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Rules, Policies, and Practices

Ninth
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PROPERTY LAW

Rules, Policies, and Practices

NINTH EDITION

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For Martha Minow,
who has made all the difference
JWS

For Caleb Berger,
who because of this project has been flipping through
property books since before he could talk
BB

For Clare Huntington,
who always keeps me climbing higher, the more so every year
NMD

For my grandmother, Yolanda Grave de Peralta Peñalver,
whose loss of property first
sparked my interest in the subject
EMP

In memory of
Mary Joe Frug
ז"ל

Property rights serve human values.
They are recognized to that end,
and are limited by it.

Chief Justice Joseph Weintraub
Supreme Court of New Jersey, 1971

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PREFACE TO THE NINTH EDITION

This Ninth Edition has been updated to reflect significant changes in the law of property over the last few years. Those include important U.S. Supreme Court decisions in *Tyler v. Hennepin County* and *Sheetz v County of El Dorado*; *City of Grants Pass v. Johnson*, holding that the Eighth Amendment does not prevent the prosecution of homeless people for sleeping on the streets; and the Supreme Court's most recent attempt to grapple with Fair Use in Copyright in the 2023 case of *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*. For an area one might have thought settled in a mature, market economy, these developments provide powerful evidence that property law continues to change with surprising regularity.

As in the earlier editions, we have attempted to ensure that students and professors can get a clear and accurate picture of the current law, as well as a thorough understanding of the many disagreements among the states on the applicable rules in force. Some of the rules governing property are arcane and complex, and students should be able to learn them without reading a treatise on the side. At the same time, many of the cases have dissents, and almost all have policy discussion justifying the court's approach. Where no dissents are present and the states disagree about the law, we have made this clear in the note material.

In this edition, as in the past, we have included statutory and regulatory text as principal readings throughout the book. It is critical for first-year students to understand that the law is as much a creature of legislatures and agencies as it is of courts, and this is as true in property as in other areas of the law. We have also presented problems that place students in real lawyering roles so that they can use the materials in the book (principal cases, subsidiary cases, textual explanation of the doctrine, and policy concerns) to make arguments on both sides of hard cases and to learn both to justify their judgments and to criticize the results reached by the courts and legislatures.

For some of the principal cases, we have listed the exact or approximate address of the property considered in the case. Here is an example, from *Glavin v. Eckman* in Chapter 1:

Map: Aquinnah, Martha's Vineyard, Massachusetts

This will allow students and professors to go to an Internet map service, such as Google Maps (*http://maps.google.com*) or Bing Maps (*http://www.bing.com/maps/*) to view the property in question. Both Google and Bing Maps have satellite or aerial views that help give a sense of how the property is situated, as well as the surrounding terrain, and Google Earth has other features as well. Some of us project satellite images on a screen in the front of the classroom as we teach these cases, and it seems to help give students a sense of the lay of the land and the relations among the neighboring parcels. It is particularly helpful in understanding cases that involve land use conflicts among neighbors.

Note that cases throughout the book have been edited for succinctness and to focus students on the most relevant discussions. Some deletions of text within cases are noted by an ellipsis (. . .), but the bulk of our elisions in the text, as well as internal case citations and most footnotes, have been deleted without notation. When footnotes are retained in cases, they are renumbered so that footnotes are consecutively numbered in each chapter.

As with any new edition, especially one as thoroughly updated as this one has been, some mistakes surely have crept in. We would be delighted to hear about them or about any other feedback from faculty and students who use this book. Such feedback motivated many of the changes in this edition, and we welcome future suggestions from users of the Ninth Edition. Feel free to write to us at bethany-berger@iowa.edu; nestor_davidson@gsd.harvard.edu; eduardo@seattleu.edu; and jsinger@law.harvard.edu.

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A GUIDE TO THE BOOK

ORGANIZATION OF THE BOOK

The book is organized around six broad themes. In Part One, we introduce a basic framework for understanding the balance of rights, limitations, and duties inherent in ownership, using the example of tensions between the right to exclude and the right of access. We then address the primary justifications that have traditionally been invoked to justify property rights, including sovereignty, reward for labor, distributive justice, efficiency, recognition of relationships, possession, and personhood. This part also explores the outer boundaries of ownership by examining how the legal system mediates a variety of resources other than real estate and personal goods, notably ideas, culture, human beings, and human bodies. Many of the most important doctrines in property law focus on relationships between neighbors, and Part Two explores adverse possession, nuisance, zoning, and private agreements between owners (called servitudes) as examples. In Part Three, we explore the myriad ways the law allows property to be divided and shared, both concurrently and over time. These forms of ownership in common include concurrent tenancies, family property, corporate and other entity property, leaseholds, as well as the complex system of estates and future interests we have inherited from early English law. Part Four explores two fundamental aspects of the market for real estate, the role of property law and property lawyers in sales and financing, and the importance of antidiscrimination law. Finally, the book concludes in Part Five highlighting the fundamental tension between the role of the state in both defining and defending property rights. The constitutional law of property, most notably under the takings clause, is a fitting way to return to the themes explored throughout these materials. In all of this, we seek to present a contemporary introduction to the law of property, focusing on various pressing issues of current concern as well as the basic rules governing the property system.

WHAT IS PROPERTY?

Property rights concern relations among people regarding control of valued resources. Property law gives owners the power to control things, and it does this by placing duties on non-owners. For example, owners have the right to exclude non-owners from their property; this right imposes a duty on others not to enter property without the owner's consent. Property rights are relational; ownership is not just power over things but entails relations among people. This is true not only of the right to exclude but of the privilege to use property. An owner who operates a business on a particular parcel may benefit the community by creating jobs and providing needed services, and she may harm the community by increasing traffic or causing pollution. Development of a subdivision may affect drainage patterns and cause flooding on neighboring land. Property use makes others vulnerable to the effects of that use, for better or for worse. Power over things is actually power over people.

Property rights are *not absolute*. The recognition and exercise of a property right in one person often affects and may even conflict with the personal or property rights of others. To give one person an absolute legal entitlement would mean that others could not exercise similar entitlements. Property rights are therefore limited to ensure that property use and ownership do not unreasonably harm the legitimate, legally protected personal or property interests of others. The duty to exercise property rights in a manner compatible with the legal rights of others means that *owners have obligations as well as rights.*

Owners of property generally possess a *bundle of entitlements.* The most important are the privilege to use the property, the right to exclude others, the power to transfer title to the property, and immunity from having the property taken or damaged without their consent. These entitlements may be disaggregated — an owner can give up some of the sticks in the bundle while keeping others. Landlords, for example, grant tenants the right to possess their property in exchange for periodic rental payments while retaining the right to regain possession at the end of the leasehold. Because property rights are limited to protect the legitimate interests of others and because owners have the power to disaggregate property rights, entitlements in a particular piece of property are more often shared than unitary. It is almost always the case that more than one person will have something to say about the use of a particular piece of property. Property law therefore cannot be reduced to the rules that determine ownership; rather, it comprises rules that allocate particular entitlements and define their scope.

Property is owned in a *variety of forms.* An infinite number of bundles of rights can be created from the sticks in the bundle that comprise full ownership. However, some bundles are widely used and they comprise the basic forms or models of ownership. Some forms are used by individuals while others are used by couples (married or unmarried) or families. Other forms are used by groups of unrelated owners. Differences exist between forms that give owners management powers and those that separate ownership from management. Further distinctions exist between residential and commercial property and between nonprofit organizations and for-profit businesses. Within each of these categories are multiple subcategories, such as the distinction between partnerships and corporations or between male-female couples and same-sex couples. Particular models of property ownership have been created for different social contexts and types of property. Each model has a different way of bundling and dispersing the rights and obligations of ownership among various persons. Understanding property requires knowledge both of the individual sticks in the bundle of property rights and the characteristic bundles that characterize particular ownership forms.

Property is a *system* as well as an *entitlement*. A property right is a legal entitlement granted to an individual or entity but the extent of the legal right is partly determined by rules designed to ensure that the property system functions effectively and fairly. Many property law rules are geared not to protecting individual entitlements, but to ensuring that the environment in which those rights are exercised is one that maximizes the benefits of property ownership for everyone and is compatible with the norms underlying a free and democratic society. Some rules promote efficiency, such as the rules that facilitate the smooth operation of the real estate market. Other rules promote fairness or distributive justice, such as the fair housing laws that prohibit owners from denying access to property on the basis of race, sex, religion, or disability.

TENSIONS WITHIN THE PROPERTY SYSTEM

In 1990, roughly a year after his nation was freed from Soviet domination, the foreign minister of Czechoslovakia, Jiri Dienstbier, commented that "[i]t was easier to make a revolution than to write 600 to 800 laws to create a market economy."[1] If anything, he understated the case. Each of the basic property entitlements is limited to ensure that the exercise of a property right by one person is compatible with the property and personal rights of others. The construction of a property system requires property law to adjudicate characteristic core tensions in the system.

Right to exclude versus right of access. It is often said that the most fundamental right associated with property ownership is the right to exclude non-owners from the property. If the right to exclude were unlimited, owners could exclude non-owners based on race or religion. Although at one time owners were empowered (and in some states required) to do this, current law prohibits discrimination on the basis of race, sex, national origin, religion, or disability in public accommodations, housing, and employment. Although individuals are free to choose whom to invite to their homes for dinner, market actors are regulated to ensure that access to property is available without regard to invidious discrimination. Property therefore entails a tension between privacy and free association norms on one side and equality norms on the other. Sometimes the right of access will take precedence over the right to exclude. The tension between these claims is one that property law must resolve.

Privilege to use versus security from harm. Owners are generally free to use their property as they wish, but they are not free to harm their neighbors' property substantially and unreasonably. A factory that emits pollutants into the air may be regulated to prevent the use of its property in ways that will destroy the individual property rights of others and common resources in air and water. Many uses of property impose "externalities" or spillover effects on other owners and on the community as a whole. Because owners are legally entitled to have their own property protected from pollutants dispatched to their property by others, owners' freedom to use their property is limited to ensure that their property use does not cause such unreasonable negative externalities.

Power to transfer versus powers of ownership. Owners are generally free to transfer their property to whomever they wish, on whatever terms they want. Freedom of disposition gives them the power to sell it, give it away, or write a will identifying who will get it when they die. They are also free to contract with others to transfer particular sticks in the bundle of sticks comprising full ownership to others while keeping the rest for themselves. Owners may even place conditions on the use of property when they sell it, limiting what future owners may do with it. They may, for example, limit the property to residential purposes by including a restriction in the deed limiting the property to such uses. Although owners are free to disaggregate property rights in various ways, and to impose particular restrictions on the use and ownership of land, that freedom is not unlimited. Owners are not allowed to impose conditions that violate public policy or that unduly infringe on the liberty interests of future owners. For example, an owner could not impose an enforceable condition that all future owners agree to vote for the Democratic candidate for president; this condition infringes on the liberty of future owners and wrongfully attempts to tie ownership of the land to membership in a particular political party. Nor are owners allowed to limit the sale of the property to persons of a particular race. Similarly, restrictions limiting the transfer of property will ordinarily not be enforced, both to protect the freedom of owners to move and to promote the efficient transfer of property in the marketplace. The freedom of an owner to restrict the future use or disposition of property must be curtailed to protect the freedom of future owners to use their property as they wish. The law limits freedom of contract and freedom of disposition to ensure that owners have sufficient powers over the property they own.

Immunity from loss versus power to acquire. Property owners have the right not to have their property taken or damaged by others against their will. However, it is often lawful to interfere with the property interests of others. For example, an owner who builds a house on a vacant lot may block a view enjoyed by the neighbor for many years. A new company may put a prior company out of business or reduce its profits through competition. Property rights must be limited to ensure that others can exercise similar rights in acquiring and using property. In addition, immunity from forced seizure or loss of property rights is not absolute when the needs of the community take precedence. To construct a new public highway or municipal building, for example, the government may exercise its eminent power to take private property for public uses with just compensation.

RECURRING THEMES

A number of important themes will recur throughout this book. They include the following:

Social context. Social context matters in defining property rights. We have different typical models of property depending on whether it is owned individually or jointly, among family members or non-family members, by a private or a governmental entity, devoted to profitable or charitable purposes, for residential or commercial purposes, open to public use or limited to private use.

Formal versus informal sources of rights. Property rights generally have their source in some formal grant, such as a deed, a will, a lease, a contract, or a government grant. However, property rights also arise informally, by an oral promise, a course of conduct, actual possession, a family relationship, an oral gift, longstanding reliance, and social customs and norms. Many of the basic rules of property law concern contests between formal and informal sources of property rights. While the law usually insists on formality to create property rights, it often protects informally created expectations over formally created ones. Determining when expectations based on informal arrangements should prevail over formal ones is a central issue in property law.

The alienability dilemma. It is a fundamental tenet of the property law system that property should be "alienable," meaning that it should be transferable from one person to another. Transferability allows a market to function and enables efficient transactions and property use to occur. It also promotes individual autonomy by allowing owners to sell or give away property when they please on terms they have chosen. This suggests that the law should allow owners to disaggregate property rights as they please. However, if owners are allowed to disaggregate property rights at will, it may be difficult to reconsolidate those rights. If property is burdened by obsolete restrictions, it may be expensive or impossible to get rid of them. Similarly, if property is disaggregated among too many owners, transaction costs may block agreements to reconsolidate the interests and make the property useable for current needs. The property may therefore be rendered inalienable.

Many rules of property law limit contractual freedom to ensure that particular bundles of property rights are consolidated in the same person — the "owner." Consolidating power in an "owner" ensures that resources can be used for current purposes and current needs and allows property to be freely transferred in the marketplace. We therefore face a tension between promoting alienability by consolidating rights in owners and promoting alienability by allowing owners to disaggregate their rights into unique bundles constructed by them.

Contractual freedom and minimum standards. Individuals want to be free to develop human relationships without having government dictate the terms of their association with others. Having the ability to rearrange property rights to create desirable packages of entitlements will help enable various relationships to flourish. However, there are also bounds to what is acceptable; this is why the law imposes certain minimum standards on contractual relationships. For example, although landlords are entitled to evict residential tenants who do not pay rent, the law in almost every state requires landlords to use court eviction proceedings to dispossess defaulting tenants. These proceedings give tenants a chance to contest the landlord's possessory claim and to have time to find a new place to live, rather than having their belongings tossed on the street and being dispossessed overnight. These limitations on free contract protect basic norms of fair dealing and promote the justified expectations of individuals who enter market transactions.

Social welfare. Granting owners power over property ensures that they can obtain resources to satisfy human needs. It also promotes social welfare by encouraging productive activity and by granting security to those who invest in economic projects. Clear property rights facilitate exchange and lower the costs of transactions by clarifying who owns what. At the same time, owners may use their property in socially harmful ways, and clear property rights may promote harmful, as well as beneficial, actions. Property rights must be limited to ensure that conflicting uses are accommodated to minimize the costs of desirable development on other owners and on the community. Moreover, rigid property rights may inhibit bargaining rather than facilitate it by granting owners the power to act unreasonably, thereby encouraging litigation to clarify the limits on the owner's entitlements. Reasonableness requirements, while less predictable than clear rules, may promote efficient bargaining by encouraging competing claimants to compromise in ways that minimize the costs of property use on others. We need to design rules of ownership and transfer that promote efficiency and social welfare by decreasing the costs of using and obtaining property while maximizing its benefits both to individual owners and to society as a whole.

Justified expectations. In a famous phrase, Jeremy Bentham wrote that "[p]roperty is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it."[2] Owners justifiably expect to use their own property for their own purposes and to transfer it on terms chosen by them. However, because the property use often affects others, it must be limited to protect the expectations of others. Property law protects justified expectations. A central function of property law is to determine what the parties' actual expectations are and when they are, and are not, justified.

Distributive justice. Property rights are the legal form of wealth. Wealth takes many forms, including the right to control tangible assets, such as land and buildings, and intangible assets, such as stocks that give the holder the right to control and derive profit from a business enterprise. In fact, any legal entitlement that benefits the right holder may be viewed as a species of property. The rules of property law, like the rules of contract, family, and tax law, play an enormous role in determining the distribution of both wealth and income.

How well is property dispersed in the United States? One expert has noted that "[b]y several measurements, the United States in the late twentieth century led all other major industrial countries in the gap dividing the upper fifth of the population from the lower — in the disparity between top and bottom."[3]

One indicator of the distribution of property is income. Since 1967, income distribution has become increasingly unequal in the United States. The Census Bureau reports that the share of total income going to the top fifth of American households increased from 43.6 percent in 1967 to 51.9 percent in 2023.[4] Within the top fifth of the population, the bulk of this increase was obtained by those at the very top. Between 1979 and 2021, the incomes of the top 1 percent of families rose 326 percent, whereas the bottom 60 percent of families saw increases of 73 percent.[5]

The distribution of income also varies according to race, gender, and age. The median income of households in the United States was $80,610 in 2023; half of all households received more and half less than that amount. However, differences are substantial along racial lines. While the median income of white, non-Hispanic families was $89,050 in 2023, the median income for African American households was only $56,490 and that of Latino households was $65,540. The median annual household income of American Indians and Native Alaskan households for 2023 was $61,061.[6]

Poverty is similarly unequally distributed by race. While 11.1 percent of all persons were poor by federal standards in 2023, only 7.7 percent of non-Hispanic whites were poor; by comparison, 17.9 percent of African Americans and 16.6 percent of Latinos fell below the poverty line, as did 21.2 percent of American Indians and Native Alaskans.[7]

Although the gap in incomes between men and women has narrowed over the last quarter-century, men still earn more than women on average. In 2023, men who worked full time earned $66,790 at the median, while the median earnings for women who worked full time was only $55,240, or 82.7 percent of male earnings.

Children are more likely to be poor than adults, and some children are very likely to be poor. Although 11.1 percent of the population fell below the poverty line in 2023, 15.3 percent of children did so; moreover, 29 percent of African American children, 30 percent of American Indian/Alaska Native, and 22 percent of Hispanic children were living in poverty.[8] As to family composition, while only 5.2 percent of children in families of married couples were poor in 2023, 12.4 percent of children in male-headed families and 23.6 percent of children living in female-headed households were poor.

Inequalities of both income and wealth are somewhat alleviated by transfer payments in the form of public assistance. Until the 1970s, elderly persons were more likely to be poor than the non-elderly. By 1990, however, the poverty rate for persons over 65 was less than that for the rest of the population, and relatively few elderly persons are among the homeless and extremely poor. This change in the position of the elderly was the result of public spending in the form of Social Security pensions, Medicare, and housing subsidies.[9] In 2023, the poverty rate for those 65 and older was 9.7 percent compared to 10 percent for those between 18 and 64.

