PROPERTY (Section 1)
Winter Semester 2017
Professor Wilson Freyermuth
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Course Information and Policies

TEXT AND MATERIALS: The required text for this course is FREYERMUTH, ORGAN & NOBLE-ALLGIRE, PROPERTY AND LAWYERING, 3d ed. (WestGroup 2011). Copies are available in the campus bookstore, or can be purchased online from a variety of sources, including Westlaw’s online bookstore.

The following is a list of suggested secondary materials that should aid your study outside of class. Each should be available in the library.

JOHN G. SPRANKLING, UNDERSTANDING PROPERTY (LEXIS). Many students find the mini-treatises in LEXIS’s Understanding series to be helpful resources, and this is a good one. There are copies of the Second Edition in the library; LEXIS released a Third Edition in 2012, but the Second Edition is perfectly adequate. [Note: This is the only one of the secondary materials listed here that is not available electronically as part of the Library’s Study Aid Subscription packet.]

HOVENKAMP & KURTZ, PRINCIPLES OF PROPERTY LAW (6th ed., West). This paperback treatise (part of West’s Concise Hornbook series) is moderate in its coverage, and does an excellent job of laying out basic property rules in an extended outline form. It has a large number of short essay-type problems (with answers) for you to test your understanding of basic concepts. It is available to you for free online through West Academic Study Aids package available through the Law School library.

STOEBUCK & WHITMAN, THE LAW OF PROPERTY (3d ed., West). This hornbook is the most detailed in its coverage. If you cannot find a satisfactory explanation in one of the
other two hornbooks, consult this one. The library has numerous copies. It is also available to you for free online through the West Academic Study Aids package.

ACADEMIC INTEGRITY: Academic integrity is fundamental to the activities and principles of a university. All members of the Law School community must be confident that each person’s work has been responsibly and honorably acquired, developed, and presented. Any effort to gain an advantage not given to all students is dishonest, whether or not the effort is successful. The Law School community regards breaches of the academic integrity rules as extremely serious matters. Sanctions for such a breach may include grade sanctions (up to and including failing the course) and disciplinary sanctions ranging from probation to expulsion. I encourage you to make sure that your work in this and other courses complies in all respects with the Law School’s Honor Code. If you have any question regarding whether your conduct complies with the Honor Code, you should contact me for clarification.

COURSE WEB PAGE: I maintain a webpage for this course. You can use the following URL http://www.law.missouri.edu/freyermuth/property/winter2017/index.html to reach the course webpage. A copy of this syllabus is posted on the webpage. By each Friday, I will post the assignments for the following week, and the website will archive assignments throughout the semester. In addition, I may occasionally post a new hypothetical (i.e., one not included in the course materials) for a following class period’s discussion. Any messages regarding the postponing or rescheduling of classes will be posted to the course webpage. Finally, after some class periods, students may pose one or more questions after class, and in many circumstances, I will prepare and post on the website a “question/answer memo” that identifies such questions and provides an answer for the benefit of the class. As a result, you should check the course webpage daily for new information.

CLASS SCHEDULING: The class meets on a “flexible schedule” (the class appears on the schedule for all five days each week). There are several weeks during the semester where I will have to travel due to professional meetings, conferences, or testimony at legislative hearings. Scheduling the class for all five days each week allows for “make-ups” to occur during the regularly scheduled class hour on Friday, rather than at 1:00 p.m. (when the make-up hour is only 50 minutes long and conflicts arise due to other make-ups, speakers, or career programs).

During some weeks, the class will meet all five days. In other weeks, it may meet four days or fewer (and for the week of January 30-February 3, it will not meet at all). At the end of the Syllabus, you will find a list of the scheduled class meetings for the first month of the semester. The list is subject to revision if emergency or weather-related class cancellations arise. Thus, you should always double-check the course web page each week for confirmation of the scheduled classes for the week.

INTERACTION WITH STUDENTS: I maintain an open-door policy. I do not maintain regular “office hours,” but am in my office much of the time during most weekdays. If you have a question or concern about the course or law school, and I am in my office, please feel free to come and see me. If you need to set up a specific appointment time for scheduling reasons, you are welcome to do so. Many students also find it easy to communicate with me by e-mail: my
address is freyermuthr@missouri.edu and you are welcome to raise questions or concerns by e-mail if it is convenient for you.

