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TEACHING THE AMISTAD

BRANT T. LEE*

In 1841, a Cuban slave ship called the *Amistad* was captured and taken into custody near Long Island. The forty-five Black people on board were alleged to be slaves, who had mutinied, murdered the captain, killed or expelled the crew and taken over the ship. Two Cubans found on the ship claimed to be their owners. There were salvage claims by the officers who captured the ship and its passengers and miscellaneous other claims by parties claiming a property interest in the ship or its cargo. The United States government intervened on behalf of the Queen of Spain in support of treaty rights regarding the restoration of the lost property of Spanish subjects, thus taking the side of the alleged slave owners. Astonishingly, the alleged slaves intervened on their own behalf, claiming not to be Cuban slaves at all, but illegally kidnapped free Africans, and the United States Supreme Court was eventually called upon to determine their fate.¹

Based on all of the issues that spring from these facts, I find *Amistad* a useful Property case. In this Essay, I will describe how I teach the *Amistad* case to first-year Property students. Teaching *Amistad* works well both as a review and test of general property principles and as a “perspective” case, allowing the class to step back and examine the nature of property in general.

I. TEACHING SLAVERY IN PROPERTY

Why teach a slavery case in a modern property law course? Racism and slavery are, of course, a central element of American legal history, but no required first-year course necessarily addresses racial issues. Moreover, because any discussion of race, even one that focuses on the unambiguous evil of slavery, tends to provoke controversy, professors have a tendency to avoid the topic. The dangers are multifaceted: Black students may resent discussing a case in which Black people are treated as chattel property; White students may feel that they are being confronted with historical racism that they had

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1. *The Amistad*, 40 U.S. (15 Pet.) 518 (1841).

nothing to do with, even if no one in class claims that they did; and any student concerned about being seen as either racist or radical hesitates to venture far beyond the safe and mundane.

Not surprisingly, then, most property casebooks do not cover slavery at all.² The casebook I use, written by Dukeminier and Krier,³ contains only the most passing reference to slavery in the context of a debate over the sale of body organs.⁴ Four exceptions are the texts by Chused,⁵ Singer,⁶ Berger and Williams,⁷ and Hylton, Callies, Mandelker and Franzese.⁸ Professor Frances Lee Ansley has collected a range of slavery-related readings used by some property teachers.⁹

I have three main goals in my property course generally, and they are sometimes somewhat at odds with each other. Because it is a part of the first-year core curriculum, I want to teach legal reasoning and legal analysis generally. I also want to give my students an understanding of the operation of

2. See Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261 (2000).

3. JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* (4th ed. 1998). This may be the most widely used Property textbook. A fifth edition is due out in the Spring of 2002. In the remainder of this essay I will refer to cases and materials from Dukeminier and Krier that students in my class will have reviewed prior to reading the *Amistad*. The references are generally to familiar property law principles, however, so law faculty using other texts should be able easily to convert my suggestions to analogous materials covered in their classes.

4. *Id.* at 84.

5. RICHARD H. CHUSED, *CASES, MATERIALS, AND PROBLEMS IN PROPERTY* 1075-1103 (2d ed. 1999). The last chapter in this text focuses on "Autonomy and Community," and the section on slavery excerpts *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), together with extensive historical background.

6. JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 1326-41 (2d ed. 1997). The last chapter of this text is devoted to "Property in People," focusing generally on the problem of market commodification. The section on slavery excerpts *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), "because it highlights the link between conceptualizing of people as property and excluding them from the body politic." Joseph William Singer, *Teacher's Manual* 416. The remaining materials focus on the problem of choice and freedom of contract in the context of systemically unequal bargaining power.

7. CURTIS J. BERGER & JOAN C. WILLIAMS, *PROPERTY: LAND OWNERSHIP AND USE* 1111-25 (4th ed. 1997). A section on slavery in a late chapter on commodification in this text includes *State v. Mann*, 13 N.C. (1 Dev.) 263 (N.C. 1829), a criminal case involving battery on a slave by the defendant. Scholarly commentary includes materials on how black slavery created value in whiteness, and an extended economic analysis of contracts for self-enslavement.

