

**Mine**  
**Examining the Law of Ownership**  
**A Talk with Professor Michael Heller**

- How the rules of ownership permeate facets of our lives
  - Ownership design as a social engineering tool
  - Tailoring ownership design to achieve designer/owner's interests or other goals
  - Examine 6 ownership stories through interesting high-profile cases and legal developments in property law
  
- First in time
  - Rule of capture: *Pierson v. Post*<sup>1</sup>
    - Classic American property law case establishing rule of capture
    - On a beach in New York, Post pursued a fox while out with his hunting party. As he grew close, Pierson killed the fox and carried it off. Post filed suit, claiming that because he had begun pursuing the fox, he had legal right of possession.
    - The lower court sided with Post.
    - The New York Supreme Court of Judicature reversed. The court found that mere pursuit does not give a right of possession. It noted, "Pursuit alone vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken."
  
- Possession
  - What does it mean to possess: *Popov v. Hayashi*<sup>2</sup>
    - Barry Bonds hit his recording-breaking 73rd home run in October 2001. Popov stopped the momentum of the ball with his glove but was unable to secure it as he was tackled by a mob and lost control. Hayashi grabbed the loose ball. Popov sued for conversion.
    - The court ruled that both parties have equal claims to the ball and that the ball should be sold and proceeds split evenly. Popov had "pre-possessory interest" and may have been able to establish possession if he had not been mobbed. Hayashi was not a wrongdoer and established possession, so he should not be penalized.
  - Adverse possession: *McLean and Stevens v. DK Trust and Kirlin*<sup>3</sup>
    - Adverse possession

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<sup>1</sup> 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1805),  
[http://www.courts.state.ny.us/reporter/archives/pierson\\_post.htm](http://www.courts.state.ny.us/reporter/archives/pierson_post.htm).

<sup>2</sup> 2002 WL 31833731 (Cal. Super. Dec. 18, 2002).

<sup>3</sup> No. 06 CV 982, slip op. at 1 (Dist. Ct. Colo. Oct. 17, 2007).

- A person in possession of land acquires valid title to the property owned by someone else by meeting certain requirements.
- Varying requirements among jurisdictions. Typically, possession must be:
  - Continuous
  - Hostile
  - Open and notorious use
  - Actual possession
  - Exclusive use
- Continuous possession requirements generally range from five to thirty years.
- The Kirlins purchased land in 1981. McLean and Stevens lived in the adjoining lot and for 25 years used a part of the Kirlins' land as a footpath to their garden and deck. They also kept a garden and woodpile on the disputed land and regularly weeded and landscaped. The Kirlins testified that they did not give permission and did not notice their neighbors' use until 2006. The statutory period for adverse possession in Colorado is 18 years.
- The court ruled that Mclean and Stevens adversely possessed the land and ordered title to be transferred.
- The decision was controversial. Colorado passed a bill in 2008 amending its law on adverse possession, requiring the possessor to prove by clear and convincing evidence each element of adverse possession and that they have a reasonable "good faith" belief that they are the actual owner of the property. Colo. Rev. Stat. § 38-41-101(3)(a). It also gives the court discretion to award damages to the actual owner losing title. Colo. Rev. Stat. § 38-41-101(5).
- Attachment
  - Airspace:
    - *Commonwealth v. William Merideth*<sup>4</sup>
      - Boggs flew a drone over Meridith's property. Meridith claimed that the drone was flying as low as 10 ft off the ground, and Boggs claimed it was flying more than 200 ft. Meridith shot the drone with a shotgun. He was arrested and charged with criminal mischief and wanton endangerment. A judge dismissed the charges, stating that the drone flight violated his privacy.<sup>5</sup>
    - *Boggs v. Merideth*<sup>6</sup>

<sup>4</sup> Bullitt County, KY #15-F-473 (Oct. 26, 2015).

<sup>5</sup> *Judge dismisses charges for man who shot down drone*, WDRB (Oct 26, 2015), [https://www.wdrb.com/news/judge-dismisses-charges-for-man-who-shot-down-drone/article\\_b52eff9b-0c87-53ce-ad68-38806c7c9288.html](https://www.wdrb.com/news/judge-dismisses-charges-for-man-who-shot-down-drone/article_b52eff9b-0c87-53ce-ad68-38806c7c9288.html).

<sup>6</sup> No. 3:16-CV-00006-TBR (W.D. Ky. Mar. 21, 2017).

- Boggs sued Merideth in federal court seeking a declaratory judgment finding, among other things, that he was operating his drone in navigable airspace space within exclusive federal jurisdiction and that operating in this manner does not violate Merideth's reasonable expectation of privacy. The court dismissed the case for lack of subject matter jurisdiction.
- Solar & shade: *California v. Bissett*<sup>7</sup>
  - California Solar Shade Control Act<sup>8</sup>
    - Enacted in 1978, prohibits tree owners from planting or allowing newly planted trees or shrubs that would cast a shadow during certain times over more than 10% of a solar collector on a neighboring parcel.
    - Previously, violators could be held criminally liable.
  - Bissett and Treanor planted redwood trees in their backyard from 1996 to 2001. In 2001, their neighbor Vargas installed solar panels on his roof. He asked Bissett and Treanor to remove or prune their redwoods that were shading his panels. They refused. They were charged and convicted under the state's nuisance law.
  - Amendment SB 1399<sup>9</sup>
    - Effective in 2008, amendment exempts all trees and shrubs planted prior to the installation of a solar panel.
    - Violations of the Act are no longer criminal and now constitute a private nuisance.
- Beach: *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*<sup>10</sup>
  - Florida passed the Beach and Shore Preservation Act establishing procedures for local governments to undertake beach nourishment. Generally, under the law, the area where sand is added becomes public land. Destin and Walton County applied for permits to restore beaches in the area. The project was to add about 75 ft of sand from the existing mean-water line. Destin and Walton County residents formed the nonprofit Stop the Beach Renourishment to challenge the project. After an unsuccessful administrative challenge, the group filed suit in state court claiming that the Act unconstitutionally deprived the residents of littoral rights without just compensation.
  - The case made its way up to the Florida Supreme Court where the court held for the State. The nonprofit sought rehearing from the Supreme Court.

