Property

- Module 1
- Acquisition of Property

Introduction

- Preliminary matters
- Quick review of class web site
- Other class mechanics

Especially true in Property:

"a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345 (1921) (Holmes, Justice)

Introduction

An allegory for the historical nature of Property:

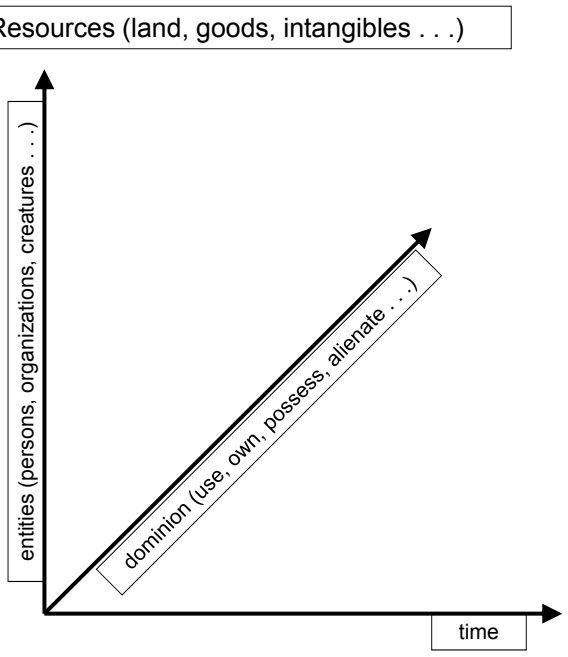
The QWERTY Keyboard

&

The Dvorak Keyboard

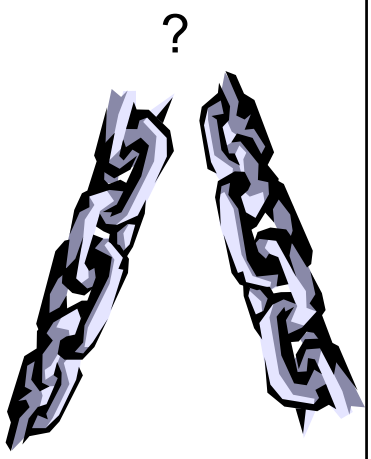
Introduction

- Competition for resources
- Effects of scarcity and the need to coordinate dominion
- Other values and effects of property rights



Johnson v. M'Intosh (US 1823)

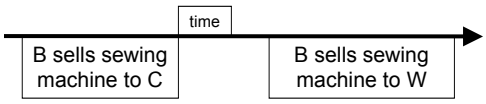
- Dispute?
- Discovery versus Conquest?
  - What is the traditional discovery rule for creation of property?
  - How does it contrast with Conquest?
- What general privileges did the other European countries grant to the first discoverer?
- What privileges/rights with respect to the Native Americans did the other European countries grant the first discoverer?



Johnson M'Intosh

Johnson v. M'Intosh (US 1823)

- In what two ways could the European first-discoverer acquire title from the Native Americans?
- Under a chain of title analysis, why did Johnson lose?
- Under the law of conquest, why did Johnson lose?

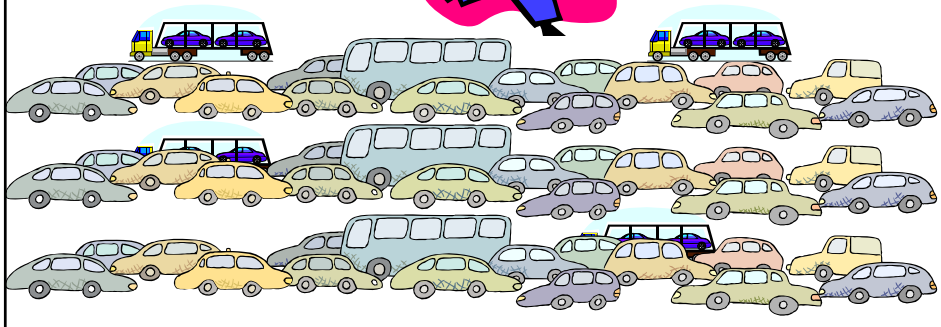


Pierson v. Post (Sup. Ct. NY 1805)

- Dispute?
- What is required to make "occupancy" to acquire rights in wild animals?
- Majority:
  - hot pursuit plus wounding creates the entitlement?
- Dissent:
  - hot pursuit plus probable capture creates the entitlement?
- Interests served by the majority and dissent arguments?
- Mode of argumentation by majority and dissent?

