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EXCLUSION AS DUTY

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ABSTRACT

In this article, I present a new account of the idea of ownership and an owner’s right to exclude. By identifying foundational values that animate property law, I identify the boundary between an owner’s right to exclude and a nonowner’s right of access. Under this view, the essence of property is the owner’s right to make decisions about the use of the property, but that right is circumscribed by the owner’s duty—under carefully defined circumstances—to take into account the well-being of nonowners when making decisions. By situating the right to exclude in the context of an owner’s right to make decisions about a resource, and by showing that sometimes an owner is required to take into account the well-being of others when making decisions, I see the right to exclude as the application of the no-duty values that underlie private law, while limitations on the right to exclude reflect an owner’s obligations to others. This account fills important gaps in property theory by bridging the conceptual gap between exclusion and access and by addressing several conceptual issues that haunt property theory: the distinction between exclusion rights and social obligation norms, the distinction between a bundle of sticks approach and an essentialist approach, and the distinction between essentialism grounded in the right to exclude and essentialism based on an owner’s exclusive decisions.

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I. Introduction: The Problem

It is not surprising that an owner’s right to exclude provides a central focus for debates about the idea of ownership and the scope of an owner’s rights. What is surprising is how little attention has been paid to locating the boundary between exclusion and access and to the values that impel a court to draw the boundary in one place rather than another. Property theory is dichotomous and polar rather than unified and cohesive, focusing either on an owner’s right to exclude or a nonowner’s right of access, but not on both simultaneously. This puts property theorists in an uncomfortable position: they can advance theories to explain why an owner has the right to exclude, and they can advance theories to explain why sometimes nonowners have the right to use another’s property, but they cannot comfortably explain why courts draw the boundary between the two in one way rather than another. The methodologies available to reconcile the conflicting interests of owners and nonowners leave the boundary between exclusion and access up for grabs.

In this article I argue that we ought to understand the right to exclude and its limitations as rights that flow from a single social value, one that allows us to identify the boundary between exclusion and access and that justifies how and why, in particular cases, the law favors exclusion over access or access over exclusion. Ignoring the boundary issue is not an option, for we have little clarity in property theory without knowing the content of property rights.1 The challenge is to identify the social value that explains and justifies the right to exclude and simultaneously explains and justifies why the right to exclude is sometimes limited — a unified theory of exclusion that flows from a value common to owners and nonowners. This article is part of a larger unification project that seeks to explore the concepts and ideas that unify private law. In this article, I use the concept of obligations that I have developed in my study of tort law2 to illuminate the scope of the right to exclude, finding that the same requirement of other-regarding decision making underlies both tort and property. Under this view, property law governs the obligations of private owners to provide access to others to use the property; tort law governs the obligation of common owners (users of streets and highways) concerning other users of the common property.

In this article, I explain property law’s unsatisfactory schizophrenia about exclusion and provide a theory of property that addresses it. I then apply that

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1 Michael Heller, Gridlock Economy, 18-19 (Basic Books 2008)
2 Peter M. Gerhart, Tort Law and Social Morality (Cambridge University Press 2010).
theory to shed light on current discourse about the essence of property. The article comes in three parts. In part II, I describe the dichotomous and unsatisfactory nature of property theory applied to exclusion rights. I argue that balancing methodologies and information cost theory are both inadequate to define the boundary between exclusion and access. The idea that one can meaningfully balance an owner’s exclusion right against the access right of a nonowner is unworkable if it pits two conflicting interests or values against each other. That methodology provides no sense of the values that underlie the interests to be balanced or their application in concrete cases, while threatening the right to exclude (by making every case a grab bag of interests to be balanced). It is ad hoc legal analysis at its worst. The separate idea that information theory provides a coherent view of the boundary between an exclusion regime and a governance regime belies the fact that the choice of strategies is itself a value-based choice. Information theory begs the issue of which information matters from a normative standpoint. Going beyond standard methodologies for reconciling conflicting values, I describe a different methodology, one that, by identifying values that are important to both exclusion and access, allows us to understand why courts draw the boundary between the two in one place rather than another.

Part III sets forth the theory that provides a normative guide to the divide between exclusion and access. The central idea rests on the concept of duty at private law (including the concept of no-duty). It is this: when an owner has no obligation to take into account the well-being of others (owners or nonowners), the owner may exclude for any and no reason (the core exclusion strategy). This reflects the common sense notion that if a property owner has no relevant relationship with a nonowner, a nonowner may not create an enforceable claim against the owner merely by asking to use the property. Any redistributive obligation an owner has is imposed only by society working through its legislature, not as a matter of private law. That is why an owner of a farm need not make the farm available to one who wants to take a mobile home across the farm, even when that can be done without injuring the owner.4

3 The Restatement approach illustrates the problem, for it presents a clear rule against trespass, followed by forty-nine privileges that allow a nonowner to have non-trespassory access to the owner’s property. RESTATEMENT (SECOND) OF TORTS, PROPERTY §158 (1979). For general descriptions of the border between exclusion and access, see Barbara McFarland, LAW OF PREMISES LIABILITY § 2.2 (3d ed. 2001) (explaining who is a trespasser and the exceptions); J.D. Lee & Barry A. Lindahl, MODERN TORT LAW: LIABILITY AND LITIGATION §§38:3-38:15 (2d ed. 2010) (describing trespass privileges).

4 Jacque v. Steenberg Homes, Inc., 563 N. W. 2d 154 (1997) (owner may exclude seller who seeks to cross owner’s land to deliver mobile home to a neighbor)
But often owners do enter into relationships from which they have taken on the obligation to think about the well-being of others. When they do, they must adopt a governance approach to exclusion, balancing their interest with the interests of those to whom they have an obligation. A farmer who hires migrant workers has an obligation for their well-being and therefore may not exclude social workers from meeting with the migrant workers unless he has an overriding reason for doing so. This distinction between duty and no-duty fully explains the boundary between exclusion and access.

The justification for these duty and no-duty principles explains and justifies why and when an owner must take into account the well-being of the user when deciding whether to exclude. This article works out the contours of that idea in a way that, I believe, identifies the boundary between exclusion and access (by identifying the distinction between no-duty and duty), including questions about the remedy to which the owner is entitled when a trespass occurs.

Part IV of the article explores the implications of this analysis for a central concern of contemporary property theory – the question of the essence of property. It suggests that the supposed choice between an essentialist and bundle-of-sticks approach is, in fact, a false choice. The essential feature of property, heretofore unnoticed, is the owner’s right to make decisions about the property (in the context of this article, deciding who may use the property). However, because that right is constrained by an owner’s duty to take into account the well-being of others—a duty that is triggered by the owner’s decisions—the right to decide takes on various applications in various contexts. This view provides an account of what is essential about property and preserves an owner’s “dominion” over the property, while acknowledging that, as the bundle of sticks metaphor suggests, the content of the right to exclude is shaped by the context in which the decision is made.

Part I: The Exclusion/Access Dichotomy.

Exclusion is said to be the essence of property. Yet, no one believes that the right to exclude is absolute; it is acknowledged to be limited by necessity, custom, public accommodation, easements, irrevocable licenses and many other privileged uses. When use of another’s property is privileged in one of these ways, it is wrong for an owner to deny others the beneficial use of the property.

5 State v. Shack, 277 A. 2d 396 (1971) (owner may not exclude social worker from visiting migrant workers on owner’s farm)
By what right is the right of the owner limited, and what kind of a rights regime is it that so importantly limits the right in question? How do we reconcile the rhetoric of rights with its practice? And how do we find Blackstone’s “dominion” over property when the dominion is so obviously sometimes limited?

Reflecting exclusion’s schizophrenia, scholars tend to start from one of two polar positions, creating a kind of tug of war between the poles, without considering how the values behind the polar positions might be reconciled. Property is, as Larry Lessig has said, “binary to its core.”

The exclusion story, as recently developed by scholars like Henry Smith, Thomas Merrill, and J.E. Penner, emphasizes exclusion as the essence of property. Because the essentialist view is framed in rights rhetoric, it is unable,

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6 See Lawrence Lessig, Re-Crafting the Public Domain, 18 YALE J. L. AND HUMAN. 56, at *81 (2006) (the ordinary view of property is “binary at its core.”).

