b/c it gives all the power to the LO over ppl working and living on his land.
 - (a) We only want bargaining to be able to take place when we're willing to let the owner the final decision of allowing access or not.
- b) **Hamidi – trespass to chattels and the rt. To excl.**
 - i) Ct. said no trespass b/c no inj.
 - (1) Inj. Could have been a slowing down of server, etc.
 - (2) Some debate whether ct. didn't understand the dmg. Or whether they were concerned w/ limiting rights of expression.

- ii) Diff. btwn. Trespass to land v. chattels is that trespass to land is more deliberate and rare – we bump into chattel all the time.
- iii) Basically, here Intel has a rt. To self-help.
 - (a) Maybe the reason we allow self-help here is b/c it doesn't lead to violence, just new technology. Actually, benefits ppl.

B) Self-Help

- a) **Berg v. Wiley – limits right to self-help for evicting a tenant (rest. Case)**
 - i) Hldg: changing locks, etc. not peaceable b/c there is always a chance for violence.
 - ii) Trend is country – CL and legis. Against self help. Legis. Gives remedies for non-peaceable evictions. Reasons:
 - (1) Ppl. Have a strong attachment to land. (but so does LL)
 - (2) Land not going anywhere. No big deprec. In value. No big rush.
 - (3) We're very worried about erroneous deprivation.
 - (a) Present poss'r v. one who may have superior title. Possession still gives you some protection.
- b) **Williams – repo'd car. – self-help still available for personal prop.**
 - i) Weird definition of peaceable here.
 - ii) Self-help gets much more latitude w/ personal property.
 - (1) Can significantly decrease in value in short period of time.
 - (2) Cost of going thru judicial process to recover personal prop may not be worth it.
 - (a) Costs of items may go up if owners have to resort to courts to recollect prop.

C) **Exceptions to Rt. To Exclude – Common Law**

- a) **Ploof** – in cases of necessity (to avoid serious harm), person has an affirmative rt. To trespass.
 - i) Suddenness matters here.
 - (1) As opposed to Jacques where they could have been avoiding a serious harm, but the lack of suddenness allowed them the opp. To bargain for the rt. To cross.
- b) **McConico – rt. To hunt in privately owned unenclosed fields. RT OF ACCESS AND USE – NOT OF OCCUPATION**
 - i) Old school rationale from when hunting was imp. To livelihood.
 - ii) Also, idea that if you value land so much, protect it w/signs or fences.
- c) **Uston - casino kicks out card counter in NJ. Public accommodation rt. Invokd. – this is mostly for NJ.**
 - (1) Since the statute concerning casinos was so comprehensive, but didn't rule out card counters, casino can't kick them out.
 - (2) CL – can't kick ppl. Out of private places unless they are dangerous, or other good reason.
 - (a) So, if you make your prop. Public – you lose a lot of your right to exclude.

- (i) In NJ, burden of proof is on LO. Can't exclude from public-private prop unless you have a good reasons.
- (3) NJ is cutting-edge. In other juris. The person seeking access has to cite to a trumping authority.

D) **Exceptions to Rt. To Exclude – Constitutional Triumphs**

* Prop rights protected by state CL and fed. Constit. Bottom and Top of hierarchy.

- a) **Marsh v. Alabama – passing out leaflets on the sidewalk of a company town. Arrested for trespass (which is EXACTLY what she did according to code).**
 - i) Legal Question: Does the fact that it was private property trump the rt. To free speech?
 - (1) Free speech doesn't always trump prop rts. But here the prop rts were weaker and free speech stronger.
 - (a) LO was trying to control what the residents in the co. town could here.
 - (i) Can't tolerate this kind of isolation.
- b) **Shelley v. Kramer (1948)**
 - i) Legal question: What was the state action?
 - (1) Ct. enforcing the racially discriminatory covenant even the buyer and seller were both willing to engage in the transaction.
- c) **Bell**
 - i) Very difficult ? never decided by the govt. b/c the Federal Civil Rights Act was passed. Can ct. strike down trespass convictions for lunch counter protests w/out limiting a homeowner's right to exclude.
- d) **LOGAN VALLEY, HUDGENS, ETC.**
 - i) **Shopping centers right to exclude????**

V. **The Forms of Ownership – Estates and Interests**

A) Fee Simple Absolute

- a) Closest thing to true "ownership".
- b) Can be freely conveyed, devised and inherited.
- c) Goes to your heirs if you die intestate.

B) Fee Simple Defeasible

- a) A fee simple subject to conditions that may cut it short.
- b) **Fee Simple Determinable**
 - i) "as long as" – once the event happens, then there is a **possibility of reverter**. The present possessory estate ends as soon as the event occurs. Then AP starts rolling.
- c) **Fee Simple Subject to Condition Subsequent**
 - i) "but if" - Doesn't end automatically, gives party the option to end possessory interest. There is a **RT of re-entry/Power or termination**.
 - ii) AP doesn't start until O reclaims rt. Of poss'n.

C) Life Estate

- a) Easy to create.
- b) Can be defeasible

- c) Interest ends upon death.
- d) Has to be followed by some future interest:
 - i) Reversion: future interest reverted back to the grantor.
 - ii) Remainder: future interest in another grantee (3rd party)
 - (1) Rules for remainder:
 - (a) Must be able to become possessory at the end of the preceding estate
(no gap in time)
 - iii) Cannot divest preceding estate.