8. J. GORDON HYLTON ET AL., *PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS* 28-30 (1998). The first chapter of this text, on "Defining Property," uses a slavery case to explore briefly how it is that law designates something—or someone—"property."

9. Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1512, 1524, n. 31 (1991). In this essay, Professor Ansley argues more broadly that because race is central to American law, it ought to be integrated more thoroughly into the core curriculum. I agree with that argument, which goes far beyond the scope of this Essay. I hope this Essay will advance the practice Ansley promotes.

particular legal doctrines in property such as adverse possession, the rule against perpetuities and land use regulation. I do this not to prepare them to answer questions on these subjects on the bar, or even to practice law in this area, but because I feel that in the first year they need to gain mastery over a legal subject by being able to work their way around the mechanics of doctrinal analysis. Finally, I want to familiarize them with the foundational principles that underlie the concept of property in ways that will serve them well in life wherever it takes them. Teaching *Amistad* helps to achieve all of these goals.

I find that discussing a case regarding people as property is a particularly effective way to teach property rules and principles. I schedule the case to follow the review of the real estate transaction in *Dukeminier and Krier*. Rather than lecture on policy directly, I tend to first lead a careful discussion reviewing the Court's reasoning. Together we tease out the ways in which the parties are simply applying the familiar arguments available whenever a property issue is at stake. On the one hand, those claiming to be slave owners invoke possession, along with the inevitable predictions of disastrous consequences that will befall if possession is not held to establish an enforceable property interest. On the other hand, the Africans dispute the validity of official documents, valid on their face, which identify them as legal slaves; and again the Spaniards warn of the calamity that will result if courts are to review facts that contradict an otherwise valid title document from another jurisdiction. Students often find that their intuitions regarding the property rules applied in *Amistad* are contrary to what their inclinations were when discussing the rule as applied to more familiar forms of property. At the outset, I nonetheless press them to apply the ordinary reasoning as previously learned.

Law school is not, however, about drumming human values out of the souls of law students. We then proceed as a class to confront more directly the contradiction between the concept of constructive possession as applied to a fox and the same concept applied to a human being, or the difference between a bureaucratic system designed to make title to real estate more secure and a bureaucratic system designed to make title to kidnapped slaves more secure. In the process, I believe they learn something important about the contingent nature of the rules and reasoning they are learning to rehearse.

Moreover, some of my students think it is more important to master the mechanics of particular rules than to understand the principles underlying those rules. They do not think that vague philosophical conjectures about what property *really* is will help them to memorize the rules they think they need to learn, meaning, the different standards that can establish the hostility element of an adverse possession claim or the elements of a valid *inter vivos* gift. They are nonetheless startled to recognize familiar rules deployed to justify keeping illegally kidnapped human beings as slaves. I have discovered that talking

about slavery is a good way for the class to step back from the run of more straightforward real estate cases and look at the big picture of what it means to apply the concept of property in law.

So at the outset, I tell my students explicitly that we are taking a break from the ordinary run of real property cases, a pause that will help us step back and understand the reaches and limits of property law principles more fully. I also directly address the discomfort that students may feel in discussing the case, by stating the following:

I want us to be careful about how we talk about this. I do want to explore just how it is that the law in this country, including the Constitution, once treated some human beings, particularly Blacks or African-Americans, as property. To some extent we want to put ourselves in the place of justices at the time and analyze their rulings as legal reasoning. Was it sound, given the existence and legality of slavery at the time? How is it that they arrived at their conclusions? How did they justify their actions?

At the same time, we don't want to gloss over the violence and the horror of how slavery actually worked. I don't want to argue or suggest that ordinary property law principles should be applied and used here. If we talk about it too casually, we might forget that we're talking about owning people here, and not about just any old archaic rule.