During the semester, as we finish certain chapters in the casebook, I will schedule a question/answer session to assist students in their review and synthesis of the course materials. [These sessions are scheduled outside of class time and attendance is voluntary.]

COURSE OBJECTIVES AND EXPECTATIONS: The Property course focuses upon the way in which the law has recognized and used the concepts of “ownership” and “property” to resolve interpersonal disputes over access to, use of, and “rights” in resources, with the most heavy focus on land (“real” property). We will talk about this in a variety of different contexts, as identified in the “Course Coverage” outline that appears later in this Syllabus. I have four basic objectives for you as a student in the Property course:

1) That you obtain a good understanding of the substantive rules that apply in these differing contexts (e.g., Estates, Concurrent Ownership, Landlord/Tenant, Easements and Servitudes, Adverse Possession, etc.);

2) That you obtain a good understanding of how these substantive rules reflect the importance of a variety of public policy concerns relevant to interactions between persons (and the balancing of competing policy concerns);

3) That you can synthesize the application of these concepts and policies across these differing contexts (for example: How do the rules governing Adverse Possession “fit” with the rules governing concurrent ownership between multiple persons? What impact does the law’s strong policy preference for the transferability of property rights have on the law in the differing contexts?), so as to be able to predict the results of interpersonal disputes over access to and “rights” in resources; and

4) That you begin to appreciate how lawyering requires not only effective advocacy in the resolution of disputes but also the development and implementation of problem solving skills to be applied in the formation and documentation of transactions involving the transfer of property.

In this process, I have several basic expectations of each student in the course:

- **I expect you to be present for each class, to have read the assignment for the class period, and to be prepared to participate in class discussion.** Each of you has a responsibility for your own learning and that of your fellow classmates. If you are not present in class, not attentive, not engaged in discussion with your classmates, and not contributing to class discussion generally, you aren’t fulfilling that responsibility.

- **I expect you to be in class, ON TIME, with phones silenced, so that class discussion can commence each day promptly at 3:30 p.m.**
I expect you to participate actively in class discussion, even if you are not sure of the “right” answer. One of the most important lawyering skills that you must develop — whether as an advocate or a counselor — is the ability to process verbal and written information and to respond to extemporaneous questions or comments in a concise and articulate way. One of the benefits of the law school classroom is that you can work to develop this ability in an environment where your mistakes don’t have meaningful consequences — if you answer something wrong in class, your client does not go to jail or become subject to an enormous monetary judgment. You and your classmates can (and should) learn not only from one another’s insights, but also from one another’s mistakes. In reviewing and synthesizing the course material and class discussions, you will inevitably identify questions or issues about which you are uncertain.

I expect you to make an effort to “fill the gaps” in your understanding of the material, such as by (a) posing questions in class; (b) posing questions to a fellow classmate outside of class, (c) reference to secondary resources, and/or (d) posing the questions to me outside of class, either in person or by e-mail. I particularly encourage you to pose questions immediately following a class meeting, while those questions are fresh in your mind.

ATTENDANCE POLICY: According to American Bar Association accreditation guidelines, class attendance is required and expected of all students. At each class, I will circulate a sign-in sheet for you to record your attendance. You are responsible to make sure that your name is on the attendance sheet. I also expect students to be present and ready to begin class promptly at the scheduled time. Any student that misses more than ten (10) regularly scheduled classes during the semester will be dropped from the course or (if allowed to remain in the course) subject to a grade reduction for each absence above the limit.

From time to time, you may have to miss a class because of illness, family responsibilities, or the like. I expect that you will provide me with prior notice of any anticipated absence (an e-mail message is fine) or, in cases of emergency when notice prior to class is impossible, as promptly as possible afterwards. In practice, clients and colleagues will expect such courtesy, so I encourage you to get in the habit of providing notice when you must miss class. Keep in mind (for this class and others) that most of you will need one or more of your professors to provide valuable references for you in the future — whether for the bar examiners or for potential future employers. If you are present and prepared for class discussion, and provide your professors with prior notice on the rare occasions when you must be absent, your professors will take note of your diligence and discipline — and will not hesitate to share that impression with persons seeking information about you. If you are often absent without explanation or excuse (or are in attendance but disengaged during class), your professors notice that too.