Wealth data show even greater inequality than income data. Far more than income, wealth determines financial security and economic prospects in the United States. In 2024, the top 1 percent of U.S. households owned 30.8 percent of U.S. family net wealth while the top 10 percent owned nearly 67.3 percent of all net wealth.[10] The bottom 50%, meanwhile, had just one percent of the nation's wealth.[11] The racial disparities are also stark. In 2022, the median net worth of Black households was only 16 percent that of non-Hispanic White households, while the median net worth of Hispanic households was only 22 percent.[12]

Individual versus shared ownership. Property may be owned and controlled by individuals; the history of the development of land law in England, for example, may be described as a shift from control over property by feudal lords and family inheritance restrictions to control by individual owners. But shared ownership continues to characterize property, perhaps increasingly so. In marriages and other intimate relationships, for example, ownership of homes and bank accounts is typically in the name of both partners. The assets of Americans, moreover, increasingly consist of investments in corporate stocks and ownership of condominiums or other common interest developments, both forms of property in which ownership and control are shared with many individuals. In addition, because ownership rights affect others, both statutory and common law recognize rights in the community to control property to some degree. The recognition of shared rights in property may differ in different cultures and legal systems. Compared to U.S. property law, for example, continental European systems may do more to recognize and facilitate common ownership, while English and Scottish legal systems recognize greater rights in the community to traverse and enjoy private lands.[13]

One persistent conflict between shared and individualist conceptions of property concerns American Indian nations, the original possessors of land in the United States. With over 570 federally recognized tribes and scores of unrecognized tribes, it is difficult to generalize about Indigenous land use systems, either in the past or the present. Nonetheless, many Native peoples recognized shared and community ownership more explicitly than did European American settlers. Native individuals and families did own property and land was bought and sold, but Indigenous property systems often had a robust concept of shared use rights. While a particular family might use a piece of land to plant crops, for example, this would not preclude other tribal members from entering or gathering nonagricultural food on such lands. Much land, moreover, was considered to be owned by a tribe in common, and open to hunting, fishing, or the like by the tribe as a whole. (Note, however, that this sense of shared rights is not so different from rights of villagers to graze on common or uncultivated lands in early England, discussed in Chapter 7, §2.1, or the "right to roam" on unfenced land recognized for much of American history, discussed in Chapter 1, §1.)

More radically, for most Indigenous peoples, land was not fungible — it could not simply be replaced with similar land elsewhere. Rather, specific areas were deeply connected to the history and spiritual identity of a tribe. For many Native peoples even today, particular areas may be "the source of spiritual origins and sustaining myth which in turn provides a landscape of cultural and emotional meaning. The land often determines the values of the human landscape."[14] The community, therefore, could not be excluded from such areas without doing violence to the tribe and its identity. These differences in emphasis on shared versus individual rights in U.S. and Indian property systems were the source of much conflict, as well as repeated efforts by the federal government to inculcate a love of individual property as a tool to encourage tribal assimilation and dissolution.[15]

NORMATIVE APPROACHES

How should courts and legislatures adjudicate conflicting property claims? Various approaches can be used to conceptualize property rights and to adjudicate conflicts among property claimants.[16] Here are brief descriptions of the most common approaches.[17]

Positivism and legal realism. Positivist theories identify law with the "commands of the sovereign" or the rules promulgated by authoritative government officials for reasons of public policy.[18] Those rules may be intended to protect individual rights, promote the general welfare, increase social wealth, or maximize social utility. Judges are therefore directed to apply the law, as promulgated by authoritative government lawmakers, and to exercise discretion where there are gaps, conflicts, or ambiguities in the law while respecting the need for consistency with the letter and spirit of preexisting laws. Jeremy Bentham wrote that the "idea of property consists in an established expectation . . . of being able to draw . . . an advantage from the thing possessed."[19] He believed that "this expectation, this persuasion, can only be the work of law. It is only through the protection of law that I am able to inclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest . . . ."[20] Property exists to the extent the law will protect it. "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."[21]

Positivists separate law and morals; they emphasize that, although moral judgments may underlie rules of law, they are not fully or consistently enforced by legal sanctions. Positivism was adopted by Progressive-era judges and scholars such as Oliver Wendell Holmes, who suggested analyzing legal rules in the way a "bad man" would. Such a person would not be interested in the moral content of the law but would simply want to predict what legal sanctions would be imposed on him if he engaged in prohibited conduct.[22] This approach was adopted by legal realist scholars of the 1920s and 1930s such as Karl Llewellyn, who argued that the law is what officials will do in resolving disputes.[23]

All lawyers are positivists in some sense because the job of advising clients necessarily entails identifying the rules of law that have been explicitly or implicitly adopted by authoritative lawmakers and predicting how those rules will be applied to the client's situation. Judges may also see their jobs as the enforcement of existing law and leave the job of amending law to legislatures. On the other hand, determining whether an existing rule was intended to apply to a particular situation requires judgment, as well as techniques of *statutory interpretation* and analysis of *precedent*, and a conception about the proper role of courts in the lawmaking process.

Justice and fairness. Positivism has been criticized by scholars who argue that ambiguities in existing laws must be filled in by judges, and that judges should not exercise untrammeled discretion in doing so. Rather, they should interpret gaps, conflicts, and ambiguities in the law in a manner that protects individual rights, promotes fairness, or ensures justice.

Rights theorists attempt to identify individual interests that are so important from a moral point of view that they not only deserve legal protection but may count as "trumps" that override more general considerations of public policy by which competing interests are balanced against each other. Such individual rights cannot legitimately be sacrificed for the good of the community.[24] Some *natural rights* theorists argue that rights have roots in the nature of human beings or that they are natural in the sense that people who think about human relationships from a rational and moral point of view are bound to understand particular individual interests as fundamental.[25] Other scholars, building on Immanuel Kant, ask whether a claim that an interest should be protected could be *universalized* such that every person in similar circumstances would be entitled to similar protection. Still others build on the *social contract* tradition begun by John Locke and Thomas Hobbes and ask whether individuals would choose to protect certain interests if they had to come to agreement in a suitably defined decision-making context. John Rawls, for example, asks what principles of justice would be adopted by individuals who did not know morally irrelevant facts about themselves, such as their race or sex.[26]

Some theorists focus on *desert*. John Locke argued that labor is the foundation of property. "Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property."[27] Eric Claeys draws on Lockean labor theory to develop a modern natural rights theory of property.[28]

Other theorists focus on the role that property rights play in developing individual *autonomy*.[29] Hegel believed that property was a way that human beings constituted themselves as people by extending their will to manipulate the objects of the external world.[30] Professor Margaret Jane Radin, for example, has argued that "to be a *person . . .* an individual needs some control over resources in the external environment."[31] Hanoch Dagan, meanwhile, emphasizes the need for autonomy for both owners and non-owners in relation to each other to argue for both protections for and limitations to private property..[32]

Other scholars focus on satisfying *human needs* or ensuring *distributive justice.* Nancy Fraser has argued that an important way to think about property rights is to focus on the ways we define people's needs and the ways in which the legal system does or does not meet those needs.[33] Frank Michelman has similarly argued that a system of private property requires, by its very nature, that property be widely dispersed. If all property were owned by one person, that person would be a dictator. Private property implies wide availability. It therefore entails a compromise between the principle of protecting possession and promoting widespread distribution.[34] Theorists have also turned to the Aristotelian idea of human flourishing,[35] arguing that property should be structured to provide a plurality of goods health, practical reason, sociability, personhood, and autonomy.

Utilitarianism, social welfare, and efficiency. Utilitarians focus on the *consequences* of alternative legal rules. They compare the costs and benefits of alternative property rules or institutions with the goal of adopting rules that will maximize *social utility* or *welfare.* Some scholars in the law and economics school of thought measure social utility by the concept of economic *efficiency*. Efficiency theorists measure costs and benefits by reference to what people are willing and able to pay for entitlements, given their resources.[36]

Individual property rights are thought to increase efficiency by encouraging productive activity and by granting security to those who invest in economic projects. Clear property rights also facilitate exchange by clarifying who owns what. They therefore create incentives to use resources efficiently.[37] On the other hand, Carol Rose has argued that clear definitions of property rights may be overly rigid, upsetting settled expectations and reliance interests.[38] This is why property rights are often defined by flexible standards, such as a reasonableness requirement, that adjust the relations of the parties to achieve a fair and efficient result. Rose has also argued that common ownership is sometimes the most efficient way to manage property.[39] Frank Michelman and Duncan Kennedy have also argued that efficiency requires a mixture of private property, sharing, and deregulation.[40] Behavioral economic insights also show that preferences are partially shaped by law and that cognitive biases may affect individuals' perceptions of their preferences.[41]

Social relations. Social relations approaches analyze property rights as relations among persons regarding control of valued resources. Legal rights are correlative; every legal entitlement in an individual implies a correlative vulnerability in someone else, and every entitlement is limited by the competing rights of others.[42] This analysis was developed by pragmatic legal scholars — called "legal realists" — from the 1920s through the 1930s. Property rights are interpreted as delegations of sovereign power to individuals by the state; these rights should therefore be defined to accommodate the conflicting interests of social actors.[43] Current social relations theorists have broadened the scope of this analysis by examining the role property rights play in structuring social relations and the ways in which social relations shape access to property.[44] These approaches include feminist legal theory, critical race theory, critical legal studies, communitarianism, law and society, deconstruction and cultural studies.

Feminists such as Martha Minow argue that our identities, values, and needs are developed in relation to and in connection with others. The legal system relies on implicit conceptions of social relations and often implicitly treats certain groups or individuals as the norm and others as the exception. She argues that we must become conscious of the ways those underlying assumptions function in both social relations and the legal system.[45] Elizabeth Spelman similarly analyzes the implicit assumptions underlying conceptions of human relations. In particular, she focuses on the role that race, class, and gender play in shaping the concepts with which we understand human relations.[46]

These new insights have permeated recent discussions of property law. Property has traditionally been associated with the idea of autonomy within boundaries; for example, we assume that people are generally free to do what they like within the borders of their land. Yet Jennifer Nedelsky has argued that "[w]hat makes human autonomy possible is not isolation but relationship" with others.[47] She proposes that we replace the idea of *boundary* as the central metaphor for property rights with the idea of *relationships*.[48] Social relations approaches assume that people are situated in a complicated network of relationships with others, from relations among strangers, to relations among neighbors, to continuing relations in the market, to intimate relations in the family. Moreover, many of the legal developments of the twentieth century can be described as recognition of obligations that emerge over time out of relationships of interdependence.[49] The relational approach shifts our attention from asking who the owner is to the question of what relationships have been established.[50]

A wealth of scholarship explores the relationship between race, sex, and property. Scholars have written eloquently about the social meaning of race and gender and their relation to power and to property law,[51] the ways that residential segregation produces and maintains social inequality,[52] and the impact of race on property laws and distribution.[53] Other scholars have explored the ways that gender shapes the distribution of property and power.[54]

Critical legal theorists have explored tensions or contradictions within property theory and law and used marginalized doctrines to argue for reform of property rules and institutions.[55] Communitarians and environmentalists emphasize the importance of community life as well as individual rights and argue that individuals have obligations as well as rights.[56] Law and society theorists investigate the "law in practice" rather than the "law on the books" to determine what norms actually govern behavior in the real world with respect to property.[57] Other scholars have used deconstruction, poststructuralism, or cultural theory to explore the unconscious assumptions underlying property law.[58]

Libertarian and progressive approaches to property. Property is not only an intensely interesting subject but also an intensely debated one. As much or more than another subject typically covered in the first year of law school, property law is likely to elicit disagreement between libertarians who hope to minimize government regulation of property and progressives who believe that property is enmeshed in government regulation and should be regulated to promote human well-being and equality.[59] The text will incorporate explicit considerations of these alternative perspectives, as well as the contrast between approaches focused on the normative idea of economic efficiency and approaches focused on norms of liberty, fairness, justice, and democracy.

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1. William Echikson, *Euphoria Dies Down in Czechoslovakia*, Wall St. J., Sept. 18, 1990, at A-26, 1990 WL-WSJ 56114.

2. 1 Jeremy Bentham, *Theory of Legislation* 137 (Boston: Weeks, Jordan & Co., R. Hildreth trans. 1840).

3. Kevin Phillips, *The Politics of Rich and Poor: Wealth and the American Electorate in the Reagan Aftermath* 8 (1990).

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HOW TO BRIEF A CASE AND PREPARE FOR CLASS

SOURCES OF LAW

Legal rules are promulgated by a wide variety of government bodies in a hierarchical scheme. The major sources of law in that system include the following:

1. ***United States Constitution.*** The federal Constitution is the fundamental law of the land. It was originally adopted by state constitutional conventions, whose members were elected by (a small subset of) the people.[60] Constitutional amendments are generally passed by Congress and ratified by state legislatures. The Constitution determines the structure of the federal government, including the relations among the executive, legislative, and judicial branches of the federal government, and the relations between the federal government and the state governments. It also defines the powers of the federal government and limits the powers of both the federal government and the states to protect individual rights, including property rights and rights such as freedom of speech, freedom from unreasonable searches and seizures, equal protection of the laws, and due process.

2. ***Federal statutes.*** Legislation is passed by the Congress of the United States and ratified by the president, or passed over the president's veto. Federal statutes address a wide variety of matters relating to property law; examples include the *Fair Housing Act of 1968,* the *Civil Rights Act of 1964,* the Internal Revenue Code, the *Sherman Antitrust Act,* and the *Worker Adjustment and Retraining Notification Act of 1988.*

3. ***Administrative regulations.*** Congress may pass legislation creating administrative agencies, such as the Environmental Protection Agency, the Equal Employment Opportunity Commission, the Department of Housing and Urban Development, and the Internal Revenue Service; these agencies may have the power to promulgate regulations implementing statutes in a particular field.

4. ***State constitutions.*** Each state has its own constitution defining the structure of state government and defining certain fundamental individual rights against the state. Although state constitutions may not reduce the protection provided by the federal constitution, they may interpret their constitutions to provide more protection

for individual rights. For example, some state courts have held that their state constitutions provide more protection against police searches or government takings than the U.S. Constitution would require.

5. ***State statutes.*** State statutes are passed by state legislatures with the consent of the governor (or by a supermajority vote over the governor's veto). Many state statutes deal with property law matters such as landlord-tenant legislation, recording acts, civil rights, and disposition of family property on divorce.

6. ***State administrative regulations.*** State legislatures, like the federal Congress, may create administrative agencies that have the power to promulgate regulations in limited fields of law. The Massachusetts legislature, for example, created a Building Code Commission with the power to promulgate and enforce regulations on building construction and materials to protect the public from unsafe structures.

7. ***Common law.*** In the absence of any controlling statute or regulation, courts adjudicate civil disputes by promulgating or applying rules of law derived from judicial decisions. During the first year of law school, most courses focus on common law rules and the process of common law decision making by judges, but property law is as much a statutory and regulatory topic as it is a product of common law decision making.

8. ***Local ordinances and bylaws.*** States delegate to local governments such as counties, cities, and towns the power to promulgate ordinances or bylaws in areas of law that include zoning, rent control, schools, traffic, and parking.

LAWYERS' SKILLS

Lawyers perform four basic tasks as they use and shape the law.

1. ***Counseling.*** In advising clients, lawyers perform a variety of roles. First, they answer clients' questions about their legal rights. They do so by looking up the law in statutes, regulations, and judicial opinions. In so doing, they may or may not find legal rules that specifically address the question they need to answer. In either case, lawyers must predict how the courts would rule on the question if they had the opportunity to do so. This requires lawyers to make educated judgments about how prior case law will be applied to new fact situations. Second, lawyers counsel clients on how to conform their conduct to the dictates of the law and how to achieve their goals in a lawful manner. Third, lawyers draft legal documents for clients, including leases, deeds, purchase and sale agreements, bond documents, and employment contracts. Fourth, lawyers negotiate with other parties or their attorneys to settle disputes or to make deals.

2. ***Advocacy.*** If a dispute cannot be resolved amicably, one of the parties — called the plaintiff — may bring a lawsuit against the other party — called the defendant — claiming that the defendant engaged in wrongful conduct that violated the plaintiff's legal rights. To prevail in such a lawsuit, the plaintiff must be able to (a) prove in court by testimony, documentation, or other admissible evidence that the defendant engaged in the wrongful conduct and that the conduct caused the

plaintiff's harm, and (b) demonstrate that the defendant's conduct violates a legally protected interest guaranteed to the plaintiff in a way that violates the plaintiff's legal rights. The parties will normally hire attorneys to conduct the lawsuit. Lawyers argue before judges about what the legal rules are governing the dispute. Sometimes the rules in force are clear. Often, however, the rule governing a particular situation is not clear. The rules contain numerous gaps, conflicts and ambiguities, and lawyers are experts in using the open texture of the law to develop plausible competing arguments about alternative possible rules of law to govern the situation. The attorneys for each side engage in advocacy of alternative possible rules of law, both in written arguments called "briefs" and in oral arguments before judges. In these settings, lawyers attempt to persuade judges to interpret existing rules or to create new legal rules in ways that favor their clients' interests. Lawyers must therefore learn the kinds of arguments judges find persuasive in interpreting and in modernizing the rules in force. Lawyers may also represent clients before legislative committees considering the passage of legislation.

3. ***Transactional planning, design, and management.*** Lawyers don't just advocate for people with complaints, they also help clients structure complex transactions, such as sales, leases, and incorporation. In doing so, they draft documents, negotiate with private and governmental entities, and anticipate and plan for potential risks. Transactional — or "deal" — lawyers help bridge gaps between parties to compromise and reach agreement and ensure that the transaction as structured reflects the understanding and intent of the parties.

4. ***Decision making.*** Lawyers also decide cases as judges. Their role is to adjudicate the cases before them by choosing the applicable legal rules to govern the dispute and others like it in the future. Similarly, legislatures promulgate statutes regulating conduct and resolving conflicts among competing interests. It is also important for you as a participant in the legal system to develop your own views about the wisdom and justice of our legal institutions and rules. Legal education teaches us to consider both sides of contested questions of law before reaching a judgment about the proper outcome of the dispute. This does not mean we should be indifferent to what those outcomes are or that we should not criticize the rules in force. Your ability to argue for and against a position does not mean that you cannot make up your mind or present persuasive arguments to justify the result you reach; it means simply that your judgment about right and wrong should be true to the complexity of your own moral beliefs and that it is important to recognize what is lost, as well as what is gained, by any choice.

PREPARING FOR CLASS

Preparing for class involves not just reading the assigned materials but also trying to approach them as a lawyer would in performing the skills of counseling, advocacy, and decision-making. Your professors may ask, for example, how a particular case would come out if particular facts had changed, or how the rule announced to that case would apply to a different set of facts. They may ask you to challenge the result in a case, whether as a matter of application of precedent, statutory interpretation, or policy. They may ask how you would counsel or advocate for a client faced with a problem in this field. In preparing for class, therefore, try to understand not only the rules you are learning, but also what justifies those rules, how they might be challenged, and other situations in which they might apply.