As a kind of dry run, I sometimes read to the class a shorter excerpt from a slavery case such as this excerpt from Patricia Williams' *The Alchemy of Race and Rights*:

The plaintiff alleged that he purchased of the defendant a slave named Kate, for which he paid \$500, and in two or three days after it was discovered the slave was crazy, and run away, and that the vices were known to the defendant It was contended [by the seller] that Kate was not crazy but only stupid, and stupidity is not madness; but on the contrary, an apparent defect, against which the defendant did not warrant The code has declared, that a sale may be avoided on account of any vice or defect, which renders the thing either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed the buyer would not have purchased with a knowledge of the vice. We are satisfied that the slave in question was wholly, and perhaps worse than, useless.¹⁰

When discussing this case, I point out that we have seen this kind of argument before. The buyer argues that this property had a latent defect, which the seller had a duty to disclose. The seller counters that the defect was patent and obvious upon observation, and the buyer had the opportunity and the duty to discover it. The court says that it is going to presume that the parties would intend to buy and sell a valuable slave, and that not running

10. *Icar v. Suars*, 7 La. 517 (La. 1835), in PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 3 (1991).

away is so much a part of the core value of owning a slave that the law will imply a warranty—like presuming that no tenant would rent an apartment that was not habitable, or that property buyers would only want marketable title. The court is going to imply a term in the contract—that a slave buyer would only want sane, intelligent slaves who would not run away.

I explicitly say to the class that in this context the reasoning is offensive and sickening, even though we found the same arguments unproblematic only a few days ago. And I ask whether the judge, given the social and legal context, and presented with a dispute between a buyer and a seller over the value of slave, had any way of stepping outside or above the fray to address the evils of slavery.

II. THE AMISTAD

Many students are already familiar with the story of the Amistad because of the movie “Amistad,” which was based on the historical events surrounding the case. It was directed by Steven Spielberg and released by Dreamworks Pictures in 1997. The movie focuses in large part on the efforts of the local trial attorney, Roger Baldwin (played by Matthew McConaughey), to persuade former President and aging abolitionist John Quincy Adams (played by Anthony Hopkins) to argue the case before the United State Supreme Court. In the movie, Baldwin is portrayed as a young lawyer who first must convince the abolitionist supporters of the Amistad Africans to hire him. The abolitionists are portrayed as seeking a criminal defense attorney to represent the dozens of Africans who had apparently risen up and slaughtered their captors. Baldwin explains his approach:

I deal with property . . . sometimes I get people’s property back for them and other times I get it taken away. As in this case, which is clearly a property issue. You see, all of the claims here, every single one of them, speaks to the issue of ownership

The case is much simpler than you think. It’s like anything, isn’t it? —land, livestock, heirlooms, what have you Consider: the only way one may sell or purchase slaves is if they are born slaves, as on a plantation. I’m right, aren’t I? . . . Let’s say they are [born slaves]. Well, if they are, they are possessions, and no more deserving of a criminal trial than a bookcase or a plow, and we can all go home, can’t we? Now on the other hand let’s say they aren’t slaves. Well if they aren’t slaves, they were illegally acquired, weren’t they? Forget mutiny, forget piracy, forget murder and all the rest. Those are subsequent, irrelevant occurrences. Ignore everything but the preeminent issue at hand—the wrongful transfer of stolen goods—either way, we win.¹¹

11. AMISTAD (Dreamworks Pictures 1997).

In addition to the movie, there are several good websites devoted to the Amistad incident which provide original documentation and background materials that you or your students may wish to explore.¹²

The facts of the case are as follows:¹³ “Amistad”¹⁴ is the name of a Spanish schooner that leaves Havana loaded with, in addition to other cargo, forty-five Black people in bondage. Somehow, despite their chains, they manage to rise up, kill the captain and take over the ship. The rest of the crew either escapes or is killed. They take into custody two surviving Spanish citizens, Pedro Montez and Jose Ruiz, whose assistance they demand in attempting to sail the ship back to Africa. Montez and Ruiz comply during the day, but manage to steer the ship back westward at night. They apparently zigzag up the Atlantic seaboard to Long Island, where they are captured by a United States naval ship and brought into custody in Connecticut, where the case is tried. At least seven parties bring claims before the court.

Thomas R. Gedney and Richard W. Meade, officers of the United States ship that took the Amistad into custody, claim salvage of the ship and its cargo, including the slaves. I often take a moment to explore the rule of salvage as a review and follow-up to the rule of find. A salvager has the right to a certain percentage of the value of any property that is about to be lost at sea due to stormy weather, mishap or piracy. Why should this be necessary, when we already have a rule governing what happens when one party comes upon and takes possession of property belonging to another? That is, why does not the ordinary rule of find suffice for these circumstances?