Pierson v. Post (Sup. Ct. NY 1805)

- Car Salesperson Hypo



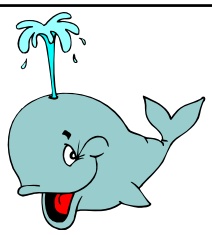
Rose: Possession as the Origin of Property

- Locke's Labor Theory
- Consent Theory
- Possession / Occupancy Theory
  - c/l: first possession is the root of title
  - What counts as possession?
- Pierson v. Post
  - Reward for useful labor versus Notice of a clear act
- Importance or relevance of clear title/notice/communications of ownership
  - Facilitates trade, allowing items to be put to highest value uses
  - Minimizes resource-wasting conflict
- To what degree can acts provide clear notice?
  - Does the audience understand the symbolism behind the act?

Rose: Possession as the Origin of Property

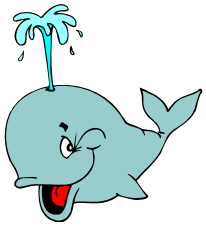
- Johnson v. M'Intosh
  - Chain of title, from the common law perspective, could not run through the Native Americans
  - Their original dominion over the land was not in the form of acts that the European "vocabulary" regarded as signaling possession
  - Doctrine of first possession has a "text" of cultivation, manufacturing and development
- Are the indicia of possession and property relevant from group to group, or universal?

Ghen v. Rich (U.S. Dist. Ct. 1881)



- Property entitlement in question?
  - How does the system of capture and property rights identification occur?
  - Role of whaling company?
  - Role of finder on beach?
- Related customs of usage discussed
  - Anchoring a whale with an identifying mark secures rights, even if whale goes adrift from anchorage
  - Anchored whale, gone adrift and mark lost, prior "firm possession" still vests entitlement
  - "Iron holds the whale"

Ghen v. Rich (U.S. Dist. Ct. 1881)



- Enforce the custom of usage?
  - Under what conditions should custom of usage be enforced?
  - Should all be bound by the custom, or only those in the group that generated it?
- Principles to evaluate whether to enforce custom of usage
  - Groups generating the custom versus those impacted by it
    - What are the interests of these groups?
    - Costs and benefits for these groups
  - Only enforce customs engrained throughout society, or similar to society-wide practices?
    - How would you imagine that the whaling customs are similar or dissimilar to generally applicable rules?

Keeble v. Hickeringill (Queen's Bench 1707)

- Entitlement in question?
  - How has Hickeringill upset Keeble?
- Outcome?
- Doctrine of constructive possession for wild animals on one's land – landowner is regarded as prior possessor of the animal
  - Pg. 29 n.14: "constructive"
    - "the word is a way of pretending what whatever word it modifies depicts a state of affairs that actually exists when actually it does not"
- Importance for encouragement of this sort of activity
- Compare and contrast with Pierson v. Post

Problems, pg. 31-32

- Prob. 1
  - Relativity of Title
  - Can O trespass on T's land to recover the animal?
- Prob. 2
  - Original possessor does not lose title (constructive possession) if . . . ?

Demsetz, Toward a Theory of Property Rights

- Property rights (rights to entitlements)
  - Help one form expectations she can hold in her dealings with others
  - These expectations find expression in the laws, customs and mores of a society
- One purpose of property rights relates to externalities
  - Internalizing externalities
  - "Every cost and benefit associated with social interdependencies is a potential externality"
- Allowing transactions increases the degree to which internalization takes place

Demsetz, Toward a Theory of Property Rights

- If the main allocation function of property rights is internalization of beneficial and harmful effects, when do we expect to see new systems of property rights emerge?
- Researchers recounting a relationship between Native American private rights in land around Quebec and the commercial fur trade
  - What is the externality that arises from the commercial fur trade?
  - Did it exist before the fur trade? To what degree both before and after?

