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Teaching Important Property Concepts

*629 BACK TO THE FUTURE: INTELLECTUAL PROPERTY AND THE REDISCOVERY OF PROPERTY RIGHTS--AND WRONGS

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Why Property? I first encountered this question when I applied for a job at Santa Clara in the late eighties. I had been happily teaching Contracts at George Mason in Arlington, Virginia, when my husband received a job offer in San Francisco. Santa Clara had a tenure track opening in Property, and the question was why did I want to switch courses. The short answer was I wanted to be in the Bay area. I no longer remember the long answer. Not long after I was hired, the issue changed to why teach Property in the first year. The short answer at Santa Clara was the property emphasis on the California bar. I remember having trouble with a longer answer. To someone who had recently taught Contracts, Property seemed to be specialized agreements, with bits of tort (nuisance) and public law (zoning and takings) thrown in. The most distinctive parts of Property, estates in land, future interests and covenants, used the connection to land to solve the third party problem in Contracts. As Property professors moved landlord-tenant law earlier in the semester to make the course more timely, and as land became a less critical component of wealth, the justifications for including it in the first year at all became more remote. When I interviewed at Santa Clara, what I didn't say was that of all the first year courses, Property was the one I knew the least about--I had never even taken it in law school. No one at Santa Clara thought to ask, but Yale had dropped it from the first-year curriculum well before I arrived. Property was in danger of becoming a dinosaur.

I began writing this essay on the way back from the AALS Hiring Conference in Washington, D.C. We have an opening for entry level faculty in first-year courses, and no real preference by subject matter. A substantial number of the candidates we interviewed volunteered that they would like to teach Property, and their enthusiasm was genuine. One young man went on at great length about how intellectually stimulating property was as opposed to the areas like civil procedure that he knew more about. I have even had ***630** students ask me to organize an upper class seminar on property theory. It's been over a decade since I've thought about switching back to Contracts. Property is back to a respected place in the law school canon.

What has brought Property back from the brink of first year extinction is the continuing importance of what a Stanford professor described to me as “the thingness of it.” The classic account of Property's distinctiveness is that the legal relationships between people included in the course--those between neighbors, landlords and tenants, testators and devises, sellers and buyers, losers and finders--are mediated by their relationship to a thing. When the “thing” is important, or the allocation of rights uncertain, Property becomes the stuff of struggle, philosophy and the first year introduction to law. When the allocation of rights becomes so settled that the course focus shifts too completely to their colorfully trivial acquisition (the fox hunt?) or their mindnumbingly

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complex division (the welter of land use regulations), property as a unified and distinctive concept loses its way. Joe Singer writes in this Issue that he has reorganized his property course to emphasize the intermediate transactions--the governance, sharing and division of property rights--that make up lawyers' most frequent encounters with property law. I believe that Singer's reconstruction of the course was right. It captures the most distinctive part of the subject at the time I started teaching it. It misses, however, the questions that the new generation of faculty candidates and our students are increasingly asking: Is property theft? Are property rights fixed? What interests do they serve? What alternatives are possible? Singer's emphasis on transactions often addresses these issues in the midst of established property regimes; I believe that now is the time to reconsider how we address them in the construction of the regime--and at the beginning of the first year.

In the first decade of the new millenium it is the allocation of property rights and the creation of a structure for governance that is again engaging the legal imagination. My introduction to property rights came when Curtis Berger started the college land use course I took by asking to borrow a student's watch, and then spending the rest of the class asking us to justify the student's right to have it returned. The classic property introductions with their lines of cases on wild animals and finders were designed to introduce students to the case method and to remind them that the allocation of rights in things should be questioned, but then quickly resolved into an established, if not always entirely determinate, order. My colleagues at Santa Clara and I have revised the classic materials to provide a more thorough introduction to intellectual property and to the raging controversies over the extension of property rights to images, ideas, body parts and fertilized eggs. Dorothy Glancy, who also teaches an upper level intellectual property class, developed the materials. Margalynne Armstrong, Cynthia Mertens and I have incorporated them into our first-year courses. We have selectively replaced the cases on wild animals, finders and bailment with these new materials that ***631** examine the emerging property regimes that govern information, identity, cells and progeny. The result is a reinvigorated course that more thoroughly examines the question “what is property,” and how the allocation of property rights governs new technologies and the relationships between those involved.

In this Essay, I intend to examine these materials, and explain how they frame the way we teach the rest of course. I will emphasize, first, how we use Johnson v. M'Intosh, the Native

American land rights case that now opens many property texts, to introduce the idea that property regimes are legal constructs, chosen rather than ordained within particular contexts. Second, I will examine the messages that come out of the wild animal cases and compare them to the similar conclusions that come from INS v. AP., Bette Midler and Vanna White. Third, I will discuss Moore and Hecht, and the contrasting ideas of property and contract. Finally, I will end with the frozen embryos cases and Shack, and the idea that public policy, sometimes, but not always trumps the allocation of private interests.

I. In the Beginning: John Marshall and the Sources of American Law

Johnson v. M'Intosh [FN1] is the ideal case for our multicultural, globalized times. A rich and powerful civilization is in a position to dictate the property regime for an inhabited continent it has recently discovered. The two cultures have radically different approaches to the allocation of real property rights, and fundamentally different values in their treatment of land. What principles will govern the terms of their interaction? John Marshall's 1823 opinion gives the answer not only to settle the specific dispute in the case, but also to create a framework that still stands almost two centuries latter.

The challenge in teaching Johnson v. M'Intosh lies not in getting students to appreciate its significance. It

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has the hallmarks of the traditional property case: relativity of title, the idea of exclusivity, the importance of a chain of title. Like many cases, and all John Marshall opinions, it richly rewards further study. Articulation of the holding, the ratio decidendi, or the authority accepted as influential in the case, provides a rigorous introduction to the case method--and the study of law. The problem in teaching the case, however, comes from the very characterization of the issue: if this is the story of a rich and powerful civilization imposing a property regime on unconsenting natives about to be deprived of their land, how can teaching it become more than an exercise in political correctness? The first time I read the case as a possible replacement for Pierson v. Post, [FN2] I wondered if the primary purpose of its inclusion in the property course was to induce European-American guilt.

***632** Two experiences outside the course deepened my appreciation for the case and provided greater insight into how to teach it. The first occurred when I attended a Law and Society Conference in Chicago roughly a decade ago. My colleague Margalynne Armstrong and I were on a panel with an Israeli and a Jordanian. The Israeli addressed the problems that arose from communally held town squares in the West Bank. The Jordanian described how urban sprawl outside Amman had triggered conflicts between tribes that had historically held, but for tax reasons never registered, the grazing lands, and settlers with deeds from the state. In Israel, the issue had symbolically become a clash in Israeli-Palestinian values; in Jordan, the conflict was more associated with modernization. But the legal tensions in both countries were a legacy of British colonial rule, and the conflicts between traditional forms of land-holding and the needs of a modern society. [FN3] It was a reminder that Marshall's opinion, written in 1823, addresses issues that remain timely two centuries later.