7 See Thomas W. Merrill & Henry E. Smith, Property (Denis Patterson, ed. 2010); Thomas W. Merrill, Property and the Right to Exclude, 77 NEB. L. REV. 730, 730 (1998) (“[T]he right to exclude others is more than just ‘one of the most essential’ constituents of property—it is the sine qua non.”); J.E. Penner, Ownership, Co-Ownership, and the Justification of Property Rights, in PROPERTIES OF LAW: ESSAYS IN HONOUR OF JIM HARRIS, 166, 167-168 (Timothy Endicott, Joshua Getzler & Edwin Peel eds., 2006) (“[A]n ownership right is truly a right to a thing, an exclusive right to engage with a thing . . . . a right which roughly corresponds with a duty on all other not to engage with that thing, to ‘keep off’ as it were . . . . Thus ownership provides owners with a realm of non-interference, in which they may realize the value of particular things which, in virtue of this protection, they are said to own. An ownership right, then, is a right of exclusive engagement or use, allowing the owner or co-owners to determine the disposition of a thing because all others are under a duty not to interfere with it. Importantly, no particular realization of the value of the thing is indication. (Note ownership does not empower an owner in any way— they can only do with their property what they are independently capable of doing, for their right correlates only with the duty of non-interference on all others . . . . )”); J.E. Penner, THE IDEA OF PROPERTY IN LAW 128-152 (Oxford University Press 1997) (describing the duty of non-interference); Henry E. Smith, Exclusion and Property Rules in the Law of Nuisance, 90 VA. L. REV. 965, 971 (2004) (“[G]iving owners a right to exclude from a thing good against the world is a rough but low-cost method of generating information that is easy for the rest of the world to understand. These exclusionary rights can be justified on a number of grounds: libertarianism, autonomy, personhood, desert, and so on . . . .”). This centrality of the right to exclude has been endorsed by the Supreme Court, even while the Supreme Court has also noted that the right to exclude can be limited. See Dolan v. City of Tigard, 512 U.S. 374 (1994) (the abrogation of the petitioner’s right to exclude others supported the holding that a taking had occurred); Nollan v. California Coastal Comm’n, 483 U.S. 825, 831 (1987) (citing Loretto and Kaiser for the proposition that the Supreme Court “has repeatedly held the right to exclude is one of the most essential sticks in the bundle”); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982), abrogation recognized by Seawall Assoc. v. City of New York, 74 N.Y.2d 92 (1989) (holding that a cable wire, although a minor physical occupation of the owner’s property, was a taking under the Fifth Amendment); Kaiser Aetna v. U.S., 444 U.S. 164, 180 (1979) (holding that the ‘right to exclude’
on its own terms, to reconcile the absolutist rhetoric of rights with practical limitations on rights. On the other hand, scholars who emphasize the social obligation of owners approach the problem of exclusion by emphasizing limitations on the right to exclude, starting from the other end of the spectrum to focus on the rights of nonowners to use an owner’s property (and therefore the obligations of owners to allow such use). Like the exclusion vision, this vision accurately represents the interests that animate limitations on the right to exclude, but does not provide an adequate way of determining how those interests are to be integrated with the interests that animate the right to exclude.

Each position is accurate in its own terms. The right to exclude is necessary and sufficient for ownership, while at times owners, because they have obligations to others, must grant a nonowners access. Yet the positions are inconsistent, what Kant called “antimonies”9. The resulting generative contradictions suggest the need for a new understanding of the normative values of exclusion and its limitations – a justification for marking its boundaries one place rather than another. The theory advanced here reconciles these two polar positions by advancing a theory that shows why an owner has the right to exclude, why that right is sometimes limited, and how and when an owner is

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8 Gregory S. Alexander, The Social-Obligation Norm in American Property Law, 94 CORNELL L. REV. 745, 747 (2009) (“The right to exclude itself, thought by many to be the most important twig in the so-called bundle of rights, is subject to many exceptions, both at common law and by virtue of statutory or constitutional provision. For example, the common law requires landowners to permit police to enter privately owned land to prevent a crime from being committed or to make an arrest.”); Hanoch Dagan, Exclusion and Inclusion in Property 1 (June 7, 2009), http://ssrn.comabstract=1416580 (criticizing the right to exclude as property’s most defining feature, instead advocating that inclusion is also a key component); Carol Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. CHI. L. R. 711, 744 (1986) (“The concept of a managed commons also suggests that under some circumstances property might be more valuable as a commons than in individual hands, because the administrative costs of customary management are low relative to those of an individual property system.”) (emphasis in original); Joseph Singer, No Right to Exclude: Public Accommodations and Private Property, 90 N.W. U. L. REV. 1283 (1996) (describing the limitations on the right to exclude from public accommodations such as retail stores). Joseph W. Singer, Reliance Interest in Property, 40 STAN. L. REV. 611, 678 (1988) (“In a variety of circumstances, property rights are shared or shifted to nonowners when they have relied on relationships of mutual dependence that made access to such property available in the past. Moreover, property is held subject to various public rights of access both to prevent waste and to fulfill fundamental needs of the community.”).

9 Arthur Ripstein reminds us that: “If two inconsistent claims are both true, we are faced with what Emmanuel Kant called an ‘antimony.’ The only way to overcome an antimony is through a critique of the broader premise that thesis and antithesis share.” Arthur Ripstein, Private Order and Public Justice: Kant and Rawls, 92 VA. L. REV. 1391 (2006).
expected to reconcile her own interests with the interests of nonowners.

To the extent that it exists, the unity of property law is thought to come from a methodology that balances rights, interests, or values. The methodological pattern of property theory is this: identify the clashing rights, interests, or values and find a way to balance them in order to determine the content of property law.\(^\text{10}\) Often this boils down to a theory that starts with the rights of owners and understands the rights of nonowners to be exceptions to those rights (often begrudged exceptions)\(^\text{11}\) or that starts with the rights of nonowners or of the community and understands property theory to derive from those rights, limited only by the weight given to owners’ rights. A methodology of balancing conflicting rights, interests, and values has familiar problems: the problem of comparing incommensurables (an owner’s interest in keeping someone out; an outsider’s interest in access), agreeing on weights to be assigned to incommensurables (should the owner’s interest be given added weight in recognition of her ownership?), and the problem of defining the border between the various rights, interests, or values.\(^\text{12}\) But the fundamental problem is methodological: as I explain below, one cannot balance the interest, rights, or values in order to determine whether to balance the interests, rights, or values, which is the decision that determines where the boundary between exclusion and access is drawn in the first instance. No matter how finely or eloquently one articulates the test, a balancing methodology seems always to reduce itself to a statement of the following kind: an owner has the right to exclude a nonowner except when the owner does not. If one seeks to understand the substantive content of the law, that approach is not effective, for it provides no basis for understanding the normative values that would induce the law to draw the line between rights and responsibilities in one place rather than another.

\(^{10}\) See, e.g., Laura Underkuffler, **The Idea of Property: Its Meaning and Power** (Oxford University Press 2003) (developing a theory of core rights with presumptive power that can then be evaluated in the light of conflicting interests); Joseph William Singer, **Normative Methods for Lawyers**, 56 U.C.L.A. Law Rev. 899 (2009) (surveying various approaches to legal methodology and the kinds of arguments that can be made about the two cases).

\(^{11}\) See, e.g., Henry Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 Cornell L. Rev. 959, 964 (2009) (“when the issue is important enough and bargains will not or should not happen, then owner’s rights must give way to larger societal interests”).

In this article, I posit a different kind of property theory: one that identifies the value that underlies both the owner’s right to exclude and the nonowner’s right of access and that therefore allows us to identify the boundary between exclusion and access. I provide a justification for the substantive content of property law that sees the rights of owners and nonowners to grow from a set of shared values, rather than from a set of conflicting interests. My challenge to conventional property theory is fundamental: A theory of an owner’s right to exclude is a theory of property (by definition) but not a theory of property law because it does not account for limitations on an owner’s right to exclude. And a theory of the social responsibility of owners is a theory of access to property, but not a theory of property law, because it represents interests that are opposed to, rather than unified with, the rights of owners. The theory I seek accounts simultaneously for rights and limitations on those rights and does so in a way that does not require the law to balance diverse interests.

Instead of a balancing theory that defines, and tries to reconcile, opposing interests, the theory here suggests that rights and responsibilities over resources emanate from shared values, not from opposing forces. To be sure, people have different interests, and the interests clash, but a unified theory suggests that the reconciliation of these conflicting interests comes not from their differences but from the values that individuals share. I seek a theory of property that sees the an owner’s obligations and disabilities to flow from the same source that gave rise to the rights in the first place, so that one theory explains both the origin of rights and the scope of the rights. Under this approach, the values that give rise to the right to exclude are also the source of limitations on the right to exclude; the right of exclusion and the responsibility to provide access flow from a single set of social values.