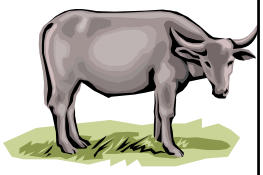
Demsetz, Toward a Theory of Property Rights

- With hunting grounds parceled . . .
  - What is the effect on externalities?
  - What types of externalities remain?
- Types of ownership
  - Communal
  - Private
  - State
  - Anticommons (Notes, pg. 48-49)
- Aspects of property . . .
  - Demsetz – utilitarian
  - Wealth distribution/redistribution
  - Nourish individuality and diversity
  - Essential to political freedom?
- Alienability

Garrett Hardin: The Tragedy of the Commons

- What is the tragedy?
- Examples in use of common resources
  - Parking spots, cattle grazing, national parks, pollution
- Difficulty in influencing a person to act against the logic of the commons
- Mutual coercion mutually agreed upon
  - Prohibition
  - Tax, fees, fines
- Commons only worked under situations of low population density?
- Ways to solve the commons problem?
  - Role of culture in solving or creating commons problems

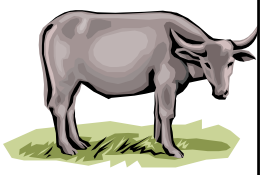
Coase: The Problem of Social Cost



- Reciprocal nature of the problem
  - Problem wrongly framed as: A harmed B
  - To avoid the harm to B, is a harm to A
- Want to avoid the more serious harm
- Hypo:
  - Annual cost to fence property is: $9
  - Price of crop per ton: $1

# in Herd (steers)	Annual Crop Loss (tons)	Crop Loss / Addl. Steer (tons)
1	1	1
2	3	2
3	6	3
4	10	4

Coase: The Problem of Social Cost



- Outcome without transaction costs?
  - Does the initial assignment of rights matter?
  - Why or why not?
- Effect of transaction costs
  - Increase in value of production resulting in reallocation of the rights must exceed the costs of doing so for the reallocation to occur
  - Effect of initial assignment of rights
- Potential policy prescriptions from Coase?

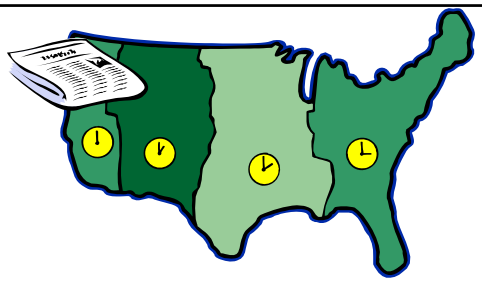
Ellickson: Order without Law

- Two types of range – open & closed
  - Indicating two types of liability rules
- Non-Coasian behavior observed in Shasta county
  - Norm of cooperation
  - Ranchers believe they should keep cattle from eating neighbor's grass, even if it is open range
  - Minor damage from lone animal trespass handled by social interaction
  - Housing each other's strayed animals
  - Offsetting mental "accounts" in various areas
- Litigation and relationships, pg. 213 n.51

Ellickson: Order without Law

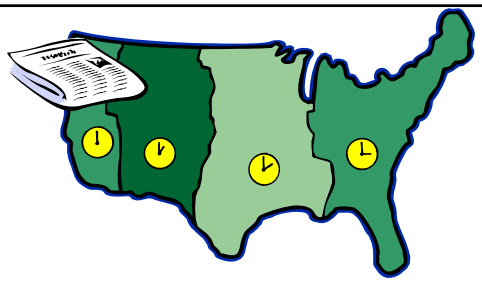
- Control of deviants
  - Self-help
    - Degrees
  - Report to county officials
  - Claims for money relief, without, and with, attorneys
    - Both rare; in-kind payments preferred

INS v. AP (U.S. 1918)



- Dispute
- Questions
  - Property in news?
  - If so, survive publication?
  - Are INS' acts of appropriation unfair competition?
- Dual character of the news
- What does the designation of the news as "quasi property" mean?