A review of the rule of find recalls that the rule that a finder has good title against all the world except the true owner (or any prior possessor) serves the purposes of: 1) rewarding the honest finder who announces his find by allowing him to keep the found property if the true owner does not appear; 2) protecting the interests of the true owner or prior possessor; 3) allowing the productive use of lost objects; and 4) keeping the peace and preventing others from forcibly taking objects from finders in an endless chain of violence.

12. Some of these include: National Archives & Records Administration, *The Amistad Case*, at <http://www.nara.gov/education/teaching/amistad/home.html> (last visited Feb. 8, 2002), having images of many of the original pleadings filed in the case); The Museum of America and the Sea, *Exploring Amistad at Mystic Seaport*, at <http://amistad.mysticsaport.org/main/welcome.html> (last visited Feb. 8, 2002); The Legal Information Institute, *The Amistad Case: 'Outright Plagiarism' or 'Who Owns History?'*, at <http://www.law.cornell.edu/background/amistad/> (last visited Feb. 8, 2002); University of Missouri, Kansas City, *Famous American Trials, Amistad Trials 1839-1840*, at <http://www.law.umkc.edu/faculty/projects/ftrials/amistad/AMISTD.htm> (last visited Feb. 8, 2002).

13. All of the facts and arguments of the parties described below are taken directly from the text of the report of the case.

14. “Amistad” is Spanish for “Friendship.”

A sinking ship is previously owned property to which the rule of find might be applied. However, a ship is so valuable that in most instances the owner can be counted on to search for and claim any “found” ship or recovered cargo. Moreover, a ship is not easily or usefully hidden. Finally, it can be dangerous and expensive to rescue a foundering ship. Thus, if a finder must risk much to gain possession of a sinking ship, but on the other hand is almost certain not to be allowed to keep it when the true owner inevitably appears, then sinking ships are not likely to be rescued. A grateful owner might of course provide a reward, but the mere prospect of recompense, at the whim of the owner, might not be enough to encourage salvage efforts. Requiring a share of the salvaged property to be turned over as a reward provides an incentive to rescue sinking ships that the rule of find does not, and serves the purpose of preserving property from likely loss.

The particular application of the rule of salvage to this case is somewhat curious. The *Amistad* was not about to sink when it was “rescued.” Salvage does not apply only to property at risk of destruction by natural forces. It also applies when pirates seize property, and here, if there is to be a salvage claim, it must be based on the argument that the escaped slaves are akin to pirates. Of course, they are also part of the valuable cargo on which salvage rights are being claimed.

Two others, Henry Green and Pelatiah Fordham, also claim salvage rights. They captured some of the Africans who had gone ashore to get water and food. Thus salvage is applied here to ocean borne property that was “rescued” on dry land.

Ruiz and Montez allege that all of the Africans are slaves, and that Ruiz and Montez own all of them, except for one named Antonio, who was the slave of Raymon Ferrer, the slain captain of the ship. The United States government intervenes representing the interests of the Queen of Spain, who had requested the return of property belonging to Spanish subjects pursuant to treaty obligations. The treaty provides, in part, “that all ships and merchandise of what nature soever, which shall be rescued out of the hands of pirates or robbers, on the high seas, shall be . . . restored entire to the true proprietors”¹⁵ So on behalf of Spain and thus on behalf of Ruiz and Montez the United States government argues that the *Amistad* Africans are slaves, the property of Spanish subjects.

There are also direct claims by Cuban merchants for some of the cargo, and by the Spanish heirs of Captain Ferrer, for Antonio. The purported slaves, led by one named Cinque, but not including Antonio (who appears to be concededly a “true” slave), claim to be not slaves at all, but free Africans, kidnapped and brought to Cuba illegally.

15. *The Amistad*, 40 U.S. (15 Pet.) 518, 555 (1841).