I am, in other words, looking for a theory of the following type: A has the right to exclude for any or no reason if but only if X is true, where X is the value that both defines the right to exclude and provides a measure of its limitations. As long as X is well-specified, this kind of theory overcomes the indeterminacy and circularity of the balancing approach and provides us with a single reference value for understanding both rights and responsibilities. To reconcile the polar

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13 The property theory propounded by Jeremy Waldron is an example; see JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (Clarendon Press 1988). Although his theory is distinct from the one provided here, it has the characteristics I am seeking. From the theory that private property enables human flourishing, Waldron has derived the obligation of a community to redistribute property to achieve human flourishing for all members of the community. Rights and obligation are supported by a unified theory.
positions of exclusion and access, we need to take a closer look at what courts are doing in exclusion cases.

At private law, the right to exclude has a distinctive analytical structure that reflects the exclusion/access dichotomy, and its structure provides the key for understanding exclusion’s unity. 14

The core exclusion concept is that an owner may exclude for any and no reason. When the right is recognized, the owner need not give good reasons, or even any reason, for excluding. Indeed, nonowners are to infer the owner’s decision to exclude—the command to “keep out”—from the fact of ownership. A boundary marker is its own “keep out” sign; without permission or privilege, a nonowner knows to stay outside the boundary. As a result, an owner’s decision to exclude in these core cases is not subject to judicial scrutiny and the state may not interfere with it. If someone wants access to the property, she must seek the owner’s permission and pay the price the owner exacts, and the state stands ready to protect the owner’s exaction. If an individual accesses the property without permission or privilege, a court will impose a remedy designed to deter such conduct, such as an injunction or punitive damages, even if the owner suffers no compensable harm from the incursion; the unlawful incursion is harm enough. 15

The right to exclude is not just a means to protect other rights in property; 16 it rests on a value capable of being protected even if no other injury to the owner is apparent.

On the other hand, when a court limits the right to exclude, the situation is different. When a nonowner is privileged to enter the property, courts evaluate

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15 “Generally speaking, when the intrusion is governed by trespass, then there is no exception for de minimis harms, a rule of strict liability applies, and the landholder can obtain an injunction to prevent future invasions. Thomas W. Merrill, Trespass, Nuisance, and the Costs of Determining Property Rights, 14 J. LEGAL STUD. 13 (1985). According to the Restatement of Torts, if B intentionally enters A’s land without privilege, B will be subject to liability “irrespective of whether he causes harm to any legally protected interest of the other.” RESTATEMENT (SECOND) OF TORTS § 158 (1965).

16 See e.g., Henry E. Smith, Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law, 94 CORNELL L. REV. 959, 964 (2009) [hereafter, Smith, Mind the Gap].
the owner’s reasons for exclusion in light of the nonowner’s interest in access to the property. In this class of cases, the reasons for exclusion become relevant and the right to exclude is subject to judicial oversight. Courts then undertake a balancing test to determine the border between exclusion and access. When the balance is in favor of access, they allow access without any payment for the privilege.\(^{17}\) And even when access is not itself privileged, courts sometimes enforce the right to exclude not with a deterrent remedy, but simply by requiring the defendant to compensate the owner for the harm that occurred because of the access.\(^{18}\) Then, the amount of harm from the incursion is the measure of the scope of the owner’s exclusion right.

In other words, courts sort cases into two categories –they either reject or embrace a balancing test –and everything about the case follows from that decision. Viewed in this way, the decision of whether to balance interests is anterior to the question of how to balance interests in those cases where the interests are to be balanced. Courts do not balance the interests in order to determine whether they ought to balance the interests. They decide whether a particular case falls in the balancing category or not, and undertake a balancing test only if it does, but not if it does not.

Because exclusion cases fall into one of two categories, each having different implications for the relationship between the state and owner and the owner and nonowners, it is important to be able to identify how and why courts put a case in one category rather than another.\(^{19}\) Without such a distinction, the balancing approach threatens to swallow the right to exclude by making categorization just a matter of balancing and robs the exclusion right of its certainty. And without such an approach the notion that exclusion is the essence of property seems to fly in the face of reality, which includes cases where courts,

\(^{17}\) Moreover, when a nonowner is privileged to go on an owner’s property, the burden of communicating the desire to exclude may fall on the owner. Under some circumstances, a nonowner is privileged to gain access to the owner’s property *unless* the owner makes the intention to exclude clear, in which event the privilege to enter the property is the default rule.

\(^{18}\) As I show below, if the nonowner’s incursion into the property resulted from a good faith and reasonable mistake, courts generally award only compensatory damages. *See infra*, § III.C.

\(^{19}\) It does not help to say that the right to exclude is justified by the owner’s interest in exclusion, although courts often do. Jacque v. Steenberg Homes Inc., 563 N.W.2d 154 (1997) (“because a legal right is involved, the law recognizes that actual harm occurs in every trespass.”); Butler v. Ratner, 173 Misc.2d 783, 786 (N.Y. City Ct. 1997) (“[T]he law infers some damage without proof of actual injury from every direct invasion of the person or property of another, the plaintiff is always entitled to at least nominal damages in an action of trespass . . .” citing 104 NY Jur.2d, Trespass, §36, at 484). Such statements simply beg the issue of why the interest in exclusion is so strongly protected. Because the law wants a right to exclude even if another’s use threatens no harm, the right to exclude needs a justification that is independent of the other rights of ownership.
after putting cases in a category to balance interests, deny the right to exclude. To understand exclusion we must address this question: “what values is the court following when the court makes the categorization decision – that is, when it decides whether to balance?” Only with such a theory can we justify the boundary between exclusion and access.\(^{20}\) It does not help to say that exclusion protects an owner’s interest in autonomy and privacy unless we can also say why that interest is not protected in cases where the right to exclude is limited.\(^{21}\) Because the law wants a right to exclude even if another’s use threatens no harm, the right to exclude needs a justification that is independent of the other rights of ownership. In the class of cases where balancing is necessary, we need to identify why the balancing occurs. In the class of cases where balancing is not used, we need to relate the remedy courts impose to the nature of the trespasser’s underlying wrong.

Because courts approach exclusion cases by sorting cases into one of two categories, information cost theory, as developed thus far, does not provide a workable methodology for determining whether a court should or should not balance the interests or for identifying the border between exclusion and access. Tom Merrill and Henry Smith have worked out, and applied to property law, the implications of a foundational insight – namely the importance of categorization as a methodology that allows the law to economize on the information costs for both judges and third parties who would obey the law. They correctly understand property law to be built around the two basic categories of decision making I have already mentioned: exclusion (the right to exclude for any and no reason) and governance (the right to exclude that is limited by the interests of nonowners or other owners). They also correctly point out the information cost advantages of the exclusion model in terms of conserving on the costs of determining and enforcing rights. As Professor Smith say: “under an exclusion regime, the law uses a rough informational variable or signal – such as entry – to define the right, and thus bunches together a range of uses that juries, judges, and other officials need never measure directly.”\(^{22}\) The exclusion regime does this by

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\(^{20}\) Joseph Singer has made the important point that when the law limits the right to exclude it is simultaneously transferring a property right to nonowners. Joseph Singer, Entitlement 40 (2000). The theory here identifies which part of the right to exclude is being transferred to a nonowner when the right is transferred. For convenience, I retain the rhetorical focus on exclusion and its limitations.

\(^{21}\) As the reader will see, we can understand both the right to exclude and limitation on the owner’s right to exclude in terms of an owner’s autonomy, for when the law limits the owner’s right to exclude it is because of the way the owner has exercised her autonomy in making decisions about the property.

\(^{22}\) See Henry Smith, Exclusion and Property Rules in the Law of Nuisance, 90 VA. L. REV. 965
delegating decision making to the owner and protecting that decision from judicial intervention, which involves “a strategy of delegating information questions to owners by delineating exclusive rights to a thing enforceable against all others.”

The governance regime, on the other hand, involves judges, juries, and third party in considering information about the interest of both owners and nonowners and therefore imposes additional cost on the system of rights and responsibilities.

Merrill and Smith concentrate on the information cost advantages that flow from putting a case in one category or another, but they cannot claim any insight into the categorization decision itself. Information theory tells us the advantage of one strategy over another, but not how courts choose one strategy over another. The point here is the one already made – once we distinguish between the question of whether to balance and the balancing process itself, we must, under information theory, determine the information costs of the categorization decision – the decision of whether to balance.

To understand the implications of information costs on the boundary between exclusion and governance, we must focus on the variable that Merrill and Smith have not yet explored: what I call the cost of categorization – the cost of putting a particular case in one category rather than another. When social workers want access to migrant workers on a farm, what is the cost of determining whether to apply the exclusion model or the governance model? The boundary between exclusion and governance is determined by the process of categorization – the process of determining whether a case goes in the exclusion category or the governance category (which I have described as the issue of whether the owner may exclude for any and no reason or whether the owner must balance her interest against the interests of nonowners). The cost of categorization is the cost of making that determination.

