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Teaching Fundamental Learning Techniques With Moore v. Regents of the University of California

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TEACHING FUNDAMENTAL LEARNING TECHNIQUES WITH *MOORE v. REGENTS OF THE UNIVERSITY OF CALIFORNIA*

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I. INTRODUCTION

"Obviously we are all agreed that we are forging new frontiers because science has run ahead of common law."[1]

I use a nearly full-text version of *Moore v. Regents of the University of California*,[2] as the first case in Property[3] and find it to be a very useful tool for introducing not only a number of key property law concepts but also a number of concepts (not all of which directly relate to property) that are revisited throughout the curriculum, as well as contrasting the more dynamic body of tort law with the slow-moving world of property law. I also find it to be a more useful introduction to twenty-first century Property than the wild animal cases.[4] If the "New Property" theory is now old,[5] body parts, sperm and "pre-embryos" may indeed be the "Newest Property."[6]

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1. Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 280 (Cal. Ct. App. 1993) (quoting the probate court judge below). *Accord* Boulier, *infra* note 30, at 695 ("Unfortunately, the law is often slow to come to grips with technology, especially when technology advances so quickly. Indeed, one accurate observation is that 'the law marches with medicine, but in the rear and limping a little.' It is time that the law began to catch up to the present reality.") (citation omitted).

2. 793 P.2d 479 (Cal. 1990).

3. Where Property is a first semester or first and second semester course, I teach *Moore* as the first case in Property. Where, as at Syracuse University School of Law, Property is a second semester course, I teach *Moore* as the first case in Torts. I then begin the second semester Property class with *State v. Shack*, 277 A.2d 369 (N.J. 1971), but still rely heavily upon *Moore* in the first week of class. *See infra* text accompanying notes 7-16.

4. See the old standby, *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805) (first person to capture wild animal gains title, despite hot pursuit by hunters).

5. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 786-87 (1964). This oft-quoted and oft-debated article appeared in 1964. The article was cited by Justice Brennan in *Goldberg v. Kelly*, 397 U.S. 254, 265 n.8 (1970) and thus, "[h]is claim that deprivations of governmental largess warranted protection similar to that given traditional property rights formed an important part of the background for the procedural due process revolution that began with

I have come to use *Moore*, to answer the question, "where to start?"[7] in Property somewhat by happenstance. I had used *Moore* for a number of years in teaching Property but, because of the editing in the text I was using, I had focused exclusively on the property issue presented.[8] I generally followed the text's introductory structure[9] and placed a heavy emphasis on *State v. Shack*,[10] *Sierra Club v. Morton*,[11] *Jones v. Alfred H. Mayer Co.*,[12] then *Moore*, *Johnson v. M'Intosh*[13] and finally *Shelley v. Kraemer*.[14] As is obvious, I first concentrate on determining what property is and the relationship of property

[*Goldberg*]." GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 617 (13th ed. 1997). Of course, the *newer* property must come before the newest. Mark Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 278 (1975).

6. *See generally* Kermit Roosevelt III, *The Newest Property: Reproductive Technologies and the Concept of Parenthood*, 39 SANTA CLARA L. REV. 79 (1998) (arguing that family law decisions can best be understood by applying a model which treats body parts, particularly reproductive material, as property). As far as I can tell, Roosevelt's is the first recorded (at least by Westlaw) use of the term.

7. *See* Joseph William Singer, *Starting Property*, 46 ST. LOUIS U. L.J. 565 (2002).

8. *See* JOHN E. CRIBBET ET AL., PROPERTY 66 (7th ed. 1996).

9. Pedagogically, some of the cases also belong elsewhere in the course, and generally are briefly reviewed again elsewhere. For example, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), would again be discussed in the chapter on covenants. *See infra* note 12 and accompanying text.

10. 277 A.2d 369, 375 (N.J. 1971) (holding defendants were not guilty of criminal trespass when they entered complainant's farm to provide aid to migrant farmworkers living there). See Keith Sealing, *Dear Landlord, Please Don't Put a Price on My Soul: Teaching Property Law Students That "Property Rights Serve Human Values"*, 5 N.Y. CITY L. REV. (forthcoming 2002), in which I discuss how to infuse a property course with human rights concerns using cases such as *Shack*.

11. 405 U.S. 727, 739-41 (1972). The Sierra Club's suit was dismissed because it had not shown itself to be among those that would be injured by the resort project, a requirement of the "injury in fact" test. The Sierra Club had argued that its standing was based on being a "representative of the public." Although noting the trend toward increasing recognition that non-economic injuries could give standing to sue, the Court rejected the idea that an organization with a "mere 'interest in a problem'" would have standing. To do so would lead down a slippery slope, the Court said, and all special interest organizations, "however small or short-lived" would have standing to sue in similar situations.

12. 392 U.S. 409, 438-39 (1968) (holding Section 1982 barred all discrimination, public and private, in the sale and rental of housing and the Fair Housing Act was a valid exercise of the power granted to Congress by the Thirteenth Amendment).

13. 21 U.S. (8 Wheat.) 543, 589 (1823) ("The title by conquest is acquired and maintained by force."). *See* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001).

14. 334 U.S. 1, 10 (1948) ("It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property.").

and state enforcement before embarking on the familiar cases on acquiring ownership of property, such as *Goodard v. Winchell*.[15]

But later, when I first began teaching Torts, I found that the Torts text had edited *Moore* to include only the breach of fiduciary duty and lack of informed consent issues.[16] Thus, a student might read Moore twice but never read it in its entirety and never have the opportunity to contrast the torts and property aspects of the case. Since, as I attempt to demonstrate below, the case is replete with excellent opportunities to teach students how to read Property in particular and the law in general, I began to start the first semester with a deliberate, careful march through *Moore*.

Many property casebooks consider the case important enough to devote a good bit of space to it.[17] Other property texts ignore it or mention it briefly;[18] the Torts texts tend to give it lesser consideration.[19] It is also given extended

15. 52 N.W. 1124, 1125 (Iowa 1892) (holding "Aerolite" embedded in the soil became part of the soil and so finder who dug it up did not have good title against landowner).

16. *See* VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 188-191 (10th ed. 2000). This casebook abridges *Moore* to about two and a half pages.

17. Cribbet devotes a little over seven pages to *Moore*, focusing, as is appropriate in a property text, on the conversion issue, and then notes that the breach of fiduciary duty and informed consent issues were deleted. CRIBBET ET AL., *supra* note 8. *See also* CURTIS J. BERGER & JOAN C. WILLIAMS, PROPERTY: LAND OWNERSHIP AND USE 1154-62 (4th ed. 1997) (committing about eight pages in an interesting section on sale of bodily organs, which also reproduces 42 U.S.C. § 274e (1994)); A. JAMES CASNER & W. BARTON LEACH, CASES AND TEXT ON PROPERTY 221-245 (4th ed. 2000) (devoting about twenty-two pages, including many of the important footnotes, plus follow-up questions, including the question of whether the law of accession and improvers has any implications for the case); RICHARD H. CHUSED, CASES, MATERIALS AND PROBLEMS IN PROPERTY 1168-87 (2d ed. 1999) (nineteen pages as the final case in the book); JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 79-99 (5th ed. 2002) (fourteen pages of the case, plus a copy of Dr. Golde's patent to Moore's cell line and extensive notes); SANDRA H. JOHNSON ET AL., PROPERTY LAW: CASES, MATERIALS AND PROBLEMS 83-96 (2d ed. 1998) (thirteen pages plus excellent notes); JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES AND PRACTICES 51-59 (3d ed. 2002) (eight pages, plus discussion questions).