Briefing Cases

In preparing for class, at least at the beginning, you should brief your cases after reading them. This means writing an outline of the important elements of the decision. Recommendations on how to brief a case vary, but the elements might include the following.

1. ***Facts.*** What is the dispute between the parties about? Who did what to whom? What facts seem particularly important in shaping your or the court's understanding of that dispute?
2. ***Procedural history.*** How did the case get to court (who sued who, and what did they ask for?) How did the courts below rule on the case? First, how did the trial court resolve the matter? Who won, and why? Was the decision after a trial before a jury or a judge, or by a judge before trial? Was there a decision by an intermediate appellate court? If so, how did the appellate court rule, and why? What court issued the opinion you are reading — the state supreme court or some lower court? (Note that because cases in this and other casebooks have been edited, some portion of the procedural history may be omitted from the text reprinted in the book.)
3. ***Issue and Holding.*** What issues did the court face and how did it resolve them?
4. ***Rule of law.*** Try to identify the rule of law the court applied in deciding the case. This is more than the holding under these specific facts. Rather it is the general principle that, when applied to the facts here, explains why the court reached the holding it did. If there are particular phrases in the opinion setting out the rule, it may be helpful to note their page numbers for easy reference. Note that rules can be described either broadly or narrowly. For example, one might argue for a broad, rather vague, rule of law: "Non-owners are privileged to enter property when their activity will further a significant public policy." Or one might argue for a narrow rule of law, tied very closely to the facts of the case "Lawyers and physicians working for agencies funded by the federal government may enter property to give professional assistance to migrant farmworkers." Similarly, an owner might argue for a broad rule of law granting owners the right to exclude non-owners under all circumstances, or she might argue for a narrower rule granting owners the right to exclude non-owners only if the owner can show just cause. It is up to you to identify the different ways each side might have framed its proposed rules of law.
5. ***Rationale for the court's decision.*** It is important to understand not only what a court held but the rationale for why it held that way. Understanding the rationale for a decision will also help you see ways you can challenge the decision or argue that it is wrong. (Although it is tempting to accept judicial opinions as always

correct, easy cases don't usually result in written opinions; there is almost always a plausible argument for a different result.) Rationales usually depend on some combination of the following three kinds of arguments:

a. ***Precedential arguments.*** Precedents are earlier decisions relevant to a particular issue. Precedential arguments analogize from those decisions to argue that they control the current case. In evaluating these arguments, consider whether the analogy is valid. Are there differences in fact or policy that mean that the rationale of the past decision does not or should not apply here?

b. ***Statutory interpretation.*** Many cases involve interpretation of federal or state statutes. Read the language of these statutes carefully. Do they support the court's decision? Can you argue for a different interpretation? Is there evidence of the purpose behind the statute that should influence how it is interpreted? Does the court discuss particular rules for how courts should interpret statutes like these?

c. ***Policy arguments.*** Judicial opinions often rest not just on interpretation of precedent and statutes but also arguments that a particular rule or result is preferable as a matter of policy. Many of these arguments concern what is best for the parties or society according to considerations of (1) fairness, individual and group rights, and justice in social relationships; and (2) the social consequences of alternative rules such that the choice of rules promotes social utility, efficiency, or the general welfare. Other arguments reflect administrative or institutional concerns, such as the respective roles of the judiciary and the legislature. Try to spot how such arguments influence the opinion, and consider alternative arguments or responses you could make.

Reading Statutes and Regulations

Statutory interpretation is the subject of entire law school courses, but it is important to become comfortable from the outset with statutory and regulatory language. This is because a great deal of legal practice involves statutory or regulatory questions that have not necessarily been ruled on by the courts.

There are examples of statutes and regulations throughout this book. The task in reading these legal texts is different than briefing cases for class discussion. The goal is to come to class with a broad-brush understanding of how the relevant statute or regulation works. As you prepare, pay attention to the details of the language and the structure of the text, note the kinds of issues the statute or regulation covers (and does not), what explicit exceptions or exemptions are set out, how the various parts of the text relate to each other, and ambiguities the language creates. It can be hard to master statutory or regulatory language in the absence of a specific conflict or question, but the basic exercise of careful reading will soon come naturally.

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60. When the United States Constitution was adopted in 1789, the voting population in the 13 states excluded women, African American men, American Indians, and white men who owned less than a certain amount of property.

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Like dozens of other people, I had set up a date to talk with Mary Joe. I hoped to get further advice from her about this casebook. Our conversation setting up our date took place several days before her death. I have been playing out the conversation we might have had ever since. I hope that some of her appears in this book.

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Imagine a walled city bursting at its seams; with too many people, the constraints of the wall cause division among the inhabitants and the possibility of oppression — the powerful are inclined to exclude the weak. Where others see constraints, scarcity, and frustration, Martha thinks about how to break the wall down or how to create openings in it; if these things cannot be done — for now — she imagines how relationships among people in the city might be restructured so that this artificial constraint becomes understood as everyone's problem and not just the problem of minority groups. She embodies possibility; when everything seems hopeless, she opens doors to the land of change. In ways too many to count, to me and to many other people, she has made all the difference.

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PROPERTY LAW

PART ONE

PROPERTY IN A FREE AND DEMOCRATIC SOCIETY

CHAPTER 1

TRESPASS: THE RIGHT TO EXCLUDE AND RIGHTS OF ACCESS

§1 TRESPASS

Many rights go along with ownership or possession of property. Legal scholars have compiled lists of the standard property rights or "incidents of ownership," often derived in some way from Roman law. The following list, by professor and Harvard Law School dean Roscoe Pound, is typical: the right to possess, the right to exclude, the right to alienate, the right to use, the right to enjoy the fruits or profits, and the right to destroy. *See* Roscoe Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A. J. 993, 997 (1939). Competing lists might be longer or shorter. But on virtually any telling, one of the central rights of ownership is the *right to exclude* others from one's property. The law of trespass both defines and protects the owner's right to exclude.

A **trespass** under the common law is an *unprivileged intentional entry on property possessed by another*. The **intent** requirement is met if the defendant engaged in a voluntary act, such as walking onto the property. It is not necessary that the trespasser intended to violate the owner's legal rights; mistaken entry on the land of another does not relieve the trespasser of liability. The intent requirement is not met if, for example, someone carries the trespasser onto the property against her will. The **intrusion** occurs the moment the non-owner enters the property. "The gist of an action of trespass is infringement on the right of possession." *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238 (Utah 1998). An intrusion may occur upon physical entry by a person, an agent such as an employee, or an object such as a building that extends over the boundary onto a neighbor's property. A trespass may occur either above or below the surface. For example, a well dug on one's property that slants to an area underneath the neighbor's property constitutes a trespass. Similarly, a second-story porch that overhangs the neighbor's property also qualifies as a trespass.

An entry is **privileged**, and thus not wrongful, if (1) the entry is done with the **consent** of the owner;[1] (2) the entry is justified by the **necessity** to prevent a more serious harm to persons or property; or (3) the entry is otherwise encouraged by **public policy**. Entry on property of another may be privileged, for example, if one is doing so to stop a crime or to help someone out of a burning house.

§1.1 Public Policy Limits on the Right to Exclude

The right to exclude protected by trespass law is very broad, but it is not absolute. In a variety of circumstances, legal rules limit the possessor's right to exclude non-owners from the property. In such cases, non-owners may have a right of access to the property. These rights of access are created by different sources of law, including common law, federal and state public accommodations statutes and labor relations statutes, and federal and state constitutional guarantees of freedom of speech. The cases in this chapter explore the contours of these competing rights in different contexts.

State v. Shack

277 A.2d 369 (N.J. 1971)

Joseph Weintraub, C.J.

Defendants entered upon private property to aid migrant farmworkers employed and housed there. Having refused to depart upon the demand of the owner, defendants were charged with violating N.J. Stat. §2A:170-31[2] which provides that "[a]ny person who trespasses on any lands . . . after being forbidden so to trespass by the owner . . . is a disorderly person and shall be punished by a fine of not more than $50." Defendants were convicted in the Municipal Court of Deerfield Township and again on appeal in the County Court of Cumberland County on a trial de novo.

Complainant, Tedesco, a farmer, employs migrant workers for his seasonal needs. As part of their compensation, these workers are housed at a camp on his property. Defendant Tejeras is a field worker for the Farm Workers Division of the Southwest Citizens Organization for Poverty Elimination, known by the acronym SCOPE, a nonprofit corporation funded by the Office of Economic Opportunity pursuant to an act of Congress, 42 U.S.C.A. §§2861-2864.[3] The role of SCOPE includes providing for the "health services of the migrant farm worker." Defendant Shack is a staff attorney with the Farm Workers Division of Camden Regional Legal Services, Inc., known as "CRLS," also a nonprofit corporation funded by the Office of Economic Opportunity pursuant to an act of Congress, 42 U.S.C.A. §2809(a)(3). The mission of CRLS includes legal advice and representation for these workers.

Differences had developed between Tedesco and these defendants prior to the events which led to the trespass charges now before us. Hence when defendant Tejeras wanted to go upon Tedesco's farm to find a migrant worker who needed medical aid for the removal of 28 sutures, he called upon defendant Shack for his help with respect to the legalities involved. Shack, too, had a mission to perform on Tedesco's farm; he wanted to discuss a legal problem with another migrant worker there employed and housed. Defendants arranged to go to the farm together. Shack carried literature to inform the migrant farmworkers of the assistance available to them under federal statutes, but no mention seems to have been made of that literature when Shack was later confronted by Tedesco.

Defendants entered upon Tedesco's property and as they neared the camp site where the farmworkers were housed, they were confronted by Tedesco who inquired of their purpose. Tejeras and Shack stated their missions. In response, Tedesco offered to find the injured worker, and as to the worker who needed legal advice, Tedesco also offered to locate the man but insisted that the consultation would have to take place in Tedesco's office and in his presence. Defendants declined, saying they had the right to see the men in the privacy of their living quarters and without Tedesco's supervision. Tedesco thereupon summoned a State Trooper who, however, refused to remove defendants except upon Tedesco's written complaint. Tedesco then executed the formal complaints charging violations of the trespass statute.

I

The constitutionality of the trespass statute, as applied here, is challenged on several scores.

It is urged that the First Amendment rights of the defendants and of the migrant farmworkers were thereby offended. Reliance is placed on *Marsh v. Alabama*, 326 U.S. 501 (1946), where it was held that free speech was assured by the First Amendment in a company-owned town which was open to the public generally and was indistinguishable from any other town except for the fact that the title to the property was vested in a private corporation. Hence a Jehovah's Witness who distributed literature on a sidewalk within the town could not be held as a trespasser. Later, on the strength of that case, it was held that there was a First Amendment right to picket peacefully in a privately owned shopping center which was found to be the functional equivalent of the business district of the company-owned town in Marsh. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc*., 391 U.S. 308 (1968). [*Logan Valley* rests] upon the fact that the property was in fact opened to the general public.[4] There may be some migrant camps with the attributes of the company town in *Marsh* and of course they would come within its holding. But there is nothing of that character in the case before us, and hence there would have to be an extension of *Marsh* to embrace the immediate situation.

Defendants also maintain that the application of the trespass statute to them is barred by the Supremacy Clause of the United States Constitution, Art. VI, cl. 2,[5] and this on the premise that the application of the trespass statute would defeat the purpose of the federal statutes, under which SCOPE and CRLS are funded, to reach and aid the migrant farmworker. The brief of the United States, amicus curiae, supports that approach. Here defendants rely upon cases construing the *National Labor Relations Act*, 29 U.S.C.A. §§151 *et seq*., and holding that an employer may in some circumstances be guilty of an unfair labor practice in violation of that statute if the employer denies union organizers an opportunity to communicate with his employees at some suitable place upon the employer's premises.

These constitutional claims are not established by any definitive holding. We think it unnecessary to explore their validity. The reason is that we are satisfied that under our State law the ownership of real property does not include the right to bar access to governmental services available to migrant workers and hence there was no trespass within the meaning of the penal statute. The policy considerations which underlie that conclusion may be much the same as those which would be weighed with respect to one or more of the constitutional challenges, but a decision in nonconstitutional terms is more satisfactory, because the interests of migrant workers are more expansively served in that way than they would be if they had no more freedom than these constitutional concepts could be found to mandate if indeed they apply at all.

II

Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.

Here we are concerned with a highly disadvantaged segment of our society. We are told that every year farmworkers and their families numbering more than one million leave their home areas to fill the seasonal demand for farm labor in the United States. The migrant farmworkers come to New Jersey in substantial numbers.

The migrant farmworkers are a community within but apart from the local scene. They are rootless and isolated. Although the need for their labors is evident, they are unorganized and without economic or political power. It is their plight alone that summoned government to their aid. In response, Congress provided under Title III-B of the *Economic Opportunity Act of 1964* (42 U.S.C.A. §§2701 *et seq*.) for "assistance for migrant and other seasonally employed farmworkers and their families." Section 2861 states "the purpose of this part is to assist migrant and seasonal farmworkers and their families to improve their living conditions and develop skills necessary for a productive and self-sufficient life in an increasingly complex and technological society." Section 2862(b)(1) provides for funding of programs "to meet the immediate needs of migrant and seasonal farmworkers and their families, such as day care for children, education, health services, improved housing and sanitation (including the provision and maintenance of emergency and temporary housing and sanitation facilities), legal advice and representation, and consumer training and counseling." As we have said, SCOPE is engaged in a program funded under this section, and CRLS also pursues the objectives of this section although, we gather, it is funded under §2809(a)(3), which is not limited in its concern to the migrant and other seasonally employed farmworkers and seeks "to further the cause of justice among persons living in poverty by mobilizing the assistance of lawyers and legal institutions and by providing legal advice, legal representation, counseling, education, and other appropriate services."

These ends would not be gained if the intended beneficiaries could be insulated from efforts to reach them. It is in this framework that we must decide whether the camp operator's rights in his lands may stand between the migrant workers and those who would aid them. The key to that aid is communication. Since the migrant workers are outside the mainstream of the communities in which they are housed and are unaware of their rights and opportunities and of the services available to them, they can be reached only by positive efforts tailored to that end. The *Report of the Governor's Task Force on Migrant Farm Labor* (1968) noted that "One of the major problems related to seasonal farm labor is the lack of adequate direct information with regard to the availability of public services," and that "there is a dire need to provide the workers with basic educational and informational material in a language and style that can be readily understood by the migrant." The report stressed the problem of access and deplored the notion that property rights may stand as a barrier, saying "In our judgment, 'no trespass' signs represent the last dying remnants of paternalistic behavior."

A man's right in his real property of course is not absolute. It was a maxim of the common law that one should so use his property as not to injure the rights of others. [*Sic utere tuo ut alienum non laedas*.] Although hardly a precise solvent of actual controversies, the maxim does express the inevitable proposition that rights are relative and there must be an accommodation when they meet. Hence it has long been true that necessity, private or public, may justify entry upon the lands of another.

The subject is not static. As pointed out in 5 Powell, *Real Property* §745, at 493-94 (Rohan 1970), while society will protect the owner in his permissible interests in land, yet

> such an owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies. The necessity for such curtailments is greater in a modern industrialized and urbanized society than it was in the relatively simple American society of fifty, 100, or 200 years ago. The current balance between individualism and dominance of the social interest depends not only upon political and social ideologies, but also upon the physical and social facts of the time and place under discussion.

Professor Powell added in §746, at 494-96:

> As one looks back along the historic road traversed by the law of land in England and in America, one sees a change from the viewpoint that he who owns may do as he pleases with what he owns, to a position which hesitatingly embodies an ingredient of stewardship; which grudgingly, but steadily, broadens the recognized scope of social interests in the utilization of things.
>
> To one seeing history through the glasses of religion, these changes may seem to evidence increasing embodiments of the golden rule. To one thinking in terms of political and economic ideologies, they are likely to be labeled evidences of "social enlightenment" or of "creeping socialism" or even of "communistic infiltration," according to the individual's assumed definitions and retained or acquired prejudices. With slight attention to words or labels, time marches on toward new adjustments between individualism and the social interests.

This process involves not only the accommodation between the right of the owner and the interests of the general public in his use of his property, but involves also an accommodation between the right of the owner and the right of individuals who are parties with him in consensual transactions relating to the use of the property. Accordingly substantial alterations have been made as between a landlord and his tenant.

The argument in this case understandably included the question whether the migrant worker should be deemed to be a tenant and thus entitled to the tenant's right to receive visitors, *Williams v. Lubbering*, 63 A. 90 (N.J. Sup. Ct. 1906), or whether his residence on the employer's property should be deemed to be merely incidental and in aid of his employment, and hence to involve no possessory interest in the realty. *See Scottish Rite Co. v. Salkowitz*, 197 A. 43 (N.J. 1938). These cases did not reach employment situations at all comparable with the one before us. Nor did they involve the question whether an employee who is not a tenant may have visitors notwithstanding the employer's prohibition. Rather they were concerned with whether notice must be given to end the employee's right to remain upon the premises, with whether the employer may remove the discharged employee without court order, and with the availability of a particular judicial remedy to achieve his removal by process. We of course are not concerned here with the right of a migrant worker to remain on the employer's property after the employment is ended.

We see no profit in trying to decide upon a conventional category and then forcing the present subject into it. That approach would be artificial and distorting. The quest is for a fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between the migrant worker and the operator of the housing facility.

Thus approaching the case, we find it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well-being. The farmer, of course, is entitled to pursue his farming activities without interference, and this defendants readily concede. But we see no legitimate need for a right in the farmer to deny the worker the opportunity for aid available from federal, state, or local services, or from recognized charitable groups seeking to assist him. Hence representatives of these agencies and organizations may enter upon the premises to seek out the worker at his living quarters. So, too, the migrant worker must be allowed to receive visitors there of his own choice, so long as there is no behavior hurtful to others, and members of the press may not be denied reasonable access to workers who do not object to seeing them.

It is not our purpose to open the employer's premises to the general public if in fact the employer himself has not done so. We do not say, for example, that solicitors or peddlers of all kinds may enter on their own; we may assume for the present that the employer may regulate their entry or bar them, at least if the employer's purpose is not to gain a commercial advantage for himself or if the regulation does not deprive the migrant worker of practical access to things he needs.

And we are mindful of the employer's interest in his own and in his employees' security. Hence he may reasonably require a visitor to identify himself, and also to state his general purpose if the migrant worker has not already informed him that the visitor is expected. But the employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens. These rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties.

It follows that defendants here invaded no possessory right of the farmer-employer.

Their conduct was therefore beyond the reach of the trespass statute. The judgments are accordingly reversed and the matters remanded to the County Court with directions to enter judgments of acquittal.