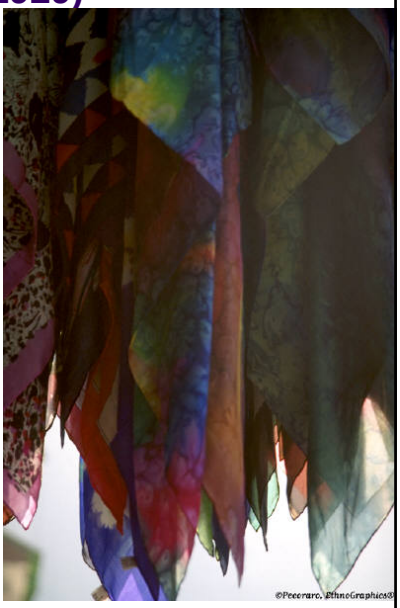
INS v. AP (U.S. 1918)



- Rights of public to use AP's news versus rights of a competitor to use it
- Is INS reaping where it has not sown?
- Did AP abandon the news by publishing it?

Cheney Bros. v. Doris Silk (2d 1929)

- Dispute
- Property is limited to the chattels which embody the creation, unless . . .
- Controlled by INS v. AP?



NBA v. Motorola (2d 1997) [NOT ASSIGNED]

- Motorola system sent game updates to pagers by gathering information from broadcasts
- NBA had competing pager delivery system

(i) a plaintiff generates or gathers information at a cost;
(ii) the information is time-sensitive;
(iii) a defendant's use of the information constitutes free-riding on the plaintiff's efforts;
(iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and
(v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product that its existence or quality would be substantially threatened.

Smith v. Chanel (9th 1968)

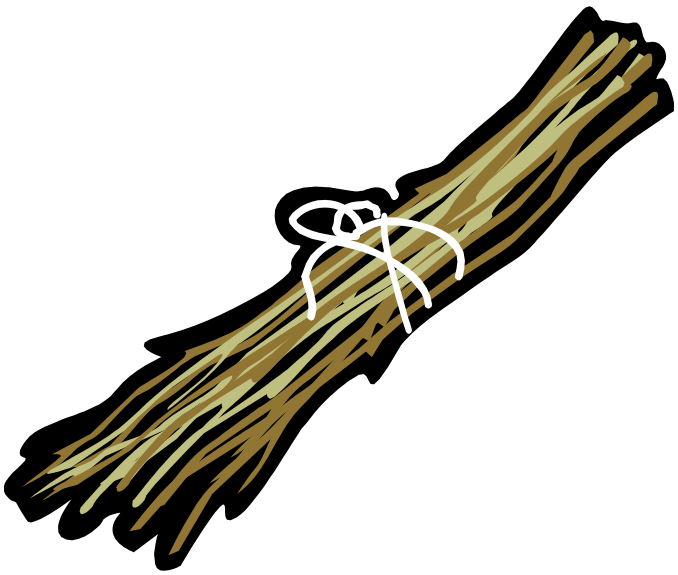
- Smith claimed in advertisements that its product was the equivalent of Chanel No. 5
  - Can it use the Chanel name in this way?
- Imitation and product substitutes are important for competition

Baird: Common Law IP and Legacy of INS v. AP

- Wheat versus Information
  - How different?
- Information as a public good and solving the public good problem

Option	Problem	→			Benefit	Cost
No IP 	Public good nature of info: -nonrivalrous -nonexcludable	Invest in R&D, create & sell product	Imitations sell at lower cost	May not be able to recover R&D costs	Getting info is "cost free"	Info under produced
IP 	Costs associated with limiting access to info	Invest in R&D, create & sell product	IP rights block imitators to some degree	Recoup R&D with (hope-fully) a profit	Info is produced & supplied*	Limits to access of info, ↑ trans-action costs