18. *See* EDWARD CHASE, PROPERTY LAW CASES, MATERIALS AND QUESTIONS (2002) (not included); ROGER BERNHARDT, PROPERTY: CASES AND STATUTES (1999) (not included); JON W. BRUCE & JAMES W. ELY JR., CASES AND MATERIALS ON MODERN PROPERTY LAW (4th ed. 1999) (not included); BARLOW BURKE ET AL., FUNDAMENTALS OF PROPERTY LAW 107 (1999) (briefly noted); JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 4 (1998) (mentioning briefly in notes, but also asking the same question I stress: "Is property the best legal concept to decide such issues [as whether a person is free to sell his own organs]?"); J. GORDON HYLTON ET AL., PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS 31 (1998) (briefly noted); SHELDON F. KURTZ & HERBERT HOVENKAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW 100 (3d ed. 1999) (briefly as a note case); GRANT S. NELSON ET AL., CONTEMPORARY PROPERTY 13 (1996) (briefly noted and used as hypothetical); EDWARD H. RABIN ET AL., FUNDAMENTALS OF MODERN PROPERTY LAW 24, 1263 (4th ed. 2000) (noted briefly in two places).

19. The Dobbs and Hayden text mentions *Moore* in two separate notes, first noting that the court rejected the trespass to chattels claim, and second, noting that the court held that the

treatment in a text on law, science and medicine.[20] The full text is too long, printing out at about sixty pages off of Westlaw and taking up forty-four pages in Pacific Reports (Second). I make my own version available on my course Web page at about thirty-five pages.[21] This includes all of the concurring and dissenting opinions.

In the decade since it was decided, *Moore* has generated a large number of citations but has not often been followed.[22] A Minnesota court declined to adopt its fiduciary duty standard.[23] The state of Washington refused to adopt

physician had the duty to disclose some facts, and asking, "Is this an informed consent case or something different?" *See* DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 69, 363 (4th ed. 2001). Franklin and Rabin do not include *Moore*. *See* MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES CASES AND MATERIALS (7th ed. 2001). Neither does Professor Diamond. JOHN L. DIAMOND, CASES AND MATERIALS ON TORTS (2001).

20. *Moore* is the first case in the section on "Ownership of the Body," in JUDITH AREEN ET AL., LAW, SCIENCE AND MEDICINE 885-913 (2d ed. 1996), where it takes up a little over twenty-six pages. The casebook also includes some useful information and questions, some of which are referenced below. The text includes some additional interesting cases such as: Whaley v. County of Tuscola, 58 F.3d 1111 (6th Cir. 1995) (holding, under Michigan law, next of kin had a constitutionally protected property interest in deceased relatives' corneas); State v. Powell, 497 S. 2d 1188 (Fla. 1986), *cert. denied*, 481 U.S. 1059 (1987) (holding state statute which authorizes medical examiners to remove corneas during statutorily authorized autopsies without notifying next of kin is constitutional); McFall v. Shimp, 10 Pa. D. & C.3d 90 (Allegheny Co. Ct. 1978) (refusing, where plaintiff was dying of rare bone marrow disease and only compatible donor, his cousin, refused to give bone marrow transplant, to issue injunction requiring him to do so); In re George, 630 S.W.2d 614, 622 (Mo. Ct. App. 1982) (refusing to use court's discretionary power to open sealed adoption records where to do so might have increased the adoptee's chances of finding a suitable bone marrow transplant donor to cure life-threatening illness); Brown v. Delaware Valley Transplant Program, 615 A.2d 1379, 1382 (Pa. Super Ct. 1992) (holding appellees did not violate Pennsylvania's version of the Uniform Anatomical Gift Act when they harvested deceased's organs for transplantation prior to notifying next of kin).

21. I would be happy to make this available to any faculty member who would find it useful.

22. Using the Westlaw citation system, *Moore* has been "*Disagreed With*" in one case, D.A.B. v. Brown, 570 N.W.2d 168, 171 (Minn. Ct. App. 1997) (declining, where physician prescribed a synthetic growth hormone but failed to disclose that he was receiving a kickback for prescribing a particular brand, to follow *Moore* and allow plaintiffs to assert tort of breach of fiduciary duty), "*Declined to Follow*" by one case, Whiteside v. Lukson, 947 P.2d 1263, 1265 (Wash. Ct. App. 1997) (discussed *infra* note 24), "*Declined to Extend*" by one case, Hecht v. Kaplan, 645 N.Y.S.2d 53 (N.Y. App. Div. 1996) (holding, where physician with permission to draw blood drew additional sample to test for a contagious disease without permission, *Moore* was "factually inapposite"), "*Distinguished*" by one case, Neade v. Portes, 739 N.E.2d 496, 505 (Ill. 2000) (finding, in breach of fiduciary duty case, physician's failure to disclose HMO's incentive plan not egregious like the failure to disclose in *Moore*), "*Examined*" by four cases, including *Hecht*, "*Discussed*" in five cases, "*Cited*" in sixty-five cases, and "*Mentioned*" in an additional twenty cases.

23. In *D.A.B.*, a physician (Brown) was convicted on multiple federal criminal charges for receiving kickbacks for prescribing the synthetic growth hormone Protopin. 570 N.W.2d at 169. The drug, manufactured by Genetech, Inc. and exclusively distributed in the United States by

Moore's expansive definition of the term "material fact" in determining what a physician must disclose to obtain truly informed consent and in so doing aptly illustrates the "slippery slope" argument.[24] In the early 1990's it generated a number of case notes and comments,[25] some supporting the court's decision

Caremark, Inc., costs between $20,000 and $30,000 a year and must be taken for a number of years. Dr. Brown had prescribed the drug to more than 200 patients and received kickbacks from Caremark. As part of a guilty plea, Caremark agreed to pay several million dollars and stipulated that it had paid Brown. *Id.* Six patients and their parents subsequently filed suit, but the case was dismissed, and the plaintiffs appealed the dismissal, inter alia, of the claim that Brown had breached his fiduciary duty by not disclosing the kickbacks. *Id*. at 169-70. Noting that the Minnesota statute that prohibits a physician from receiving kickbacks does not provide a private remedy, the court stated that a physician's failure to disclose must constitute medical malpractice. *Id.* at 170-71. The plaintiffs argued, citing *Moore*, that Brown should be held to the standard of a fiduciary. *Id.* at 171. This was crucial to their case because, as was also the case in *Moore*, it could not be demonstrated that the treatment was in any way the incorrect medical procedure. Further, the plaintiffs had blown the statute of limitations for medical malpractice but not for breach of fiduciary duty. Nevertheless, the court stated, "We decline to create a new cause of action simply to permit the putative class to avoid showing injury or to circumvent the legislatively mandated statute of limitations." *Id.*

24. *Whiteside*, 947 P.2d 1263. Patient Whiteside was diagnosed by Dr. Lukson as needing to have her gallbladder removed. At the time he obtained her consent, he had never performed the operation on a patient but had participated in a two-day class, which included hands-on surgery on three pigs. He did not inform her of his inexperience. Before he operated on Whiteside he did perform the operation on two humans. During the operation Lukson misidentified and damaged her bile duct, a mistake that caused a number of complications. *Id.* at 1264. Although a jury concluded that Lukson had not obtained informed consent, the trial judge granted Lukson's motion for a JNOV, concluding that the doctor's experience is not a material factor of which the patient must be informed. *Id.* The court of appeals affirmed. *Id.* In so doing, it rejected the "broader construction of the term 'material fact'," used in Moore, and followed the "traditional view" that "material facts are those which relate to the proposed treatment." *Id.* at 1265. If conflicts of interest caused by financial considerations could be considered material facts, the court asked, why not inquire as to the doctor's own health, financial status and even medical school grades?