Commonwealth v. Magadini

52 N.E.3d 1041 (Mass. 2016)

GERALDINE HINES, J.

The defendant, David Magadini, was convicted by jury on seven counts of criminal trespass, each based on the defendant's presence, in 2014, in privately-owned buildings where he was the subject of no trespass orders. Five incidents occurred between February and March, the sixth occurred on April 8, and the seventh occurred on June 10. Before trial and during the charge conference, the defendant requested a jury instruction on the defense of necessity, asserting that his conduct was justified as the only lawful alternative for a homeless person facing the "clear and imminent danger" of exposure to the elements during periods of extreme outdoor temperatures. The judge denied the request, concluding that the defendant had legal alternatives to trespassing available. As to each conviction, the judge imposed concurrent sentences of thirty days in a house of correction. A single justice of the Appeals Court stayed the sentences pending resolution of this appeal. We granted the defendant's application for direct appellate review.

We recite the facts the jury could have found, reserving certain details for our discussion of the specific issues raised. In 2014, the defendant was charged with trespassing on three properties in Great Barrington — Barrington House, Castle Street, and SoCo Creamery.[6] Barrington House is a mixed-use building with several different restaurants, an enclosed atrium, and apartments above the businesses. Castle Street is a three-story building with retail establishments, offices, and apartments. SoCo Creamery is an ice cream shop. The defendant was barred from each property by no trespass orders. The owner of the Castle Street building had the defendant served with a no trespass order in July, 2008; the manager of Barrington House had the defendant served in June, 2012; and the owner of SoCo Creamery had the defendant served in January, 2014. All of the no trespass orders were in effect at the time the charges were brought against the defendant.

Four charges related to the defendant's presence at Barrington House. On February 21, March 4, and March 6, police found the defendant lying in a hallway by a heater during the evening, nighttime, or early morning hours of days described as "cold" or "very cold." At approximately noon on April 8, a day described as "cool," police responded to a report and observed the defendant walking through a common area in the Barrington House toward the front door. Two charges stemmed from the defendant's presence at Castle Street, where police had found the defendant lying on the floor in the lobby next to a heater during periods of cold weather. The first incident occurred between 8 A.M. and 10 A.M. on February 20, 2014; the defendant was awake. The second incident occurred at approximately 6:30 A.M. on March 28; the defendant was sleeping. The seventh charge was based on conduct that occurred on June 10, 2014, when the defendant entered SoCo Creamery, ignored requests by the clerk to leave the premises, and used the bathroom for ten to fifteen minutes. The defendant did not dispute that he violated all of the trespass orders, focusing his case instead on the necessity defense in cross-examination and his direct testimony.

The defendant, a lifelong resident of Great Barrington, became homeless after he moved out of his parents' home in 2004. His purpose in moving out was to "reorganize." He planned to return to his parents' home, but he was unable to do so because the "landlord," who "wanted [the defendant] out" refused to allow it. After leaving his parents' home, he generally lived outside year-round, but during the winter months, he tried to "find a more sheltered area" from the "ice and a snow storm." During the cold weather, the defendant used blankets, gloves, and scarves to try to stay warm, but when the weather was "so severe . . . that [it was] not possible," he would seek shelter in private buildings.

For a two- to three-month period in the winter of 2007, the defendant stayed at the local homeless shelter, called the Construct. Three days before he began staying there, he had gone to that shelter at approximately 3 A.M. following a blizzard. He was refused entry, and he stayed on the porch for about an hour before being asked to leave. A few days later, he spoke with someone from the shelter, and he was allowed to stay for a few months before he was told to leave because of "certain issues." Therefore, the defendant had no other place to stay in Great Barrington. For a period of "three to four years," he lived outdoors, first at Stanley Park and later at the outdoor gazebo behind the Great Barrington Town Hall, where he had been living at the time of the trespass incidents. He considered the gazebo his home and registered to vote from that address.

At the time of the trial, the defendant was a sixty-seven year old unemployed college graduate. He had worked in the past, but he was not employed at the time he was charged with the trespassing offenses. The defendant had attempted to obtain an apartment almost "every week for about seven years." Although he had money to pay for an apartment depending on the day, he explained that it was very difficult to find an apartment in Great Barrington because of the upfront fees. Accordingly, he was unable to obtain an apartment. He was aware of a homeless shelter in Pittsfield, but he did not consider renting lodging or staying at a homeless shelter outside of Great Barrington. He testified, "I was born here and I intend to stay here." He does not have a driver's license.

Discussion

1. Necessity Defense

The defendant claims that the judge erroneously denied his request for a jury instruction on the defense of necessity and that he improperly excluded evidence relevant to the defense. The common-law defense of necessity "exonerates one who commits a crime under the 'pressure of circumstances' if the harm that would have resulted from compliance with the law . . . exceeds the harm actually resulting from the defendant's violation of the law." *Commonwealth v. Kendall*, 883 N.E.2d 269, 272 (Mass. 2008). As such, the necessity defense may excuse unlawful conduct "where the value protected by the law is, as a matter of public policy, eclipsed by a superseding value. . . .” *Kendall, supra*.

For a defendant to be entitled to a necessity defense instruction, he or she must present “some evidence on each of the four underlying conditions of the defense,” *Kendall*: “(1) a clear and imminent danger, not one which is debatable or speculative”; (2) [a reasonable expectation that his or her action] will be effective as the direct cause of abating the danger; (3) there is [no] legal alternative which will be effective in abating the danger; and (4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue.” *Id*. If the defendant satisfies these foundational conditions, “the burden is on the Commonwealth to prove beyond a reasonable doubt the absence of necessity.” *Commonwealth v. Iglesia*, 525 N.E.2d 1332, 1333 (Mass. 1988).

The judge focused only on the third element in his denial of the defendant’s request for a necessity defense instruction at the close of all the evidence. The judge ruled that the defendant had other available legal alternatives, “motels, and hotels, the police station,” and that the evidence was lacking on the defendant’s inability to “rent a hotel room on these isolated evenings.” We conclude that the judge erred in ruling that the defendant failed to meet his burden to provide some evidence that showed the lack of an available legal alternative to the trespasses.

a. Clear and Imminent Danger

Before we address the third element, we review the first element, “clear and imminent danger,” because the Commonwealth contends that the defendant failed to meet the foundational requirement for this element as to the seventh offense, which occurred on June 10, 2014.

There appears to be little question that the weather conditions on the dates of the offenses in February and March presented a “clear and imminent danger” to a homeless person. The temperatures on the dates of the offenses were not admitted at trial, but the weather on the February and March dates was described as “cold,” “really cold,” and “very cold.” Moreover, the timing of each of those incidents, in the early morning or late evening hours when the defendant was either sleeping or lying down, suggests the dangerousness of the circumstances where sleeping may place one in the same position for an extended period and, thus, increases the potential harm from the weather. *See Jones v. Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006) (“involuntary sitting, lying, or sleeping on public sidewalks . . . is an unavoidable consequence of being human and homeless without shelter”). See also *In re Eichorn*, 69 Cal. App. 4th 382, 389 (1998) (“Sleep is a physiological need, not an option for humans”). Moreover, the Commonwealth concedes that the defendant met his burden of demonstrating a “clear and imminent danger” for these six incidents.

We agree with the Commonwealth that the defendant did not meet his burden to show a “clear and imminent danger” for the incident on June 10, where the evidence showed only that he had to use the bathroom. Accordingly, we do not include the incident on June 10 in our analysis requirements of the availability of “legal alternatives” to trespass.

b. Availability of Lawful Alternatives

We have explained previously that satisfaction of the third element requires a defendant to demonstrate that he "ma[d]e himself aware of any available lawful alternatives, 'or show[ed] them to be futile in the circumstances.'" *Kendall*. On that point, the defendant must present "some evidence," enough that "supports at least a reasonable doubt" whether the unlawful conduct was justified by necessity. *Id*. In other words, the defendant must present enough evidence to demonstrate at least a reasonable doubt that there were no effective legal alternatives available before being entitled to an instruction on the necessity defense. This does not require a showing that the defendant has exhausted or shown to be futile all conceivable alternatives, only that a jury could reasonably find that no alternatives were available. *See id*.

Here, the defendant's evidence was sufficient to meet his burden. In determining whether there has been sufficient evidence of the foundational conditions to the necessity defense, "all reasonable inferences should be resolved in favor of the defendant, and, no matter how incredible his testimony, that testimony must be treated as true." *Commonwealth v. Pike*, 701 N.E.2d 951, 955 (Mass. 1998). Taken in this light, there is at least "some evidence" that the defendant lacked effective legal alternatives to trespass during cold days and nights. *Kendall*. The defendant testified that he stayed at an outdoor gazebo "[p]retty much" year round, that in 2007 he was told to leave the only local homeless shelter and had previously been denied entry to the shelter in the middle of the night following a blizzard, that no other places "want [him] in . . . their facility," that he was unable to rent an apartment despite repeated attempts, and that there was nowhere besides public parks where he could stay. Additionally, the officer who asked the defendant to leave the Barrington House at approximately 9:30 P.M. on February 21 testified that the defendant had to go back outside, and the judge sustained an objection to defense counsel's question about whether the officer offered to transport him to any other shelter or facility. The manager of Castle Street corroborated the defendant's attempt to rent an apartment by his testimony that he called police to have the defendant removed from the building after the defendant "forced his way onto the third floor of the building, flashing money in hand, demanding I rent him an apartment."

The Commonwealth argues that the defendant failed to meet his burden because he presented no evidence that he was unable to rent an apartment outside of Great Barrington, that he was unable to gain entry to the Pittsfield shelter, and that he would still be excluded from the local homeless shelter in 2014. The Commonwealth's argument is unavailing. We do not require an actor facing a "clear and imminent danger" to conceptualize all possible alternatives. So long as the defendant's evidence, taken as true, creates a reasonable doubt as to the availability of such lawful alternatives, the defendant satisfies the third element. The defendant has done so here.

Additionally, we note that the options proposed by the Commonwealth do not appear to be effective alternatives on the record before us. Where the only local homeless shelter had previously denied the defendant entry at 3 A.M. following a blizzard and had later told him he had to leave, the law does not require the defendant to continue to seek shelter there in order to demonstrate that doing so is futile.

Our cases do not require a defendant to rebut every alternative that is conceivable; rather, a defendant is required to rebut alternatives that likely would have been considered by a reasonable person in a similar situation.[7] Moreover, we are not prepared to say as a matter of law that a homeless defendant must seek shelter outside of his or her home town in order to demonstrate a lack of lawful alternatives.[8] Our law does not permit punishment of the homeless simply for being homeless. *See Commonwealth v. Canadyan*, 944 N.E.2d 93, 96 (Mass. 2010) (setting aside finding that defendant violated condition of probation where homeless shelters did not have technology required for compliance). Once the foundational requirements are met, the necessity defense allows a jury to consider the plight of a homeless person against any harms caused by a trespass before determining criminal responsibility.[9]

Accordingly, in the circumstances of this case, we conclude that the judge erred in denying the defendant's request for an instruction on the defense of necessity. As the defendant satisfied the foundational elements entitling him to the defense, the judge's failure to instruct the jury about the defendant's principal defense requires a new trial. See *Commonwealth v. Lapage*, 435 Mass. 480, 486, 759 N.E.2d 300 (2001) (ordering new trial after judge erred in omitting instruction on principal defense). We therefore vacate the defendant's convictions of the charges occurring in February, March, and April, 2014.

Conclusion

Because we conclude that the judge erred in denying the defendant's request for a jury instruction on the defense of necessity for the trespassing charges that occurred in February, March, and April, 2014, we vacate those six convictions and remand for a new trial. We affirm the conviction stemming from conduct that occurred on June 10, 2014.

So ordered.

RULES, POLICIES, AND PRACTICES

1. ***Criminal trespass.*** Shack, Tejeras, and Magadini were charged with **criminal trespass**. In New Jersey, that crime is defined by statute.[10] How did the charge of criminal trespass in *Shack* differ from the common law definition of trespass?

2. ***Legal basis for Shack decision.*** Did the court in *Shack* rest its ruling on the U.S. Constitution, a federal statute, a state statute, or the state common law? If the court rested its opinion on only one of these sources of law, what role did the others play in determining the outcome of the case? In *Rivero v. Montgomery County*, a case with facts very similar to those in *Shack*, the district court found that legal aid employees had a first amendment speech right to disseminate information to farm workers residing on a private farm. *See* 259 F. Supp. 3d 334, 345-48 (D. Md. 2017).

3. ***Incomplete defense of necessity.*** As the Massachusetts Supreme Judicial Court observes in *Magadini*, **necessity** is a defense to a trespass claim. If someone takes refuge on your property to escape a flood, as happened in New Orleans during

Hurricane Katrina, there is no trespass. If a trespasser damages the property, the law imposes on the trespasser a duty to compensate the owner for the damage, but does not require the trespasser to pay for the mere privilege of access. *See Restatement (Second) of Torts* §197 (1965). Thus, in *Ploof v. Putnam*, 71 A. 188 (Vt. 1908), a couple and their children moored a small sailboat to the dock of the defendant during a sudden storm that threatened to overturn the boat and placed them in fear of their lives. But the defendant's servant unmoored the boat, which was driven on the shore by the storm, destroying it and casting the occupants into the lake. The court held that necessity justifies a trespass when needed to save lives or property and that defendant committed a tort (a wrongful act) against the plaintiffs by unmooring the boat. In *Vincent v. Lake Erie Transportation Co*., 124 N.W. 221 (Minn. 1910), however, the court held that a steamship moored to a private wharf to avoid a severe storm was required to pay for the damage when the wind thrust the ship onto the wharf. Why do you think the trial court in *Magadini* tried so hard to keep the defendant's necessity defense away from the jury? *See also State v. Spokane County Dist. Ct*., 491 P.3d 119 (Wash. 2021) (holding climate change activist was entitled to have jury decide his necessity defense to charges of trespass for protest on railroad tracks used to transport volatile oil).

4. ***Ad coelum, ad inferos.*** What are the spatial dimensions of the owner's land protected by the law of trespass? Does an airplane flying 30,000 feet above the parcel make an entry (privileged or otherwise)? A satellite orbiting the earth? What about someone tunneling a mine shaft thousands of feet below the surface? For centuries, the common law's short response to the question of the dimensions of an owner's parcel was the maxim that "*cujus est solum ejus est usque ad coelum et ad inferos*" — whoever owns the soil also owns up to the heavens and down to the depths (literally, "down to hell"). Applying this principle, courts have conceived of land ownership as ownership of a column of space (really a cone) extending from the center of the earth up to the sky. Although, on its own terms, the *ad coelum* maxim speaks in terms of ownership rather than exclusion of trespass, courts and commentators alike have sometimes used the maxim to argue that anything that penetrates the column is ostensibly an unprivileged entry onto the owner's land.

The *ad coelum* maxim is usually said to have made its way into the common law through the English jurist Sir Edward Coke in the seventeenth century, who included the principle in his influential *Institutes of the Lawes of England*. 1 Coke, *Institutes*, 19th ed. 1832, ch. 1 §1(4a); *see also* William Blackstone, *Commentaries on the Laws of England* 18 (Univ. of Chicago reprint 1979) (1768). For trespasses near the surface, the doctrine accurately describes how the law defines an entry. *See, e.g., Hannabalson v. Sessions*, 116 Iowa 457 (1902) (thrusting one's arm over a property boundary constitutes an entry); *Puerto v. Chieppa*, 78 Conn. 401 (1905) (a board attached to defendant's building and overhanging plaintiff's land constitutes an entry); *509 Sixth Avenue Corp. v. New York City Transit Authority*, 15 N.Y.2d 48 (1964) (encroachment by subway line 30 feet below surface constitutes an entry).

Far from the surface in either direction, however, the *ad coelum* maxim has come under increasing pressure within trespass law in recent years as a result of activities that Lord Coke (as he is sometimes called) could not possibly have anticipated. Consider aircraft overflights. After a debate during the early years of the aviation age, *see, e.g*., *Swetland v. Curtiss Airports Corp*., 41 F.2d 929 (N.D. Ohio 1930), it is now settled doctrine that airplane overflights that do not interfere with the surface owner's use of the land do not give rise to a cause of action for trespass. *See Hinman v. Pacific Air Transport*, 84 F.2d 755 (9th Cir. 1936) ("This formula 'from the center of the earth to the sky' was invented at some remote time in the past when the use of space above land actual or conceivable was confined to narrow limits, and simply meant that the owner of the land could use the overlying space to such an extent as he was able, and that no one could ever interfere with that use."). Near the surface, courts are more willing to find airplane overflights to violate the rights of owners. *See, e.g., United States v. Causby*, 328 U.S. 256 (1946); *Griggs v. Allegheny Cnty*., 369 U.S. 84 (1962); *Brenner v. New Richmond Reg'l Airport Comm'n*, 816 N.W.2d 291 (Wis. 2012); *see also* Stuart Banner, *Who Owns the Sky?* (2008).

The situation has similarly become more complicated far below the surface. As the law had traditionally operated, entering below someone's land constitutes a (subterranean) trespass. *See, e.g., Lewey v. H.C. Fricke Coke Co*., 166 Pa. 536 (1895). New oil and gas drilling techniques, such as hydraulic fracturing (or "fracking," as it is called for short), have led some to question the reach of the traditional rule. Fracking involves the use of directional drilling to create a well bore through porous rock formations that contain isolated pockets of oil or gas. Fluids under very high pressure are then pumped into the bore hole. This high-pressure fluid creates cracks in the adjoining rock, allowing the pockets of oil and gas to escape to the surface. Those cracks can extend thousands of feet from the bore hole. Along with the fracking fluid, sand or even small beads are also pumped into the bore hole as "proppants" to prop the rock fissures open and prevent the cracks from closing on themselves once the fluid pressure is removed. The direction and length of the cracks that form as a result of the fluid pressure are impossible to control with any precision. As a result, they occasionally cross property boundaries. Applying the traditional *ad coelum* principle, injecting the fracking fluid and proppants into the column of space underlying the surface property of another person (even several miles down) would seem to constitute an entry. *Briggs v. Southwestern Energy Prod. Co*., 224 A.3d 334 (Pa. 2020) (suggesting that physical invasion of fracking fluids and proppants would constitute a trespass). But, as the Texas Supreme Court put it, "the law of trespass need no more be the same two miles below the surface than two miles above." *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 10 (Tex. 2008). As a general matter, law professor John Sprankling says, "when courts directly confront the scope of deep subsurface rights, they usually soften or ignore the [*ad coelum*] approach to the point where the exceptions swallow any supposed rule." John G. Sprankling, *Owning the Center of the Earth*, 55 UCLA L. Rev. 979, 1004 (2008).