By “cost of categorization” I do not mean the possibility that a judge will make a mistake. My argument is not, as others might say, that a categorization methodology might lead to categorization errors because judges might put cases in the wrong category. I am fully confident that judges faced with categories will successfully manipulate them to get a just result. This is apparent from the fact that judges have never been deterred by the power of the rule against trespass from limiting the right to exclude in the case of airplane overflights or social

(2004).

23 Id at 975.
24 See, e.g., Hinman v. Pacific Air Transport, 84 F. 2d. 755 (9th Cir. 1936).
workers who seek to go on a farmer’s land to visit migrant workers, and many other instances. A legal methodology based on categorization leads to the possibility of categorization errors at the margin, but I do not make that point here.

By the cost of categorization, I mean that it takes information resources to determine whether to put a case in one category rather than another. Consider two types of categorization costs: the costs of determining in which category a particular case falls (determination costs) and the costs of enforcing the right to exclude when the categorization process result is in doubt (enforcement costs). Determination costs are the costs a person faces if she needs to determine whether a case falls in the exclusion category or the governance category. A judge gets a case and must determine whether to apply the rule against trespass (the exclusion strategy) or apply (or create) a privilege to enter another’s property (the governance strategy). Often that is easy and takes little information; sometimes it takes a great deal of information and thought. Even though a judge putting a case in the exclusion category minimizes information costs, deciding whether to put a case in that category imposes information costs not accounted for in the Merrill and Smith models. This is one of the costs of determining the boundary between exclusion and governance.

The second kind of categorization costs is enforcement costs. Third parties need to be able to identify the boundary between exclusion and governance because, if the categorization methodology is to reduce information costs, they need to know in which category a case will fall. Just as the exclusion strategy depends on simple proxies (a boundary and entry) to reduce the information costs of complying with the exclusion rule, the cost of categorization needs a simple proxy to determine whether a particular case goes in the exclusion or the governance category. When that boundary is murky and misunderstood, as it is now, the information costs of the categorization approach go up enormously. By identifying that boundary, we reduce the information costs of categorization. Indeed, one of the categorization costs is the cost of litigating trespass cases, like the airplane overflight cases, that got to court only because the exclusion category was too roughly defined.

Although I have written of the “cost of categorization,” it is apparent that categorization is a normative process, involving information costs as only one relevant variable. When a judge or third party is deciding in which category to put a case they are asking the following kind of question: “given the values the

25 Smith and Merrill refer to entitlement delineation costs, but I interpret that to be the cost of delineation once a case is put in a category.
law is trying to achieve, would the cost of acquiring additional information be offset by an increase in the just resolution of this dispute.” When the judge puts a case in the exclusion category, the judge is effectively saying: “no amount of additional information about the interests of the nonowner would bring about a more just result. The costs of particularization by getting information about the use by the nonowner are not worth it in order to reach a just result.” When a judge puts the case in the governance category, on the other hand, the judge is saying something like the following: “I cannot determine the just result without taking into account the uses of the nonowner in relation to the uses of the owner. To determine whether the nonowner’s use was privileged, I therefore need to gather more information.” When the judge makes the former, exclusion determination, the judge is saying: the owner may exclude for any and no reason. When the judge makes the latter determination, the judge is saying: the owner’s right to exclude is limited by the legitimate interests of nonowners, about which I need more information.

That means that the process of categorization requires a justification for the right to exclude for any and no reason that is normatively different from the information cost savings that inhere after the case is put in the exclusion category. Understanding the boundary between exclusion and access reduces the information costs of the categorization process, and that cannot be done unless we understand the normative appeal of the exclusion category and the kind of information we need to put a case in one category rather than another. That compels us us to seek a theory that identifies the value that determines the border between exclusion and access.

Part III. Exclusion as Duty

We can locate the normative basis for an owner’s right to exclude if we look away from an owner’s rights and toward an owner’s obligations and non-obligations. In this section, I explain that an owner’s right to exclude is based on the principle that an owner has no duty to benefit another, and I examine the normative basis for that principle. I also explain when and why an owner takes on obligations to others and how we think about the scope of those obligations. Together, the no-duty and duty principles of private law provide a complete, and justifiable, account of the exclusion concept in property law, and the boundary between exclusion and access.

The theory presented here explains the categorization process that courts use. As developed here, an owner may exclude for any or no reason (without a balancing test) when the owner has no obligation to benefit others – the majority
of trespass cases. An owner of a farm has no duty to benefit the seller of a mobile home and may therefore deny the seller access to the property. This explains the strength and scope of the right to exclude. On the other hand, a court invokes a balancing test (governance strategy) when the owner has the obligation to take into account the well-being of nonowners, which, in turn, requires the owner to appropriately adjust his projects and preferences in light of the projects and preferences of others. A farmer who employs migrant workers must, as their employer, take their well-being into account, and must therefore reasonably take their well-being into account when deciding whether to allow social workers on the property to work with the migrant workers. The obligation to be other regarding under certain circumstances underlies the social obligation norm of owners. The contours of these obligations allow courts to define the boundary between an owner’s right to exclude and another’s right to use the owner’s property. And because of the strong normative reasons for private law to recognize these duty and no-duty principles, the right to exclude is fully anchored in a theory of justice.

The value underlying exclusion and access is the value of autonomy, but autonomy supports both the right to exclude and its limitations. Absent a relevant relationship with a nonowner, the law treats the owner as an autonomous being in a way that allows the owner to exclude for any and no reason. But many decisions an owner makes in the exercise of the owner’s autonomy implicate the obligation to take into account the well-being of others—as when an owner hires migrant workers. Then the value of autonomy requires one to bear responsibility for the well-being of others because the principle of autonomy requires that one bear the burdens of one’s decisions. The autonomy of the owner both empowers and limits the ability of the owner to exclude for any and no reason.

A. Exclusion as Implementation of the No-duty Principle.

An owner’s right to exclude for any or no reason (that is, without considering the interests of others) reflects private law’s parsimonious requirements about the circumstances under which one individual ought to take into account the well-being of others. When an owner denies a nonowner the right to use the owner’s property, the owner is effectively saying: “I have no duty to benefit you.” The right to exclude affirms the basic principle that unless an actor undertakes an activity that fairly implicates the obligation to think about the well-being of others, the actor is not required do so.26 As I argue in this

section, under this no-duty principle an actor is under no general obligation, without more, to allow another to use the actor’s resources because, under private law, no individual is under a general obligation to benefit others and no individual has a general claim to be benefited. The concept of duty to another in private law requires that an actor has made a choice from which one can fairly imply that the actor has, because of that choice, undertaken an obligation to look out for the well-being of others. In this way, the right to exclude is not so much an expression of a property right as it is property law’s expression of the general no-duty orientation of the common law.

The intuition is straightforward; one may not pick the apples in my apple orchard for the same reason that one may not pick my pocket or compel me to rescue them if they are drowning.

The notion that private law imposes no duty to benefit others – even a duty of easy rescue – is accepted, despite the expansion of tort obligations in recent years. It is nonetheless controversial. In order to defend the normative pull of the no-duty-to-benefit principle, we must confront the strong moral intuition that failing to easily rescue another, even a stranger, is a violation of one’s moral


27 See William M. Landes & Richard A. Posner, Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism, 7 J. LEGAL STUD. 83, 106-08 (1978) (looking at the duty to rescue from an economic perspective); Ken Levy, Killing, Letting Die, and The Case For Punishing the Bad Samaritanism, 44 GA. L. REV. 607, (2010) (arguing that all states should enact a “bad-Samaritan” law); Robert Justin Lipkin, Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue, 31 U.C.L.A L. Rev. 252, (1993) (addressing the objections to a general legal duty to rescue); Jeremy Waldron, On the Road: Good Samaritans and Compelling Duties, 40 SANTA CLARA L. REV. 1053 (2000) (arguing that the law is capable of securing help for those in need or danger by a state-enforced good samaritan law instead of simply a moral duty to help); Ernest J. Weinrib, The Case for A Duty to Rescue, 90 YALE L. J. 247(1980) (arguing for a reconsideration of the common law position against a duty to rescue); Daniel B. Yeager, A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers, 71 WASH. U. L. Q. 1, 13-23 (1993) (arguing that the common notion that affirmative duties are intolerable is less vigilant than most observers suggest).
obligations. We must also confront the assumption that the doctrine of necessity provides property law’s equivalent of a requirement of easy rescue, compelling the owner to allow those in distress to use her property.