Here, a review of the legal status of slavery is necessary. In 1841, slavery itself was legal in both Cuba and the United States. The slave trade, however, had been abolished in the United States in 1819 and throughout Spanish territory as of 1820. The Africans' argument rests on the distinction between the capture of slaves from Africa, which was illegal under both Spanish and American law, and the possession, control, propagation and sale of existing slaves, which was not.

The main issue thus appears to be whether the Amistad Africans are property. After reviewing the facts and identifying this basic issue, I ask my students the simple question: how do you generally prove that you own property? If I have done my job well, they start their answer with possession.

A. *Constructive Possession*

Baldwin, the attorney for the Africans, argues that when found, the Amistad Africans "were in a free state, where all men are presumed to be free, and were in the actual condition of freemen."¹⁶ The Attorney General responds that when they left Cuba they were "in the actual possession of the persons claiming to be their owners."¹⁷ What is at stake in these arguments?¹⁸

In most property texts, possession is a foundational concept. Indeed, the first chapters of Dukeminier and Krier are organized entirely around the rights assigned to initial and subsequent possessors of property.¹⁹ The classic and widely taught fox-hunting case of *Pierson v. Post*²⁰ deals with the rule of capture—that property in wild animals is acquired by possession only. One of my principal goals when teaching the rule of capture is to introduce the general idea that rules serve policy goals. The case comes early in the first year of law school, and students quickly find that the rule is not always easily applied. Courts must determine when conduct that falls short of actual possession should be recognized as constructive possession. I emphasize that this determination requires consideration of the policy goals the rule is intended to serve. Policy arguments often involve analysis of the incentives a particular rule creates together with predictions about the effect those incentives will have on a particular industry or practice. Thus, the warning that hunters will no longer chase foxes, or that the whaling industry will not survive, if courts do not recognize a property interest in prey that has not quite been actually captured.

16. *Id.* at 561.

17. *Id.* at 583.

18. The case reporting style of the time includes the arguments made by both sides as well as a description of some of the evidence presented. I include relevant portions of these arguments in the edited version of the case that I distribute.

19. DUKEMINIER & KRIER, *supra* note 3, at 1-184.

20. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805), *in* DUKEMINIER & KRIER, *supra* note 3, at 19.

The Amistad Africans do not appear to be in anyone's possession when found. Even when first setting out from Havana, one might argue technically that they are not in the actual possession of their alleged owners, presuming that no one is literally grasping all forty-five captives. However, there is no argument but that human beings in chains on board a slave ship in the company of their alleged owners are in constructive possession, if there is to be such a thing as possession of a human being. I often raise the question of whether the Africans are in possession of their alleged owners when found off the coast of New England. They are, after all, still on a ship in the presence of those owners. Students will intuit that if anyone is in the possession of another, it seems it is the captive Cubans who are in the possession of the Africans. Here we reprise the issues of control and possibility of escape as possible indicators of possession that would serve the appropriate policy goals.

Is there any warning of dire consequences that will befall if constructive possession of the Amistad Africans is not recognized? The Attorney General argues,

they may be regarded as slaves, *as much as the negroes who accompany a planter between any two ports of the United States*. This, then, is the first evidence of property—their actual existence in a state of slavery, and in the possession of their alleged owners, in a place where slavery is recognized, and exists by law.²¹

Here, I have found it effective to ask my students to imagine the threat this case posed to American slave owners. The prospect of slaves traveling in the company of their owners who rise up, murder their masters, and then claim never to have really been slaves at all must have been terrifying. For the federal courts then to actually affirm the claims must have been astounding. It seems to me that the Attorney General's argument in this context takes on more of the flavor of an implicit threat to the Court—that recognizing the claims of the Amistad Africans, based on evidence that they provide in their own interests, might put the institution of slavery at risk, with national political consequences that the Court might not want to contemplate.

It is worthwhile here to pause and consider the issue of race more directly. The argument for constructive possession is based not only on control and the possibility of escape, but on the races of the respective parties. “[T]he negroes who accompany a planter between any two ports of the United States”²² are imagined to be in the constructive possession of their White owners even absent any shackles or restraints. The opposite presumption, that the White person might be considered to be in the constructive possession of the Black person, does not arise. Cheryl Harris has pointed out how the conflation of race and slavery invested Whiteness with value:

21. *Amistad*, 40 U.S. at 583 (emphasis added).