Do the examples of airplane overflights and drilling deep underground show that, in the modern world, the *ad coelum* maxim is outmoded? Can we reconcile the results in these cases with continued adherence to the *ad coelum* understanding of the dimensions of an owner's property? In answering the question, it is important to remember that determining whether there has been an entry is just one part of establishing an actionable trespass. If a court were to conclude that either an overflight or a hydraulic fracturing operation constituted a trespass, what remedy should the court impose? How might such a court measure the harm to the property owner?

5. ***The significance of the right to exclude.*** In recent years, a number of leading legal scholars (and some courts) have argued that the right to exclude is not just one of the most important rights but is in fact a defining feature of the very concept of property. Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 (1998); J.E. Penner, *The Idea of Property in Law* 71 (2000) ("[T]he right to property is a right to exclude others from things which is grounded by the interest we have in the use of things."); *see also Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021) (describing "the right to exclude" as one of the most "treasured" and "important" sticks in the owner's "bundle of rights" (quoting *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 434 (1982)).

In a similar vein, some scholars have suggested that the right to exclude — and therefore the law of trespass — is uniquely important for how property operates as a legal institution. Protecting the right to exclude with a relatively simple law of trespass, they argue, creates a broad zone of discretion for owners to choose what to do with their property. This ensures that owners are empowered to put their property to its most productive use. In addition, a clear law of trespass also economizes on "information costs" by sending a relatively simple message to people other than the owner, making it easy for them to navigate through a world of privately owned property without violating the rights of others. *See, e.g*., Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 Yale L.J. 357, 389 (2001). As Thomas Merrill and Henry Smith put it, "messages about everyday property must be very simple — messages such as 'keep off' or 'don't touch' — couched in concepts readily comprehensible to remote people with little special legal or asset-specific information." Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J.L. & Econ. 77, 90 (2011).

Other scholars have criticized the notion that the right to exclude has a privileged place within the concept or operation of property. Professor Larissa Katz, for example, argues that the heart of the concept of property is the owner's authority to determine its use, not the right to exclude. *See* Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. Toronto L.J. 275 (2008). Does the law of airplane overflights support her view? The rules governing aircraft navigation require all airplanes to stay 500 feet above the surface except when landing and to stay at least 500 feet away from any structures. *See* 14 C.F.R. §91.119. Is a landowner who cannot exclude an airplane from flying over her property at 500 feet still an owner of that space in a meaningful sense? Does the rule governing aircraft access prevent an owner from doing anything with her property that she might otherwise be able (or want) to do?

As long as non-owners (like the aircraft pilot navigating over privately owned land) must accommodate their activities to the owner's use decisions (*e.g*., by keeping their distance from whatever buildings an owner happens to put up), defining the right to exclude in terms of the owner's use decisions does not by itself seem to undermine an owner's power to put the property to its most productive use. As for the cost of navigating through a world of owned property, placing too much importance on the law of trespass — particularly far from the surface in either direction — may make navigation more costly. In addition, many owners wish to convey messages other than "keep off!" or "don't touch!" Owners of commercial property often want to say "come in! take a look!" Giving owners too much discretion with respect to the conditions they place on their "come in" messages may drive up information costs for non-owners rather than reducing them. *See* Gregory S. Alexander & Eduardo M. Peñalver, *An Introduction to Property Theory* 138 (2012).

6. ***Drones.*** The growth in popularity and capability of unmanned aircraft systems (colloquially, "drones") has given rise to a host of legal questions, some of which resemble the discussions sparked by the invention of airplanes in the twentieth century. Drones, which range in size and sophistication from small toys to industrial models that approach the size of small airplanes, are often equipped with cameras and usually operate by remote control within line-of-sight of the operator. They are used by hobbyists but also by farmers and natural resource companies to survey land or pipelines. Law enforcement increasingly employs them for surveillance and investigation. Federal Aviation Agency regulations, which cover drones weighing between 0.55 and 55 pounds, limit drones to altitudes below those used by fixed wing aircraft and require operators to have a "Remote pilot certificate" issued by the FAA and to operate no higher than 400 feet above ground level. *See* 14 CFR Pt. 107. Although the regulations preempt conflicting state and local laws, they leave a great deal of latitude for local variation. *See* Henry H. Perritt, Jr., *Law Drones and Drone Laws*, 70 No. 3 Prac. Law 3, 5-6 (2024).

The low altitudes at which drones typically operate, their ability to hover over a fixed location, and their potential (through their use of cameras) to violate the expectations of privacy of the people below them have introduced novel legal questions that the law is still working to resolve. And in the criminal context, drones operated by law enforcement raise questions for search and seizure law. *See* Robert Molko, *The Drones are Coming: Will the Fourth Amendment Stop Their Threat to Our Privacy?*, 78 Brook. L. Rev. 1279 (2013). Among the open questions are the best way to apply the law of trespass to low-flying drones and (because owners have the right to take reasonable steps to exclude trespassers) the power to engage in self-help against overflying drones. In one case, a farmer shot down a drone with a shotgun, leading to a lawsuit by the owner of the drone. *See Boggs v. Merideth*, 2017 WL 1088093 (W.D. Ky. Mar. 21, 2017) (dismissing the claim for lack of federal subject matter jurisdiction). The Uniform Law Commission proposed a Uniform Tort Law Relating to Drones Act to address issues like trespass and self-help, which drew criticism from interested parties, such as the American Bar Association's section on Real Estate Law for (on its view) failing to provide sufficient protection of landowners' air rights. The Uniform Commission effort is currently on hold. *See* Troy A. Rule, *Drones, Airspace and the Sharing Economy*, 84 Ohio St. L.J. 157, 166-67 (2023).

7. ***The right to roam.*** Granting owners a robust right to exclude expands their freedom at the expense of the freedom of those with an interest in accessing their land. At one time in the United States, most unenclosed and undeveloped land was open to the public for the purpose of hunting, gathering kindling and berries, and walking. Eric Freyfogle, *The Lost Right to Roam*, in *On Private Property: Finding Common Ground on the Ownership of Land* 29 (2007); Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 Temp. L. Rev. 665, 675-79 (2011). Today, about half the states still allow hunting on private land unless the owner has posted "no trespassing" signs. Mark R. Sigmon, *Hunting and Posting on Private Land in America*, 54 Duke L.J. 549 (2004). Similarly, owners who wanted to protect their fields from wandering cattle originally had

to fence them out; they had no right to complain that a trespass had occurred when cattle wandered onto their property. Nor could railroads insist that cattle owners prevent them from intruding on train tracks. *See, e.g., Nashville & Chattanooga R.R. Co. v. Peacock*, 25 Ala. 229 (1854); *Macon & Western Railroad Co. v. Lester*, 30 Ga. 911 (1860). Over time, the rules changed to place liability on cattle owners for damage to crops on the neighbors' property and denied cattle owners remedies if their cattle wandered onto railroad tracks, effectively changing to a fencing-in system by which owners had the duty to keep their cattle from invading neighboring property. One careful history suggests that southern states closed the range after Emancipation so that free Black people would be forced to work for plantation owners rather than supporting themselves with free range hogs and cattle. Brian Sawers, *Property Law as Labor Control in the Postbellum South*, 33 Law & Hist. Rev. 351 (2015).

The *right to roam* has long been recognized in Finland, Norway, and Sweden. Known as the *allemansratt* ("everyone's right") in Sweden, it entitles everyone to hike across or camp in the countryside on the property of another as long as they do not damage the land, interfere with the owner's use, or intrude on the privacy of owners and occupants. In 2000, the United Kingdom adopted the *Countryside and Rights of Way Act 2000*, Acts of 2000, ch. 37, guaranteeing public rights of access for recreational purposes (mainly walking) to certain categories of uncultivated countryside in England and Wales. Scotland adopted an even broader right-to-roam law in 2003. *See* John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 Neb. L. Rev. 739 (2011); Jerry L. Anderson, *Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks*, 19 Geo. Intl. Envtl. L. Rev. 375 (2007).

8. ***Investigative journalism.*** In *Desnick v. American Broadcasting Co.*, 44 F.3d 1345 (7th Cir. 1995), seven employees of an investigative news program posed as potential patients of an ophthalmic surgery practice (Desnick) that performed cataract surgery. The program was investigating large cataract practices. Desnick had 25 offices in 4 midwestern states and performed more than 10,000 cataract operations per year. In addition, the show's producer asked Desnick — which did not know about the undercover operation — for permission to film inside a clinic, promising to do a "fair and balanced" report. Desnick gave the crew permission to enter the clinic, and to interview doctors, technicians, and patients. Ultimately, ABC aired a report that was extremely critical of Desnick and suggested that Desnick performed unnecessary surgeries and then billed Medicare for the procedures. Desnick sued ABC, alleging that its employees committed trespass, both in posing as undercover patients and in misrepresenting ABC's intention to present a "fair and balanced" picture of Desnick's practice in order to gain access for their film crew.

In an opinion for the U.S. Court of Appeals for the Seventh Circuit, rejecting Desnick's claim, Judge Richard Posner began by noting that, while entry upon the land of another without consent is trespass, and while consent procured by fraud is not usually valid to defeat a claim of trespass, sometimes it is:

> How to distinguish the two classes of case . . .? The answer can have nothing to do with fraud; there is fraud in all the cases. It has to do with the interest that the torts in question [protect]. . . . There was no invasion in the present case of any of the specific interests that the tort of trespass seeks to protect. The test patients entered offices that were open to anyone expressing a desire for ophthalmic services and videotaped physicians engaged in professional, not personal,

communications with strangers (the testers themselves). The activities of the offices were not disrupted. Nor was there any "inva[sion of] a person's private space," as in our hypothetical meter-reader case, as in the famous case of *De May v. Roberts*, 9 N.W. 146 (Mich. 1881) (where a doctor, called to the plaintiff's home to deliver her baby, brought along with him a friend who was curious to see a birth but was not a medical doctor, and represented the friend to be his medical assistant), as in *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), on which the plaintiffs in our case rely. *Dietemann* involved a home. True, the portion invaded was an office, where the plaintiff performed quack healing of nonexistent ailments. The parallel to this case is plain enough, but there is a difference. Dietemann was not in business, and did not advertise his services or charge for them. His quackery was private.

No embarrassingly intimate details of anybody's life were publicized in the present case. There was no eavesdropping on a private conversation; the testers recorded their own conversations with the Desnick Eye Center's physicians. There was no violation of the doctor-patient privilege. There was no theft, or intent to steal, trade secrets; no disruption of decorum, of peace and quiet; no noisy or distracting demonstrations. Had the testers been undercover FBI agents, there would have been no violation of the Fourth Amendment, because there would have been no invasion of a legally protected interest in property or privacy. *United States v. White*, 401 U.S. 745 (1971); *Northside Realty Associates, Inc. v. United States*, 605 F.2d 1348, 1355 (5th Cir. 1979). "Testers" who pose as prospective home buyers in order to gather evidence of housing discrimination are not trespassers even if they are private persons not acting under color of law. The situation of the defendants' "testers" is analogous. Like testers seeking evidence of violation of antidiscrimination laws, the defendants' test patients gained entry into the plaintiffs' premises by misrepresenting their purposes (more precisely by a misleading omission to disclose those purposes). But the entry was not invasive in the sense of infringing the kind of interest of the plaintiffs that the law of trespass protects; it was not an interference with the ownership or possession of land.

Desnick, 44 F.3d at 1352-53. *Accord, American Transmission, Inc. v. Channel 7 of Detroit, Inc.*, 609 N.W.2d 607 (Mich. Ct. App. 2000). *But see Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (finding a trespass due to undercover reporters' filming of business activities at a supermarket but awarding only nominal damages); *Restatement (Second) of Torts* §892B(2) (1965) ("[I]f the person consenting to the conduct of another . . . is induced [to consent] by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm"); *cf.* Roseanna Sommers, *Commonsense Consent*, 129 Yale L.J. 2232 (2020) (discussing experimental data suggesting that most people perceive consent procured by fraud as valid consent).[11]

9. ***Trespass to chattels.*** Trespass is usually a doctrine that concerns intrusions to land. A version of the doctrine, called **trespass to chattels**, applies to personal property. The tort of trespass to chattels allows owners of personal property to recover damages for intentional interferences with the possession of personal property. The owner is entitled to injunctive relief stopping any such interference with the chattel. Mere touching of an object is usually not sufficient to constitute trespass to chattels; the plaintiff must either allege some injury to the property or show either dispossession or intentional "using or intermeddling" with it. *Restatement* (*Second*) *of Torts* §218 (1965).

In the case of computer systems, the "touching" of the chattel can be done electronically, but it must result in some actual harm to the owner's use or enjoyment of the property. *See Kinslow v. State*, 860 S.E.2d 444 (Ga. 2021) (reversing conviction for computer trespass against employee who altered network settings to copy his boss's email and forward it to his own email account because no data was blocked or impeded); *Intel Corp. v. Hamidi*, 71 P.3d 296 (Cal. 2003); *eBay, Inc. v. Bidder's Edge, Inc*., 100 F. Supp. 2d 1058, 1071 (N.D. Cal. 2000) (finding trespass when defendant's auction aggregation site sent up to 100,000 information requests per day to eBay by "diminish[ing] the quality or value of eBay's computer systems [by consuming] at least a portion of [eBay's] bandwidth and server capacity"). In *In re Apple, Inc. Device Performance Litigation*, 347 F. Supp. 3d 434 (N.D. Cal. 2018), the district court found that a class of Apple iPhone owners stated a valid claim for trespass to chattels (sufficient to defeat a motion to dismiss) when they alleged that Apple had installed software updates onto their devices with the intention of causing the phones to slow down in order to conceal a design defect that was harming battery life. Although the users had consented to the software updates in question, the plaintiffs alleged that Apple exceeded the scope of that consent, having obtained it by misrepresenting its purpose as "bug fixes and improvements." As a result, plaintiffs argued, users only consented to software updates that would improve, not diminish, the performance of their devices. The court agreed that, if these allegations were true, installing software that impaired the performance of their phones by slowing them down was without the users' valid consent and would constitute a trespass to chattels. Can you distinguish the decision in this case from the court's discussion of the scope of consent in *Desnick*, discussed above in note 8?

10. ***Trespass and government searches.*** The fourth amendment of the United States Constitution says that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." But what is a search? After the U.S. Supreme Court's landmark decision in *Katz v. United States*, 389 U.S. 347 (1967), whether a particular government action would be deemed a "search" depended on whether the defendant had a "reasonable expectation of privacy" that was violated by the government's activity. The results did not necessarily track the law of trespass. For example, applying this approach, the courts traditionally held that the fourth amendment regulated police conduct around the immediate vicinity of the home (the so-called curtilage), but not the "open fields" beyond that area. *See, e.g*., David A. Dana & Nadav Shoked, *Property's Edges*, 60 B.C. L. Rev. 753, 778-79 (2019).

In *United States v. Jones*, 565 U.S. 400 (2012), however, the Court seemed to change gears, turning toward the law of trespass for an alternative definition of searches. The case involved a defendant who had been convicted of possessing several kilograms of cocaine. Part of the evidence used against the defendant came from a small GPS tracking device that federal agents attached to the underside of the defendant's wife's car. At trial, data from the GPS device was used to link the defendant to the location of a drug stash house. Instead of looking into the defendant's expectations of privacy (with regard to either the exterior of the vehicle or his presence on public streets), the Supreme Court asked whether the government's behavior constituted a trespass (to chattels). "The text of the Fourth Amendment," Justice Scalia wrote for the Court, "reflects its close connection to property. . . ." *Id*. at 405. Although the Court conceded its more recent cases had "deviated from that exclusively property-based approach, . . . for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers and effects') it enumerates." *Id*. Because, in *Jones*, "[t]he Government physically occupied private property," its actions constituted a trespass on an enumerated category of property, and because it did so to obtain information, its actions amounted to a search within the meaning of the fourth amendment. As Justice Alito noted in his concurring opinion in *Jones*, however, most courts would require some damage to the chattel in order to find a trespass. "Attaching to the bottom of a car a small, light object that does not interfere in any way with the car's operation . . . is generally regarded as so trivial that it does not provide a basis for recovery under modern [trespass] law." *Id*. at 425 (Alito, J., concurring in the judgment). Do you agree with Justice Alito that attaching a GPS device to a car does not harm the owner's interest in use or possession of the vehicle? Or do you think a car owner would be able to obtain an injunction to remove a GPS tracker installed on her car by a private party against her wishes, even if the tracker did not physically damage the car or interfere with its operation?

In *Florida v. Jardines*, 569 U.S. 1 (2013), the Court considered a challenge to a "search" in which police officers (acting on an anonymous tip and without a warrant) brought a drug-sniffing dog onto the front porch of the defendant's home. In finding a search, the Court acknowledged that an invitation to approach the front door "may be implied from the habits of the country." *Id*. at 8. Notwithstanding this implicit license, the Court ruled out the notion that the police were acting under such a license to approach the defendant's front door, since there is no implicit, customary invitation to bring a drug dog onto the front porch to sniff for contraband. Applying this logic, could a police officer approach the front door, knock, and ask the defendant a few questions without first obtaining a warrant? Could the police meander on their way to the front door, looking through garage windows for incriminating evidence? *See, e.g., Bovat v. Vermont*, 141 S. Ct. 22, 23-24 (2020) (memorandum dissenting from denial of certiorari on these facts). If the law of trespass defines (in part) the scope of fourth amendment protection, to whose law should courts look in order to determine whether some government action constitutes a trespass (and therefore a fourth amendment search)? The law of the jurisdiction where the putative search occurs? The law of the jurisdiction in which the criminal charges are brought? Some federal "constitutional common law" standard of trespass? What if different jurisdictions reach different conclusions about whether a particular sort of activity constitutes a common law trespass or instead falls within an implicit license?

LAWYERING EXERCISES

1. Was *Desnick* decided correctly?

a. ***Consent.*** Should fraudulently obtained consent be a defense to a trespass claim, as *Desnick* held, or should such consent be ineffective as a defense to a trespass claim, as the *Apple* court held? Was the Seventh Circuit in *Desnick* correct to find no trespass, or was the district court in the *Apple* case correct to find a trespass when the software update exceeded the scope of the users' consent by misrepresenting its purpose? Can both cases be correct?

b. ***Public policy.*** Should trespasses by investigative journalists be privileged because they further a strong public policy of protecting consumers from harmful products and services?

c. ***Punitive damages.*** If a trespass can be shown either because entry is obtained by fraud or because secret videotaping exceeds the scope of the permission to enter, should punitive damages be available for trespass to deter investigative journalists from entering property on false pretenses and thus obtaining embarrassing information they can broadcast to the world? Punitive damages are generally to punish and deter "outrageous" or "egregious" conduct, including conduct that displays a willful or reckless disregard of the rights of others. *JCB, Inc. v. Union Planters Bank, NA*, 539 F.3d 862, 872-877 (8th Cir. 2008). Does intentional trespass rise to that level? Did the conduct in *Desnick* rise to that level? If the actual damages are only $1, is a $100,000 punitive award excessive in relation to the harm?