A recent expression of the moral intuition supporting an obligation of easy rescue comes from Ronald Dworkin. Given the need for each individual to live in the balance between two intersecting values – due regard for the way one has chosen to live her own life and equal regard (although not equal weight) for the lives of others, one can see situations in which one must sacrifice one’s own projects and preferences for the sake of other people’s projects and preferences. As Dworkin puts it:

We must show full respect for the equal objective importance of every person’s life, but also full respect for our own responsibility to make something valuable of our own life. We must interpret the first demand as making room for the second, and the other way around...[t]here is a limit to how far I can consistently ignore something that I claim has objective value. I cannot be indifferent to its fate.\[28\]

I do not intend to shadow box with arguments of this type, for doing so is not necessary to support my claim that private law ought not impose a general duty to benefit another, not even a duty of easy rescue. I argue that the moral obligation of easy rescue does not control the private law stance toward easy rescue and that sound reasons support the divergence between an actor’s general moral obligations and an actor’s moral obligations under private law. Consider two related points. The first is that private law is but a subset of the law, so that the failure to incorporate the moral obligation of easy rescue within private law does not create a necessary divergence between the law and moral requirements; the moral duty of easy rescue can be, and is, incorporated in law in many ways. The second point is that there are good reasons for not incorporating the obligation of easy rescue into private law.

My position is not that law and moral obligations necessarily diverge; it is that moral obligations ought not be implemented in private law. In exploring the right to exclude, we deal only with private law – in this instance, a nonowner’s right to make a claim against an owner that the owner must, as a matter of corrective justice, honor. More broadly, private law deals only with claims an injured person makes against another individual that the other is responsible for

\[28\] RONALD DWORIN, JUSTICE FOR HEDGEHOGS 272 -4 (2011).
the injury. It deals only with the division of responsibility between individuals when bad things happen to one of the individuals. Outside of private law, the law deals with harms more broadly and the law finds many ways of incorporating the moral obligation for the well-being of others into the law without incorporating the obligation of easy rescue or beneficence into private law. Law can, and does, offer rewards or indemnities to rescuers.\textsuperscript{29} Criminal law can express the sense of the community that the failure to easily rescue another ought to be punished. And social norms can exert a strong law-like force of reputational rewards to support rescue. I am not suggesting any general divergence between moral obligations and the law; only a divergence between moral obligations and private law.

The distinction between the moral obligation to benefit another and private law’s lack of an obligation to benefit another is the distinction between what an actor ought to do (the moral issue) and what another person can claim from the actor if the actor fails to do what the actor ought to do. Private law enforces corrective justice, which always treats the bilateral relationship between two people and seeks to divide responsibilities as between people. In the context we are discussing, it always asks: what responsibility does the owner owe the nonowner and what responsibility does the nonowner owe the owner? It does not ask about the moral action of one person only, but about the moral character of their interaction, taking into account, and giving equal weight to, the personhood of each individual in the context of their interaction. That is because private law is about a claim that one person may make against another based on the division of responsibility between the two of them. The moral obligation of beneficence is about what an individual ought to expect of himself. The private law concept is about what an individual can claim from another (using the coercive power of the state). The difference between what an individual ought to expect of himself and what another can claim of him suggests that every \textit{ought} should not be translated into a legitimate claim by another person.

A duty to benefit others enforceable at the claim of others would enmesh the law in a host of practical problems: knowing where the duty to benefit another

the would-be-rescuer’s many questions about the need for, and costs of, rescue, and the problem of determining which of several possible rescuers ought to execute the rescue. But even if we put these problems to rest, private law fails to incorporate a doctrine of easy rescue because the values that compel a person to make the rescue are foreign to the values that govern the claims that one person may make against another.

Arthur Ripstein provides the philosophical support for the proposition that corrective justice precludes one person from making a claim to be benefitted by another if the would-be rescuer is not associated with the risk the claimant faces in a relevant way. He draws the important distinction between two realms: private law deals with the division of responsibility between individuals, not with the division of responsibility between the individual and the state. This distinction orients the further distinction between claims an individual has against other individuals and claims in individual has against the community (in the person of the state). Claims against the state are claims of distributive justice, while claims against individuals are claims of corrective justice. In both realms, choice must be grounded in the responsibility one takes for one’s own life in the context of equal respect for others. Naturally, that means that when an individual is attached to the risk of loss another faces in an appropriate way the individual must, when making choices, attach appropriate significance to the harm another might incur. This is because it is the individual’s own choice that leads the individual to be attached to the risk of harm another might face. The other is entitled to be free from that choice.

By the same reasoning, the would-be rescuer ought to be free of the choices that affect the life of one who would otherwise absorb a loss. As Ripstein says:

Independence from another person’s choice is important not because it is thought of as the best way of promoting successful choice, but rather because it implies the more general idea of reconciling the purposiveness of separate persons—each of whom has a special responsibility for his or her own life—through a set of reciprocal restraints. …[Y]our independence from the

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30 Even the most persuasive expression of the doctrine of easy rescue requires the rescuer to draw difficult lines between her interests and the interests of the victim, mediated by the immediacy of the victim’s plight (what Dworkin calls the “confrontation factor”).

choices of others is to be understood as your entitlement to be the one who decides what purposes you will pursue with the means that are at your disposal.\textsuperscript{32}

Based on the independence of each individual to choose her own goals and means of reaching those goals, each must be independent of the choices made by others, which is what gives the decisions of each their independence.

The idea that each person has responsibility for his or her own life limits the means people are able to use for their purposes. In particular, my special responsibility for my life is only consistent with your special responsibility for yours if each of us is required to keep from using the other, in pursuit of our purposes.\textsuperscript{33}

Claims against another individual must therefore flow from choices that the other has made. Unless a claim against another flows from such a choice, an individual’s life is her own responsibility (or the responsibility of the community) and not the responsibility of any other individual who stands outside relationships that have already been formed. This account is Kantian because “Kant approaches private law through its relationship to freedom, understood as independence from the choices of others”.\textsuperscript{34}

Because the moral \textit{ought} looks at the situation only from the standpoint of the would-be rescuer, it does not take into account the moral status of the person to be rescued. Once we account for the moral status of the person to be rescued, it is hard to see why the person to be rescued can impose on a stranger an obligation to help avoid a loss. Even if the victim’s position is determined only by their bad luck, by what right does the luckless victim make a claim that a stranger should bear the consequences of that bad luck? Hypothetical cases involving children in danger are meant to sway the moral judgment about the relationship between adult rescuer and child, but they ignore the moral relationship between the would-be rescuer and the person who put the child in danger.

This view is consistent with autonomy theories of property. Private law sees each person as an autonomous actor, fully endowed with the freedom to make decisions that do not positively interfere with the projects and preference of

\textsuperscript{32} Id. at 1403.
\textsuperscript{33} Id. at 1405.
\textsuperscript{34} Id. at __, citing IMMANUEL KANT, THE METAPHYSICS OF MORALS 30 (Mary Gregor, ed. & trans., 1996) 1797 \textit{[Hereinafter KANT, METAPHYSICS OF MORALS].}
others. Each person is an individual of purposive agency and for each person to fulfill her individuality she must be able to develop her talents in directions she finds to be important, toward goals she values, and by means that enhance her journey. That implies that each actor has the freedom to make decisions without taking into account the well-being of others unless the actor has surrendered or used her autonomy in a way that fairly implies an obligation to another.