COURSE GRADE: Grades in this course will be based upon the following:

A. **Final Exam.** The final exam will be administered in two portions. The first portion will be a multiple choice exam that will be administered on Friday morning, May 5, 2017, at 8:30 a.m. The second portion will be an essay exam that will be administered on Friday afternoon, May 5, 2017, at a time to be announced.
B. **Class Participation.** Participation in class discussion is an integral part of the law school learning experience. As a result, I both encourage and expect you to participate in class discussion. I reserve the right to add **up to two (2) points** to a student’s final course grade for **consistent and exceptional** class participation. I also reserve the right to deduct **up to two (2) points** from a student’s final course grade for repeated unpreparedness (note: this has happened only three times in previous Property classes, but it has happened three times). **I also reserve the right to deduct one (1) point for each absence in excess of the ten (10) absences permitted by the attendance policy.**

For each class or topic, I will post a series of questions relating to the assigned material. We will use these questions as a basis for in-class discussion. To facilitate good class discussion and the optimal use of limited class time, **I encourage you to review and discuss the questions with your classmates prior to the class meeting.**

**ASSIGNMENTS:** Before each Friday, I will post a message containing specific daily assignments for the following week’s classes on the course Web page. Prior to each class, all students should have read, and should be prepared to discuss, any portion of the assigned material. The assignment for the first two classes appears at the end of this Syllabus, and also appears on the course website.

**COMPUTER POLICY:** You are welcome to use a tablet or laptop computer during class, but use is limited to **class-related use only.**

**CALI LESSONS:** There are a number of interactive computer lessons for Property law available from CALI (The Center for Computer-Assisted Legal Instruction). Weekly assignments will indicate the course topics for which there are currently CALI lessons available. Where the weekly assignments indicate that a CALI lesson is available, you may wish to review that lesson in conjunction with the assigned reading from the casebook. The lessons are available via the web from CALI’s website, which is [www.cali.org](http://www.cali.org).
The Property course will have 56 class meetings. Here is the schedule for the first 19 of those meetings (essentially the first one-third of the course):

Class #1: Thursday, January 12
Class #2: Friday, January 13
Class #3: Tuesday, January 17
Class #4: Wednesday, January 18
Class #5: Thursday, January 19
Class #6: Friday, January 20
Class #7: Monday, January 23
Class #8: Tuesday, January 24
Class #9: Wednesday, January 25
Class #10: Thursday, January 26
Class #11: Monday, February 6
Class #12: Tuesday, February 7
Class #13: Wednesday, February 8
Class #14: Thursday, February 9
Class #15: Friday, February 10
Class #16: Tuesday, February 14
Class #17: Wednesday, February 15
Class #18: Thursday, February 16
Class #19: Friday, February 17

I will post the schedule for Class #20 through Class #56 by no later than February 1. This schedule is subject to revision if emergency or weather-related class cancellations arise. Thus, you should always double-check the course web page each week for confirmation of the scheduled classes for the week.
Note that the first class meeting will be **Thursday, January 12, 2017.**

A. **Assignment prior to first class:** Please write a note (about a page in length) giving me some biographical information about yourself, including: (1) where you’re from, (2) your background, (3) why you came to law school, (4) the most important thing you think you learned last semester; (5) your outside interests, and (6) any other information that will help me get to know you better. Submit this to me by e-mail at freyermuthr@missouri.edu **no later than Wednesday, January 11.**

B. **Assignment for Class #1, Thursday, January 12.** Read pages v-vii in the Preface of the casebook and pages 1-11 (including the excerpt from the Calabresi and Melamed article *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*).

For the first class, consider the hypothetical situations below, and then consider the following questions:

- Is the concept of “property” relevant in the resolution of these situations? If so, what is the “property” and why should the law protect it as “property”?
- Would the claim in each of the hypotheticals be appropriately or better protected by some other source of law (such as Contract Law, Tort Law, or Criminal Law)?
- If you were asked as a judge or an arbitrator to “decide” the dispute, how would you rule and why?