25. *See generally* Catherine Caturano Horan, *Your Spleen is Not Worth What it Used to Be:* Moore v. Regents of UCLA, 24 CREIGHTON L. REV. 1423, 1424 (1991) (arguing that the court created severe inequities in the physician-patient relationship by deciding that the proper remedy for cases in which the physician has a commercial interest in a patient's excised cells are remedies derived from disclosure obligations); *California Supreme Court Recognizes Patient's Cause of Action for Physician's Nondisclosure of Excised Tissue's Commercial Value*—Moore v. Regents of the University of California, 104 HARV. L. REV. 808 (1991) (arguing that the court focused primarily on improperly motivated professional judgment and failed to recognize patient self-determination as an independent rationale for the informed consent doctrine and therefore inadequately protected patient dignitary interests); Jeffrey W. Guise, *Expansion of the Scope of Disclosure Required Under the Informed Consent Doctrine*: Moore v. Regents of the University of California, 28 SAN DIEGO L. REV. 455 (1991) (arguing any interest causing the physician to have conflicting loyalties must be disclosed under the California doctrine of informed consent); Joseph M. Healey, Jr. & Kara L. Dowling, *Controlling Conflicts of Interest in the Doctor-Patient Relationship: Lessons from* Moore v. Regents of the University of California, 42 MERCER L.

not to apply *Moore*'s conversion theory,[26] some arguing that conversion should have been applied,[27] others suggesting legislative[28] or other more novel

REV. 989, 1001-04 (1991) (noting the law of fiduciary relations provides a useful framework within which to develop strategies to prevent, limit or eliminate conflicts within the doctor-patient relationship); James P. Leeds, Moore v. Regents of the University of California: *More for Biotechnology, Loss for Patients*, 25 IND. L. REV. 559 (1991) (questioning whether existing legal doctrines can effectively resolve the issues posed by the emerging field of biotechnology).

26. *See, e.g.*, Maureen S. Dorney, Moore v. Regents of the University of California: *Balancing the Need for Biotechnology Innovation Against the Right of Informed Consent*, 5 HIGH TECH. L.J. 333 (1990) (claiming it is inappropriate to treat human body parts as tangible personal property).

27. Laura M. Ivey, Moore v. Regents of the University of California: *Insufficient Protection of Patients' Rights in the Biotechnological Market*, 25 GA. L. REV. 489, 507 (1991) ("The opinion, however, failed to convincingly justify its rejection of Moore's conversion cause of action."); Bernard M. Dickens, *Living Tissue and Organ Donors and Property Law: More on* Moore, 8 J. CONTEMP. HEALTH L. & POL'Y 73, 75-76 (1992) ("The qualified solicitude the majority showed to medical researchers and biotechnological researchers influenced its treatment of Moore's claim of conversion of property"); Jeffrey A. Potts, Moore v. Regents of the University of California: *Expanded Disclosure, Limited Property Rights*, 86 NW. U. L. REV. 453 (1992) (arguing that a cause of action for conversion should be allowed; however, Moore cannot state a property interest in the patented cell line; instead he can recover damages only based on the value of his cells and whatever equitable form of remedy the trial court deems appropriate); K. Peter Ritter, Note, Moore v. Regents of the University of California: *The Splenetic Debate Over Ownership of Human Tissue*, 21 SW. U. L. REV. 1465, 1484 (1992) ("The majority's treatment of Moore's cause of action for conversion grants researchers and those who commercially exploit biological materials substantial rights at the expense of those of the donor."); Karen G. Biagi, Note, Moore v. Regents of the University of California: *Patients, Property Rights, and Public Policy*, 35 ST. LOUIS U. L.J. 433 (1991) (arguing that the court's public policy arguments are outweighed by the right of a patient to affirmatively assert his own commercial interest in his tissues, particularly when the same tissues can clearly be considered the property of another); Lisa Mundrake, *Biotechnology and* Moore v. Regents of the University of California: *The Revolution of the Future*, 13 WHITTIER L. REV. 1009, 1042 (1992) ("[I]t is manifestly unjust to allow all participants in that industry to share in the profits of their research, denying compensation to the uninformed and indispensable first participant.").

28. Helen R. Bergman, *Case Comment*: Moore v. Regents of the University of California, 18 AM. J.L. & MED. 127 (1992) (rejecting application of conversion, instead proposing legislative changes which would (1) eliminate any trade in human tissues and (2) require doctors to inform their patients of any research interest in proposed medical procedures); Henry L. Hipkins, *The Failed Search for the Perfect Analogy: More Reflections on the Unusual Case of John Moore*, 80 KY. L.J. 337 (1991) (arguing legislatures, as the most appropriate forums for evaluating these issues, should accept responsibility); Benjamin Applebaum, Comment, Moore v. Regents of the University of California: *Now That the California Supreme Court Has Spoken, What Has It Really Said?*, 9 N.Y.L. SCH. J. HUM. RTS. 495, 498 (1992) (recommending that federal legislation be enacted in order to resolve this problem on a national basis, since common law has the potential to create a patchwork of remedies that may prove unsuitable to all parties); Judith B. Prowda, Moore v. Regents of the University of California: *An Ethical Debate on Informed Consent and Property Rights in a Patient's Cells*, 77 J. PAT. & TRADEMARK OFF. SOC'Y 611, 638 (1995) (arguing federal and state laws regulating informed consent should be amended to require that patients be told of all potential commercial application of research performed on their tissues

solutions[29] and others placing *Moore* in the context of the "Newest" property.[30] Recently, *Moore* even made the cover story of a popular magazine.[31]

or cells and that an individual should also have the right to refuse to give consent if such use conflicts with moral, religious or personal values and that an equitable system of compensation would be more respectful of the patient whose tissues are used for commercially profitable research.); *see, e.g.*, Rhonda G. Hartmann, *Beyond* Moore: *Issues of Law and Policy Impacting Human Cell and Genetic Research in the Age of Biotechnology*, 14 J. LEGAL MED. 463, 464 (1993) (arguing that there is a need to develop new law to govern biotechnology and that that should strike a balance between respect for individual autonomy and recognition for the value of biotechnology).

29. Brett J. Trout, Comment, *Patent Law: A Patient Seeks a Portion of the Biotechnological Patent Profits in:* Moore v. Regents of the University of California, 17 J. CORP. L. 513, 515 (1995) (concluding that the court's holding is inequitable and could hinder future donative efforts if patients are not allowed to share in the profits derived from their tissue, and arguing that a scheme such as is used to treat blood sales as a service rather than a sale of property is best); Hallie Plitman, Comment, *Tort Law*—Moore v. Regents of the University of California: *Was He Merely Venting His Spleen?*, 21 MEMPHIS ST. U. L. REV. 625, 633-34 (1991) (analogizing to the western water law doctrine of prior appropriation and concludes that Moore's physician had superior rights to the cells by virtue of his ability to put them to beneficial use); Luisa A.M. Giuffrida, Casenote, Moore v. Regents of the University of California: *Doctor, Tell Me Moore!*, 23 PAC. L.J. 267, 309-12 (1991) (arguing that application of a constructive trust would shift the court's focus from the plaintiff's injury, which may be difficult to prove, to the defendant's breach of fiduciary duty and lack of disclosure, which are more easily established and noting that the constructive trust decree typically grants to the injured party the entire profit derived from the defendant's misconduct.); Michelle J. Burke & Victoria M. Schmidt, *Old Remedies in the Biotechnology Age:* Moore v. Regents of the University of California, 3 RISK: ISSUES HEALTH & SAFETY 219, 241 (1992) (noting that "[e]veryone to whom property is transferred in violation of trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration."—thus, bona fide purchasers, meaning, pharmaceutical companies and others who purchased rights in the cell line without knowledge of any improper behavior, would be insulated from liability).