The resonance with modern predicaments, however, complicates rather than simplifies the sensitivities involved in teaching the case. I find it impossible to avoid, for example, Marshall's images of Native Americans as “fierce savages . . . with whom it was impossible to mix,” [FN4] and equally essential to acknowledge Marshall's efforts to distance himself from some of the more extreme views of the day by mocking the “pompous claims” of the Europeans, [FN5] and their belief that “the character and religion of [the] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy.” [FN6] Tying the substance of the decision to the colonial legacy of Great Britain and its celebration of certain forms of property that will culminate, by the end of the semester, in future interests runs the risk of discrediting the entire enterprise. I was equally reluctant, however, to take on the modern version of “the white man's burden” and attempt to justify the decision--until I discovered that Joe Singer could do it for me. [FN7]

***633** Several of my Santa Clara colleagues and I adopted Singer's text, Property Law: Rules, Policies and Practices, when it was first published. Singer did two things that have influenced my teaching of Johnson ever since. He provided enough of the history of the case to be able to conclude that it was one of the most pro-Indian decisions to come from the Supreme Court in the nineteenth century, [FN8] and he drove the point home by pairing Johnson with the Supreme Court's 1955 decision in Tee-Hit-Ton Indians v. United States. [FN9]

Johnson is a seminal case both in establishing that Native Americans had no ability to convey a title to private individuals that would be recognized in the courts of the United States and in recognizing a Native American right of occupancy. Tee-Hit-Ton involves the more limited issue of whether the U.S. government must pay compensation for interference with Native American possession, and it is arguably wrong. [FN10] The contrast between the two cases could not be greater. Marshall's opinion in Johnson can be taught as a subtly crafted intellectual puzzle; Reed's as a prosaic recital that masks (or misses) the complexity underlying the decision. To illustrate the comparison, I try to get the students to identify the foundation on which Johnson stands. We start with discovery. Marshall clearly invokes the principle of discovery at the beginning of the opinion, but he pokes fun at the pretension of discovering an inhabited continent, [FN11] and concludes that the

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principle "gave title to the government by whose subjects, or by whose authority, it was made, against all European governments, which title might be consummated by possession." [FN12] The principle regulates only the relationship of European governments with each other, it does not address Native American power to convey title.

The next foundation upon which Johnson might arguably stand is the idea of conquest. Conquest, like discovery, is important to the opinion, and perhaps one of Marshall's most noted lines is his assertion that "[c]onquest gives a title which the Courts of the conqueror cannot deny . . . respecting the original justice of the claim which has been successfully asserted." [FN13] Marshall qualifies that judgment, however, by adding that where incorporation of a conquered people into the conqueror's society is "practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired." [FN14] When the English conquered the French in Canada, they did ***634** not necessarily conclude that French landowners who chose to remain could not convey good title to English citizens taking residence in Montreal. The fact that a conqueror has the power to deprive the conquered of their power of alienation does not resolve the issue of whether it should, or must do so, as an element of the law of the land.

This leads to the heart of the opinion. Marshall's justification accordingly rests not on universal principles of discovery or conquest, but on the particulars of European-American/Native American relationships. Even then, he distances himself from too stereotypical a characterization of the relationship, observing: "We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits." [FN15] Instead, he focuses on the particular history of the United States, observing:

> [T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence. [FN16] The character of the Indians and the nature of the wars that followed ("in which the whites were not always the aggressors") led to the principle that:
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> [T]he Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their land, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by the Courts of justice . . . . [FN17]

Marshall's opinion is maddening; the precise justifications for his conclusions elusive. What about the fierce character of the Indians, if not their status as hunters, prevents them from conveying individual title? Why is the conclusion with respect to alienation "indispensable to that system under which the country has been settled," [FN18] particularly as it applies to tribes at peace with a settled history of possession of the area in question? Does the ***635** opinion rest on custom and power alone, even if "opposed to natural right, and to the usages of civilized nations?" [FN19] In short, Marshall's opinion is the perfect vehicle for introducing students to the intricacies of legal reasoning and the charms of the Socratic method.

Tee-Hit-Ton has few such virtues. Although the case raises an issue of first impression, whether federal interference with native possession, in this case in the form of a sale of timber rights, gives rise to a constitutionally compensable claim, Justice Reed's opinion for the Court treats it as a settled matter. [FN20] Perhaps the

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most striking line of Reed's opinion is his declaration that "[e]very American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, foods and trinkets, it was not a sale but the conquerors' will that deprived them of their land . . . ." [FN21] Marshall's opinion in 1823 combined a realpolitik analysis with a careful effort to secure a modicum of recognition for Indian land claims. Reed's opinion blithely concludes that no such rights exist for the Tee-Hit-Ton, a tribe whose members are citizens of the United States, and which has never had other than peaceful ties with the Russians and Americans who settled in Alaska. [FN22]

The most immediate issue in teaching Tee-Hit-Ton is discussing whether it can be reconciled with Johnson, the major precedent on which Reed relies for his conclusion. Singer and other Indian law experts maintain that it cannot, [FN23] but my students tend to be sympathetic to Reed. Given the wholesale U.S. usurpation of Indian land, why should timber sales in 1955 trigger a different result? After an initial discussion of the question, [FN24] Singer emphasizes that, contrary to popular opinion, the United States did compensate Indian nations when it took land pursuant to treaties, and by the fifties, an Indian Claims Commission had been created to provide compensation at fair market value. [FN25] ***636** I tend to emphasize a different point: if this really turns on an assertion of power, could either case have come out differently? Although my classes have engaged in many creative discussions of the issue over the years, [FN26] I have a hard time imagining a different result in Johnson. The custom was well established at the time the case was decided. [FN27] Moreover, it is not at all clear that permitting tribal sale of Indian lands would have benefited Native Americans. [FN28] Widespread fraud and unscrupulous practices often characterized European-American land transactions; the specter of questionable deeds and alcohol-induced bargains haunted potential Native American land sales. [FN29] Effective policing of the bargains was unlikely, and a legislative reversal of any judicial decision authorizing the practice almost certain. [FN30]

The outcome in Tee-Hit-Ton is another matter. Not only is it possible to imagine the Supreme Court deciding that the Alaskan natives should be compensated for the loss of timber rights; the Alaskan natives were in fact compensated. Singer reports that Congress, though not constitutionally obligated to do so, later passed a statute providing $962.5 million plus about forty million acres of federal public lands to Alaskan natives. [FN31] The Court's realpolitick analysis of American history overlooked both the fact that the ***637** Court's prior decisions left this particular issue open, [FN32] and that in the second half of the twentieth century the political realities of the nineteenth century did not necessarily dictate the result of this case. [FN33]

In class, I use the comparison between Johnson and Tee-Hit-Ton to explore the possibilities of the judicial role, and the nature of property rights. The outcome in Johnson may have been inevitable, but Marshall was a master in rewriting conventional scripts. Whatever the holding, he saw that he had considerable leeway in crafting the rationale, and he did so in a way that carved out some recognition of Indian rights and while distancing himself--and the United States--from the more pretentious assertions of the colonial area. [FN34] Reed's opinion, in contrast, is most notable for its lack of imagination and empathy. He simply does not conceive of the possibility, in 1955, of granting Native Americans a greater measure of rights than those in his "schoolboy" account of American history and, unlike Marshall, he does not recognize Alaskan natives as actors on the American stage whose interests deserve legal protection. [FN35] It is easier to appreciate Marshall after dissecting Reed. It is also ironic that an opinion from an era so overtly hostile to Native American rights, because of its ambiguity and finesse, may offer more for twenty-first century law than an opinion only a few decades old. [FN36]

The most compelling issue in these cases, at least for Property professors, however, must be the source of

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the property regime at the core of these cases. If the precise basis of Marshall's holding is elusive, and if Reed's opinion is arguably wrong, then the justification for the property rights at issue must remain forever contested. Are the property regimes of hunter-gatherers and ***638** agriculturists inevitably incompatible? [FN37] Is the real problem the chaos that would be introduced by the need to determine the validity of Indian deeds? Or is the result simply an assertion of power that advances the interests of the conqueror over the conquered? Whatever the answer, Anglo-American real property law follows from adoption of a regime of private, individual, [FN38] exclusive and alienable title [FN39]--and the larger issue of property's role will continue to occupy the rest of the course.