22. *Id.*

Because whites could not be enslaved or held as slaves, the racial line between white and Black was extremely critical; it became a line of protection and demarcation from the potential threat of commodification, and it determined the allocation of the benefits and burdens of this form of property. White identity and whiteness were sources of privilege and protection; their absence meant being the object of property.²³

B. Title

A second foundational determinant of property ownership is record or paper title. In our review of the recording system for title to real property, I tell my students that when property is valuable we need better evidence than possession to establish title. One might keep receipts for a start, as evidence of legitimate acquisition from another, and for very important property like real estate, a title recording system is better yet. I point out that property that is both valuable and mobile—a car—also has registered title documents. Here, we have property that is not only valuable and mobile, but volitional—it might run away all by itself. So one might expect that documentation would be important.

There is no allegation that Ruiz and Montez kidnapped the Africans personally. Indeed, Ruiz and Montez do not directly contest the claim that the Africans were kidnapped. Their claim is essentially that they are subsequent innocent purchasers. They have an official document, signed by the chief government official of Cuba, establishing ownership of these people. A formal determination of property having been made, the United States argues that the Court should not look beyond the face of the document. Any claim of fraud is an issue for the Spanish legal system to consider. I do not dwell on the treaty interpretation or choice of law issues, except to note that as a matter of abstract law it seems correct that Spanish law regarding the determination of property should govern the identification of property for purposes of a treaty in which the United States government promises to return Spanish property to its owners.

Here, it is interesting to note certain depositions referred to by the circuit court below and included in the record by the reporter. Richard Robert Madden, a British subject, described the practice of bringing illegally imported African slaves to Havana, where they were sold, and of issuing travel documents that falsely identified the Africans as having been slaves in Cuba prior to 1820, when the importation of new slaves from Africa became illegal.²⁴ The Governor was alleged to receive a “voluntary” bounty of ten dollars for each illegally introduced slave.²⁵ The slaves were then taken away,

23. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1720-21 (1993).

24. *Amistad*, 40 U.S. at 533-37.

25. *Id.* at 536-37.

with freshly printed documentation establishing their slave status. This was, in essence, a government slave-laundering operation. Madden described his interactions with the Amistad Africans, and, based on his familiarity with Africans and the response of some of them to certain Arabic greetings, he concluded that they were “newly imported” Africans.²⁶ James Covey, an English-speaking African man from the same area of Africa as the Amistad Africans, was able to speak to them in their own language, to identify their names as Mendi words, and therefore to also identify them positively as Africans.²⁷ Faced with this kind of evidence, Ruiz and Montez, and the United States, had little choice but to maintain that the Court should rely solely on the formal papers identifying them as slaves. The Africans’ response was that the documents identifying them as legal Spanish slaves were fraudulent.

Here, I ask the class to recall how we treat fraud in title documents in the context of the recording acts. I note that every subsequent conveyance of the same property from the same grantor might be considered a fraudulent transaction. In a notice jurisdiction, as long as there is good faith and no constructive notice, the subsequent purchaser prevails.

In a previous class, I teach *Messersmith v. Smith*.²⁸ In *Messersmith*, the structure of the sequence of conveyances is as follows: O conveyed a property interest to A, which was not recorded. O then was alleged to have conveyed the same interest to B, who subsequently transferred that interest to C. B and C promptly record their deeds. C claims the benefit of the race-notice recording statute against A as a subsequent purchaser in good faith who recorded first. However, B’s deed was held not appropriately recorded, and thus C’s deed was a “wild deed” and also not recorded for the purposes of the recording act. The reason the court deems the O-to-B deed not appropriately recorded is that the notary did not properly acknowledge the deed; the notary’s signature and seal was placed on the deed even though the deed was not signed in the presence of the notary.

During class discussion of this case, I explore the policy rationale for not recognizing the recording of a deed that is not appropriately connected to the record chain of title. That is, an important purpose of encouraging purchasers to record is so that the record will be complete and subsequent purchasers will be on constructive notice. An interest that is recorded but which cannot be discovered through an ordinary record search of the grantor-grantee index, because prior conveyances in that chain of title are not recorded, does not achieve this purpose. I then draw out criticism of the court’s application of that rule to the facts in *Messersmith*. Where the defect—an inappropriately applied notary seal—was latent, all diligent subsequent purchasers should find

26. *Id.* at 533.