30. William Boulier, Note, *Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693, 696-711 (1995) (recommending that courts recognize that there can be a true property interest in the human body, particularly one's own, and place body parts more squarely under the well developed and generally consistent law of property and discusses in context of *Hecht*); Jodi K. Frederickson, *Umbilical Cord Blood Stem Cells: My Body Makes Them, But Do I Get to Keep Them? Analysis of the FDA Proposed Regulations and the Impact on Individual Constitutional Property Rights*, 14 J. CONTEMP. HEALTH L. & POL'Y 477, 478 (1998) (arguing that regulations regarding the storage and use of umbilical cord blood have an adverse impact on a child's property right to reclaim his stored cord blood for later use); Judith D. Fischer, *Misappropriation of Human Eggs and Embryos and the Tort of Conversion: A Relational View*, 32 LOY. L.A. L. REV. 381, 383 (1999) (arguing that because misappropriation of reproductive material has many severe, lifelong implications, these concerns should be addressed by recognizing that such misappropriation is conversion); Erik B. Seeney, Moore *10 Years Later – Still Trying to Fill the Gap: Creating a Personal Property Right in Genetic Material*, 32 NEW ENG. L. REV. 1131, 1133 (1998) (arguing that there should be a sufficient property interest in one's body—based in constitutional guarantees, existing case and statutory law, and property theory—to support a claim of conversion and allow one to profit from the use of his or her genetic materials); Stephen R.

II. PARCING THROUGH *MOORE*

If I am to present *Moore* in a first semester course, in which case *Moore* may well be the first case my students have ever read, I must first cover some preliminary matters by asking some simple questions. These are not necessarily "property" questions, but rather questions every law student needs to quickly develop the ability to answer in order to read any case, be it in Property, Torts or whatever. What court are we in?[32] Who are the parties and what are their titles?[33] What happened in the courts below?[34] What does it means to sustain a demurrer?[35] What is the state supreme court's task at this stage in the proceedings?[36] None of these issues are property questions *per se*, but they lay the structural and procedural groundwork for an understanding of substantive issues to come.

The plaintiff stated thirteen causes of action: which did the court focus on? There were essentially three: breach of fiduciary duty, lack of informed

Munzer, *The Special Case of Property Rights in Umbilical Blood for Transplantation*, 51 RUTGERS L. REV. 493 (1999) (arguing that the unique nature of cord blood distinguishes it from body wastes and qualifies it as a body part in which property rights vest); Roosevelt, *supra* note 6, at 957; Brian G. Hannemann, *Body Parts and Property Rights: A New Commodity for the 1990s*, 22 SW. U. L. REV. 399 (1993); Bonnie Steinbock, *Sperm as Property*, 6 STAN. L. & POL'Y REV. 57 (1995); Judith D. Fischer, *Walling Claims In or Out: Misappropriation of Human Gametic Material and the Tort of Conversion*, 8 TEX. J. WOMEN & L. 143 (1999) (arguing where a man consents to sexual intercourse because of his partners' contraceptive fraud, because the tort was committed by the mother, not the child any damages awarded to the father should not cancel or offset his obligation to support his child); Michelle Bourianoff Bray, Note, *Personalizing Personality: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209 (1990); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 742-44 (1996) (arguing that Professor Radin's personhood analysis of property and its alienability should be adopted to determine whether certain classes of property are alienable).

31. *See* Wil S. Hylton, *Who Owns This Body?*, ESQUIRE, June 1, 2001, at 102. Although not exactly standard law review fare, the magazine does demonstrate pop culture's captivation with the subject matter.

32. The students need to learn all that can be gleaned from the unedited header: that we are in the Supreme Court of California, that the court sat "In Bank" and that a rehearing was denied. Students should understand the three-tiered state and federal court systems.

33. Mr. Moore was the plaintiff; now the appellant. The defendants, now the respondents, were Dr. Golde, the named defendants Regents of the University of California, the university researcher Shirley Quan, the Genetics Institute and Sandoz Pharmaceuticals. *Moore*, 793 P.2d at 480-81.

34. The trial court, the Superior Court of Los Angeles County, sustained all defendants' demurrers and dismissed the case, No. S006987, the appeals court reversed, 249 Cal. Rptr. 494, and the state supreme court granted review, superceding the opinion of the intermediate appellate court, which explains why Moore is the appellant rather than the appellee.

35. At this point I make it clear that everyone is expected to look up new terms such as "demurrer" in BLACK'S LAW DICTIONARY (7th ed. 1999).

36. Not to decide who wins or loses, but rather to determine whether there is a viable cause of action, and, if so, remand the case with instructions.

consent[37] and conversion. What is conversion?[38] Here is where the students must grasp the reason why *Moore* is a property case. Although all three causes of action sound in tort, because one cannot be liable for conversion without property to convert, a key issue under conversion becomes whether or not excised body parts should be considered property.

Now we are ready for the facts.[39] As noted, the case is very long, even as abridged, so students must learn to parce out the key facts. The plaintiff, Moore, contracted hairy cell leukemia.[40] Victims of the disease produce excessive amounts of certain lymphokines, making their blood valuable in research,[41] but more importantly, all of the defendants "were aware that" Moore's blood was "of great value," *prior at least to the date they removed his spleen*.[42] Defendant Dr. Golde[43] removed blood and other body parts and fluids, including Moore's spleen[44] without ever telling him that they were

37. Breach of fiduciary duty and lack of informed consent are given relatively greater attention when *Moore* is taught in Torts.

38. *Moore*, 793 P.2d at 487-88. Conversion derived from the common law action of trover. To maintain an action in trover, the plaintiff had to allege that she was possessed of certain goods, that she had lost the goods, that the defendant found the goods and instead of returning them, the defendant converted the goods to her own use. Gradually, the elements of losing and finding the goods were not required. The plaintiff needed only to demonstrate that she had the right to possession and the fact of conversion of the personal property by the defendant. The plaintiff was entitled to damages amounting to the full value of the personal property at the time of conversion. *See id*. at 488 n.17. Originally, because intangible property could not be lost and subsequently found, conversion was applicable only to tangible personal property, but the doctrine has been expanded to include intangible personal property.

39. There are many "facts" in *Moore* that are not contained in the case itself. As noted *supra* many casebooks and articles provide additional information on this well-documented case.

40. *Id.* at 481. There is a great deal of information about the disease available on the Web. *See*, *e.g.*, Hairy Cell Leukemia Research Foundation, *at* http://www.hairycellleukemia.org (last visited Feb. 6, 2002).