II. Property Rights Revisited: From Wild Animals to Wheel of Fortune

My initiation into the world of Property professors came with the study of wild animals. I had just been hired at Santa Clara and was about to begin teaching Property despite a background limited to a stint in a landlord-tenant clinic in law school and the experience of buying, selling and renting my own residences. I was invited to help out with orientation, and it turned out that orientation focused on an introduction to the case method that featured Pierson v. Post, [FN40] and the line of cases assigning rights in wild animals. The cases included the traditional panoply of Pierson, Glen v. Rich, [FN41] and Keeble v. Hickeringill, [FN42] and added to them the note cases in many textbooks involving ***639** silver foxes and oil and gas. [FN43] Fresh from George Mason and an exploration of law and economics, I tried to reconcile the conflicting decisions. The answer I came up with was a conventional one: the outcomes in the cases reflect a balance between the extent of the investment and the importance of property rights in encouraging it [FN44] weighed against the transaction costs involved in policing the rights accorded. [FN45] Determining which wild fox running through the woods is subject to hot pursuit is not worth the effort; returning a valuable pelt from a readily identified fox raised for profit is. Decisions about foxes and whales lend themselves to simply stated principles more easily than the more muddied terrain of Native American rights. [FN46]

Once introduced, the principle of balance between investment incentives and enforcement costs can be applied to the assignment of property rights in any arena, and my colleague, Dorothy Glancy, has developed an introduction to intellectual property [FN47] that collects three sets of common law cases to test the importance of property rights in the emerging law that governs the regulation of ideas and technology. Johnson and the wild animals cases, if not carefully dissected, often leave the impression that property rights expand to protect any new industry if enough money is at stake. [FN48] Glancy's collection ***640** presents a more complex picture that contrasts common law rights with statutory protection, and both expands and contracts the assertion of rights within developing industries. [FN49]

A. Quasi-Property, Unfair Competition, and Investment in Information

The first set of cases pairs International News Service v. Associated Press [FN50] (INS v. AP) with Feist Publications, Inc. v. Rural Telephone Service Co. [FN51] I have added Cheney Brothers v. Doris Silk [FN52] from the Dukeminier & Krier text and jettisoned wild animals and finders, colorful though the discussions have been. [FN53] INS v. AP, which involved International News's appropriation and resale of breaking stories from the AP wire, [FN54] tracks the lessons from the more recent of the wild animal cases. The Court characterizes the case as one where the defendant

> is taking material that has been acquired by complainant as the result of organization and the ex-

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> penditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. [FN55] In short, when someone has invested time, money and effort in producing something valuable for the public and a competitor appropriates the product for his own benefit, the competitor has interfered with a quasi-property interest, and can be sued for unfair competition.

What then to make of Feist Publications? Rural Telephone Service Company, like most phone companies, collects names, addresses and phone numbers and publishes them in a yearly telephone directory. The directory earns its revenues by charging for ads in the yellow pages. Feist Publications publishes area-wide telephone directories that cover larger areas than individual phone companies, and competes with them for yellow pages advertising. When Rural became the only telephone company to refuse permission to use the data it had collected, Feist included Rural's data in its directory anyway, and Rural sued. Feist won, despite the fact that Rural had ***641** invested time, money and effort in producing something valuable for the public, and Feist was a competitor who appropriated the product for its own benefit.

How can INS and Feist Publications be reconciled? The easy way is to note that INS turned on an unfair competition claim while Rural's lawyers raised only the issue of copyright. Since the Supreme Court has ruled that copyright did not extend either to the news or to phone numbers, no copyright violation existed in either case. “Is this an issue of malpractice?” I ask my class. Would Feist have turned out differently if the issue of unfair competition had been raised? When the questions are presented in proper Socratic fashion, first leading the students toward the comparison of the causes of action, and then asking whether the different counts explain the result, the students are often thrown off stride by the questions. But they quickly begin to resist the conclusion. The first paragraph of the opinion lays the foundation for an alternative answer. It observes that Rural “is a certified public utility” that publishes a “typical” telephone directory “as a condition of its monopoly franchise.” [FN56] Rather than reflecting entrepreneurial enterprise, Rural collected its data as an incidental part of the phone service it provided. The Court notes, in a passage that first-year students often overlook, that the District Court (in a decision later than the one under review) ruled that Rural's refusal to grant permission to use the data “was motivated by an unlawful purpose ‘to extend its monopoly in telephone service to a monopoly in yellow pages advertising.’” [FN57] How can a company press a claim for unfair competition when it is guilty of monopolistic practices?

The reconciliation of the two cases occurs a little too quickly, so I press on to include Cheney Brothers. Here, no monopolistic practices exist. A silk scarf manufacturer who had invested time, money and effort in producing distinctive designs finds that a competitor has appropriated the designs as its own. Surely this is unfair competition? Alas, Learned Hand rules for the defendant. The plaintiffs cite INS v. AP in support of their claim, and the Second Circuit observes:

> we agree that, if it meant to lay down a general doctrine, it would cover this case; at least, the language of the majority opinion goes so far. We do not believe that it did. While it is of course true that law ordinarily speaks in general terms, there are cases where the occasion is at once the justification for, and the limit of, what is decided. This appears to us [to be] such an instance; we think that no more was covered than situations substantially similar to those then at bar. The difficulties of understanding it otherwise are insuperable. We are to suppose that the court meant to create a sort of ***642** common-law patent or copyright for reasons of justice. Either would flagrantly conflict with the scheme which Congress has for more than a century devised to cover the subject-matter. [FN58] INS had been limited to its facts more than a half-century before Feist Publications reached the Supreme Court. [FN59] The expansion of

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property rights has its limits, even when justice and commerce seem to demand otherwise.

The Glancy materials use the discussion in these cases to introduce patent, copyright, trademark and trade secrets more systematically than most property texts, providing a short description of the origins and current status of each. The cases set up a comparison of patent and copyright and the common law forms of property protection. INS, Feist Publications and Cheney Brothers all raise--and reject--the possible application of copyright law to news, phone numbers and scarf designs. None of the products is original, [FN60] and the statutory forms of recognition last not just for the brief shelf life of the profitable use of the information, but for a lengthy prescribed period that cannot be changed. Common law and statutory forms of property differ, and property rights are not always so easy to come by--or so the students who read Feist Publications and Cheney Brothers may think. Bette Midler and Vanna White, more colorful characters than any of those involved in a fox hunt, recently suggested otherwise to appellate courts and won. In the process they add a new wrinkle to the discussion, the idea that the expansion of property rights may involve not only the possibility of "theft" from the powerless, [FN61] but the inhibition of public as well as private discourse. [FN62]

B. Personality, Publicity, Privacy and Property

Midler v. Ford Motor Co. [FN63] and White v. Samsung Electronics America, Inc. [FN64] should be included in every property text. The facts are compelling, Kozinki's dissent could fill a class discussion by itself, and the cases present ***643** one of the most far-reaching expansions of modern common law property rights. [FN65]

Bette Midler's case is the more sympathetic of the two. The advertising agency for Ford Motor Company asked Midler to appear in a commercial. Midler, who did not do commercials, refused. So the agency, which "had paid a very substantial sum to the copyright proprietor" for one of Midler's songs, hired a singer who "sounded like Midler," and ran the ad. [FN66] Midler sued. The court rejected her claim of unfair competition because Midler who, after all, did not do commercials, was not in the business of advertising and the ad did not curtail the market she was in. Instead, the court characterized the sound of her voice as an attribute of her identity and concluded, therefore, that to "impersonate her voice is to pirate her identity." [FN67] The court held that "when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California." [FN68]

Vanna White's case builds on Midler's. Samsung's ad agency ran a humorous series of commercials that poked fun at the twenty-first century. One ad, for example, depicted a raw steak with the caption: "Revealed to be health food. 2010 A.D." The ad that gave rise to the lawsuit showed a robot dressed in a wig, gown and pearls that intended to evoke Vanna White, posed next to a Wheel of Fortune game show set. The caption read: "Longest running game show. 2012 A.D."