The “bundle of sticks” analogy for property



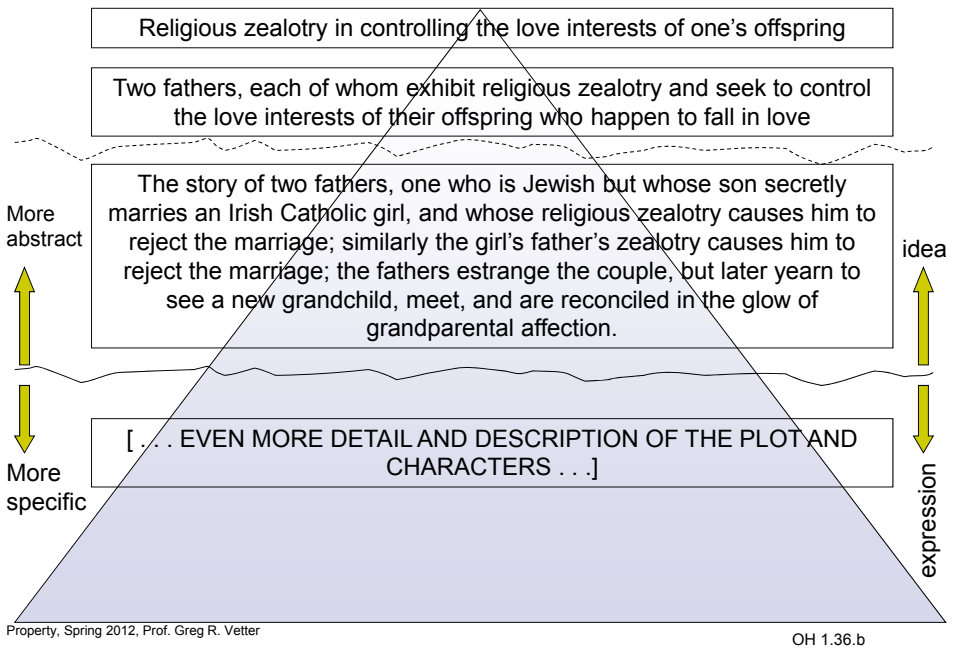
Prelude to IP - Intangibles

- Basic forms of protection for intangibles
  - Copyright
    - Protection for original expression (not ideas/facts/information) fixated in a tangible medium
    - Protection = exclusive right to do the following (and thus, the right to exclude others): reproduce, distribute, perform, display, create derivative works
  - Patents
    - Protection for useful, novel and nonobvious (more than a trivial advancement) ideas or technological improvement (products or processes)
  - Trademarks
    - Protection of the source indicating significance of a mark (word or symbol) against “likely to confuse” marks applied to the same or similar goods or services

Nichols v. Universal Pictures

- Improper Appropriation
  - Distinguishing protected versus unprotected expression
    - Abie's Irish Rose
    - The Cohens and the Kelleys
  - Characters and sequence of incident
    - Development of plot and characters
  - Common matter of plot
    - a quarrel between a Jewish and an Irish father
    - the marriage of their children
    - the birth of a grandchild
    - a reconciliation
  - Character comparison

Nichols v. Universal – Abie's Irish Rose



Chakrabarty - The elements of Patentability

- ***Patentable subject matter***, i.e., patent eligibility
- ***Useful/utility*** (operable and provides a tangible benefit)
- ***New*** (statutory bar, novelty, anticipation)
- ***Nonobvious*** (not readily within the ordinary skills of a competent artisan at the time the invention was made)
- ***Specification requirements*** (enablement, written description, best mode, definiteness)

Chakrabarty - 35 USC §101

Whoever invents or discovers any new and useful

process,

machine, manufacture, or composition of matter,

or any new and useful improvement thereof,

may obtain a patent therefor, subject to the conditions and requirements of this title

"Product" claims or inventions

Chakrabarty

- Patent application for genetically engineered bacteria
  - It had the property of breaking down multiple components of crude oil
  - Its intended application was to treat oil spills (never field tested or applied)
- Claim to the bacteria itself:
  - "a bacterium from the genus *Pseudomonas* containing therein at least two stable energy-generating plasmids, each of said plasmids providing a separate hydrocarbon degradative pathway."
- Various other claims in other claim formats
- Issue – is the bacteria a “manufacture” or “composition of matter” within the meaning of those terms as they apply from 35 U.S.C. §101?

White v. Samsung

- Growth in one’s “Right of Publicity”
  - Bette Midler’s voice in a Ford commercial
  - The Vanna White robot
    - “marketable celebrity identity value”
  - What explains this?