Personal autonomy demands that the decision to benefit or rescue another be made freely and not under the compulsion of the victim, for that is the only way by which the autonomy can be fully realized. As a reciprocal value, autonomy strengthens the individuality of the would-be rescuer by protecting the rescuer from claims to change the rescuer’s projects and preferences, while protecting the person to be rescued, for no person may make claims against him. Importantly the reciprocal autonomy protected by private law strengthens the bond between would-be rescuer and victim. When the victim is rescued voluntarily, as moral action requires, the victim knows that the rescue is an act of grace, not an act compelled by the community. The very voluntariness of the rescue builds a bond between rescuer and victim that would not be there if the law put a price on the failure to rescue. Acting voluntarily out of concern for another’s well-being builds the bonds of relationship and community that might not be there if the act were done to avoid legal liability to the victim.35

Elsewhere, I show how this conception of an actor’s freedom from claims of easy rescue by others is integral to our understanding of obligations in tort law, one not weakened by the great expanse in tort obligations.36 The same concepts shape the right to exclude. An actor who asks to take a mobile home across another’s fallow field is asking the owner to confer a benefit that the owner has not fairly agreed to confer. The actor is asking the owner to be other-regarding in a way that is not part of the obligation the owner has accepted. If the law were to impose the obligation to confer this benefit – that is, if the law were to require that the owner give up the right to exclude – the law would be requiring the owner

36 PETER M. GERHART, TORT LAW AND SOCIAL MORALITY (Cambridge Univ. Press 2010).
to look out for the well-being of others even when that obligation cannot fairly be implied by any choice the owner had previously made. Such an imposed obligation would easily undercut social interchange as people made claims against each other without the other’s express or implied consent.\textsuperscript{37}

Because the owner has no duty to think about the well-being of others, there is no warrant for balancing the owner’s interest against a potential nonowner’s interest; the owner can exclude for any and no reason. This explains, therefore, why the right to exclude does not depend on a potential injury to the owner. The injury is in invading the decision making autonomy of the owner and seeking to appropriate, without warrant, the owner’s resources to other uses. The same point can be made another way. An owner bears the burdens of ownership: purchase, upkeep, and risk. Unless the owner has in some way agreed to share the benefits of that investment with others, the owner is entitled to the benefits.\textsuperscript{38} The biblical and legal admonition to reap only where one has sown expresses the ethical and functional imperative that one who carries the burdens of ownership ought to also reap the benefits of ownership.\textsuperscript{39}

Some will argue that the doctrine of necessity imposes a duty of easy rescue in property law and that this is the implementation of the moral duty to rescue. It is easy to see why analysts would jump to this conclusion. When the owner of a sloop ties to a landowner’s dock to avoid a dangerous and unavoidable storm, the dock owner is disabled, under the doctrine of necessity, from forcing the sloop into the dangerous waters. This looks as if the owner of the dock must

\textsuperscript{37} This account is, I believe, consistent with “the traditional everyday morality of property” that is “recognized by all members of society” [Merrill and Smith] Morality at 1851057, 67, 91-92. My sense is that everyday morality respects the obligation to confer benefits on strangers but would not expect that to be coerced by the beneficiary.

\textsuperscript{38} Henry Smith has made a similar point in the context of information theory:

Ownership concentrates on the owner the benefits of information developed about –and placed bets on – the value of the asset. …[S]uch owners make bets in situations of uncertainty and are rewarded or punished depending on how those bets turn out later when the uncertainty is resolved. The owner develops information about the attributes and potential uses of the asset he owns, but he may not be able to communicate his prediction about future values to others at reasonable cost.

Smith (\textit{Property Rules}, 2004) 1729

\textsuperscript{39} This account is, of course, consistent with the accounts of property that emphasize the value of an owner’s autonomy, Dagan 96. It goes beyond other accounts, however, by also emphasizing that it is an actor’s exercise of autonomy that gives the actor the obligation to take into account the well-being of other people. See infra text at notes \_\_ to \_\_.
allow his dock to be commandeered by another in order to avoid greater harm. Is this not the duty to allow someone to benefit from your property? It is, but as I will show below, the doctrine of necessity is far narrower than this simple reading suggests. First, it applies only when a nonowner is already on the property. Second, it requires that that nonowner exhaust all other reasonable means of self-protection. And, importantly, it does not disable the owner from making his property unavailable for rescue. The owner has no obligation in the first place to build a dock that provides a refuge for people in a storm, and nothing in the doctrine of necessity disables the owner from making the dock inaccessible to nonowners. Property owners routinely erect fences and other barriers that disable people from using their property in an emergency. Thus narrowed, the doctrine of necessity stands, as I show below, for the proposition that once a nonowner is on the owner’s property in an emergency, the owner is limited in the choices the owner may make with respect to that use of the owner’s property. This seems to be consistent with the concept of duty that I believe animates the law of property.

B. Limitations on Exclusion as An Owner’s Duty

The right to exclude elevates the decision-making autonomy of the owner over the well-being of the nonowner, but the right to exclude is not, as we have said, absolute. Just as the right to exclude is driven by the no-duty principle, it is limited by the duty principle—that is, by the obligations to others that an owner has undertaken. Owners sometimes take on the obligation to take into account the well-being of others, and when they do they may not exclude nonowners unless the exclusion is reasonably necessary to protect their legitimate interest, given the legitimate interests of nonowners. This section elaborates on the concept of duty that animates private law and shows how and when the concept limits an owner’s right to exclude.

40 I write only about obligations to private individuals, not obligations to the state or state officials. As to the right of public officials to go on private property, see RESTATEMENT (SECOND) OF TORTS § 202 (1965) (abatement of public nuisance by public official); § 204 (entry to arrest for criminal offense); §205 (entry to recapture or to prevent crime and in related situations); § 206 (forcible entry of dwelling to arrest, recapture, prevent crime, and related situations); § 207 (entry to assist in making arrest or other apprehension); § 208 (entry to execute civil process against occupant of land); § 209 (entry to execute civil process against non-occupant of land); § 210 (entry pursuant to order of court); § 211 (1965) (entry pto legislative duty or authority).

I therefore exclude from my analysis limitations on the right to exclude that flow from the need of public officials to enter to undertake their public function and cases in which entry is shaped by the public interest in gathering information. No doubt the duty to be other-regarding extends to public officials who are doing the business of the community, and several of the traditional privileges of entry reflect that fact. I am not, however, proposing a framework for thinking about the relationship between the individual and public officials acting for the public.
An actor takes on many obligations by consent, of course, and the right to exclude is limited by those consensual obligations. But obligations to be other-regarding are not limited to consensual relationships.

An actor also surrenders her decision-making autonomy protected by the no-duty principle when the actor makes decisions from which the duty to take into account the well-being of others can fairly be implied (that is, by the exercise of the owner’s decision-making autonomy). Just as the no-duty principle protects an actor’s decision-making autonomy, the duty concept reflects the consequences that attach when an actor has exercised her autonomy in a way that implicates the well-being of others. Although the concept of the duty to be other regarding is not prominent in property theory, it ought to be, for property law, like contracts and torts, is about how an individual ought to understand herself in relation to other individuals. When, for example, an owner uses his property to erect a steel mill, the obligation to think about the well-being of others is clear from the owner’s knowledge that the steel mill will pollute the air. The law of nuisance is built on an obligation of each owner to others owners, one that flows from the choices each owner makes about how to use her property.

Contract law provides the most straightforward example of how an actor’s choices impose on them obligations to others. The identical notion animates tort law—duties are imposed because they are the natural consequence of choices people make. A person getting behind the wheel of a car surrenders decision-making autonomy by the very decision to subject others to the risks inherent in the actor’s driving; the actor must therefore make reasonable decisions while driving. Similarly, a supplier of goods or services, has, by virtue of going into

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41Du Mez v. Dykstra, 241 N.W. 182, 183 (Mich. 1932) (implied consent from “general custom of owners of wild lands to permit the public to pass over them without hindrance.”); Rawls & Associates v. Hurst, 550 S.E.2d 219 (N.C. Ct. App. 2001) (finding vendor’s implied consent to purchaser to occupy premises precluded trespass claim); Maint. Equip. Co. Inc. v. Godley Builders, 420 S.E.2d 199, 202 (N.C. Ct. App. 1992) (requiring construction company to get permission from tenant, who occupied land owned by railroad, before grading and bulldozing adjacent property). The restatement addresses issues of consent in several provisions; see, e.g., RESTATEMENT (SECOND) OF TORTS § 167 (1965) (effect of consent of possessor); id., § 168 (1965) (conditional or restricted consent); id., § 169 (1965) (consent restricted as to area); id. at § 170 (1965) (consent conditioned or restricted as to time). Permissive privileges for nonowners to use an owner’s property are, of course, implied by law, as in the case of irrevocable licenses and many easements. McCaig v. Taldega Pub. Co., Inc., 544 So.2d 875 (Ala. 1989) (finding co-op agent did not trespass and had right of access for limited purpose of inspecting and servicing co-op equipment); Moore v. Schultz, 91 A.2d 514 (N.J. Ct. App. Div. 1952) (finding that defendant had a right of profit a prendre in gross to extract sand and gravel from plaintiff’s land).
business, surrendered decision-making autonomy and accepts the obligation to think reasonably about the well-being of those the supplier serves. The duty extends even to risks that the actor did not create. A landlord has the obligation to tenants to reasonably protect them from muggers and a store owner must take reasonable steps to protect a customer who suffers a seizure while in the store. These obligations are fairly implied from the decision to be a landlord or store owner.

These examples from tort law have their counterparts in property law. In particular, limitations on the right to exclude flow from decisions the owner makes and from the owner’s relationship to people on the owner’s property. As I will now show, we can understand that an owner’s duties to take into account the well-being of nonowners when making exclusion decisions are fairly implied by the owner’s decision to buy property, by their decisions about how to use property, and by their status as owners and their relation to people who are on their property. These circumstances in which an owner must reasonably account for the well-being of others determine the limitations on the right to exclude.