2. Imagine that you are a juror in a case with facts very similar to *Magadini*. Would you conclude that the defendant's presence on private property was justified by necessity on a very cold night if the property in question were:

a. the heated vestibule of a shopping mall after closing time? during business hours?

b. an empty, foreclosed home that the defendant had broken into?

c. the detached garage of an occupied, private home?

§1.2 Limits on the Right to Exclude from Property Open to the Public

Uston v. Resorts International Hotel, Inc.

445 A.2d 370 (N.J. 1982)

Map: 1133 Boardwalk, Atlantic City, New Jersey

Morris Pashman, J.

Since January 30, 1979, appellant Resorts International Hotel, Inc. (Resorts) has excluded respondent, Kenneth Uston, from the blackjack tables in its casino because Uston's strategy increases his chances of winning money. Uston concedes that his strategy of card counting can tilt the odds in his favor under the current blackjack rules promulgated by the Casino Control Commission (Commission). However, Uston contends that Resorts has no common law or statutory right to exclude him because of his strategy for playing blackjack.

Kenneth Uston is a renowned teacher and practitioner of a complex strategy for playing blackjack known as card counting. Card counters keep track of the playing cards as they are dealt and adjust their betting patterns when the odds are in their favor. When used over a period of time, this method allegedly ensures a profitable encounter with the casino.

"[T]he statutory and administrative controls over casino operations established by the [Casino Control] Act are extraordinarily pervasive and intensive." *Knight v. Margate*, 86 *N.J.* 374, 380-81, 431 A.2d 833 (1981). The almost 200 separate statutory provisions "cover virtually every facet of casino gambling and its potential impact upon the public." *Id.* at 381, 431 A.2d 833. These provisions include a preemption clause, stating that the act prevails over "any other provision of law" in conflict or inconsistent with its provisions. *N.J.S.A.* 5:12-133(b). Moreover, the act declares as public policy of this State "that the institution of licensed casino establishments in New Jersey be strictly regulated and controlled." *N.J.S.A.* 5:12-1(13).

At the heart of the Casino Control Act are its provisions for the regulation of licensed casino games. *N.J.S.A.* 5:12-100 provides:

> e. All gaming shall be conducted according to rules promulgated by the commission. All wagers and pay-offs of winning wagers at table games shall be made according to rules promulgated by the commission, which shall establish such minimum wagers and other limitations as may be necessary to assure the vitality of casino operations and fair odds to and maximum participation by casino patrons.

The ability of casino operators to determine how the games will be played would undermine this control and subvert the important policy of ensuring the "credibility and integrity of the regulatory process and of casino operations." *N.J.S.A.* 5:12-1(b). The Commission has promulgated the blackjack rules that give Uston a comparative advantage, and it has sole authority to change those rules. There is no indication that Uston has violated any Commission rule on the playing of blackjack. *N.J.A.C.* 19:47-2.1 to -2.13. Put simply, Uston's gaming is "conducted according to rules promulgated by the Commission." *N.J.S.A.* 5:12-100(e).

The right of an amusement place owner to exclude unwanted patrons and the patron's competing right of reasonable access both have deep roots in the common law. In this century, however, courts have disregarded the right of reasonable access in the common law of some jurisdictions at the time the *Civil War Amendments* and *Civil Rights Act of 1866* were passed.

As Justice Goldberg noted in his concurrence in *Bell v. Maryland*, 378 U.S. 226 (1964):

> Underlying the congressional discussions and at the heart of the Fourteenth Amendment's guarantee of equal protection, was the assumption that the State by statute or by "the good old common law" was obligated to guarantee all citizens access to places of public accommodation. [378 U.S. at 296, Goldberg, J., concurring.]

See, e.g., Ferguson v. Gies, 46 N.W. 718 (Mich. 1890) (after passage of the Fourteenth Amendment, both the civil rights statutes and the common law provided grounds for a non-white plaintiff to recover damages from a restaurant owner's refusal to serve him, because the common law as it existed before passage of the civil rights laws "gave to the white man a remedy against any unjust discrimination to the citizen in all public places"); *Donnell v. State*, 48 Miss. 661 (1873) (state's common law includes a right of reasonable access to all public places).

The current majority American rule has for many years disregarded the right of reasonable access,[12] granting to proprietors of amusement places an absolute right arbitrarily to eject or exclude any person consistent with state and federal civil rights laws.

At one time, an absolute right of exclusion prevailed in this state, though more for reasons of deference to the noted English precedent of *Wood v. Leadbitter*, 153 Eng. Rep. 351 (Ex. 1845), than for reasons of policy. In *Shubert v. Nixon Amusement Co.*, 83 A. 369 (N.J. Sup. Ct. 1912), the former Supreme Court dismissed a suit for damages resulting from plaintiff's ejection from defendants' theater. Noting that plaintiff made no allegation of exclusion on the basis of race, color or previous condition of servitude, the Court concluded:

> In view of the substantially uniform approval of, and reliance on, the decision in *Wood v. Leadbitter* in our state adjudications, it must fairly be considered to be adopted as part of our jurisprudence, and whatever views may be entertained as to the natural justice or injustice of ejecting a theater patron without reason after he has paid for his ticket and taken his seat, we feel constrained to follow that decision as the settled law. 83 A. at 371.

It hardly bears mention that our common law has evolved in the intervening 70 years. In fact, *Leadbitter* itself was disapproved three years after the *Shubert* decision by *Hurst v. Picture Theatres Limited*, 1 K.B. 1 (1914). Of far greater importance, the decisions of this Court have recognized that "the more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property." *State v. Schmid*, 423 A.2d 615, 629 (N.J. 1980).

State v. Schmid involved the constitutional right to distribute literature on a private university campus. The Court's approach in that case balanced individual rights against property rights. It is therefore analogous to a description of the common law right of exclusion. Balancing the university's interest in controlling its property against plaintiff's interest in access to that property to express his views, the Court clearly refused to protect unreasonable exclusions. Justice Handler noted that

> Regulations . . . devoid of reasonable standards designed to protect both the legitimate interests of the University as an institution of higher education and the individual exercise of expressional freedom cannot constitutionally be invoked to prohibit the otherwise noninjurious and reasonable exercise of [First Amendment] freedoms. *Id*. at 632.

Schmid recognizes implicitly that when property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably. On the contrary, they have a duty not to act in an arbitrary or discriminatory manner toward persons who come on their premises. That duty applies not only to common carriers, innkeepers, owners of gasoline service stations, or to private hospitals, but to all property owners who open their premises to the public. Property owners have no legitimate interest in unreasonably excluding particular members of the public when they open their premises for public use.

No party in this appeal questions the right of property owners to exclude from their premises those whose actions "disrupt the regular and essential operations of the [premises]," or threaten the security of the premises and its occupants. In some circumstances, proprietors have a duty to remove disorderly or otherwise dangerous persons from the premises. These common law principles enable the casino to bar from its entire facility, for instance, the disorderly, the intoxicated, and the repetitive petty offender.

Whether a decision to exclude is reasonable must be determined from the facts of each case. Respondent Uston does not threaten the security of any casino occupant. Nor has he disrupted the functioning of any casino operations. Absent a valid contrary rule by the Commission, Uston possesses the usual right of reasonable access to Resorts International's blackjack tables.

RULES, POLICIES, AND PRACTICES

1. ***Historical background.*** *Uston* is an outlier. Virtually all other modern courts have come out the other way, affirming the right of owners to exclude others from their commercial property for any reason not specifically prohibited by, for example, civil rights laws. The leading case affirming the majority rule is *Madden v. Queens County Jockey Club, Inc*., 72 N.E.2d 697 (N.Y. 1947). In that case, the defendant barred the plaintiff "Coley" Madden from attending races at its racetrack on the mistaken belief that he was "Owney" Madden, a well-known bookmaker. Plaintiff sued the racetrack, claiming that he had a right "as a citizen and a taxpayer — upon paying the required admission price — to enter the race course and patronize the pari-mutuel betting there conducted." *Id*. at 698. The court concluded that places of amusement and resort enjoyed "an absolute power to serve whom they pleased." *Id*. Although New York's *Civil Rights Law* prohibited discrimination on account of race, creed, color, or national origin, because Coley Madden was not excluded for any of these reasons he had no right of access, and the defendant did not need to explain why it excluded him. Accord, *Slade v. Caesars Entertainment Corp*., 373 P.2d 74 (Nev. 2016).

This was not always the rule. Before the Civil War, it was well established that certain business owners had a duty to serve anyone who sought their services and was able to pay. The reach of this duty is a matter of some confusion. Blackstone noted in 1765 that "if an inn-keeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler." 3 William Blackstone, *Commentaries on the Laws of England* 164 (Univ. of Chicago reprint 1979) (1768). For centuries, this duty applied to "anyone who held himself out [as open to the public] to serve all who might apply," and any such business was liable if, having so held itself out as open to the public, it refused to serve any member of the public who applied. *See* Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 Colum. L. Rev. 514, 515-16 (1911); *see also* Norman F. Arterburn, *The Origin and First Test of Public Callings*, 75 U. Pa. L. Rev. 411, 421 (1927) (describing fourteenth-century laws, enacted in the wake of the Black Death, requiring all to work who were able, at a reasonable rate, and that none could refuse to practice his calling to whomever applied). The duty to serve extended beyond the modern categories of common carriers and innkeepers and encompassed other businesses as well. *See* Burdick, *supra*, at 514-16, 522 (describing farriers, tailors, and even surgeons as potentially "common" in the relevant sense of being subject to a duty to serve the general public). Early U.S. cases affirmed the obligation on public accommodations to serve the public. *Adams v. Freeman*, 12 Johns. 408 (N.Y. Sup. Ct. 1815). The usual justification for this obligation was the assumption underlying the traditional law of "common callings" that an owner assumes certain duties when he holds himself out as open to the public. *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1315-16 (1996).

The limitation of the duty to serve to the categories of innkeepers and common carriers is a later development. The first case to clearly assert that places of entertainment holding themselves out as open to the general public had no common law duty to serve the public was decided in 1858 in Massachusetts. The court held that the Howard Athenæum, a well-known lecture hall near the State House, had the power to exclude African Americans. *McCrea v. Marsh*, 78 Mass. 211 (1858). The apparent connection between the (relatively recent) narrowing of the duty to serve and the motive to exclude free African Americans led the New Jersey Supreme Court to comment in a footnote in *Uston* that the "the current majority rule may have less than dignified origins." 445 A.2d at 374. After the Civil War, most southern states adopted public accommodations laws prohibiting exclusion on the basis of race, but those laws were repealed when Reconstruction ended. The repeals began a long period of racial segregation in many states that ended only with passage of the federal public accommodations law in 1964. *See below* §2.1.

2. ***Impact of the access/exclusion choice.*** Professor Patricia J. Williams wrote about an incident in which she was denied entry to a clothing store in New York City. *See* Patricia J. Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. Miami L. Rev. 127 (1987). The store was locked and equipped with a buzzer allowing the clerk inside to determine whether to allow customers into the store. Williams writes, "Two Saturdays before Christmas, I saw a sweater that I wanted to purchase for my mother. I pressed my brown face to the store window and my finger to the buzzer, seeking admittance." The clerk looked at her and mouthed "We're closed," even though it was one o'clock in the afternoon and several white customers were in the store. She continues,

> I was enraged. At that moment I literally wanted to break all of the windows in the store and *take* lots of sweaters for my mother. In the flicker of his judgmental grey eyes, that sales child had reduced my brightly sentimental, joy-to-the-world, pre-Christmas spree to a shambles. He had snuffed my sense of humanitarian catholicity, and there was nothing I could do to snuff his, without simply making a spectacle of myself.
>
> I am still struck by the structure of power that drove me into such a blizzard of rage. There was almost nothing I could do, short of physically intruding upon him, that would humiliate him the way he humiliated me. No words, no gestures, no prejudices of my own would make a bit of difference to him. His refusal to let me into the store was an outward manifestation of his never having let someone like me into the realm of his reality. He had no connection, no compassion, no remorse, no reference to me, and no desire to acknowledge me even at the estranged level of arm's length transactor. He saw me only as one who would take his money and therefore could not conceive that I was there to give him money.
>
> The violence of my desire to have burst into that store is probably quite apparent to the reader. I wonder if the violence and the exclusionary hatred are equally apparent in the repeated

> public urging that blacks put themselves in the shoes of white store owners, and that, in effect, blacks look into the mirror of frightened white faces to the reality of their undesirability; and that then blacks would "just as surely conclude that [they] would not let [themselves] in under similar circumstances."

Id. at 129. In *Brooks v. Chicago Downs Association, Inc*., 791 F.2d 512, 517, 518-19 (7th Cir. 1986), a case written around the same time as Professor Williams's experience at the clothing store, the Seventh Circuit Court of Appeals argued that market incentives mean that business owners are unlikely to overuse their right to exclude:

> [P]roprietors of amusement facilities, whose very survival depends on bringing the public into their place of amusement, are reasonable people who usually do not exclude their customers unless they have a reason to do so. What the proprietor of a race track does not want to have to do is *prove* or *explain* that his reason for exclusion is a *just* reason. He doesn't want to be liable to [an excluded patron] solely because he mistakenly believed he was a mobster. The proprietor wants to be able to keep someone off his private property even if they only *look like* a mobster. As long as the proprietor is not excluding the mobster look-alike because of his national origin (or because of race, color, creed, or sex), then the common law, and the law of Illinois, allows him to do just that.
>
> [I]t is arguably unfair to allow a place of amusement to exclude for any reason or no reason, and to be free of accountability, except in cases of obvious discrimination. In this case, the general public is not only invited but, through advertising, is encouraged to come to the race track and wager on the races' outcome. But the common law allows the race track to exclude patrons, no matter if they come from near or far, or in reasonable reliance on representations of accessibility. We may ultimately believe that market forces would preclude any outrageous excesses — such as excluding anyone who has blond hair, or (like the plaintiffs) who is from Pennsylvania, or (even more outrageous) who has $250,000 to spend in one day of betting. But the premise of the consumer protection laws [is] that the reality of an imperfect market allows numerous consumer depredations. Excluding a patron simply because he is named Adam Smith arguably offends the very precepts of equality and fair dealing expressed in everything from the antitrust statutes to the Illinois Consumer Fraud and Deceptive Business Practices Act.
>
> But the market here is not so demonstrably imperfect that there is a monopoly or any allegation of consumer fraud. Consequently, there is no such explicit legislative directive in the context of patrons attending horse races in Illinois — so the common law rule, relic though it may be[13] still controls.

What criteria would a proprietor seeking to exclude "mobsters" employ when deciding whether a potential customer "look[s] like a mobster" (to use the Seventh Circuit's example in *Brooks*)? If the proprietor relies on stereotypes rooted in national origin (*e.g*., the customer "looks Italian"), what effect (if any) does recognizing a right to exclude without offering reasons have on the ability of the customer to prove that he was the victim of unlawful discrimination?

Why did the owner of the clothing store exclude Professor Williams? Black customers report that retail establishments frequently offer them inferior service or engage in discriminatory surveillance. *See* Shaun L. Gabbidon & George E. Higgins, *Shopping While Black: Consumer Racial Profiling in America* 63 (2020) ("A startling 75% of Black males believe they have been victims of consumer racial profiling" with close watching and following among the most commonly reported behaviors). Although reliable data about shoplifting is hard to come by, one leading study concluded that "Black and Hispanic shoppers were not more likely to steal than Whites" and that "behavioral cues are much stronger indicators to identify potential shoplifters than demographic characteristics." *Id*. at 10. Can the Seventh Circuit's argument make sense of the observed behavior of retail establishments? Can the law help to change that behavior?

3. ***Rules versus standards.*** Scholars have long observed that property doctrine sometimes allocates property rights through rigid rules and sometimes through flexible standards. *See, e.g.*, Carol Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577 (1988). Trespass law in most jurisdictions operates as a rigid rule — owners have virtually absolute discretion to exclude from privately owned property for any reason not specifically prohibited by law. In New Jersey, on the other hand, trespass operates more like a standard, at least for commercial properties — owners who voluntarily open up their land to the public for the operation of a business open to all comers may only exclude on grounds that are commercially reasonable.

Rigid rules carry two advantages. First, they clarify who has the power to control a particular resource, thus quickly settling disputes. Second, they promote transactions by identifying who owns a particular set of rights in land, thereby clarifying who has the power to sell it. Without such clear rules, negotiations may be more drawn out and costly; the parties may spend time fighting about who really owns the entitlements about which they are supposed to be bargaining.

To legislatures and courts, rigid rules often look good at the planning stage. When an actual dispute arises, however, rigid rules often bring unanticipated, and substantial, injustice. Time and again, confronted with an actual conflict in which the application of the rigid rule seems unfair, courts have shown themselves to be unwilling to mechanically apply the rule. These courts often adjust relationships in ways that more closely approach the judges' intuitions about the just results in particular cases. They often do so by introducing standards, such as reasonableness, that increase flexibility.

Some scholars argue that the law of property cycles back and forth between rules and standards as judges and (especially) legislatures periodically try to clarify the law, which judges then muddy up with standards and exceptions. *See* Rose, *supra*. Others see in the modern law of property a steady shift from rules to standards as society becomes more complex and property rights more frequently butt up against each other. *See* Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. Davis L. Rev. 1375 (2013). Is it possible to generalize about when rules (or standards) are likely to be appropriate? *See, e.g.*, Felix Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357 (1954) (suggesting that clear rules are likely to arise in property law when numerous normative considerations line up in favor of a particular outcome).

LAWYERING EXERCISES

1. ***Homeless persons.*** A large department store located in downtown Boston has become a hangout for homeless persons during winter months when it is freezing outside. The store begins excluding any person who appears to be homeless. Massachusetts has the majority rule that imposes a duty to serve the public on innkeepers and common carriers but not on retail stores. Should Massachusetts adopt the New Jersey rule? What are the arguments on both sides? If Massachusetts does adopt the New Jersey rule, would exclusion of homeless persons be reasonable? What factors would go into such a determination?

2. ***Teenagers.*** A suburban mall has turned into a hangout for teenagers, some of whom block the entrance to shops and act in a manner the customers consider obnoxious. The mall manager institutes an anti-loitering policy, asking teenagers to leave if they are not in the mall to shop. Should the mall owner have the right to exclude the teenagers?

3. ***Racially discriminatory surveillance.*** A retail clothing store routinely has its employees follow Black customers around the store. One such customer is stopped and loudly accused of stealing the shirt he is wearing. He had purchased the shirt in the store several days earlier and, by some miracle, even has the receipt in his pocket to prove it. He sues the store, claiming that he was subjected to discriminatory surveillance because of his race and that the store's practice of giving greater scrutiny to Black customers than to other customers denies his right of reasonable access to a place of public accommodation. The store defends the claim by noting that it is not a public accommodation because it is neither a common carrier nor an innkeeper, and that even if it is a common carrier, it did not deny him reasonable access to the store.[14] Are retail stores places of public accommodation with the duty to serve the public? If they are subject to this duty, is racially discriminatory surveillance a violation of the right of reasonable access under the common law of property?