41. Here the reported facts get murky. As Justice Mosk argues in dissent, it does appear that the majority imposes an "amateur biology lecture" at this point. *Moore*, 793 P.2d at 521 (Mosk, J., dissenting). Most hairy cell leukemia sufferers produce cancerous blood cells with an excess of B-lymphocytes; Moore (and only one other reported patient in the world) produced an excess of T-lymphocytes. It was this that made a cell line derived from Moore particularly valuable. Cell lines are not easily established; most human cells have a limited lifespan and die after undergoing a fixed number of divisions. By contrast, malignant cells, such as those derived from Moore, do not have fixed lifespans. Nevertheless, establishing a cell line is not an easy process and is as much an art as a science. See Anthony R. LoBiondo, *Patient Autonomy and Biomedical Research: Judicial Compromise in* Moore v. Regents of the University of California, 1 ALB. L.J. SCI. & TECH. 277, 287-88 (1991), who delivers one of the best explications of the science involved, even if I disagree with his ultimate conclusion.

42. *Moore*, 793 P.2d at 481.

43. Dr. Golde liked to have his patients call him "Goldie." Hylton, *supra* note 31, at 104.

44. Hairy cell leukemia tumors often gather in the spleen and trap and destroy normal blood cells; therefore removal of the spleen is often a normal procedure for this disease. Hairy Cell Leukemia Research Foundation, *at* http://www.hairycellleukemia.org (last visited Feb. 6, 2002).

valuable or that he was using them in research projects.[45] Moore had to fly from Seattle to the University of California at Los Angeles (UCLA) between 1976 and 1983 for "treatments" that Dr. Golde said were necessary, but were actually performed to provide Golde with additional samples of blood, sperm and bone marrow.[46] Ultimately, the market value of products derived from Moore amounted to possibly more than $3 billion, but Moore received nothing.[47]

At this point the students are still struggling with learning how to state the issues. They generally produce something like this: (1) Has a doctor breached a fiduciary duty to a patient if she performs an operation on him or removes body parts from him without telling him that she will derive an economic interest from the results? (2) Has a patient given informed consent to a medical procedure if she agrees to the procedure without being informed that the doctor has a financial interest in performing it? (3) Is a doctor liable for conversion if he uses body parts taken from a patient for commercial gain without her knowledge and consent?

The court held for Moore on the breach of fiduciary duty and lack of informed consent claims,[48] but held for the defendants on the conversion claim.[49] I use this split result to develop the idea that the body of property law has been slow to change and is often not suited to the emerging problems presented by the new property or the newest property, meaning, things such as professional degrees,[50] welfare entitlements,[51] frozen sperm[52] and pre-

A normal spleen weighs about fourteen ounces; Moore's weighed fourteen pounds at the time it was removed. Hylton, *supra* note 31, at 104.

45. *Moore*, 793 P.2d at 481.

46. *Id*. Note that removal of bone marrow is a painful process. After four years, Moore was tired of flying to California. He offered to have the blood drawn in Seattle and flown down, but Golde said that would not work. When he mentioned the cost of the flights, Golde began paying for them out of his own pocket. When his parents moved and Moore no longer had a free place to stay in the Los Angeles area, Golde put him up in the Beverly Wilshire. When Golde gave him a contract to sign and was insistent that he sign it, Moore finally contacted a lawyer, who discovered Golde's perfidy. Hylton, *supra* note 31, at 104.

47. *Moore*, 793 P.2d at 482. This number was highly speculative. However, Dr. Golde received 75,000 shares of Genetics Institute Stock for a nominal fee as part of the deal, and, as of the time the case reached the California Supreme Court, the stock was worth approximately $2,400,000. *See* AREEN ET AL., *supra* note 20, at 911. Genetics Institute agreed to pay Golde and the Regents at least $330,000 over three years. *Moore*, 793 P.2d at 482.

48. In the interest of brevity I will omit any additional discussion of these claims. For a thorough analysis of these issues, see *supra* notes 26-29.

49. *Moore*, 793 P.2d at 496.

50. *See, e.g*., Hoak v. Hoak, 370 S.E.2d 473 (W.Va. 1988) (holding that a wife obtains a cognizable interest in her husband's professional degree, earned during the marriage and based, in part, on her efforts).

embryos[53] that were not issues when the law of property emerged from common law in England. By contrast, tort law at least appears to find an answer to Mr. Moore's problem; although, as discussed later, the remedy may be illusory.

The case also serves as a springboard to the countervailing concepts of judicial activism and deference to the legislature that students will encounter in every course from Property to Torts to Constitutional Law. Should the court enact a common law change in the law of conversion by redefining "property" or should the legislature enact a solution to the problem presented? As the court stated: "Moreover, we should be hesitant to 'impose [new tort duties] when to do so would involve complex policy decisions,' especially when such decisions are more appropriately the subject of legislative deliberation and resolution."[54]

Professors Dukeminier and Krier note that a number of state legislatures have in fact taken up the issue, but that much of the field is pre-empted by federal law.[55] The California Senate introduced a bill in 1995 that would have created a cause of action for conversion of body parts, but, again relying on reporting by Professors Dukeminier and Krier, the bill never passed.[56]

Next, the case serves to introduce the concept of the court's use of precedent or lack thereof. The court states, "No court, however, has ever in a reported decision imposed conversion liability for the use of human cells in medical research."[57] The court cited to *Venner v. State*[58] which students are asked to distinguish. How can *Venner* be distinguished? It is a criminal case, it is a privacy rights case, it is from Maryland and the court's statement that a person may assert continuing rights to ownership of "blood, organs or other parts of the body" is dicta.

51. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (ruling individual acquires a property right in continued receipt of state public assistance payments, once awarded, that is entitled to Due Process protection).

52. *See, e.g.*, Hecht v. Superior Court, 59 Cal. Rptr. 2d 222 (Cal. Ct. App. 1996), and *infra* text accompanying notes 93-106.

53. *See* A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000), discussed *infra* note 116.

54. *Moore*, 793 P.2d at 488 (citation omitted).

55. *See* DUKEMINIER & KRIER, *supra* note 17, at 94 (citing 42 U.S.C. § 274e (1994) (making it unlawful to receive human organs for profit in interstate commerce) and arguing that the law recognizes property rights in body parts).

56. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 85 n.44 (4th ed. 1998) (citing a California legislative aide that pronounced the measure dead in 1987).

57. *Moore*, 793 P.2d at 487.

58. 354 A.2d 483 (Md. Ct. Spec. App. 1976) (holding seizure of defendant's feces from bedpan to search for drugs did not violate Fourth Amendment prohibition on unlawful searches and seizures).