B.1. Obligations Implied by Use

Generally, owners’ decisions about how to use property impose on them no obligations to take into account the well-being of others. As we saw in Steenberg, 42 the decision to use land as a homestead or farm does not impose the obligation to think about the well-being of those who want to use the property to transport a mobile home across the property to a neighbor. That is because nothing in the decision to use the property in that way implies the obligation to take into account the well-being of someone who wants to use the property as a transportation corridor. The owner absorbs all the burdens of ownership and is under no obligation to share the benefits of ownership with another. In other contexts, however, an owner’s decisions concerning the use of the property fairly imply an exercise of autonomy such that the owner has accepted the duty to think about the well-being of others.

As a prominent example, a decision to open a retail business implies a series of obligations to take into account the well-being of customers, including obligations to reasonably protect the customer’s safety and to provide access unless there is a good reason to deny access, one relating to protecting the legitimate well-being of the owner or other customers. Public accommodation requirements, whether imposed by private or statutory law, work out the

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42 Jacque v. Steenberg Homes Inc., 563 N.W.2d 154 (Wis. 1997).
implications of the restrictions on exclusion that an owner impliedly undertakes when deciding to open a retail business. The reasoning is straightforward. The store owner gets the benefits of attracting customers, which fairly implies that the owner ought to accept the burdens of that benefit. For that reason, the law attaches a host of obligations to the owner of retail business that it does not attach to the owner of a home, and the law works out those obligations by considering how the owner ought properly to balance her interests with the interests of others.

Although some evidence indicates that limitations on the right to exclude are less for sellers of goods than, for example, common carriers, that condition is not likely to continue. The cases are few and far between and many of them involve the gaming industry, where the justification for the right to exclude, when seen in light of public regulation, may allow owners more leeway in showing that their exclusion is reasonable. In addition, care must be taken in interpreting these decisions. Courts may confirm a retail owner’s right to exclude without making it clear whether they refer to the right to exclude as applied in a particular context or more broadly. Such cases could be saying one of two things: either that the right to exclude was affirmed because it was based on appropriate reasons, or that the case is part of a general class of cases where a bright line rule has benefits that outweigh the benefits of case-by-case approach (that is, a rule that could be justified on the basis of conserving information costs.)

The court could, in other words, uphold the right to exclude because the excluded person was reasonably thought to be a threat to other customers or because of entrance requirements that validly protect other customers (such as a ban on bringing

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43 By contrast, the owner of the farmhouse in the mobile home case did not get any benefit from the seller of the mobile homes and therefore, by deciding to use the property as a farm, did not agree to accept any burdens with respect to the seller of the mobile homes.

44 Use decisions matter because use determines the context in which expectations are constructed by property rights, which allows us to distinguish between the right to exclude from a home and the right to exclude from a business. That is why Joseph Singer writes that “the social context in which the property operates and the types of uses prevalent there affect the assignment of legal rights and obligations.” JOSEPH SINGER, ENTITLEMENTS 43 (2000)


46 Under this approach, the court would be saying that the value of a more fine-tuned resolution of the issue would not be worth the additional expenses of the inquiry to differentiate between cases where the owner had a reasonable basis for exclusion and cases where the owner did not. One might imagine, for example, that a store owner who excludes suspected shoplifters based on non-discriminatory and objective criteria might well retain the right to exclude. This analysis also suggests, of course, that exclusion based on impermissible personal factors, such as race, can be, and ought to have been restricted by the common law. See Singer, No Right to Exclude, supra note 44, at 9 (both public perception and fundamental legal principles today suggest that businesses open to the public have a duty to serve the public without unjust discrimination).”
handguns on the property).

In any event, any notion that some retail sellers have a greater right to exclude than others seems to be a vestige of formalism that cannot be long-lived, given the expanded duties that retailers are under in tort law. It is hard to escape the conclusion of the New Jersey Supreme Court 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.”

The notion that an owner’s decisions about her property may fairly imply that she has accepted limitations on exclusion also explains and justifies the outcomes in the migrant worker cases. An owner’s duty to allow social service workers reasonable access to meet with migrant workers is fairly implied from the owner’s decision to hire the migrant workers. The obligation does not attach to the owner as owner but to the owner as one who, by hiring migrant workers, undertook an obligation to consider their well-being when making decisions. The owner gets the benefits of the migrant worker’s labor and therefore ought to bear the burdens that fairly come with the benefits. The obligation did not violate the owner’s autonomy because it did not impose a burden that the owner did not impliedly accept by his decision to hire the migrant workers, and the obligation is fairly implied because the owner got the benefits of the migrant workers. Assigning reasonable limitations to the owner’s rights to exclude was fair because

48 State v. Shack, 277 A.2d 369 (1971). Asociacion de Trabajadores Agricolas de Puerto Rico v. Green Giant Co., 518 F.2d 130, 138 (C.A.3, 1975) (requiring union members to prove that no other reasonable way existed to access migrant workers than entering on the defendant’s private property); Petersen v. Tailsman Sugar Corp., 478 F.2d 73 (C.A.5, 1973) (requiring company to grant labor union officials and religious workers access to Jamaican migrant worker camps); United Farm Workers Union, AFL-CIO v. Mel Finerman Co., 364 F.Supp. 326 (D. Colo. 1973) (holding that operator of camp had to allow union to enter migrant camp subject to reasonable constraints); Velez v. Amenta, 370 F.Supp. 1250 (D.C.Conn. 1974) (holding that tobacco growers’ association, which ran a migrant workers camp, could not deprive the migrant workers of their civil rights regardless that the camp was private property); Franschina v. Morgan, 346 F. Supp. 833 (S.D. Ind. 1972) (holding that migrant workers were tenants, and therefore entitled to guests, not to the discretion of the camp owners); Folgueras v. Hassle, 331 F.Supp. 615 (W.D. Mich., 1971) (finding in favor of government workers’ access); Lee v. A. Duda & Sons, Inc., 310 So.2d 391 (Fla. Dist. Ct. App. 1975) (holding that a corporation which provided legal assistance to migratory workers had right of access to migrant worker camps but restricted to give notice and visit at reasonable hours); Baer v. Sorbello, 425 A.2d 1089 (N.J. Super. Ct. App.Div. 1981) (“One is not answerable to a charge of criminal trespass where his purpose is to ascertain working conditions and make available governmental or charitable services on behalf of migrant farmworkers.”); People v. Rewald, 65 Misc.2d 453 (N.Y. Co. Ct. 1971) (finding that privately owned migrant workers camp was partially open to the public, therefore, the landowner could not arbitrarily deny a reporter access).
the owner ought not accept the benefits of his decisions without also accepting reasonable burdens.⁴⁹

A large number of limitations on the right to exclude flow from an owner’s choices about how she uses her property. Limitations on the right to exclude imposed under the doctrine of irrevocable licenses and easements created by implication, necessity, or estoppel each arise from decisions an owner has made about the use of her property. A license to use the owner’s property generally implies that the license will be revoked only under reasonable circumstances.⁵⁰ When an owner allows another to use the property under circumstances that justify invocation of the doctrine of estoppel, the right to

⁴⁹ The controversial aspect of the migrant worker cases was not the duty to consider the well-being of the migrant workers, but the question of whether their well-being might have been accommodated by allowing them to meet with the social workers outside the premises. Had that been a reasonable alternative, the owner would not have been unreasonable in prohibiting access. But this issue was resolved by most courts against the owner. According to the court in State v. Shack: “[migrant workers] are unaware of their rights and opportunities and of the services available to them [outside of camp, thus] they can be reached only by positive efforts tailored to that end. . . . [o]ne of the major problems . . . is [migrant workers’] lack of adequate direct information with regard to the availability of public services . . . .” Shack, 277 A.2d at 372-73. The only migrant worker’s case upholding the right to exclude did so on the ground that the migrant workers could meet with the social worker’s off the premises. Asociacion de Trabajadores Agricolas de Puerto Rico v. Green Giant Co., 518 F.2d 120 (C.A.3, 1975) (requiring persons seeking access to migrant workers’ labor camp to produce proof that no other reasonable options existed for reaching the desired audience).