The case involves two issues. First, did the ad infringe on White's common law right of publicity? The ad showed neither White's name nor likeness. Indeed, no one could mistake the robot for a real person, much less the real Vanna White. Instead, the opinion emphasized that "television and other media create marketable celebrity identity value," and recognition of that value does not depend on whether the celebrity achieved her fame through "rare ability" or "dumb luck." [FN69] Invoking White's identity, with or without her name or likeness, appropriates her right of publicity. Second, even if it is otherwise inappropriate to invoke celebrity identity in an ad, is there a first amendment parody defense that protects defendant's right to lampoon public figures? The Ninth Circuit held that the difference between a "parody" and a "knockoff" is "the difference between fun

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and profit" and the parody defense was better left to the non-commercial realm. [FN70] Property rights, in the form of a ***644** common law right of publicity, give Bette Midler and Vanna White the right to control commercial use of their images.

Kozinski's dissent emphasizes how potentially sweeping this new right may be, and he starts his opinion with Saddam Hussein's complaints about ads using his image, [FN71] and George Lucas's efforts to prevent advocates of the Strategic Defense Initiative from naming it "Star Wars." [FN72] To determine just how far this new right extends, I like to ask my students what the two cases are really about: commercial exploitation or the right to control as personal a subject as one's image? The Midler holding could be restated as a series of elements, requiring 1) use of the distinctive voice of a professional singer; 2) that is widely known and; 3) deliberately imitated; 4) in order to sell a product. White can be similarly restated to require 1) use of the distinctive image of a celebrity; 2) that is widely known and; 3) deliberated imitated or evoked; 4) to sell a product. Given these formulations, do Midler and White apply to Saddam Hussein?

These questions can easily occupy a substantial part of a class. Hussein clearly has 1) a distinctive image; 2) that is widely known, and; 3) the commercial in question ran a picture of him; 4) to sell a product. He seems to meet the technical elements of the cause of action. Hussein's celebrity, unlike Midler's or White's, however, was not cultivated through commercial use. Does this matter if the offending ad agency is using his image for their own commercial benefit?I query whether it depends on the nature of the harm. Midler and White (like Saddam Hussein) are not in the advertising business and it is not lost income that concerns them. Rather, it is the loss of control over a carefully cultivated image that may be tarnished by commercial associations not of their choosing. Midler simply doesn't do commercials, and White's commercial marketability can hardly be helped by the suggestion that she can be replaced by a robot. Saddam Hussein's notoriety, in contrast, has not been burnished to advance his commercial marketability, and the U.S. ad, however much it accuses him of tyranny, is unlikely to affect the profitability of his personal image (or even the consequences were he to find himself a defendant in a proceeding before the Hague). Conversely, if the wrongful appropriation of one's image is more akin to theft, and the harm is the loss of control over an aspect of one's personality, then the marketability of the image should only go to the measure of damages and not to the nature of the cause of action. The First Amendment may protect editorial page cartoonists' right to ***645** lampoon Middle East dictators, but a right of publicity, if rooted in personal identity, may not necessarily vary with commercial appeal.

Kozinksi's dissent, which is willing to accept the commercial nature of the right to publicity, questions the wisdom of the result even if restricted to the commercial realm. He lectures that intellectual property law "is full of careful balances between what's set aside for the owner and what's left in the public domain for the rest of us," [FN73] and he queries:

> Intellectual property rights aren't free: They're imposed at the expense of future creators and of the public at large. Where would we be if Charles Lindbergh had an exclusive right in the concept of a heroic solo aviator? If Arthur Conan Doyle had gotten a copyright in the idea of the detective story, or Albert Einstein had patented the theory of relativity? [FN74] Kozinski reminds us that if one side of intellectual property is protection of the investment in ideas then, the other side is dissemination of the product. Patents guarantee a monopoly on use for a relatively short period while giving inventors an incentive to make public their discoveries. Copyright exchanges a longer period of protection for exceptions such as fair use. Kozinski concludes that:
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> Intellectual property law assures authors the right to their original expression, but encourages others to build freely on the ideas that underlie it . . . . We give authors certain exclusive rights, but in exchange

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> we get a richer public domain. The majority ignores this wise teaching, and all of us are the poorer for it. [FN75]

Property professors are, however, richer for Kozinski's dissent. By placing the right to publicity squarely in the commercial sphere in which it is rooted, he is able to recall the historic tradeoffs that have always underlain intellectual property law. He counsels that property rights, with their right to exclude, can impede commerce as well as advance it, and impoverish the public domain even if they protect individual interests. Above all, he reminds us that property rights "aren't free," and that balance rather than certainty is the foundation for their administration.

III. Property Rights in the Coming Century: From The Foundation of Contract to an Element of Status?

Kozinski's position lost in White, but concern for the colonial ambitions of property law carries greater weight when the subject changes from intellectual property to bodily products. If the explosion in information technology dominated the latter half of the twentieth century, some predict that it will be ***646** biotechnology that explodes on the scene in the twenty-first. [FN76] Our understanding of the human body--of genetics, stem cells, reproduction, the human genone, bioengineering--has been increasing so exponentially that we are now at the point of assigning property rights in things that did not exist, or which we had no way to know existed, only a short time ago. At the same time, we are more cautious about biology than information technology. Buying or selling hearts and kidneys and excluding others from cancer curing chemicals seem to be more radical developments than keeping a Vanna White robot out of a television commercial. The extension of the property realm into the allocation of biological products has been even more haphazard than the development of intellectual property generally, and Glancy's materials provide two pairs of cases that test these developments.

A. Informed Consent and Posthumous Conception

Most textbooks now include Moore v. Regents of the University of California; [FN77] Hecht v. Superior Court [FN78] provides an excellent companion case. In both cases, property rubric is used to allocate decision-making power, in the first case over the use of spleen cells for medical research and in the second to decide whether sperm cells will be available for posthumous conception. But in both cases property terms prove too blunt-edged a sword. When the courts lose sight of the idea that ownership can involve a bundle of sticks rather than a fixed collection of rights, they muddy rather than enlighten the underlying policy debates.

Moore is thus one of those cases useful for testing what property means, and much of the fun in teaching it consists of getting the class to figure out exactly what the court did--and did not--decide. It is therefore frustrating to find that many edited versions of the case leave out the answers to the questions I ask in class. Moore involved a leukemia patient whose cancerous spleen was removed from his body, and who was asked by his doctors to continue to come for seven years of follow-up care in which the doctors continued to remove tissues, blood and other bodily fluids. [FN79] What the doctors did not tell Moore was that they were using his spleen and other tissues for research, and had patented a cell line, made from his cells, which Moore alleged might become part of an industry valued at $3 billion. [FN80] Moore sued, among other things, for breach of informed consent and conversion.

***647** My first question in this (and many other cases) is what was the issue before the court? The opinion addresses the existence of a cause of action in conversion, and starts the discussion with the observation that "[t]o establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession . .

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. .” [FN81] The court stakes the idea of conversion on the existence of ownership, and apparently little more. So my next question is whether the court ever determined whether Moore had a property interest in his cells that survived their extraction from his body. Again, the issue seems critical to the court's analysis as it observes that “[s]ince Moore clearly did not expect to retain possession of his cells following their removal, to sue for their conversion he must have retained an ownership interest in them. But there are several reasons to doubt that he did retain any such interests,” [FN82] which the court then sets out at some length. At the end of the discussion, however, there is no conclusion. Instead, the court moves on to the next issue, whether conversion liability should be extended to the facts of Moore. Here, however, the court subtly shifts ground. In a line edited out of some casebooks, the court observes that “[w]hile we do not purport to hold that excised cells can never be property for any purpose whatsoever, the novelty of Moore's claim demands express consideration of the policies to be served by extending liability.” [FN83] By the end of the opinion, the court has ruled that no property interest exists sufficient to support a cause of action in conversion. [FN84] But it does not explain whether this is true because no ownership right exists at all, because that right has been so limited as to be effectively worthless, [FN85] or for policy reasons that preclude recognition of an action in conversion even if an ownership claim can be made. In short, it is not clear whether this is a case about property--in the strict sense--at all.