27. *Id.* at 537.

28. 60 N.W.2d 276 (N.D. 1953); DUKEMINIER & KRIER, *supra* note 3, at 678-83.

the O-to-B deed; they will see nothing wrong on the face of the document; and they will therefore also find the B-to-C deed. Both deeds should count as having been recorded.

In *Amistad*, the relevant documents are transportation permits, or “passports,” signed by the Governor General of Cuba formally recognizing the “black ladinós”²⁹ on board the *Amistad* as slaves belonging to Ruiz and Montez. If there has been fraud, it is not apparent on the face of the document. Although this is not a recording statute issue per se, the idea that latent defects in a document ought not to impair the rights of an innocent purchaser who relies on them would seem to apply. Of course, we probably suspect that anybody purchasing new African slaves in Havana some twenty years after the slave trade is banned is likely complicit in the fraud, and so perhaps Ruiz and Montez are not bona fide. Absent evidence of bad faith, however, our general conclusion had previously been that the subsequent purchaser would prevail.

The *Amistad* Court concluded that while the public documents were certainly prima facie evidence of the facts they stated, such documents are always open to challenge for fraud. The Court did the right thing. The class always approves of this outcome, the evidence that these are kidnapped Africans being so painfully clear. I take this moment to remind them of our previous discussion regarding registered title.

Dukeminier and Krier describe the Torrens system, whereby an adjudicated state of title is officially registered on a conclusive certificate of title, updated at each transfer, resulting ideally in certainty of title for all.³⁰ The text notes, and we discuss in class, the fact that exceptions created by courts and legislatures make the certificate less certain and therefore less valuable, contributing to the failure of the Torrens system to catch on in the United States. I draw out the difficulty courts face when confronted with an equitable claim against the interests of a certificate holder, for instance, claims involving fraud, visible easements, possessory rights or actual notice of a prior unrecorded interest. I often get at least one student criticizing soft-hearted courts for recognizing equitable exceptions to the finality of certified title, thus weakening the whole point of the system.

The application of that reasoning here, of course, would lead to a heinous result. The juxtaposition of these two fact patterns helps to emphasize the difficulty of trying to adopt universal policy prescriptions without regard to historical and factual context. Sometimes, to do justice, a court needs to step outside the four corners of the theory of a rule and find the vocabulary to do what is necessary. A government document becomes “prima facie” rather than “conclusive” evidence. Fraud is “always” an exception. I sometimes ask the class to consider how they would rule if there had been no external evidence of

29. “Ladinos” are Africans brought to Cuba prior to 1820. *Amistad*, 40 U.S. at 534.

30. DUKEMINIER & KRIER, *supra* note 3, at 717-22.

actual fraud. That is, no slave-laundering racket and no corrupt Governor, just a single signed document that appears to be false based on interviews with the alleged slaves.

I close the direct discussion of the case with two final minor points. Gedney gets salvage after all. I point out that for this to be the result, the Africans must in the end be considered pirates, and not cargo. There is no question that they did not own the ship they were in possession of, although it seems true that it was at risk of loss under the circumstances.

Antonio does not benefit from the decision. He presumably was sent to the heirs of Captain Ferrer as a slave, because he was born a slave in Cuba. They left that part out of the movie.

C. *Summing Up*

In summary, the litigants first argued about possession, which, in the context of human beings not actually in one's grasp, meant constructive possession. Saying that another human being is in your possession seems unreal. It is a fiction that we create when we apply the label property to a person. But it is no more abstract than when we say that one is in possession of a duck that landed on one's pond,³¹ or of a piece of jewelry in a house in another state that one inherited.³²

Second, the litigants argued about title, with the question being whether the Court should honor the duly executed and recognized formal legal papers or examine the underlying facts. This was the main issue addressed by the Court, and it is essentially a kind of registration of title issue. Title is not pure. Don't look for the "real" owner. You look for the person that for persuasive reasons you think the law or the court ought to recognize as the real owner.