White v. Samsung Electronics America, Inc., 989 F.2d 1512 (9th Cir.

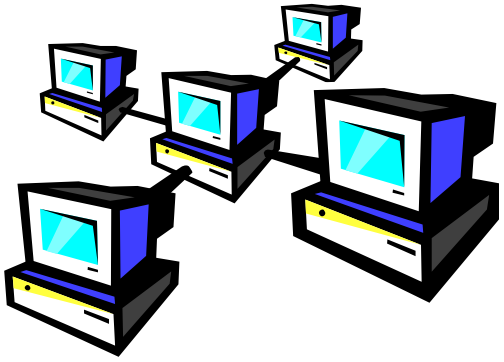
KOZINSKI, Circuit Judge, with whom Circuit Judges O'SCANNLAIN and KLEINFELD join, dissenting from the order rejecting the suggestion for rehearing en banc.

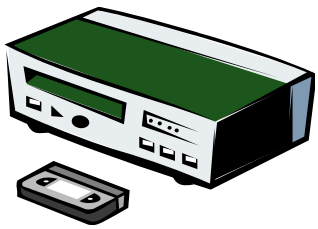
Saddam Hussein wants to keep advertisers from using his picture in unflattering contexts. [FN1] Clint Eastwood doesn't want tabloids to write about him. [FN2] Rudolf Valentino's heirs want to control his film biography. [FN3] The Girl Scouts don't want their image soiled by association with certain activities. [FN4] George Lucas wants to keep Strategic Defense Initiative fans from calling it "Star Wars." [FN5] Pepsico doesn't want singers to use the word "Pepsi" in their songs. [FN6] Guy Lombardo wants an exclusive property right to ads that show big bands playing on New Year's Eve. [FN7] Uri Geller thinks he should be paid for ads showing psychics bending metal through telekinesis. [FN8] Paul Prudhomme, that household name, thinks the same about ads featuring corpulent bearded chefs. [FN9] And scads of copyright holders see purple when their creations are made fun of. [FN10]

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

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

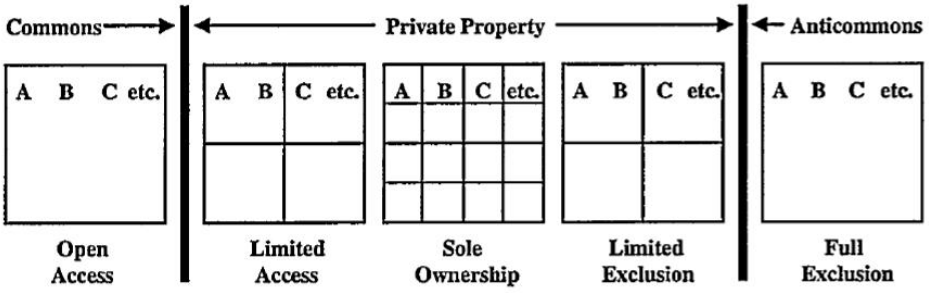
MGM v. Grokster





Heller & Eisenberg: Can Patents Deter Innovation?

- Tragedy of the commons
  - versus
- Tragedy of the anti-commons?
  - Possibility of underuse when governments give too many people rights to exclude others



Michael A. Heller, The Boundaries of Private Property, 108 Yale L.J. 1163, 1167 (1999)

Heller & Eisenberg: Can Patents Deter Innovation?

- Anti-commons?
  - Soviet storefronts?
  - Upstream scientific research?
  - Patent "thickets"?
- Evolution in biomedical research & anti-commons
  - Patents on genes with closely foreseeable products
    - versus
  - Anonymous gene fragments
  - Upstream versus downstream rights

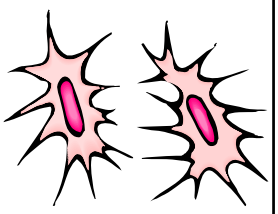
Heller & Eisenberg: Can Patents Deter Innovation?