<sup>7</sup> No. BB727255 (Cal. Sup. Ct. Santa Clara County Mar. 28, 2008).

<sup>8</sup> Cal. Pub. Res. Code §§ 25980-25986.

<sup>9</sup> 2008 Cal. Stat. ch. 176, [http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb\\_1351-1400/sb\\_1399\\_bill\\_20080722\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_1351-1400/sb_1399_bill_20080722_chaptered.pdf).

<sup>10</sup> 560 U.S. 702 (2010), <https://www.supremecourt.gov/opinions/09pdf/08-1151.pdf>.

- The Supreme Court held that the Florida Supreme Court decision did not constitute an unjust taking. The nonprofit did not establish that it had littoral rights to contact with the water and to future accretions. The Court found that the State has the right to fill submerged land and that under Florida law, formerly submerged land belongs to the owner of the seabed when it becomes dry land.
- Family
  - How heirs' property and partition laws divested black families of their lands, particularly in the South<sup>11</sup>
  - Uniform Partition of Heirs Property Act<sup>12</sup>
    - Uniform law that seeks to help preserve family wealth when landowner dies intestate. Provides procedural protections, including notice and appraisal requirements and right of first refusal. Preference for partition in kind rather than partition by sale.
    - As of 2021, enacted in 17 states.
- Bodies
  - How should rights stemming from the body or regarding bodily resources be determined
  - Surrogacy laws
    - In Re Baby M<sup>13</sup>
      - Stearns and Whiteheads entered into surrogacy contract. Mrs. Whitehead agreed to be inseminated with Mr. Stearns sperm, carry the child, and relinquish custody. Mrs. Whitehead changed her mind after the baby was born.
      - Court found that the surrogacy contract was unenforceable and that custody should be determined on the best interests of the child.
    - Surrogacy laws today vary among the states. Some outlaw compensation of any kind. Some place limits on compensation or reimbursement.

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<sup>11</sup> Thomas W. Mitchell, *Historic Partition Law Reform: A Game Changer for Heirs' Property Owners*, TEX. A&M UNIV. SCH. L. FAC. SCHOLARSHIP 65 (2019), <https://scholarship.law.tamu.edu/facscholar/1327>.

<sup>12</sup> Uniform Partition Heirs Property Act (UPHPA), Uniform Law Comm'n (2010), <https://www.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d>.

<sup>13</sup> 537 A.2d 1227, 109 N.J. 396 (N.J. 1988)

- In Michigan, under its Surrogate Parenting Act, a surrogate parentage contract for compensation is void and unenforceable.<sup>14</sup>
- Until 2021, New York outlawed surrogacy. New York passed the Child-Parent Security Act legalizing gestational surrogacy and providing certain protections for surrogates.<sup>15</sup>
- Labor
  - Concept of ownership gridlock: when too much ownership can block creativity, innovation, and efficiency.
  - Development of copyright law in the U.S.
    - Constitution's express grant to Congress: power to secure for limited times to authors (copyright) and inventors (patent)
    - Copyright Act of 1790: 14 years + optional 14-year renewal
    - Significant change with Copyright Act of 1976: 75 years or life of author + 50 years
    - (Sonny Bono) Copyright Term Extension Act (Mickey Mouse Protection Act) of 1998<sup>16</sup> extends duration of copyright for a number of categories, including:
      - Extends duration of copyright in work created on or after 1978 to life of author + 70 years
      - Extends duration of copyright in anonymous works or works made for hire to 95 years from first publication or 120 years from creation, whichever expires first
      - Extends to 2047 duration of copyright in works published on or before 2002

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<sup>14</sup> MCL 722,851 et seq., [http://www.legislature.mi.gov/\(S\(i0p5cg45xv4se045b1kcxba5\)\)/documents/mcl/pdf/mcl-act-199-of-1988.pdf](http://www.legislature.mi.gov/(S(i0p5cg45xv4se045b1kcxba5))/documents/mcl/pdf/mcl-act-199-of-1988.pdf).

<sup>15</sup> *The Child-Parent Security Act: Gestational Surrogacy Agreements, Acknowledgment of Parentage and Orders of Parentage*, NY Dep't of Health (Feb. 2021), [https://health.ny.gov/vital\\_records/child\\_parent\\_security\\_act/](https://health.ny.gov/vital_records/child_parent_security_act/).

<sup>16</sup> Pub. L. No. 105-298, 112 Stat. 2827, <https://www.congress.gov/bill/105th-congress/house-bill/2589>.