D. *The Big Picture*

I think it important to reserve time at the end of class on the day we discuss the *Amistad* case to step back and look at the "Big Picture." Students might think it is easy to draw the line and say that one just cannot own human beings and now we have established that once and for all, so this case is historically interesting but irrelevant.

In order to bring the class back to the present, I sometimes hand out a recent news clipping regarding modern instances of slavery between certain ethnic groups in the Sudan³³ or Mauritania³⁴ or among immigrants in Los

31. *Keeble v. Hickeringill*, 103 Eng. Rep. 1127 (Q.B. 1707), in *DUKEMINIER & KRIER*, *supra* note 3, at 30.

32. *Hannah v. Peel*, 1945 K.B. 509 (1945), in *DUKEMINIER & KRIER*, *supra* note 3, at 103.

33. *See, e.g.*, Richard Minter, *The False Promise of Slave Redemption*, *THE ATLANTIC MONTHLY* (July 1999), available at <http://www.theatlantic.com/issues/99jul/9907sudanslaves.htm> (last visited Feb. 8, 2002).

Angeles. We discuss the economic effect of school children raising money to purchase the freedom of slaves, thereby increasing price and demand for slaves. We might compare the difference between slavery and share-cropping, or a professional sports draft that results in a particular team “owning” the exclusive right to sign a particular player. If one is particularly interested in intellectual property, one could comment on the claim that arose when the movie came out, where historical novelist Barbara Chase-Riboud sued Steven Spielberg and Dreamworks for plagiarism, claiming that parts of the screenplay for the movie had been stolen from her 1989 novel, “Echo of Lions.”³⁵ Spielberg’s defense was that historical events cannot be copyrighted, and the parties settled out of court after it was discovered or at least alleged that the novelist herself had plagiarized previous work in another novel she had written.³⁶

More importantly, however, I point out that at the time the case was decided, people could be property. I remind them that the Civil War and the Thirteenth Amendment abolishing slavery is only twenty years in the future from this case. At some point we changed our minds, and now it does not make sense to us any more. I ask them to consider what there is now that might not make sense to us in the future. What kind of property do we recognize now that might not make sense to us in twenty years or two hundred years?

- How is it that one can own land?
- The flow of water?
- Food when people are starving?
- An idea?
- The right to buy stock at a particular price upon the occurrence of some event at some undetermined time in the future?
- The right to build a building?
- The right to cross someone else’s property?

There is some sense in which all property is artificial. Think about what actually happens when you buy a book in a bookstore. You walk into a building with stacks of objects piled up on tables and shelves. You choose one. If you walk out of the door with it, they call the police and chase you down. If instead, you stop at a counter and give them some pieces of paper

34. See, e.g., William Finnegan, *A Slave in New York*, THE NEW YORKER, Jan. 24, 2000, at 50.

35. Bernard Weinraub, *Judge Rejects Author’s Plea to Block Spielberg Film*, N.Y. TIMES, Dec. 9, 1997, at A27.

36. Margaret Loke, *Writer Who Cried Plagiarism Used Passages From Another*, N.Y. TIMES, Dec. 19, 1997, at A1.

with faces printed on them before you walk out, they wave you happily out the door. It is you who would call the police if prevented from carrying “your” book home. Property consists of expecting the police to respond appropriately when we call. That is why whenever we feel like important, established expectations are not met, we use property language: “That was *my* job that they gave to someone else. It *belonged* to me.” “Those are *my* benefits they’re taking away.” “This is *my* planet you’re fouling up.”

Are human beings property? The troubling answer is yes: if the coercive power of the state is exercised to enforce the expectations of “owners”—by chasing down and returning runaways, for example—then human beings are property. Whatever laws we have that support and enforce our settled expectations; those laws in a sense create property. When we have laws that fine someone for making a copy of a picture, we have created intellectual property. When we have laws that allow one person to say to another that they cannot walk across an imaginary boundary line in space, we are creating the institution of real property. And when we have laws that allow someone to purchase or otherwise obtain the right to cross our land—then we have imagined into being a form of property called an easement.

This is, of course, the perfect segue into the materials on servitudes, which come next on my syllabus.