The court is somewhat clearer about the policy concerns that dictated the decision. It balances two considerations: the patient's right to make autonomous medical decisions and the researcher's ability to pursue socially ***648** useful activities. [FN86] The problem with conversion is that it is a strict liability offense; if a patient owns spleen cells excised from his body, and if he has not otherwise abandoned them, then he may be entitled to their return or to compensation for their market value, even if the researcher had no idea that the cells belonged to someone else. [FN87] The court attempted to solve the problem by separating the sticks in the bundle, by distinguishing the power to determine disposition from the ability to sell and by tying the separation to the different causes of action alleged in the complaint. It accordingly upheld the action for breach of fiduciary duty because of the failure to secure informed consent while dismissing the action for conversion.

This solution, however, does not fully hold. Breach of fiduciary duty depends on the doctor's failure to inform the patient of circumstances that may affect the patient's decisions about his medical care, rather than the patient's wishes to share in the profits from the doctor's research. [FN88] If a patient knows that the doctor stands to benefit from a given course of care, for example, he may want a second opinion. The problem in a case like this, however, is that a second opinion is unlikely to change the course of treatment. Moore's leukemia was life-threatening; removal of his spleen was hardly elective surgery. At most, he might have chosen follow-up care closer to home, instead of continuing to travel to California for check-ups after he had moved farther away. The doctors' duty to inform him of their potential conflict of interest has little to do with the patient's desire to cut the best deal he could have for consent to use his spleen.

To test the issue, I use the following example. [FN89] Suppose Moore, having been duly informed by his doctors of the research potential of his cells, consents to the splenectomy, but insists that the doctors may not use his cells ***649** without payment. The doctors nonetheless sell his tissues to commercial researchers. What result?

The Moore court sidestepped the distinction between a property interest sufficient to assert decision-making power and one that would permit sale of human cells by appearing to deny the existence of any property interest at all. Yet, in another passage sometimes edited out of the opinion, the court observes that:

> It may be that some limited right to control the use of excised cells does survive operation of the stat-

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> ute. There is, for example, no need to read the statute to permit "scientific use" contrary to the patient's expressed wish. A fully informed patient may always withhold consent to treatment by a physician whose research plans the patient does not approve. That right, however, as already discussed, is protected by the fiduciary-duty and informed-consent theories. [FN90] This passage, however, misses the distinction between the remedies to the two causes of action. If the doctors in my hypothetical sell Moore's tissue in violation of the patient's expressed wishes, what is the measure of damages? Moore consented to the surgery, and he appeared to have had no special attachment to his spleen cells. [FN91] His only real loss was the market value of his tissue. If the court awards such a remedy, it will in effect have created an action for conversion whatever name it gives to the tort. If it refuses to do so, it may render the breach of informed consent in the sense of the passage quoted above meaningless. [FN92]

My students believe in property. They almost always argue that the patient should have been paid for use of his cells. The more economic minded of them observe that if patients do not have to be compensated, they are less likely to consent to use of their tissue. Those with medical experience, however, point out that, in practice, informed consent works almost exactly as the court envisioned. Few patients have cells that are distinctive enough to be valuable, and almost all patients consent to use of their cells for research. If another Moore wished to finagle for a better deal in exchange for his unique contribution to medical science, he would at least have the opportunity to present his case to the doctors, and if, in the end, he withheld consent, doctors are unlikely to knowingly violate the patient's wishes. [FN93] Consent forms have ***650** become so ubiquitous that the pure common law issue left open in Moore, of the patient's ability to control disposition of her cells after their extraction from her body, does not arise. Moore's inartful conception of property slows the overt commercialization of the field while doing little harm in the real world.

Hecht v. Superior Court [FN94] drive the point home. William Kane, who had lived with Deborah Hecht for five years before his death, deposited fifteen vials of sperm in a Los Angeles sperm bank and committed suicide a month later. [FN95] The contract with the sperm bank provided that the sperm should be released to Hecht for the purpose of bearing his child, and his will confirmed his desire to have Hecht impregnated with the sperm. Kane's adult children from a previous marriage opposed his wishes, in part because they thought additional children would reduce their claims to Hecht's estate. [FN96]

Kane's children invoked Moore to argue that "decedent had no ownership or possessory interest in his sperm once it left his body," and the sperm could thus not be part of the estate. The California appellate court, however, had no trouble concluding that "the decedent had an interest, in the nature of ownership, to the extent that he had decision making authority as to the sperm within the scope of the policy set by law," and the sperm therefore fit within the broad definition of property contained in the Probate Code. [FN97] In California, at least, cells extracted from the body can be property for one purpose and not another. The term "property" as a distinct element of analysis would appear to lose much of its explanatory power while the sticks in the bundle (meaning, decision-making authority) determine judicial outcomes.

B. Contract and Property

Moore refused to recognize a property interest in excised cells, yet acknowledged the possibility of decision-making power. Hecht used the terms synonymously, concluding that to the extent that Kane had decision-making power, he also had an ownership interest that constituted property within the meaning of the probate code. To this, Glancy adds Kass v. Kass [FN98] and A.Z. v. ***651** B.Z., [FN99] which together turn the discussion on its head. Is it possible that frozen pre-zygotes, [FN100] which have expressly been held to be property

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for purposes of an action in retinue, [FN101] and are routinely destroyed by contract, cannot be the subject of a binding agreement for implantation? In other words, if Moore contemplated decision-making power without property, can there also be property without decision-making power?

Hecht, in deciding the status of sperm, referred to the cases involving frozen pre-zygotes and observed that "the value of sperm lies in its potential to create a child after fertilization, growth, and birth" and that it is thus entitled to greater respect than other human tissue because of its potential to become a person. At the same time, which held that frozen pre-zygotes could satisfy the property requirement of an action in detinue, the York, court quoted the Ethics Statement of the American Fertility Society to the effect that: "It is understood that the gametes and concepti are the property of the donors. The donors therefore have the right to decide at their sole discretion the disposition of these items, provided such disposition is within medical and ethical guidelines . . . ." [FN102] The California court, in Hecht, acting squarely within the tradition of the pre-zygote cases that had been decided up until that point, was eager to leave the decision as to whether to proceed with posthumous conception squarely in private hands, and found no public policy objections to Kane's expressed intention of leaving his sperm to Deborah Hecht. [FN103]

Kass v. Kass, decided by the high court in New York five years later, affirmed the propriety of private disposition of frozen pre-zygotes. The New York couple in the case were divorcing five years after they created the pre-***652** zygotes. [FN104] The wife sought to have the fertilized eggs implanted while her husband objected to the burdens of unwanted fatherhood. The New York Court of Appeals not only upheld the contract that provided for donation of the pre-zygotes for research in the event of a dispute, it embraced contract as the preferred way to address these issues, emphasizing that: "To the extent possible, it should be the progenitors--not the State and not the courts--who by their prior directive make this deeply personal life choice felt." [FN105]

A.Z. v. B.Z. is the surprising case of the group. This case, decided by the Supreme Judicial Court of Massachusetts in 2000, overturned for the first time a contractual resolution of the issue. In this case, unlike all of the others that had been decided up until this point, the fertility clinic contract provided that if the couple separated, the embryos would be returned to the wife for implant. The court refused to enforce the agreement, partly because it doubted whether the contract accurately reflected the intentions of the parties, and partly on public policy grounds. The court explained that:

> [W]e conclude that, even had the husband and wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen preembryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will. As a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement . . . . [FN106]

