INITIAL ASSIGNMENT
Property § 1
Winter Semester 2019
Prof. Freyermuth

Note that the first class meeting will be Tuesday, January 22, 2019.

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 5:00 p.m. on Monday, January 21.

B. Assignment for Class #1, Tuesday, January 22. Read pages v-vii in the Preface of the casebook along with pages 1-19 and Note 2 on pages 25-26 (“Externalities and Efficiency”). Then consider the hypothetical situations below, and then consider the following questions about the Jacque v. Steenberg Homes case:

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

2. Under what circumstances, if any, should an owner’s purported “right to exclude” be limited by consideration of the potential or actual external costs (externalities) imposed by such exclusion? From your experience, can you think any situations where the law does restrict the right of exclusion in this way?

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. What’s the rationale behind the “sunbursting” principle discussed by the Jacque court (page 17)? Should the court have applied its analysis only prospectively (i.e., should it have refused to apply its analysis to the conduct of Steenberg Homes and instead have stated that its ruling would have only prospective effect)? Why or why not?

5. 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.