§1.3 Trespass Remedies

Injunctions are available to remedy a trespass where the trespass is continuous in nature. *See, e.g., Cowles v. Shaw*, 2 Clarke 496 (Iowa 1856). A trespass is continuing where someone is personally present on the land of another or where they leave some object (such as a structure) on the land. Sometimes, courts will grant injunctions for trespasses that, while not strictly continuous, are so repetitious that it would put an unfair burden on the landowner to require her to bring repeated lawsuits. In one case, for example, a court found that owners whose home was repeatedly struck by golf balls from a neighboring golf course were being subjected to a continuous trespass. *See Amaral v. Cuppels*, 831 N.E.2d 915, 921 (Mass. App. Ct. 2005); *see also Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W.2d 637, 639-640 (Iowa 1991) (repeated acts of trespass as part of protest campaign); *Theros v. Phillips*, 256 N.W.2d 852 (Minn. 1977) (repeated parking by customers of defendant's restaurant). The law occasionally departs from the presumption in favor of injunctive relief, even for continuing trespasses. *See* Chapter 4, §4.1§. What if the trespass alters the land in some way? How should the law make the injured landowner whole? What happens when a trespass does not alter the land, is a one-off event, and is not likely to be repeated? Is the owner without a remedy? Consider the following cases.

Glavin v. Eckman

881 N.E.2d 820 (Mass. App. Ct. 2008)

Map: Aquinnah, Martha's Vineyard, Massachusetts

JOSEPH GRASSO, J.

Looking to enhance their view of the ocean, Bruce and Shelly Eckman hired Jon R. Fragosa and his landscaping company, Three Trees, Ltd. (Fragosa), to top and remove the trees that stood in the way. Fragosa improved the Eckmans' view by cutting down ten large, mature oak trees standing on the property of a neighbor, James A. Glavin, without Glavin's permission.

After trial on Glavin's claim against the Eckmans and Fragosa for the wrongful cutting of his trees, see Mass. Gen. Laws ch. 242, §7,[15] a jury rendered a special verdict in favor of Glavin. The jury found that (1) Fragosa wilfully cut trees on Glavin's land; (2) Fragosa did not have good reason to believe that he was lawfully authorized to cut the trees on Glavin's land; (3) the Eckmans wilfully cut trees on Glavin's land by directing Fragosa to do so; and (4) the Eckmans did not have good reason to believe that they were lawfully authorized to cut the trees on Glavin's land. The jury assessed $30,000 in damages as "the reasonable cost of restoring the property as nearly as reasonably possible to its original condition." The judge trebled those damages as required by the statute.

On appeal, the issues before us are whether . . . the restoration cost is an appropriate measure of damages [and whether] trebling of the restoration cost damages renders such damages unreasonable. Separately, we consider the Eckmans' contention that they cannot be held liable for the acts of Fragosa, an independent contractor. We affirm.

1. ***Facts.*** From the evidence at trial, the jury could have found the following. Glavin, the Eckmans, and a third individual, named Bea Gentry, own four roughly parallel rectangular parcels of land in the Aquinnah section of Martha's Vineyard, a place of natural beauty. Glavin owns the two westernmost lots. The Eckmans own the most easterly lot. Between the Glavin and Eckman lots is the lot owned by Gentry. By virtue of its greater elevation, the Eckmans' lot has a southwest view to the ocean across the adjacent lots.

Glavin lives with his wife and children in a house that he built on the westernmost lot in 1985. In 1990, he bought the adjoining 1.7-acre lot directly to the east of his house lot. A significant feature of the adjoining lot was a wetland about one-half acre in size that rose to a knoll containing a stand of ten large oak trees that were ideally situated to provide shade and serve as a backdrop to a pond that Glavin planned to restore at the edge of the wetland. A general contractor of considerable experience, Glavin had previously converted wetlands into ponds at least a half dozen times.

When building their vacation home in 1996, the Eckmans asked Glavin for permission to cut the stand of trees on Glavin's property to enhance their view of the ocean. Glavin refused their request, indicating that he had personal reasons for not cutting the trees. Subsequently, in 2001, the Eckmans hired Fragosa to trim or cut down the trees that blocked their view of the ocean. They directed Fragosa to clear as much as possible to enhance their water view, a job that Fragosa characterized as opening the view "to the max." When discussing the job, the Eckmans and Fragosa did not walk the Eckmans' property, but stood on the Eckmans' back deck overlooking the area to be trimmed.

It was readily apparent that most of the trees the Eckmans wanted removed were not on their property. When setting about the job, Fragosa inquired of Gentry, who granted him permission to cut and trim trees on her lot. Although Fragosa obtained Gentry's permission, he did not ascertain the boundaries of her property relative to the Eckman or Glavin properties, nor did he seek permission from Glavin or any other property owners in the area.

In cutting down the trees necessary to open the Eckmans' view, Fragosa strayed fifty to one hundred feet across the unmarked boundary between the Gentry and Glavin lots and cut the stand of mature oaks on Glavin's lot. The trees that Fragosa cut ranged from eleven to thirty inches in diameter at the stumps.

2. ***The Eckmans' liability.*** Fragosa does not contest the jury's findings of liability against him. The Eckmans, however, contend that Fragosa was an independent contractor for whose acts they cannot be held liable absent a finding that they directed him to cut down the trees. They maintain that the evidence was insufficient for the jury to conclude that they so directed Fragosa.

We disagree. The jury could permissibly conclude that the Eckmans, not Fragosa, defined the scope of the work to be performed by virtue of their retaining Fragosa to cut trees so as to maximize their view to the ocean. While Fragosa retained control over the manner in which the trees would be cut — whether by ax, hand saw, chain saw or other method — the Eckmans retained the ultimate control over the scope of Fragosa's work, cutting those trees that impeded the Eckmans' view. Photographs taken from the Eckmans' deck after the cutting and admitted in evidence show a distinct gap in the treetops that Glavin identified as the area where his trees had stood prior to being cut by Fragosa. The jury were free to disbelieve the Eckmans' and Fragosa's testimony that no direction was given to cut those particular trees. Indeed, in light of the strong evidence that Glavin's trees were the chief impediment to the Eckmans' view, and the undisputed evidence that the Eckmans had previously requested and been denied permission from Glavin to remove the trees that impeded their view, the jury could permissibly infer that the Eckmans had directed Fragosa, explicitly or implicitly, to cut down those particular trees regardless of whether the trees stood on Glavin's land or elsewhere. The jury could also permissibly conclude that having been denied permission from Glavin, the Eckmans decided to resort to self-help and enlisted Fragosa as a dupe or a willing accomplice.

3. ***Restoration costs as a measure of damages.*** The defendants maintain that the judge erred in permitting the jury to award a restoration cost measure of damages, rather than damages measured by the value of the timber wrongfully cut, or by the diminution in market value of the property as a result of the cutting. We disagree.

General Laws ch. 242, §7, specifies that one who wilfully and without license cuts the trees of another shall be liable in tort "for three times the amount of the damages assessed therefor." "The statute does not prescribe how the damages shall be measured." *Larabee v. Potvin Lumber Co.*, 459 N.E.2d 93, 98 (Mass. 1983). While the most common measures of damages are (1) the value of timber wrongfully cut, or (2) the diminution in value of the property as a result of the cutting, we discern no limitation in the statute to these measures of damages. Indeed, to limit damages to these measures would encourage, rather than deter, wrongdoers from engaging in self-help in circumstances such as when an ocean or other view is desired. The timber wrongfully removed may amount to no more than a single tree; and its removal may even improve, not diminish, the market value of the property. Yet the wrongful cutting may represent a significant loss to the property owner and a significant gain to the wrongdoer even where the value of the timber cut is negligible, or the diminution in value of the property owing to the cutting is minimal or nonexistent. So to limit the damages would permit a wrongdoer to rest assured that the cost of his improved view would be no more than treble the value of the timber cut even where the change wrought to his neighbor's property by the wrongful cutting, as here, is significant. The statute does not so confine a property owner's redress for the wrongdoing of an overreaching neighbor.

Although diminution in market value is one way of measuring damages, "market value does not in all cases afford a correct measure of indemnity, and therefore is not therefore 'a universal test.' " *Trinity Church v. John Hancock Mut. Life Ins. Co.*, 502 N.E.2d 532, 536 (Mass. 1987). Accordingly, "[r]eplacement or restoration costs have also been allowed as a measure of damages . . . where diminution in market value is unavailable or unsatisfactory as a measure of damages." *Id*. This is but another way of recognizing "that more complex and resourceful methods of ascertaining value must be used where the property is unusual . . . and where ordinary methods will produce a miscarriage of justice." *Id*.

CONTEXT

Glavin had to take out loans to cover his $100,000 legal bill. He told the *Boston Herald* that he "never started this off for the money. I really saw something evil going on that had to be addressed." The paper also reported that " 'view greed' — attempts to get better ocean views at all costs," is a longstanding problem on Martha's Vineyard. "Neighbors sometimes poison each others' trees," one resident told the paper, because "everyone knows what a chainsaw sounds like." Jerry Kronenberg, *Taking a Stand*, Boston Herald, Mar. 6, 2008.

The judge, as gatekeeper, has broad discretion to determine whether evidence other than fair market value is relevant to the question of damages. Here, the judge did not abuse that discretion in concluding that diminution in market value was not a fair and adequate measure of the damages that Glavin suffered by the wrongful cutting of his trees. Glavin had no desire to sell the property. Indeed, his plan was to hold on to the lot and utilize its mature oak trees to provide shade for a pond he planned to create from the existing wetlands, and as a backdrop to a tranquil view from his house lot. Regardless whether the planned restoration would increase the value of the lot as a building site and regardless whether the wrongful cutting had an impact on the market value of the lot, elimination of the trees wrought a significant change to Glavin's property. The trees represented decades of natural growth that could not easily be replicated. Moreover, any diminution in market value arising from the wrongful cutting was of less importance than was the destruction of the special value that the land and its stand of mature oak trees held for Glavin.

In such circumstances, the evidence supported the inference that diminution in market value was not a fair and adequate measure of Glavin's damages, and the judge did not err in permitting the jury to award restoration costs as an adequate measure of damages. A plaintiff may opt for either the value of the timber cut or the diminution in value of his property as the measure of damages under the statute, and when the latter measure does not fairly measure his damages, he may permissibly opt for restoration cost damages.

When applying a restoration cost measure of damages, a test of reasonableness is imposed. "Not only must the cost of replacement or reconstruction be reasonable, the replacement or reconstruction itself must be reasonably necessary in light of the damage inflicted by a particular defendant." *Id*. Here, the evidence supported the inference that restoration of Glavin's lot to its predamaged condition was reasonable and reasonably necessary in light of the damage inflicted by the defendants. The cutting down of ten mature oak trees was not a slight injury, and was wilfully undertaken by the defendants to achieve a previously denied view from their property to the ocean. The cost of restoring the lot, while substantial, was not a "very large and disproportionate expense to relieve from the consequences of a slight injury." See *id*. Glavin's use of his property was neither uneconomical nor improper. Likewise, restoration of the property to its predamaged condition was neither uneconomical nor improper.

We also cannot say as matter of law that the jury erred in concluding that because direct restoration of the affected area was either physically impossible or so disproportionately expensive that it would not be reasonable to undertake such a remedy, $30,000 was "the reasonable cost of restoring the property as nearly as reasonably possible to its original condition" (emphasis omitted). *Id*. The jury's award was a reasonable determination from the evidence presented. As discussed further below, this was a case where making an *actual* restoration would be uneconomical. The assessment of damages is traditionally a factual undertaking appropriate for determination by a jury as the representative voice of the community. Likewise, the jury are equipped to evaluate and eliminate any claimed damages that appear excessive. So long as the damages assessed represent a reasoned weighing of the evidence by the jury, fairly compensate the plaintiff for the loss incurred, and do not penalize the wrongdoer, the object of compensatory damages is accomplished. Given the unique value of the trees to Glavin, their integral role in his intended landscaping project, and the expert evidence as to the restoration costs, the jury's award cannot be said to be unreasonable.

We disagree with the defendants that the restoration cost damages awarded by the jury provided Glavin with a windfall. The defendants' tortious actions resulted in the elimination of ten large mature trees and effectively deprived Glavin of this feature of his property for his lifetime. Far from being a windfall, the damages were, at best, a necessary substitute for what nature would require decades to replace.

5. ***Trebling damages under G.L. ch. 242, §7.*** The defendants argue that even were we to conclude that the damages awarded by the jury were reasonable, when trebled under Mass. Gen. Laws ch. 242, §7, such damages are unreasonable. As noted

previously, the restoration cost damages awarded by the jury fall within the range of what is reasonable. The trebling of those damages "ineluctably flows from the plain language of the statute," *Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc.*, 864 N.E.2d 518, 540 (Mass. Ct. App. 2007), and does not render the damages unreasonable. The mandated trebling of damages represents a legislative judgment as to the punitive measure required to dissuade wrongdoers. A court should not interfere in that determination.

Jacque v. Steenberg Homes, Inc.

563 N.W.2d 154 (Wis. 1997)

Map: (Wilke's Lake) Schleswig, Wisconsin

William A. Bablitch, J.

Steenberg Homes had a mobile home to deliver. Unfortunately for Harvey and Lois Jacque (the Jacques), the easiest route of delivery was across their land. Despite adamant protests by the Jacques, Steenberg plowed a path through the Jacques' snow-covered field and via that path, delivered the mobile home. Consequently, the Jacques sued Steenberg Homes for intentional trespass. At trial, Steenberg Homes conceded the intentional trespass, but argued that no compensatory damages had been proved, and that punitive damages could not be awarded without compensatory damages. Although the jury awarded the Jacques $1 in nominal damages and $100,000 in punitive damages, the circuit court set aside the jury's award of $100,000. The court of appeals affirmed, reluctantly concluding that it could not reinstate the punitive damages because it was bound by precedent establishing that an award of nominal damages will not sustain a punitive damage award. We conclude that when nominal damages are awarded for an intentional trespass to land, punitive damages may, in the discretion of the jury, be awarded. We further conclude that the $100,000 awarded by the jury is not excessive. Accordingly, we reverse and remand for reinstatement of the punitive damage award.

¶2 The relevant facts follow. Plaintiffs, Lois and Harvey Jacques, are an elderly couple, now retired from farming, who own roughly 170 acres near Wilke's Lake in the town of Schleswig. The defendant, Steenberg Homes, Inc. (Steenberg), is in the business of selling mobile homes. In the fall of 1993, a neighbor of the Jacques purchased a mobile home from Steenberg. Delivery of the mobile home was included in the sales price.

¶3 Steenberg determined that the easiest route to deliver the mobile home was across the Jacques' land. Steenberg preferred transporting the home across the Jacques' land because the only alternative was a private road which was covered in up to seven feet of snow and contained a sharp curve which would require sets of "rollers" to be used when maneuvering the home around the curve. Steenberg asked the Jacques on several separate occasions whether it could move the home across the Jacques' farm field. The Jacques refused. The Jacques were sensitive about allowing others on their land because they had lost property valued at over $10,000 to other neighbors in an adverse possession action in the mid-1980's. Despite repeated refusals from the Jacques, Steenberg decided to sell the mobile home, which was to be used as a summer cottage, and delivered it on February 15, 1994.

¶4 On the morning of delivery, Mr. Jacque observed the mobile home parked on the corner of the town road adjacent to his property. He decided to find out where the movers planned to take the home. The movers, who were Steenberg employees, showed Mr. Jacque the path they planned to take with the mobile home to reach the neighbor's lot. The path cut across the Jacques' land. Mr. Jacque informed the movers that it was the Jacques' land they were planning to cross and that Steenberg did not have permission to cross their land. He told them that Steenberg had been refused permission to cross the Jacques' land.

¶5 One of Steenberg's employees called the assistant manager, who then came out to the Jacques' home. In the meantime, the Jacques called and asked some of their neighbors and the town chairman to come over immediately. Once everyone was present, the Jacques showed the assistant manager an aerial map and plat book of the township to prove their ownership of the land, and reiterated their demand that the home not be moved across their land.

¶6 At that point, the assistant manager asked Mr. Jacque how much money it would take to get permission. Mr. Jacque responded that it was not a question of money; the Jacques just did not want Steenberg to cross their land. Mr. Jacque testified that he told Steenberg to "[F]ollow the road, that is what the road is for." Steenberg employees left the meeting without permission to cross the land.

¶7 At trial, one of Steenberg's employees testified that, upon coming out of the Jacques' home, the assistant manager stated: "I don't give a — — what [Mr. Jacque] said, just get the home in there any way you can."

¶9 When a neighbor informed the Jacques that Steenberg had, in fact, moved the mobile home across the Jacques' land, Mr. Jacque called the Manitowoc County Sheriff's Department. After interviewing the parties and observing the scene, an officer from the sheriff's department issued a $30 citation to Steenberg's assistant manager.

¶14 Steenberg argues that, as a matter of law, punitive damages could not be awarded by the jury because punitive damages must be supported by an award of compensatory damages and here the jury awarded only nominal and punitive damages.

The Jacques argue that both the individual and society have significant interests in deterring intentional trespass to land, regardless of the lack of measurable harm that results. We agree with the Jacques.

¶21 We turn first to the individual landowner's interest in protecting his or her land from trespass. The United States Supreme Court has recognized that the private landowner's right to exclude others from his or her land is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

¶22 Yet a right is hollow if the legal system provides insufficient means to protect it. Felix Cohen offers the following analysis summarizing the relationship between the individual and the state regarding property rights:

> [T]hat is property to which the following label can be attached:
> To the world:
> Keep off X unless you have my permission, which I may grant or withhold.
> Signed: Private Citizen
> Endorsed: The state

Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 374 (1954). Harvey and Lois Jacque have the right to tell Steenberg Homes and any other trespasser, "No, you cannot cross our land." But that right has no practical meaning unless protected by the State.

¶23 Because a legal right is involved, the law recognizes that actual harm occurs in every trespass. The law infers some damage from every direct entry upon the land of another. The law recognizes actual harm in every trespass to land whether or not compensatory damages are awarded.

¶25 In sum, the individual has a strong interest in excluding trespassers from his or her land. Although only nominal damages were awarded to the Jacques, Steenberg's intentional trespass caused actual harm. We turn next to society's interest in protecting private property from the intentional trespasser.