Unlike the California Supreme Court in Moore, the Massachusetts court did not rewrite the definition of property to reach its result. It left undisturbed the earlier cases finding pre-zygotes to be property, and the proper subject of contract. [FN107] Instead, it addressed the public policy question of involuntary parenthood head-on, and concluded that whatever the prior agreement of the parties, the court was not willing to order a result that produced a pregnancy against the contemporaneous wishes of one of the would-be parents. In this case, public law trumped rather than manipulated private law to advance its purposes. A.Z. v. B.Z. this provides a personal property counterpoint to State v. ***653** Shack, [FN108] the next case in the traditional canon. Shack's themes, from a different area of the law, and a different generation, echo the Massachusetts concerns:

> 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

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> 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. [FN109] Interests in land and frozen pre-zygotes are not so different after all. The stage has been set for a return to real property and the remainder of the course. [FN110]

IV. Conclusion: If Property is Theft, It May Matter Only If Property Rights Make Things Worth Stealing

If Property has not quite regained the status it held at the time of Blackstone, it has acquired something equally important: a new field of critics eager to write "Property is Theft" on my blackboard and to decry the "propertization" of new technologies and accompanying law. When I first started teaching, the old dean who mentored me insisted that the key to understanding the first year in law school was to recognize that Property was the foundation for everything else. Settled understandings (however superficial) of first possession and adverse possession cases unthinkable in places with modern California real estate prices did little to persuade me of the importance of his approach. Intellectual property at the turn of a new century is another matter. Property has again become a course that can be taught from the front pages of the newspaper--and on which arguably rests the future of the internet. [FN111] Property is back from a historical artifact to a work in progress. And the traditional metaphors in the property professor's arsenal--the sticks in the bundle, relatively of title, the role of alienability, the relationships between ***654** rights and markets, and the balance between the encouraging investment and exacerbating transactions costs--dominate discussions in Silicon Valley as well as the academy. Glancy's materials, which systematize and expand the materials now finding their way into many property texts, provide a comprehensive introduction to intellectual property--and to the timeless issues that have always made property law a foundation of the curriculum.

[FNa1]. Professor of Law and Presidential Professor of Ethics and the Common Good, Santa Clara University. I would like to thank Margalynne Armstrong, Carol Rose and Joe Singer for their suggestions during earlier stages in the development of this Essay and to Rosa Tsongtaatarii and Kara Koerner for their research assistance. Any errors, however, are my own.

[FN1]. 21 U.S. (8 Wheat.) 543 (1823).

[FN2]. 3 Cai. R. 175 (N.Y. 1805).

[FN3]. The history of the region is more complex than my brief recollection indicates. For an account of the evolution of land rights in the area, see George E. Bisharat, Land, Law, and Legitimacy in Israel and the Occupied Territories, 43 Am. U. L. Rev. 467 (1994) (noting that these disputes reflect Ottoman as well as British rule).

[FN4]. Jesse Dukeminier & James E. Krier, Property 9 (4th ed. 1998).

[FN5]. Id.

[FN6]. Id. at 4.

[FN7]. Metaphorically, at least. I leave to Singer, who has written ably and well on the subject, any final judgment as to his own views on the subject, as opposed to his example of how to present the materials in a way that

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makes them easier to teach. See Joseph William Singer, Introduction to Property 717-18 (2001) [hereinafter Singer, Introduction], Joseph William Singer, Property Law: Rules, Policies and Practices 23-42 (2d ed. 1997) [hereinafter Singer].

[FN8]. Singer, supra note 7, at 23-24.

[FN9]. 348 U. S. 272 (1955).

[FN10]. See, e.g., Milner Ball, Constitution, Courts, Indian Tribes, 1987 Am. B. Found. Res. J. 1, 115 (1987); Nell Jessup Newton, At the Whim of the Sovereign: Aboriginal Title Reconsidered, 31 Hastings L. J. 1215, 1243-44 (1980); Singer, Introduction, supra note 7, at 717-18.

[FN11]. "However extravagant the pretension of converting the discovery of an inhabited into conquest may appear...." Singer, supra note 7, at 34.

[FN12]. Id. at 31.

[FN13]. Id. at 33.

[FN14]. Id.

[FN15]. Id. This often leads to class discussion that asks whether the idea of individual title comes with the switch from hunter-gatherers to agriculturalists and ties in nicely with references to Locke's labor theory of value, or Demsetz and the role of property rights in dealing with externalities. See Dukeminier & Krier, supra note 5, at 40-59.

[FN16]. Singer, supra note 7, at 33.

[FN17]. Id. at 34.

[FN18]. Id.

[FN19]. Id.

[FN20]. Id. at 41 ("The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation.").

[FN21]. Singer, supra note 7, at 41.

[FN22]. See Newton, supra note 10, at 1243-44 ("To say that the Alaska natives were subjugated by conquest stretches the imagination too far. The only sovereign act that can be said to have conquered the Alaska native was the Tee-Hit-Ton opinion itself.")

[FN23]. For a summary of the argument, see Singer, Introduction, supra note 7, at 717-18. See also Newton, supra note 10; Ball, supra note 10.

[FN24]. I often press the point by exploring the idea of conquest. If President Eisenhower, in 1955, sent federal troops to Alaska to seize Tee-Hit-Ton lands, would the tribe have had no recourse? Is conquest an unlimited and

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unreviewable concept even when asserted against American citizens? Has a tribe that voluntarily became part of the United States been “conquered” ? See Ball, supra note 10, at 115.

[FN25]. See Singer, Introduction, supra note 7, at 716-17.

[FN26]. One year I asked the class to propose a property regime for establishing colonies on a sparsely inhabited planet in a pre-agricultural stage.

[FN27]. See Eric Kades, History and Interpretation of the Great Case of Johnson v. McIntosh, 19 Law & Hist. Rev. 67, 70-79 (2001) (arguing that the opinion rests primarily on well-established custom).

[FN28]. Eric Kades has recently investigated the history of Johnson v. M'Intosh, and concluded that one of the prime effects of the decision is to give the federal government a monopoly over the ability to purchase land from the Indians, driving down the price. Eric Kades, The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of Indian Lands, 148 U. Pa. L. Rev. 1065 (2000). This argument assumes, however, that the tribes would have had some ability to secure fair bargains. See infra notes 29-30.

[FN29]. Kades suggests that defendant M'Intosh may have acquired his deeds from Europeans settlers through either massive fraud or unscrupulous practices. Kades, supra note 27, at 97-98 (concluding, however, that the most likely explanation is that M'Intosh obtained the lands in return for legal services that helped establish title). He contrasts the efforts of the Johnson plaintiffs to make sure they had a valid deed for their test case litigation: Johnson prevented the Indians from getting “a drop of spirituous liquor during the whole of the negotiation;” he negotiated slowly for more than a month in order make sure all of the tribes with possible claims agreed to the terms, and he agreed to a price substantially more than the $24 in trinkets supposedly paid for Manhattan Island. Id. at 81-82. Even, then, Kades reports that the land that M'Intosh owned may not have overlapped with the land Johnson claimed, and other tribes may have originally held some of the land in dispute, though not the land subject to Johnson's deed.

[FN30]. Indeed, Kades notes that many legislatures already had laws on the books forbidding Native American sales to individual settlers, and that one of the major effects of the decision, because it was based on common law rather than statutory authority, was to keep the ban in places in states or in times in which such legislation had lapsed. Id. at 102-04.

[FN31]. Alaska Native Claims Settlement Act, 43 U.S.C. § 1601; Singer, supra note 7, at 42.

[FN32]. The Tee-Hit-Ton opinion observed that no case had ever held that compensation had to be paid, but, as Singer observes, neither did any case before Tee-Hit-Ton decide that no compensation was due. See Singer, Introduction, supra note 7, at 715-17.