- Are collective mechanisms likely to emerge to counter the anti-commons?
  - Transaction costs
  - Heterogeneous interests of owners
  - Cognitive biases
- Ways to reassemble the fragments

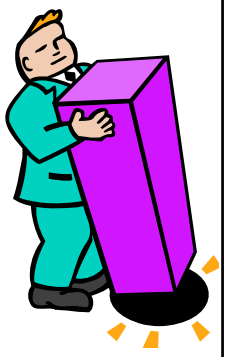
Goffman: Asylums

- Inhabitants
  - Inmates
  - Monks
  - . . .
- Effects of loss of property
- Patterns of territoriality in wards and other asylum areas
- Implications for property law?

Moore v. Regents of Cal. (Cal. 1990)



- What is a suit for "conversion"
  - "property" at issue here?
- Appellate court
  - considered meaning of property
    - Dominion (use)
    - Control
    - Disposition
  - Markets for body parts?
- Supreme Court
  - Ownership interest in these cells once removed?
  - Moore invokes privacy and dignity law
  - How has the law dealt with this material?
    - Health codes – limit patients control
  - Patent covers derived subject matter
    - Distinct from taken cells



Moore v. Regents of Cal. (Cal. 1990)

- If there is not conversion liability in the law, should it be extended?
  - Policy – patients have protection, concern with a strict liability tort's effect on third parties and research generally
  - Better to let legislature act
  - Don't need it to protect patient's rights
- Dissent – Mosk, J.
  - Property is an abstract concept that fits differently to the different types of objects to which it attaches
  - Mining and harvesting from this collected tissue is itself a moral concern of using the body
  - Unjust enrichment and unequal bargaining positions
  - Informed consent protection is less – negligence based

Notes on Moore v. Regents

- Property and modifying the bundle of rights
  - Market-inalienable
  - Only market-inalienable
  - Partial market-inalienability

- Pro and Con of market-inalienable rules for transplant organs

Radin: Property and Personhood

- Personhood based property
  - Implies some control over resources in the environment
  - Personal embodiment or self-constitution in terms of "things"
  - Wedding ring
    - Stolen from jeweler
    - Stolen from loving wearer

- Fungible property
  - Instrumental

Radin: Property and Personhood

- Carrying the personhood – property relationship too far?
- Dichotomies of property?
  - Is some kind of property afforded greater or better protection than others?
  - What explains these differences?
  - Continuum of property with varying strength to the entitlements?

Jacque v. Steenberg (Wisc 1997)

- Dispute

- Damages?
- Reasons for upholding the award?

  - Essential right
  - Hollow without enforcement
  - Owners interest in enforcement
  - Deemphasize self-help

State v. Shack (NJ 1971)

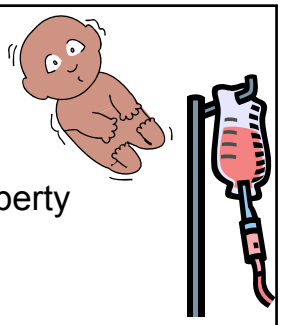
- Dispute

- Purpose of entry onto the farm
- Exceptions to the right to exclude
  - Public or private necessity
  - . . .
- Exception for government services or recognized charities?

Rights to Include, Exclude; and Transferability

- Private property right
  - Sole and despotic dominion?
- What considerations go into relaxing this view?
- What is Epstein's approach?
  - What does it mean to relax absolute rights for
    - Bilateral monopoly
    - Holdout
    - Transaction-cost obstacles

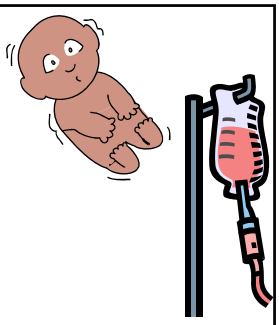
Radin: Market-Inalienability



- What does inalienable mean?
- How to evaluate when to designate a property entitlement as market-inalienable?
  - commodification

- Rhetoric of anit-commodification and of commodification

Radin: Market-Inalienability



- Dangers of Rhetoric of commodification?
  - Risk of error
  - Injury to Personhood
- Counter-points?
  - Mutual gain via exchange
  - How to decide in which domains market rhetoric is inappropriate?
  - Is property rhetoric the same as commodification rhetoric?
  - Gift economies?