1. Last week, Steve’s computer suffered a catastrophic failure. He went into the library and took the laptop sitting in Jamie’s study carrel. When Jamie confronted Steve and demanded the return of the laptop, Steve refused. Jamie wants to know if she can recover the laptop from Steve, although she admits that (a) she does not own the computer and had merely borrowed it from her uncle; and (b) she has no receipt or other proof that her uncle purchased the computer.

2. Sheldon and Penny were sitting on a park bench when a piece of trash blew by. Sheldon got up to retrieve the trash and properly dispose of it. When Sheldon got up, Leonard sat down on the bench next to Penny and refused to get up when Sheldon returned. Irate, Sheldon wants to know what rights he may have against Leonard.

3. John Jenkins has been employed at the State’s Department of Natural Resources for fifteen years. Last month he was fired because of a personality clash with his supervisor. John has come to you, an expert in all matters pertaining to property, to seek advice.
4. For the last twenty years, Phil has always slept on the right side of the bed, nearest the light and the bathroom. His wife Claire wants to begin sleeping on the right side of the bed. Phil refuses to move.

C. **Assignment for Class #2, Friday, January 13.** Read pages 1-19 of the Casebook, including the decision in *Jacque v. Steenberg Homes, Inc.* (page 11). Also read Note 2 on pages 25-26 ("Externalities and Efficiency"). Discussion questions for this material include:

1. Under the circumstances, why shouldn’t the court just allow Steenberg Homes to cross the property and pay damages to the Jacques? If it had, how would those damages have properly been measured?

2. Under what circumstances, if any, should an owner’s purported “right to exclude” be limited by virtue of the potential or actual external costs (externalities) imposed by such exclusion? What examples, if any, can you think of where the law does restrict the right of exclusion?

3. Using the Calabresi “property rules/liability rules” framework introduced on pages 10-11, does the court in *Jacque v. Steenberg Homes* protect the Jacques by means of a property rule or by means of a liability rule? On what specific grounds do you base your conclusion?

4. Thinking about these questions invites some consideration of the relationship between legal rules and morality. Consider the following commentators and their differing views on *Jacque*:


   First, no system of property rights can survive unless property ownership is infused with moral significance. By this, we mean that the differentiating feature of a system of property—the right of the owner to act as the exclusive gatekeeper of the owned thing—must be regarded as a moral right; intentional violations of this right, either by unlicensed invasions of owned things or unconsented takings of owned things, must be regarded as immoral acts. Second, the modern American legal system, at least with respect to this core aspect of property, does in fact adopt such a moral perspective….

   The court [in *Jacque*] made no attempt to consider whether the trespass would have been cost-justified. Clearly using the Jacques’ field as a temporary delivery path would have been the most efficient outcome. The opportunity costs of the intrusion to the Jacques were apparently zero: they had retired from active farming, and using the land as a temporary delivery path foreclosed no alternative use of it; nor did the Jacques suffer any risk of losing the land by granting permission. The company, in contrast, faced considerable risk, and not a little time and effort, if it had to use rollers to wrestle the ungainly mobile home around a curved private road covered in seven feet of snow. Reasonable persons would have quickly agreed on a temporary license as a solution to the problem; the Jacques were not reasonable persons. But the court obviously believed
that did not matter; the question of comparative utilities simply was irrelevant to the analysis....


Commentators on the *Jacque* case generally maintain that its protection of the right to exclude promotes the important value of dominion over property. They give various explanations why this dominion is valuable. The owner enjoys a dignity in such dominion. The owner has the power to set his or her own subjectively valued price for the land and its use. The owner enjoys security. The owner has the power to pursue a “privacy-driven agenda.” Ownership plays an “instrumental role in the promotion of utility, welfare, or wealth,” and protects the owner's “subjective perceptions of control, use, and enjoyment.” The courts are said to protect this dominion as a right to exclude even without inquiry into the reasonableness of its exercise or the benefits of the intruder’s actions. Furthermore, because of the uncertainty of measuring these values, an award of compensatory—market-measurable—damages is not sufficient to ensure that the owner receives an equivalent award for the loss the owner endures at the hands of the trespasser. Therefore, courts are justified, as in the *Jacque* case, in awarding punitive damages in order to ensure that trespasses like that of Steenberg are deterred in the future.