[FN33]. Again, it is striking that the Court, in its determination to view the issue as settled, did not acknowledge that Congress had provided for substantial compensation of Native American claims. Id. at 717.

[FN34]. The Marshall opinion clearly suggests that the Indian right of occupancy was entitled to legal recognition, observing that “[t]hey were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion.” Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823). Marshall also stated: “It has never been contended, that the Indian title amounted to nothing.” Id.

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[FN35]. Reed states: “Our conclusion does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle....” Singer, supra note 7, at 41. The paternalism in the statement, however, may be more demeaning than Marshall's reference to “fierce savages,” and less justifiable. A rationale that explained why the matter was not justifiable in terms of jurisprudential principles would have been more appropriate.

[FN36]. In this sense, I also like to remind my students of the Maine litigation in which tribes laid claim to two-thirds of the state based on the Johnson principle that only the federal government and not the state could validly acquire title. See Singer, Introduction, supra note 7, at 727.

[FN37]. While the Tee-Hit-Ton opinion ultimately rests on its interpretation of American history and precedent, it does engage in an extended analysis of the nature of Alaskan native property use, concluding that the Tee-Hit-Tons were in “a hunting and fishing stage of civilization” that was “like the use of the nomadic tribes of the States Indians.” Tee-Hit-Ton v. United States, 348 U.S. 272, 287-88 (1955). See Singer, supra note 7, at 41; Dukeminier & Krier, supra note 4, at 40-59. Compare Johnson with Harold Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. 347-57 (1967).

[FN38]. The concept of individual versus collective ownership has been the subject of extensive commentary. Nonetheless, even an individual system makes some provision for collective title, such as joint tenancies, condominiums, et cetera. For an overview of the issue, see Dukeminier & Krier, supra note 4, at 52-59. See also Carol M. Rose, The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems, 83 Minn. L. Rev. 129 (1998).

[FN39]. Singer follows up on the discussion of Johnson and Tee-Hit-Ton by including Nome 2000 v. Fagerstrom, 799 P.2d 304 (Alaska 1990), in his materials on adverse possession. The case involves an adverse possession claim by an Alaskan native family against a company with a traditional deed. Nome 2000 opposed the adverse possession claim, in part, on the ground that the possession was not exclusive since the family, in accordance with native Alaskan custom, allowed others to fish and hunt on the land. The court nonetheless upheld the claim, ruling that it was consistent with possession by a true owner in that region, and that permissive use did not defeat the claim of title. Singer, supra note 7, at 136-41.

[FN40]. 3 Cal. R. 175 (N.Y. 1805).

[FN41]. 8 F. 159 (D. Mass. 1881) (holding that a whale that washes up on the beach with an identifiable lance belongs to the owner of the lance).

[FN42]. 103 Eng. Rep. 1127 (Q.B. 1707) (stating that interference with a wildfowl attracted to a decoy pond is actionable).

[FN43]. See Reese v. Hughes, 109 So. 731 (1926); see also Dukeminier & Krier, supra note 4, at 35-6. The fox case involved valuable foxes with distinctive pelts brought from outside the area and bred on a Mississippi farm. A fox escaped, was shot, and the farmer sought to recover the pelt. A number of cases address ownership of oil and gas reserves that migrate to neighboring land when the neighbor begins drilling. Compare Hammonds v. Central Ky. Natural Gas, 75 S.W.2d 204 (1934), with Pacific Gas & Elec. Co. v. Zuckerman, 234 Cal. Rptr. 630 (Cal. Ct. App. 1987). See generally Carol M. Rose, Possession as the Origin of Property, 52 U. Chi. L. Rev. 73 (1985).

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[FN44]. See, e.g., Rose, supra note 38, at 130-31. Rose explains that:

> We humans are lazy, and disinclined to work. But property, by concentrating resource control on individuals, takes advantage of each individual's sinfulness--or as we now call it, self-interest. With property, each individual harvests the rewards of her care and effort in the management of her resources, just as she suffers the losses from her sloth and poor management; those features of property make her vastly more likely to exercise diligence and prudence about the things she owns.

Id.

[FN45]. For a fuller examination of these ideas, see Rose, supra note 38, and David D. Friedman, Law's Order: What Economics Has to Do With Law and Why it Matters (2000).

[FN46]. Johnson, however, can certainly be taught in terms of the need for certainty in real property titles, and the difficulties of policing Native American deeds. See discussion supra note 29.

[FN47]. Dorothy J. Glancy, An Introduction to Intellectual Property Law for Santa Clara University School of Law First-Year Property Students (2001).

[FN48]. The traditional cases, for example, often pair the refusal to recognize an interest in wild animals in Pierson with the greater protection accorded the commercially profitable decoy pond in Keeble or whaling industry customs in Glen. See, e.g., Dukeminier & Krier, supra note 4, at 19-40.

[FN49]. See generally Glancy, supra note 47.

[FN50]. 248 U.S. 215 (1918).

[FN51]. 499 U.S. 340 (1991).

[FN52]. 35 F.2d 279 (2d Cir. 1929), cert. denied, 281 U.S. 728 (1930).

[FN53]. Some of my colleagues include both, but reduce the time spent on wild animals to a single class.

[FN54]. INS acquired AP's stories from a number of sources including bulletin boards and early editions, particularly those published on the East Coast. INS, 248 U.S. at 230. See Glancy, supra note 47, at 2. AP also alleged that INS used bribery to obtain the information, but that allegation was not critical to the outcome of the case. INS, 248 U.S. at 231.

[FN55]. INS, 248 U.S. at 239-40. See Glancy, supra note 47, at 5.

[FN56]. Feist Publ'ns, 499 U.S. at 342. See Glancy, supra note 47, at 13.

[FN57]. Feist Publ'ns, 499 U.S. at 343 (citing Rural Tel. Serv. Co. v. Feist Publ'ns, Inc., 737 F. Supp. 610, 622 (D. Kan. 1990)).

[FN58]. Cheney Bros., 35 F.2d at 280. See Dukeminier & Krier, supra note 4, at 63-64.

[FN59]. On this point, see also the excerpt in Dukeminier & Krier, supra note 4, from Douglas G. Baird, Intellectual Property and the Legacy of International News Service v. Associated Press, 50 U. Chi. L. Rev. 411, 413-414 (1983); infra text accompanying notes 65-66.

[FN60]. The court in Cheney Bros. specifically observes that the silk scarf designs do not satisfy the originality

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requirement needed for a patent. 35 F.2d at 279. Dukeminier & Krier, supra note 4, at 63.

[FN61]. One of my Criminal Law colleagues likes to write “Property is Theft” on the board so it will be there when I enter the classroom. I only occasionally notice, but I am indebted to one of my students, Wanda Ochoa, for insisting that I respond by reading Pierre-Joseph Proudhon, What is Property? An Inquiry into the Principle of Right and Government, Chapter 1, 1 (1890).

[FN62]. For a fuller discussion, see James Boyle, Shamans, Software, and Spleens: Law and the Construction of the Information Society (1996).

[FN63]. 849 F.2d 460 (9th Cir. 1988).

[FN64]. 971 F.2d 1395 (9th Cir. 1992), 989 F.2d 1512 (9th Cir. 1993).

[FN65]. Although California Civil Code section 3344 prohibits use of a person's “name, voice, signature, photograph or likeness” without his or her consent, the Midler opinion did not rest on the statute. Glancy, supra note 47, at 29.

[FN66]. Midler, 849 F.2d at 462.

[FN67]. Id. at 463. See Glancy, supra note 47 at 29.

[FN68]. Midler, 849 F.2d at 463. See Glancy, supra note 47 at 29

[FN69]. White, 971 F.2d at 1399.

[FN70]. Id. at 1401.