Should the cited privacy rights cases provide analogous support? The court states that none of the cases cited hold that individuals have proprietary interests in their own likeness based their opinions on property law.[59]

What is troubling about the majority's citation to the Health and Safety Code?[60] In a point taken up by the dissent, the quoted section is in a division entitled "Dead Bodies." Further, it refers to disposition of human remains (interpreted by the court to include tissue taken from living beings) for health and safety reasons. Even though it states: "A primary object of the statute is to ensure the safe handling of potentially hazardous biological waste materials," the court concludes that, "one cannot escape the conclusion that the statute's practical effect is to limit, drastically, a patient's control over excised cells."[61] In my opinion, this seems to be bad statutory interpretation. Clearly, assuming the court is correct that the statute applies to excised tissue from living subjects as well as cadavers, the statute would prohibit Moore from taking his spleen home in a formaldehyde jar and displaying it on his mantle,[62] or using it in a grisly Halloween tableaux. But what does it say about Moore deciding to give (or even sell) his excised spleen to Johns Hopkins rather than UCLA? Finally, the court concluded that what the patent now protects is not Moore's cells, but a unique line of cells created by "human ingenuity" and protected by federal patent law.[63]

Having concluded that Moore has no claim for conversion under existing law, the court then turns to the question of whether conversion liability should be extended. Here, the case best allows for a discussion about the use of public policy argument in judicial decision-making. What public policy arguments support the majority's decision not to impose liability for conversion? Justice Panelli argues that allowing conversion to lie would hinder important biomedical research, since conversion is a strict liability tort[64] and any researcher acquiring the tissues might be liable for conversion.[65]

59. *Moore*, 793 P.2d at 480. Here it appears that the majority misses the scientific point. True, "Lymphokines, unlike a name or a face, have the same molecular structure in every human being and the same, important functions in every human being's immune system." *Id.* at 490. However, Moore was one of only *two* reported patients in the world that produced excess amounts of T-Lymphokine as a result of his malignancy. If that renders Moore less than unique, the Elvis Presley Foundation should be happy that Elvis' twin died at birth! *See* State ex rel. Elvis Presley Int'l Memorial Found. v. Crowell, 733 S.W.2d 89 (Tenn. Ct. App. 1987).

60. CAL. HEALTH & SAFETY CODE §§ 7001, 7054.4 (Deering 1975).

61. *Moore*, 793 P.2d at 491-92.

62. This analogy is Justice Broussard's. *Id.* at 503 (Broussard, J., concurring in part and dissenting in part).

63. *Id.* at 492-93.

64. At this point students may not know what a strict liability tort is.

65. *Id.* at 495 (citing Brown v. Superior Court, 751 P.2d 470 (Cal. 1988) (holding strict product liability would frustrate pharmaceutical research; therefore drug manufacturer's liability should not be measured by that standard)).

Finally, the court reiterates the opinion that the legislature should make the decision here,[66] and concludes that because patients such as Moore are protected by the physicians' disclosure obligations, there is no need to extend the conversion theory.[67]

Justice Arabian's concurring opinion allows my students to explore the ethical issue of whether one should be allowed to sell her own body parts for a profit:[68] "Does a right to sell one's body parts diminish dignity or enhance it by increasing self-determination?"[69]

If another medical center had stolen the cells from UCLA, would that be conversion? Justice Broussard, concurring in part and dissenting in part, argued that the fact that it would be conversion points out the fundamental unfairness of the majority's holding.[70]

Justice Broussard cites to a different statute—the Uniform Anatomical Gift Act[71]—in support of his dissent to the conversion argument.[72] This Act provides that the donor of a body part has the right to determine the recipient of that body part. How is this Act distinguishable? First, it applies only upon the death of the donor, and second it applies to *gifts*, whereas Moore wanted to sell, not give. Justice Broussard counters the former by stating that "[i]f a hospital, after removing an organ from [a living] donor, decided on its own to give the organ to a different donee, no one would deny that the hospital had violated the legal right of the donor by its unauthorized use of the donated organ."[73] Problems with this analysis? No citations are given in support. No indication that the hospital, although clearly in the wrong, would be held liable for conversion, as opposed to, say, breach of fiduciary duty or even under a bailment theory, neither of which theories buttress Moore's case.

Justice Broussard counters the lack of precedent by noting that, although there is no support, there are also not cases contra—"This is simply a case of first impression."[74]—and that is how the common law grows.

Finally, Justice Broussard disputes the majority's public policy analysis. First, he finds that it would be a rare case where a doctor knowingly concealed a patient's body part's value or disregarded his wishes,[75] and also notes that, if,

66. *Id*. at 496.

67. *Id.* at 496-97. The flaws in this theory are best taken up in analysis of the dissent by Justice Mosk. *Id.* at 506-23 (Mosk, J., dissenting).

68. *Moore*, 793 P.2d at 497-98 (Arabian, J., concurring).

69. For further discussion of this question, see AREEN, *supra* note 20, at 885-1095.

70. *Id.* at 501 (Broussard, J., concurring in part and dissenting in part).

71. CAL. HEALTH & SAFETY CODE §§ 7150-60 (West 1970 & Supp. 2002).

72. *Moore*, 793 P.2d at 501.

73. *Id.* at 502.

74. *Id.*

75. *Id.* at 504. This would be particularly true if the court sent a clear signal that such actions were conversion.

as the majority suggested, the bulk of the value in a cell line will be derived from efforts of medical researchers rather than from the raw material, the liability of any innocent purchasers will be limited.[76]

Justice Broussard's next statement, which points out a weakness in Justice Arabian's concurring opinion, opens the door to a useful discussion on commodification of the body.[77] By rejecting conversion, the majority does not stop sales of body parts, it simply stops Moore from selling his own body parts while allowing Golde to continue to do so.[78]

Justice Mosk counters the majority's deference to the legislature, calling failure to find conversion an abdication of the court's responsibility in the area of torts to develop the common law.[79] Students contrast this argument with the opinion articulated earlier that the court should defer to the legislature. Here, Justice Mosk characterizes the issue as involving "blatant commercial exploitation of Moore's tissue" by "full-fledged entrepreneurs."[80]

Justice Mosk then provides a very broad and comprehensive definition of property which I suggest be included in whatever version of *Moore* students are given.[81] The illustrations therein explore how the "bundle of rights"

76. *Id.* at 505.

77. I have not previously discussed commodification *per se* in the past but plan to do so in the future. Using the excuse of having already exceeded my allotted space, I will only do so briefly herein. Note that BERGER & WILLIAMS, *supra* note 17, at 1111-73, devote an entire chapter to "Commodification: Wealth and the Marketplace," wherein is contained their version of *Moore* as well as an excerpt from Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1879-87 (1987). See Dorney, *supra* note 26, at 365-368 for a direct application of Professor Radin's work to *Moore*. Dorney notes that Radin suggests that when a given aspect of personhood is already commodified, in this case by other sellers such as Golde, prohibiting persons from selling that aspect of their personhood places them in a double bind of powerlessness, thereby reducing the individual's autonomy. *Id.* at 365. One approach to this problem is to try to equalize the balance of power by allowing the patient to sell his or her own body parts. *Id.* at 368. The second approach, which Dorney argues is the better answer, is to amend federal and state law to clearly require a researcher to inform a patient of potential commercial uses of his or her research and to allow research subjects to profit from the use of their body parts. *Id.*

78. *Moore*, 793 P.2d at 506.

79. *Id.* at 507 (Mosk, J., dissenting).

80. *Id.* at 509.