Gregory Alexander agrees that the Jacque case protects the right to exclude in order to promote the important value of dominion over property in “the interests of home owners in protecting their privacy and associational autonomy.” But he takes the analysis to a deeper level than most commentators by explaining why these interests are valuable. The privacy of the home and its associational autonomy are not merely the possession of particular goods or the satisfaction of particular preferences; rather, they make it possible to develop and experience all, or nearly all, the capabilities that are necessary for human flourishing…. These capabilities are the freedom or power to choose to function with such goods as life and good health, the freedom to make deliberate choices, practical reasoning, and sociality. The *Jacque* case promotes these capabilities, including, in particular, the capability of sociality. The security one has in the privacy and autonomy of one’s own home gives one the freedom or power to form healthy relationships with others. For this reason the law must protect this privacy and autonomy....

Alexander is quite right to advocate that the law should promote the capabilities that one needs to lead a distinctively human life, but there are times when both sides in a dispute have the proper capabilities. The question is rather one of the proper use of these capabilities. Alexander does not address this question in the *Jacque* case because his analysis does not include the concept that the substantive content of the Jacques’ choice had value. Therefore, the only way he can evaluate the court’s opinion is based on whether the parties’ capabilities were properly protected. But does the law care only about ensuring capabilities and not about their proper use? Even though Alexander gives us that impression, there is a direction in the law, not mentioned by Alexander, that suggests that the *Jacque* case was wrongly decided and that the law really does promote the proper use of capabilities....
[I]n cases very similar to the Jacque case, other jurisdictions have even allowed individuals to deviate from a public highway over the private land of others where an obstacle, such as heavy snowdrifts, caused an impassible obstruction on the highway. In Campbell v. Race, the Supreme Court of Massachusetts ruled that there was no trespass in such a case when a traveler could not pass by a highway with his team of horses. The court stated that “[t]o hold a party guilty of a wrongful invasion of another’s rights, for passing over land adjacent to the highway, under the pressure of such a necessity, would be pushing individual rights of property to an unreasonable extent.” It added that “[s]uch a temporary and unavoidable use of private property, must be regarded as one of those incidental burdens to which all property in a civilized community is subject.” In Morey v. Fitzgerald, the Supreme Court of Vermont approved the ruling in Campbell and added that the nature of the obstacles, such as ice or washouts, need not be unexpected, unforeseen, or of short duration to give rise to the right to pass over the neighboring land. Furthermore, “[i]f the obstruction is such that to remove it would materially delay the traveler in his journey, and impose upon him any considerable labor, no duty of removal is upon him.” These cases are very much like the Jacque case on their facts, even to the point of finding an obstruction in snowdrifts. Alexander sides with the Jacque court in rejecting the application of a social-obligation norm in such cases. The courts of Vermont and Massachusetts disagree…. 

Behavior that is truly moral is done in freedom. The law cannot force a person to be moral, nor should it. Yet the law performs a beneficial role in society when it encourages moral behavior. It certainly is an important function of law to ensure the capabilities to function with such goods as life and good health, the freedom to make deliberate choices, practical reasoning, and sociality. It is also important to encourage the good use of these capabilities…. [Alexander] stops short of defining the role of law as encouraging moral behavior. The result is that when capabilities are fully accounted for, individuals such as the Jacques can turn away from a person in need and show an uncaring attitude. Such an uncaring attitude is a form of license…. 

The Jacque court could have adopted the approach of Vermont and Massachusetts to find that there was no trespass by Steenberg on the Jacques’ property due to the obstructed passage along the road. But even if it were to insist on finding a trespass, the court should not have encouraged the Jacques to turn away from their neighbor by rewarding them with $100,000 in punitive damages. The nominal compensatory damages of $1 is sufficient to recognize the freedom on the part of the Jacques to turn away if they so choose, but the law should not condone such behavior. The law has a role to guide and educate persons to make the choice for human flourishing in the form of caring—much as the Parable of the Good Samaritan guides us to love our neighbor.