Society has an interest in punishing and deterring intentional trespassers beyond that of protecting the interests of the individual landowner. Society has an interest in preserving the integrity of the legal system. Private landowners should feel confident that wrongdoers who trespass upon their land will be appropriately punished. When landowners have confidence in the legal system, they are less likely to resort to "self-help" remedies.

¶27 People expect wrongdoers to be appropriately punished. The $30 forfeiture was certainly not an appropriate punishment for Steenberg's egregious trespass in the eyes of the Jacques. If punitive damages are not allowed in a situation like this, what punishment will prohibit the intentional trespass to land? Moreover, what is to stop Steenberg Homes from concluding, in the future, that delivering its mobile homes via an intentional trespass and paying the resulting Class B forfeiture, is not more profitable than obeying the law? Steenberg Homes plowed a path across the Jacques' land and dragged the mobile home across that path, in the face of the Jacques' adamant refusal. A $30 forfeiture and a $1 nominal damage award are unlikely to restrain Steenberg Homes from similar conduct in the future. An appropriate punitive damage award probably will.

¶52 Our concern for deterrence is guided by our recognition of the nature of Steenberg's business. Steenberg sells and delivers mobile homes. It is, therefore, likely that they will again be faced with what was, apparently for them, a dilemma. Should they trespass and pay the forfeiture, which in this case was $30? Or, should they take the more costly course and obey the law? Today we alleviate the uncertainty for Steenberg Homes. We feel certain that the $100,000 will serve to encourage the latter course by removing the profit from the intentional trespass.

¶53 Punitive damages, by removing the profit from illegal activity, can help to deter such conduct. In order to effectively do this, punitive damages must be in excess of the profit created by the misconduct so that the defendant recognizes a loss. It can hardly be said that the $30 forfeiture paid by Steenberg significantly affected its profit for delivery of the mobile home. One hundred thousand dollars will.

RULES, POLICIES, AND PRACTICES

1. ***How robust is the right to exclude?*** The Jacques said that the reason they were reluctant to give Steenberg Homes the right to cross their land was because they had lost land to adverse possession and wanted to guard their property rights carefully. Adverse possession is a doctrine that allows a longtime occupant of someone else's land to obtain title to it; the usual case is a border dispute in which both parties mistakenly place the boundary in a place different from that notated in the deeds to their parcels. *See* Chapter 4, §4.2. But permission is a defense to an adverse possession claim; the Jacques were in little danger of losing any of their property rights by this neighborly gesture. Should their reasons for refusing access matter? Suppose the request was to drive the mobile home over a road on the Jacques' land, causing no damage to it, and the cost to the neighbor of using a different route was $15,000 because a structure on the land had to be removed to bring the mobile home in. Should the Jacques have an obligation to allow access? Or does their status as owners give them the absolute power to exclude others from their land regardless of the reason and regardless of the neighbor's need?

2. ***Damages and deterrence.*** Was the punitive damage award excessive in *Jacque*? Or was it necessary to deter future trespasses like this?

§1.4 The Relational Nature of Property Rights

What do we mean when we talk about "property rights"? Colloquially, many people think of property rights as entitlements that some people ("owners") have over the things they own ("property"). In a highly influential article published in 1913, Professor Wesley Hohfeld explored in exacting detail the inherently relational nature of legal rights, including property rights. *See* Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913). Within Hohfeld's rubric, "rights" are claims, enforceable by state power, that other people act in a certain manner in relation to the right-holder. If one person has a "right," everyone else has a correlative "duty" to respect that right, and the right-holder has the power to summon the aid of the state to alter or control or seek compensation for behavior of others that violates that right. Any time the state recognizes some citizen as having a property right, it necessarily changes the situation of others by creating duties for them not to violate that right. In other words, as legal rights, property rights are not simply entitlements vis-à-vis things, but jural relations among people. Rights held by one person with respect to property create duties for others, restricting their freedom of action. As Hohfeld put it, "if *X* has a right against *Y* that he shall stay off the former's land, the correlative (and equivalent) is that *Y* is under a duty toward *X* to stay off the place." *Id*. at 32. If *A* has a duty toward *B*, then *B* has a right against *A*.

Conversely, if one is legally free to engage in an action, then one has no duty not to act in that manner. When this is the case, others may be vulnerable to the effects of those lawful actions. For example, businesses are free to engage in economic competition even if this harms the profits of competitors and even puts them out of business. Legal liberties are associated with potential vulnerabilities in others, and this relationship is as important as the right-duty relationship.

The concepts Hohfeld identified serve as a reminder that property rights structure relations among persons, and that property's relationship to freedom is complex. Property rights create freedom of action for owners, to be certain, but only by constraining the freedom of action of everyone else. *A*'s right to control property in a certain way implies duties on others not to interfere with *A*'s control. In thinking about property rights, it is therefore important to consider (a) who has the entitlement, (b) against whom the entitlement runs, and (c) what specific acts are encompassed by the entitlement. We often speak as though property rights are all or nothing affairs, something we either have or lack. But, as we have already seen, the situation is substantially more complex, even in the case of the seemingly straightforward law of trespass. We can speak intelligibly about certain categories of owners, but not others, having the right to exclude certain categories of people, but not others. Understanding landownership in terms of spatial boundaries does not, by itself, answer the question whether owners should be able to exclude visitors to people residing on their property (as in *State v. Shack*) or people who need access in order to avoid death or serious bodily harm (as in *Magadini*) or airplanes flying overhead, or — as we will see in the next section — customers seeking access to privately owned business on nondiscriminatory terms.

§2 DISCRIMINATION AND ACCESS TO "PLACES OF PUBLIC ACCOMMODATION"

§2.1 The Antidiscrimination Principle

The common law right to exclude (as embodied in the law of trespass) is subject to modification by statute. The most prominent examples are prohibitions on owners using certain categorizations (such as race) in granting or denying access to their properties. Which owners are subject to civil rights statutes and which groupings receive such statutory protection are matters of disagreement. Different jurisdictions have reached various conclusions on both questions, resulting in a complicated mixture of federal, state and local law.

A. Federal Antidiscrimination Law

CIVIL RIGHTS ACT OF 1964, TITLE II

42 U.S.C. §§2000a, 2000a-6

§2000a. Prohibition Against Discrimination or Segregation in Places of Public Accommodation

(a) *Equal access*. All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) . . . Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishments.

(e) *Private establishments*. The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.

§2000a-6. [A]ssertion of Rights Based on Other Federal or State Laws and Pursuit of Remedies for Enforcement of Such Rights. . .

(b) . . . [N]othing in this subchapter shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this subchapter, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

Diane Nash (second from left), a leader of the movement to desegregate the lunch counters of Nashville's department stores, sits at an integrated lunch counter.[16]

CIVIL RIGHTS ACT OF 1866

42 U.S.C. §§1981-1982

§1981. Equal Rights Under the Law

(a) *Statement of equal rights*. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) *"Make and enforce contracts" defined*. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) *Protection against impairment*. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

§1982. Property Rights of Citizens

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

RULES, POLICIES, AND PRACTICES

1. ***The Civil Rights Act of 1964.*** The public accommodations provisions of Title II of the *Civil Rights Act of 1964*, 42 U.S.C. §§2000a to 2000a-6, directly addressed the problem of racial discrimination in motels, restaurants, lunch counters in department stores, gas stations, and theaters. It was intended to rectify some aspects of the enormous problem of racial segregation in the United States and was passed after a long period of struggle that included sit-ins, demonstrations, and litigation. Opponents of the law frequently criticized it as a violation of private property rights. *See* Eduardo M. Peñalver & Sonia K. Katyal, *Property Outlaws* ch. 4 (2010). Passage of the act was followed by widespread resistance, including refusals by some public officials to enforce the law. Note that the statute regulates discrimination only on the basis of race, color, religion, and national origin. It does not prohibit discrimination on the basis of sex or sexual orientation. Nor does any other general federal statute regulating public accommodations.

Title II makes no provision for damages. An injured party may seek a court order requiring the defendant to stop discriminating in access to public accommodations covered by the act but may not seek damages. 42 U.S.C. §2000a-3(a). The plaintiff may be able to recover attorneys' fees from the defendant if the plaintiff prevails. §2000a-3(b).

In 1875, Congress enacted a law similar to Title II under its fourteenth amendment power to promote equal protection of law. The Supreme Court struck down that law as unconstitutional in *The Civil Rights Cases*, 109 U.S. 3 (1883), because the act regulated private conduct and the fourteenth amendment only limits state action. For that reason, Title II was passed pursuant to Congress's power to regulate interstate commerce, and was upheld on those grounds by the Supreme Court in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

2. ***The Civil Rights Act of 1866.*** Unlike the 1964 act, the *Civil Rights Act of 1866*, 42 U.S.C. §§1981 to 1982, regulates race discrimination only. Also, unlike the 1964 public accommodations law, damages are available for violations of the *Civil Rights Act of 1866*. Although §1981 was already in effect at the time the *Civil Rights Act of 1964* was passed, it had not yet been interpreted by the courts to regulate private conduct, such as the refusal by a restaurant owner to serve a patron. Rather, it was thought in 1964 that §1981 merely regulated *state* conduct, prohibiting (for example) state statutes that deprived black citizens of the capacity to enter binding contracts. In important opinions in 1968 and 1976, the Supreme Court held that the *Civil Rights Act of 1866* applied to private conduct as well as to legislation passed by state legislatures. *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968) (holding that §1982 prohibits discrimination in the market for selling or leasing real property); *Runyon v. McCrary*, 427 U.S. 160 (1976) (holding that §1981 prohibits commercially operated, nonreligious schools from excluding qualified children solely on the basis of race). The Supreme

Court reaffirmed the applicability of the *Civil Rights Act of 1866* to private conduct in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). The *Civil Rights Act of 1991*, Pub. L. No. 102-166, tit. I, §101, 105 Stat. 1071 (1991), amended §1981 for the first time since 1870. This act approved the Supreme Court's interpretation of §1981 by providing that §1981 reaches private conduct, and also clarified §1981 by stating that it regulates the terms and conditions of contracts and not just the "right to make and enforce" contracts. As you will see in the notes that follow, courts continue to struggle with questions concerning the proper relationship between the *Civil Rights Act of 1866* and the *Civil Rights Act of 1964*.

3. ***What is a "place of public accommodation"?*** Is the list of covered establishments in the 1964 public accommodations law exhaustive or merely illustrative? *See Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427 (4th Cir. 2006) (holding that the list in §2000a is exhaustive). *Accord, Rhone v. Loomis*, 77 N.W. 31 (Minn. 1898) (holding that a state statute prohibiting discrimination in inns, taverns, restaurants, and places of "refreshment" did not prohibit a "saloon" from excluding a Black customer). *But see Sellers v. Philip's Barber Shop*, 217 A.2d 121 (N.J. 1966) (interpreting a state statute providing that public accommodations "shall include" a long list of business establishments as covering barber shops even though they were not listed) *and In re Cox*, 474 P.2d 992 (Cal. 1970) (list of types of discrimination is illustrative).

Some courts have held that the *Civil Rights Act of 1866* regulates establishments that are not listed in the 1964 act, such as retail stores and service establishments, and that such stores may be liable for damages if they deny the right to contract under §1981 or the right to purchase property under §1982. *See Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427 (4th Cir. 2006) (§1981 would be violated if a salon refused service because it did not "do black people's hair"); *Perry v. Command Performance*, 913 F.2d 99 (3d Cir. 1990) (§1981 may have been violated when a salon refused to cut the hair of a Black woman); *Watson v. Fraternal Order of Eagles*, 915 F.2d 235, 240 (6th Cir. 1990) (noting that a "department store" was not covered by Title II but would be covered under §1981).

The Supreme Court has never addressed the question of whether the *Civil Rights Act of 1866* regulates the conduct of public accommodations such as restaurants, innkeepers, or retail stores. Although the refusal to serve a patron because of that person's race arguably comes within the language of both §1981 and §1982, Congress passed the *Public Accommodations Act of 1875*, 18 Stat. 335, ch. 114, clearly regulating private actors. The Supreme Court struck down the *Public Accommodations Act* as unconstitutional in *The Civil Rights Cases*, 109 U.S. 3 (1883), on the ground that the fourteenth amendment authorized Congress to regulate state action but not private action by owners of private property, such as inns and restaurants. If the *Civil Rights Act of 1866* regulates the conduct of public accommodations, wouldn't this have made the 1875 statute superfluous and unnecessary? If §1981 or §1982 regulates public accommodations, why did Congress pass the 1875 statute?

Because of the holding of *The Civil Rights Cases* that the fourteenth amendment authorizes regulation of state action but not private action, Congress passed the *Civil Rights Act of 1964* pursuant to the commerce clause, which authorizes Congress to regulate "interstate commerce." *See Heart of Atlanta Motel, Inc. v. United States*, 379

U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (both upholding the act as a valid exercise of Congress's power to regulate interstate commerce). Remember that the *Civil Rights Act of 1866* was not interpreted to apply to private conduct until 1968. But *what* private conduct is regulated by §§1981 and 1982? Can you think of a reason §§1981 and 1982 should be interpreted to regulate public accommodations when Congress passed a more specific statute regulating them in 1964 — a statute that clearly omits any provision for damages?

4. ***Racially discriminatory surveillance under the Civil Rights Act of 1866.*** The courts appear to agree that the "right to make contracts" under §1981 includes the right to enter a store or other service provider. *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285 (5th Cir. 2004); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862 (6th Cir. 2001). Can you think of a way to interpret the language or purpose of §1981 that would not view it as creating an obligation to allow individuals to enter retail stores to purchase goods or services?

Assuming §1981 does require stores to allow individuals to enter without regard to race, does §1981 prohibit stores from discriminatorily following Black, Latino, or American Indian patrons around the store, searching them, and subjecting them to insults? Some courts have held that such conduct violates the right to contract under §1981 and/or the right to purchase personal property under §1982. *Chapman v. Higbee*, 319 F.3d 825 (6th Cir. 2003) (equal benefits clause in §1981 gives right to equal treatment in seeking contract); *Phillip v. Univ. of Rochester*, 316 F.3d 291 (2d Cir. 2003) (equal benefits clause of §1981 applies to private university whose security guards detained Black students but not their white friends in library lobby, calling police who arrested them and kept them detained overnight); *McCaleb v. Pizza Hut of America, Inc.*, 28 F. Supp. 2d 1043 (N.D. Ill. 1998) (family denied "full benefits" of the contract when denied utensils and harassed and threatened while at restaurant); *Nwakpuda v. Falley's, Inc.*, 14 F. Supp. 2d 1213 (D. Kan. 1998) (§1981 claim for store patron who was wrongfully detained because he was thought to be individual who had previously robbed the store).

However, particularly in the retail context, some courts have interpreted the "right to make contracts" extremely narrowly, holding that this right is denied *only* when a patron is "actually prevented, and not merely deterred, from making a purchase or receiving service after attempting to do so." *Ackerman v. Food-4-Less*, 1998 WL 316084, at *2 (E.D. Pa. 1988). *Accord, Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091 (10th Cir. 2001). These courts have denied relief when a patron was treated disrespectfully or refused assistance, *Arguello v. Conoco, Inc.*, 330 F.3d 355 (5th Cir. 2003) (no §1981 claim when clerk shouted obscenities and made racially derogatory remarks at Latino customer after she completed her purchase); *Wesley v. Don Stein Buick, Inc.*, 42 F. Supp. 2d 1192 (D. Kan. 1999); subjected to discriminatory surveillance, searches, or detention, *Gregory v. Dillard's Inc.*, 565 F.3d 464 (8th Cir. 2009) (no §1981 violation when store employees follow African Americans around the store and stand guard outside changing rooms when such customers try on clothes); *Morris v. Office Max, Inc.*, 89 F.3d 411 (7th Cir. 1996); removed from a store for discriminatory reasons after making a purchase, *Flowers v. TJX Cos.*, 1994 WL 382515 (N.D.N.Y. 1994); or put under surveillance and accused of shoplifting after purchasing items and leaving the store, *Garrett v. Tandy Corp.*, 295 F.3d 94 (1st Cir. 2002). Are these decisions consistent with the intent of the *Civil Rights Act of 1991*? Which interpretation of §1981 is correct?

5. ***Private clubs.*** What is the difference between a public accommodation and a private club? Courts generally look to see whether the organization is *selective* in its membership and has *limits* on the number of persons who can join. If the selection criteria track a statutory category, it is unlikely the group will be held to be a private club. A group that is limited to men, but has no other selection criteria and is unlimited in size, is likely to be held to be a public accommodation that is violating the law rather than a selective private club. Does it matter whether the organization is engaged in the sale of goods or services?

In *Watson v. Fraternal Order of Eagles*, 915 F.2d 235 (6th Cir. 1990), a private club was held to have violated §1981 when it refused to serve drinks to Black guests at a party held at the club. Because the defendant was clearly a private club under 42 U.S.C. §2000a(e), its actions were not covered by the 1964 act. Nonetheless, the court held that, although the defendant was immune from liability under that act, the plaintiff could bring an independent claim for relief under §1981. It noted that later, more specific statutes generally limit the interpretation of earlier, more general ones. Nonetheless, the earlier, broader statute continues in force if the legislature that passed the later act intended the general act to retain independent force. *Accord Cook v. Twin Oaks Country Club*, 122 F. Supp. 2d 1064 (W.D. Mo. 2000); *Crawford v. Willow Oaks Country Club*, 66 F. Supp. 2d 767 (E.D. Va. 1999).

However, in *Cornelius v. Benevolent Protective Order of the Elks*, 382 F. Supp. 1182 (D. Conn. 1974), the district court held that §1981 could not be applied to a private club. Judge Blumenfeld argued that "the provisions of one statute which specifically focus on a particular problem will always, in the absence of express contrary legislative intent, be held to prevail over provisions of a different statute more general in its coverage." *Id*. at 1201. Moreover, when Congress passed the 1964 act, it believed it was enacting the first federal legislation prohibiting private discrimination in public accommodations. "Prior to *Jones v. Mayer*, 392 U.S. 409 (1968), sections 1981 and 1982 were thought to apply only to 'state action.' . . . Thus, the absence of express language in the 1964 Act limiting the 1866 Act is hardly evidence of an intention not to have that effect." *Id. But see Guesby v. Kennedy*, 580 F. Supp. 1280, 1284-1285 (D. Kan. 1984) (criticizing the implied amendment theory in *Cornelius*). Should Congress's intent in 1964 with respect to the reach of Title II have decisive bearing on the proper interpretation of the 1866 law? Can you think of an argument that it should? That it should not?

LAWYERING EXERCISES

1. ***Buzzers.*** Some stores in New York City lock their front doors and allow customers in after they have pressed a buzzer. The ostensible goal is to protect the store from armed robbery and other forms of theft and assault. Store owners and managers use the buzzer system to exclude selected members of the public from access to their stores. If a store installs a lock-and-buzzer system and allows entry only to patrons who the management or employees consider "safe," does the store come