81. Mosk states:

> Being broad, the concept of property is also abstract: rather than referring directly to a material object such as a parcel of land or the tractor that cultivates it, the concept of property is often said to refer to a "bundle of rights" that may be exercised with respect to that object—principally the rights to possess the property, to use the property, to exclude others from the property, and to dispose of the property by sale or by gift. "Ownership is not a single concrete entity but a bundle of rights and privileges as well as of obligations." But the same bundle of rights does not attach to all forms of property. For a variety of policy reasons, the law limits or even forbids the exercise of certain rights over certain forms of property. For example, both law and contract may limit the right of an owner of

concept explicates the fact that a thing can be called property even though one may have some rights but not all rights, such as where one has the legal right to give the thing away but not sell the thing,[82] or, conversely, where one may have the legal right to sell the thing but not give the thing away.[83]

How should Moore's share of the financial rewards from the patented cell line be divided? Clearly, Golde added a great deal of value to the line, but "a patent is not a license to defraud."[84] Justice Mosk analogizes Moore to a "joint inventor," which would entitle Moore to some of the profits but not take everything away from Golde.[85]

Mosk also raises the issue of slavery as the most abhorrent form of exploitation of the human body.[86] This is a topic with clear implications outside of property, but which can also be considered in this introductory course.[87] Mosk also generally strikes a responsive chord with students with his arguments of "fundamental fairness" and "unjust enrichment."[88] This is useful and yet a trap for students in their first week because some struggle with the fact that they can no longer simply argue that something is "unfair" or "just doesn't seem right." Justice Mosk then argues that it would be an abdication of the court's tort law responsibility to avoid the conversion issue and defer to the legislature.[89]

> real property to use his parcel as he sees fit. Owners of various forms of personal property may likewise be subject to restrictions on the time, place, and manner of their use. Limitations on the disposition of real property, while less common, may also be imposed. Finally, some types of personal property may be sold but not given away, while others may be given away but not sold, and still others may neither be given away nor sold.
>
> In each of the foregoing instances, the limitation or prohibition diminishes the bundle of rights that would otherwise attach to the property, yet what remains is still deemed in law to be a protectible property interest. "Since property or title is a complex bundle of rights, duties, powers and immunities, the pruning away of some or a great many of these elements does not entirely destroy the title . . . "

Id. at 509-10 (footnotes omitted). I have omitted the footnotes here, but would recommend that footnotes 6-11 be included in the student text.

82. *Id.* at 510 n.10 (giving as example wild fish or game caught by a sportsman, pursuant to CAL. FISH & GAME CODE §§ 3039, 7121 (West 1998)).

83. *Moore*, 793 P.2d at 510 n.9 (giving as example property held by a person contemplating bankruptcy, pursuant to 11 U.S.C. § 548(a) (1994 & Supp. 2000)).

84. *Id.* at 512.

85. *Id.*

86. *Id.* at 515.

87. Some case books include materials on slavery from a property perspective. *See, e.g.*, SINGER, *supra* note 17, at 1325-42; BERGER & WILLIAMS, *supra* note 17, at 1111-25. *See also* Brant T. Lee, *Teaching the Amistad*, 46 ST. LOUIS U. L.J. 775 (2002) (discussing the use of slavery as a Property topic).

88. *Moore*, 793 P.2d at 516.

89. *Id.* at 517. This point has generally already been fully debated while working through the majority's analysis.

Next Justice Mosk introduces a practical note, arguing that the remedies allowed—breach of fiduciary duty and lack of informed consent—are "largely illusory."[90] First, Moore must prove a causal connection between his injury and the failure to inform; second, he must prove that no reasonable person would have refused consent; third, the holding only gives him the right to withhold consent, not bargain for compensation; finally, it only reaches Golde, not the other defendants.[91]

Was the Justice right on this last point? In fact, Professor Chused reports that Moore, who was seeking three million dollars, was only entitled to actual damages plus $250,000 under California law, and settled for much less than he would have stood to receive had he been allowed to pursue the conversion theory.[92]

III. FOLLOW-UPS AND HYPOS

There are a number of cases and issues that can be used as hypotheticals following *Moore*. I will mention just a few, some proven and some planned for next semester, starting with my favorite follow-up case.

Where ownership of all marital assets has been decided pursuant to a divorce decree, should that decree be held to apply to the husband's frozen sperm, currently being cryogenically stored? In *Hecht v. Superior Court*,[93] it took six years and three trips to appellate court to resolve that question in the negative. In 1991, William Kane took his own life in a Las Vegas hotel. He was survived by two college-age children and a wife he divorced in 1976, who did not thereafter enter the picture. He had been living for the last five years with Deborah Hecht, and prior to his death deposited fifteen vials of his sperm with California Cryobank, Inc., with the clearly expressed intent (in both his will and an agreement with the sperm bank) that they be used to impregnate Hecht after his death.[94]

A number of issues were contested in the battle over Kane's estate, and Hecht and the two children entered into an agreement whereby the residue of the estate, including sums in excess of $190,000, would be divided such that twenty percent would be distributed to Hecht and forty percent would go to each of the two children.[95] Shortly thereafter, Hecht's counsel attempted to

90. *Id.* at 519 (Mosk, J., dissenting).

91. *Moore*, 793 P.2d at 519-21. These issues are given more emphasis when *Moore* is being used in a Torts class.

92. *See* CHUSED, *supra* note 17, at 1187 (*citing* AREEN ET AL., *supra* note 20, at 911 n.1).

93. 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993). For a fascinating (and humorous) look behind the scenes at *Hecht*, see DUKEMINIER & KRIER, *supra* note 17, at 98-99. *See also* David A. Rameden, Note, *Frozen Semen as Property in* Hecht v. Superior Court*: One Step Forward, Two Steps Backward*, 62 UMKC L. REV. 377 (1993).

94. *Hecht*, 20 Cal. Rptr. 2d at 276.

95. *Id.* at 277.

claim the sperm for Hecht and was rebuffed.[96] She argued, inter alia, that the sperm was a gift to her, either *inter vivos* or *causa mortis*.[97] The court first stated that this case was not governed by *Moore*, concluding that it was self-defeating to argue Kane had no property interest in his sperm once it left his body, because the sperm then would not be part of Kane's estate and the probate court would not have jurisdiction over its disposition.[98] The court held that "the decedent's interest in his frozen sperm vials, even if not governed by the general law of personal property, occupies 'an interim category that entitles them to special respect because of their potential for human life.'"[99] Thus, the court concluded, the sperm was property as broadly defined by the Probate Code and subject to the probate court.[100] Noting that "[t]he present legal position toward property rights in the human body is unsettled and reflects no consistent philosophy or approach,"[101] the court found that decisions had been made to achieve policy goals rather than by following the rules of personal property.[102]

After remand, another probate judge concluded in 1994, with Hecht's "biological clock" ticking at forty years of age, that she was entitled to at least twenty percent of the sperm (three of the fifteen vials). In its second disposition of the case, the court ordered the distribution of the sperm.[103] Attempts to conceive with the first two vials failed, and Hecht's gynecologist needed to know if she would obtain the remaining twelve vials before deciding whether to perform a riskier technique with the last definitely available vial.[104] After stating that "[a] man's sperm or a woman's ova or a couple's embryos are not the same as a quarter of land, a cache of cash, or a favorite limousine," the court held that the sperm, to the extent it was property, was only property as to Hecht, the only person who could use it, and, thus, not property subject to the twenty percent-eighty percent division of the estate's residual property.[105] Hoping that it had seen the case for the last time, the court awarded Hecht the remaining sperm.[106]

What if the patients themselves (or their parents) harvest and control body parts they know to be valuable, not to make a financial windfall, but to keep

96. *Id.* at 278.

97. *Id.* at 279.

98. *Id.* at 280-81.

99. *Hecht*, 20 Cal. Rptr. 2d at 281 (quoting Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992)).

100. *Id.*

101. *Id.* (quoting Bray, *supra* note 30, at 220).

102. *Id*.

103. Kane v. Superior Court, 44 Cal. Rptr. 2d 578, 584 (Cal. Ct. App. 1995).

104. Hecht v. Superior Court, 59 Cal. Rptr. 2d 222, 225 (Cal. Ct. App. 1996).

105. *Id.* at 226.