[FN71]. White, 989 F.2d at 1515. Kozinski cites Eben Shapiro, Rising Caution on Use of Celebrity Images, N.Y. Times, Nov. 4, 1992, at D20 (noting Iraqi diplomat's objection on right of publicity grounds to ad containing Hussein's picture and caption “History has shown what happens when one source controls all the information”).

[FN72]. Lucasfilm Ltd. v. High Frontier, 622 F. Supp. 931 (D.D.C. 1985).

[FN73]. White, 989 F.2d at 1516.

[FN74]. Id. See Glancy, supra note 47, at 37.

[FN75]. White, 989 F.2d at 1517. Glancy, supra note 47, at 38

[FN76]. See, e.g., Jeremy Rifkin, The Biotech Century: Harnessing the Gene and Remaking the World (1998).

[FN77]. 793 P.2d 479, cert. denied, 499 U.S. 936 (1990).

[FN78]. 16 Cal. App. 4th 836, review denied, 97 Cal. Daily Op. Service 428 (1993).

[FN79]. Dukeminier & Krier, supra note 4, at 66.

[FN80]. Moore, 793 P.2d at 476. In fact, the doctors never realized any substantial amounts from the cell line. Hank Greely at Stanford Law School has gathered a much fuller account of what took place in Moore that dif-

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fers substantially from the reported opinion.

[FN81]. Id. at 485.

[FN82]. Id

[FN83]. Id. at 490.

[FN84]. Id. at 194.

[FN85]. The court observed: “By restricting how excised cells may be used and requiring their eventual destruction, the statute eliminates so many of the rights originally attached to property that one cannot simply assume that what is left amounts to “property” or “ownership” for purposes of conversion law.” Moore, 793 P.2d at 489. The problem with this analysis is that it is not linked to a definition of “ownership” for purposes of conversion law. Consider any manner of restricted items: radioactive waste, handguns, kidney stones. Would we say with respect to any of them that if they were stolen (or wrongfully taken) from a hospital or home that no conversion had occurred? We might conclude with respect to some of the items (a kidney stone, for example) that they have no market value and therefore no damages are appropriate, but I doubt that we would conclude that they could not be “owned.”

[FN86]. Moore, 793 P.2d at 492.

[FN87]. The hunter who kills the silver fox, after all, may be liable for return of the pelt even if he had no way of knowing before he shot it that the fox had been commercially bred rather than naturally born in the woods of Mississippi. See supra note 43.

[FN88]. The court explains:

These principles lead to the following conclusions: (1) a physician must disclose personal interests unrelated to the patient's health, whether research or economic, that may affect the physician's professional judgment; and (2) a physician's failure to disclose such interests may give rise to a cause of action for performing medical procedures without informed consent or breach of fiduciary duty.

Moore, 793 P.2d at 476. The “wrong” in this case is the performance of the medical procedures without consent, not the use of the cells without consent.

[FN89]. Some years, I also used a second hypo: A patient gives birth in a hospital that routinely harvests placental tissue and sells it to a cosmetics company. The patient, who had learned of the practice from a nurse, loudly insists that she does not want her placental tissue used for such a purpose. The responsible (or irresponsible as the case may be) hospital employee sells the tissue anyway. Have the patient's rights been violated? If an employee steals the placental tissue from the hospital, can the hospital sue the employee for conversion?

[FN90]. Moore, 793 P.2d at 488. In fairness to casebook authors, Moore is a long opinion with numerous concurrences and dissents, and a challenge to edit.

[FN91]. Sale of placental tissue, as suggested in note 89, supra, may be different because the patient may claim religious or psychological objections, giving rise to an alternative way of measuring the harm.

[FN92]. The court could, however, choose to permit the action, and the award of punitive damages.

[FN93]. Moore, of course, leaves open whether such a contract would be enforceable. See Dukeminier & Krier,

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supra note 4, at 80-81.

[FN94]. 16 Cal. App. 4th 836, review denied, 97 Cal. Daily Op. Service 428 (1993).

[FN95]. For a less prosaic account of Kane's life, see Dukeminier & Krier, supra note 4, at 85, who describe him as a lawyer “equally fluent in Greek mythology, tax shelters and computer programming.”

[FN96]. Glancy, supra note 47, at 41.

[FN97]. The Uniform Status of Children of Assisted Conception Act responded to Hecht by adopting a provision that: “An individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm is not the parent of the resulting child.” 9B U.L.A. 200 (Supp. 1997). The result is intended to settle inheritance so that frozen pre-zygotes cannot disrupt distribution of the estate many years after the decedent's death. So much for Rule against Perpetuities hypotheticals!

[FN98]. 696 N.E.2d 174 (N.Y. 1998).

[FN99]. 725 N.E.2d 1051 (Mass. 2000).

[FN100]. Kass defined “pre-zygotes” as “eggs which have been penetrated by sperm but have not yet joined genetic material.” 696 N.E.2d 174, 177 n. 1.

[FN101]. York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989). In York v. Jones, a couple who had enlisted the services of a Virginia fertility clinic moved to California and wanted to take their frozen pre-zygotes with them. The clinic, which wished to keep their business, refused to surrender custody. In the ensuing lawsuit, the court held that the couple had a property interest in the pre-zygotes sufficient to establish an action in detinue.

[FN102]. Id. at 426 n.5.

[FN103]. His children had tried to assert public policy objections to a donation to an unmarried woman and to posthumous parenthood, but the court rejected both assertions. Glancy, supra note 47, at 45-47. An interesting counterpoint is the English case in which a wife had sperm removed from her comatose husband and wanted to take it to Belgium where a fertility clinic was willing to assist in her efforts to bear his child. The English courts initially ruled against her request because her husband, who died from meningitis at thirty-five without regaining consciousness, had not given his informed consent. The widow eventually won by appealing to trade provisions that prevented England from blocking the export of the sperm, though she was later back in the news in her efforts to have English law changed so that her husband could be recognized as the child's father. Jenny Booth, Diane Blood looks to Europe in fight over her son's name; Widow insists the battle for law to acknowledge boy's father is not over, The Sunday Telegraph (London), Apr. 29, 2001, at 11.

[FN104]. Fertility treatments often involve harvesting and fertilizing more eggs than can safely be implanted at any one time. If the couple then wishes to try for another pregnancy, the stored pre-zygotes can be used, easing the expense and inconvenience of the second procedure. Glancy, supra note 47, at 48.

[FN105]. Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998).

[FN106]. A.Z. v. B.Z., 725 N.E.2d 1051, 1057-58 (Mass. 2000).

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[FN107]. The court notes expressly, for example, that there “is no impediment to the enforcement of such contracts [providing for destruction or donation of the preembryos] by the clinics or by the donors against the clinics, consistent with the principles of this opinion.” Glancy, supra note 47, at 59 n.9. Conversely, the court in Kass also noted that the parties in that case had not alleged either that the contract violated public policy or that changed circumstances compelled a different result. Id. at 51 n.3.

[FN108]. 277 A.2d 369 (1971). For an example of the use of the case in traditional texts, see Dukeminier & Krier, supra note 4, at 87-93 (pairing the case with Moore).

[FN109]. Glancy, supra note 47, at 90. For a different view of Shack, see sources cited at Dukeminier & Krier, supra note 4, at 96-97.

[FN110]. Glancy's materials, unlike my exegesis, do not end with adverse possession. She includes sections on co-ownership of intellectual property, title to intellectual property, intellectual property licenses and regulatory takings of intellectual property that can be integrated into the rest of the course.

[FN111]. Carol Rose observes: “Private property has long been associated with gloomy images--the rapaciousness of various Robber Barons on the one hand, the musty casuistry of future interests and the Rule Against Perpetuities on the other. But in the late twentieth century, property seems blessed with a bright, perhaps even glamorous future.” Rose, supra note 38, at 129.
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