106. *Id.* at 227. The California Supreme Court denied review and ordered that portions of the opinion not be published. *Id*. at 222.

control of the intellectual property rights they generate and thus facilitate cures for other patients? Shortly after parents discovered that their two children had a rare disease called pseudoxanthoma, or PXE, they began receiving calls from researchers seeking to draw blood samples.[107] Choosing a path unavailable to Moore, and concerned that drug companies and universities wanted to earn licensing fees from the results of their research, the parents incorporated a nonprofit blood and tissue bank and collected samples from other PXE children.[108] They were then able to require researchers to agree to share the ownership and profits from any successful research on the samples.[109] Is their plan inconsistent with the holding of *Moore*?

Should the result be any different if body parts are taken from a corpse for scientific purposes?[110] Ironically, with the Regents of the University of California again serving as the named defendant,[111] a class action suit involving nearly five hundred people was settled prior to trial for $9.5 million.[112] In 1959, a Los Alamos technician died of exposure to plutonium.[113] His wife agreed to an autopsy to determine the cause of death, but without her knowledge the doctor removed eight pounds of internal organs, including the brain, to determine where the radioactivity had migrated; he was buried in a sealed coffin.[114] The practice, which involved as many as two hundred and fifty others, continued until 1980 and was only uncovered by an investigative journalist who won a Pulitzer Prize for the story.[115]

Should frozen pre-embryos, created during a marriage but still viable at divorce, be treated as property? As demonstrated in *A.Z. v. B.Z.*,[116] the courts

107. *See* Matt Fleischer, *Seeking Rights to Crucial Gene: Parents of Children with PXE Took Steps to Control Samples Used in Research for a Cure*, NAT'L L.J., June 25, 2001, at C1. The facts noted therein tend to support Justice Mosk's views of the secrecy and lack of cooperation within the biotechnology industry, rather than those of the majority opinion. *Id.*

108. *Id.*

109. *Id.*

110. The issue of property rights in one's tissue was first developed in English cases on the disposition of corpses. English common law found no property right in one's corpse. American law recognizes that quasi-property rights exist which permit a decedent or his or her heirs to determine how to dispose of the body.

111. The Los Alamos National Laboratory is owned and run by the Regents under a contract with the Department of Energy.

112. *See* Peter Page, *Los Alamos Lab Families to Share $9.5 Million in Radiation Research Settlement: Lab Did Unauthorized Research on Bodies of Radiation-Exposed Personnel for 20 Years*, NATIONAL L.J., October 16, 2001, *available at* http://www.law.com (last visited Feb. 12, 2002).

113. *Id.*

114. *Id.*

115. *Id.*

116. 725 N.E.2d 1051 (Mass. 2000) (holding consent form signed by husband and wife that in event of separation, wife would be given custody of frozen pre-embryos unenforceable for public policy reasons).

are reluctant to take a step that would make a man a father against his will as a matter of public policy. Is it necessary to think of the male donor's continuing interest in the pre-embryos as a property interest? What issues beyond property law must be considered in this situation?[117]

What issues are raised when a transplant recipient receives organs that are obtained in a manner that would violate United States law, for example, where the organs are harvested from executed Chinese prisoners?[118] Is this sale of organs for profit the slippery slope that the *Moore* majority hoped to avoid by holding that body parts are not property? This issue has attracted international attention.[119]

Why shouldn't a poor law student be allowed to sell her kidney to pay for tuition?[120] This hypo can be embellished a great deal with good results. Why

117. As this Essay is being finalized, the stakes on the issue of embryos or preembryos have just increased tremendously, with the (perhaps premature) announcement by Advanced Cell Technology that it has cloned the first human embryo, not for the purpose of creating a new person, but rather to harvest stem cells from a blastocyst of 200 to 250 cells which would in turn be used to produce perfectly matched cells for adult DNA donors with a variety of diseases. *See Massachussetts Company Says it Cloned First Human Embryo*, SYRACUSE POST-STANDARD, Nov. 26, 2001, at A1. Clonaid immediately claimed that it had the same capability. *Id*. (Clonaid is owned by the Raelians, a religion (or cult, take your pick) of about 30,000 members, with worldwide headquarters in Canada, which believes, inter alia, that humans were created by space aliens.) President Bush promptly called for federal law essentially banning all human cloning. *Id*.; Michelle Mittelstadt, *Bush Calls for Ban on Human Cloning*, SYRACUSE POST-STANDARD, Nov. 27, 2001, at A1. Although issues created by these announcements are outside the scope of this Essay, the implications for not just Property Law but Constitutional Law and Family Law are staggering. *Human Cloning and the Constitution, Hearing before the Subcomm. on Science, Tech., & Space of the U.S. Sen. Commerce Comm.* (May 2, 2001) (testimony of Clarke D. Forsythe), *available at* 2001 WL 2007588.

118. *See* Craig S. Smith, *Quandary in U.S. Over Use of Organs of Chinese Inmates*, N.Y. TIMES, Nov. 11, 2001, at A1. China, which is expected to execute more than 5,000 prisoners this year, does not obtain any form of consent from the donors. *Id*. Americans will pay up to ten times as much for the procedures as the Chinese for transplants; there are 78,350 Americans in need of transplants, 50,000 of them waiting for an available kidney. *Id*. Chinese doctors have performed 35,000 kidney transplants and often times learn their skills in United States seminars. *Id*.

119. In 1991, the World Health Organization proposed Guiding Principles on Human Organ Transplantation that included terms "intended to emphasize the importance of developing cadaveric donation programmes in countries where this is culturally acceptable, and to discourage donations from living, genetically unrelated donors, except for transplantation of bone marrow and of other acceptable regenerative tissues." *Dickens*, *supra* note 27, at 82-83 (citing *Guiding Principles on Human Organ Transplantation*, World Health Assembly Res. 40.13 (May 1987), *reprinted in Human Organ Transplantation: A Report on Developments Under the Auspices of WHO (1987-1991)*, 42 INT'L DIG. HEALTH LEGIS. 389, 395 (1991).

120. *See Hannemann*, *supra* note 30, at 401 (addressing the problem of a shortage of transplantable organs by proposing the creation of "a free capitalist market for the sale of organs," and arguing that "[a]llowing the commodification of organs through judicial recognition of a fully alienable property right in human organs will encourage a greater supply of these scarce organs").

not allow—or even encourage—poor villagers living in less developed countries to sell certain non-vital body parts?[121] As to dying would-be donors, the American Medical Association is at least talking about the once thought taboo possibility of organ sales (although Congress banned such financial incentives in 1984).[122]

IV. CONCLUSION

Although I end up spending several days on *Moore*, I find the time to be well spent. By the time we are finished, *Moore* will have introduced the students to a number of themes that will carry forward throughout the entire semester, and students will also have learned how I expect them to brief a complex case. More importantly, they will see that twenty-first century property law is about more than just Blackacre and O's conveyance of that hallowed estate to A for life, with remainder to B; rather, it is about cutting-edge social issues as new as today's newspaper. Students will have seen that public policy arguments play a key role in these judicial debates as courts wrestle with venerable property concepts in utterly new contexts.

121. The poor in many countries sell off organs to people with money, including foreigners. *See Boulier*, *supra* note 30, at 714-15 ("Indeed, in the Indian slum of Villivakkam, nicknamed Kidney-vakkam, more than twenty percent of the residents have sold a kidney.").

122. Paul Elias, *AMA Debates Whether to Pay Would-be Donors for Organs*, SYRACUSE POST-STANDARD, Dec. 3, 2001, at A5.