⁵⁰ Standard property doctrine suggests that licenses are revocable. Chicago & N.W. Transp. Co. v. City of Winthrop, 257 N.W.2d 302, 304 (Minn. 1977) (a license is generally revocable and not an encumbrance on the land). That suggestion is justified because simple permissions to use property are generally not done under circumstances that would make revocation unreasonable. However, in a broad range of circumstance, the right to revoke the license—and thus to exclude—is limited. Messer v. City of Birmingham, 10 So.2d 760 (Ala. 1942) (holding a licensee on revocation of license is entitled to reasonable notice and opportunity to remove the improvements erected by him on licensor’s premises if improvements are removable); Rhodes v. Otis, 33 Ala. 578 (1859) (a license coupled with an interest or an executed license are exceptions to revocability); Shearer v. Hodnette, 674 So.2d 548, 551 (Ala. Civ. App. 1995) (license may become irrevocable when the licensee has expended money or labor in reasonable reliance on the continued existence of the privilege); Mize v. McGarity, 667 S.E.2d 695 (Ga. Ct. App. 2008) (finding that since licensees contributed to cost of constructing and maintaining a joint driveway they gained an irrevocable license); Lee v. Regents of Univ. of Minn., 672 N.W.2d 366 (Minn. Ct. App. 2003) (holding that if a licensee has property on the premises in question, she is entitled to reasonable notice of revocation of license). I prefer to state the rule in terms of the reasonableness of the revocation because I think that it is a mistake to state a rule as if it had no exceptions, when, in fact, exceptions arise in a variety of circumstances. The focus of analysis ought to be on the circumstances under which the license may be revoked rather than on the fact that in most instances it is reasonable to revoke the license.
exclude for that purpose is limited. And when an owner sells property subject to a prior use, that decision often creates a limitation on the right to exclude. Finally, the separation of one parcel of land from another under circumstances where use of one of the parcels is necessary implies a limitation on the right to exclude.

Some of these cases masquerade as cases of necessity, for courts easily confuse the obligation to consider the well-being of others with the doctrine of necessity. Because a railroad has a duty to its passengers, a railroad’s decision to close the railway station and send its waiting passengers into an impending storm is unreasonable. Although courts treat the owner’s conduct as violating the doctrine of necessity, the case simply works out the railroad’s obligations to treat people reasonably given the railroad’s preexisting duty to consider their passenger’s well-being. Similarly, if an owner creates an “attractive nuisance,” the owner has accepted the duty to think about the well-being of a child who might enter the property. And if an owner knows of a trespasser and the hazard the trespasser faces, the owner has a duty to the trespasser because the decision to create or fail to abate a risk (a decision about use) imposes the obligation to think about the well-being of those who are known to be on the property. And the owners of a guard dog must think reasonably about the well-being of those who might come onto the property (whether they come on the property from implied permission or because of necessity).

B.2 Obligations Implied by Purchase: Custom and Norms

An owner’s obligation to consider the well-being of nonowners, and therefore to think reasonably about the circumstances under which a nonowner can be excluded, may also arise from the decision to purchase property. This occurs where the owner buys property under circumstances where she should have known of the way that prior usage and custom restrain decisions made about property. Property comes with preexisting or customary uses and those uses bind the owner when the owner is making decisions about the property. When it can fairly be said that the owner must have known about prior or customary uses, the decision to buy the property is a decision to accept the limitations that custom


52 See Restatement (Second) of Torts §336 (1965) (discussing activities dangerous to known trespassers); Id., §337 (1965) (discussing artificial conditions highly dangerous to known trespassers).
imposes on the right to exclude.\textsuperscript{53} It does not impermissibly infringe the owner’s autonomy to say that the decision to buy the property knowing of the preexisting uses is a decision by the owner to reasonably respect those preexisting uses.\textsuperscript{54} Nor does it upset the burdens and benefits of ownership. A buyer of property subject to the burdens of prior use or custom is able to reduce the purchase price to offset the burden.

The most straightforward illustration of this principle is the option in \textit{Raise v. Castle Mountain Ranch, Inc.}\textsuperscript{55} Plaintiffs had built and used summer cottages around a lake with the permission of the owner, who gave his permission because he benefitted in a variety of ways from the plaintiff’s use. When the owner decided to sell the property, defendant bought the land, knowing of this use, and tried to get the seller to exercise his right to terminate the license, but the seller refused. The court held that even though the plaintiff’s use was governed by a contract that gave the owner the right to cancel the license at will, the defendant could not exclude plaintiffs until the plaintiffs had reaped the value of their investment in the land, and imposed a constructive trust on the defendant running in favor of the plaintiffs. The defendant had limited the scope of his right to exclude by buying the property under circumstance that required the plaintiff’s ability to get the benefits of the investment they had made.

Accordingly, when a person acquires an ownership interest in beachfront property that has been customarily used by the public, and the property is not to be used in some different way, the owner takes the land subject to the implied duty to consider reasonably the well-being of customary nonowners.\textsuperscript{56} Similarly, when the community custom is to hunt on the undeveloped portions of property, the owner takes the property subject to the obligation to look out for their well-

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\textsuperscript{53} Prior and customary uses serve as a kind of non-legislated zoning, forming a set of unstated expectations that owners take on when they purchase the property.

\textsuperscript{54} The idea that the purchase of property comes with pre-existing burdens is central, of course, to the law of servitudes, which imposes obligations on purchasers who have notice of burdens that run with the land. It also suggests that when community values require it, purchasers must also respect the habitat and preexisting wildlife on the property. Here, we examine only the burdens that purchasers take with the property in the context of preexisting uses by humans that serve to limit the right to exclude.

\textsuperscript{55} 631 P. 2d 680 (Mont. 1981).

being, which includes letting people continue customary use that does not disrupt the owner’s use.\footnote{See Du Mez v. Dykstra, 241 N.W. 182, 183 (Mich. 1932) (implied consent from “general custom of owners of wild lands to permit the public to pass over them without hindrance.”); McConico v. Singleton, 1818 WL 787 (May 1818) (hunters have a right to hunt on unenclosed lands). See Eric Freyfogle, \textit{The Last Right to Roam}, in \textit{ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND} 29 (2007).} By virtue of custom, the owner is understood to know that others have used the property and that their well-being will be reduced if customary uses are unreasonably withdrawn. The autonomy of the owner is not limited because the owner could always buy property that comes without the implied restrictions and can adjust the purchase price for property that does.

Many cases decided under the rubric of “necessity” or “privilege” are enforcing customary usages that can be fairly thought of as being an obligation that one accepts when purchasing property.\footnote{Taylor v. Whitehead, (1781), 2 Dougl. 745, 99 E.R. 475 (K.B.) (where common highway is out for repair, by the flooding of a river or any other cause, passengers have a right to go on the adjacent ground); Dwyer v. Staunton, [1947] 4 D.L.R. 393 (driving across field when snow blocked the public highway is privileged); Morey v. Fitzgerald, 56 Vt. 487 (1884), \textit{superseded by statute as recognized in} Town of Calais v. County. Road Comm’rs, 795 A.2d 1267 (Vt. 2002) (finding that when a public highway is out of repair and impassable, a traveler may lawfully go over the adjoining land, and that interference with private property is justified by necessity).} Some cases are akin to easements, where the decision to allow another to use the land for specific purposes is implied as an obligation of ownership. Here the duty to allow others access to the property comes not from a general balancing of interests but because the decision to own particular property implies, under certain circumstance, the obligation to take into account the well-being of those who have need for the property.

B.3 Necessity and Private Takings

The foregoing analysis suggests that an owner has no general duty to consider the well-being of nonowners when making exclusion decisions, and that any obligation to think about the well-being of nonowners when making exclusion decisions arises from decisions an owner makes concerning the property. Once the obligation to think about the well-being of others arises, the owner must make reasonable decisions about whether to exclude another from the property; the owner must reasonably consider the well-being of others in light of the owner’s own projects and preferences. Under this theory, the obligation to think about the well-being of others arises, or is implied, from decisions of the owner rather than from a balance of interests between the owner and nonowners. There is no balancing of interests until the court determines that the owner has
accepted the well-being nonowners as part of the owner’s projects and preferences. Duty does not arise from the fact that the use is very important to the nonowner, and this precludes any general claim that the nonowner’s use of the resource is more important than the owner’s use.

The doctrine of necessity seems to be at odds with this theory, for the doctrine of necessity seems to create a duty on the part of the owner that arises from the balance of interests of the owner and nonowner rather than from the owner’s decisions. In its most general form, one might say that a person is privileged to use the property of an owner whenever that use is necessary to avoid greater harm or inconvenience to the nonowner. In a more restricted form, one might say that the owner’s right to exclude is limited when the nonowner’s physical safety is in danger. Either formulation makes it look as if the owner’s duty not to exclude arises from a balance of interests rather than from any owner decision from which the duty can fairly be implied. In the classic case, the owner of a dock is not permitted to force a sloop away from the dock and into a dangerous storm; the privilege to stay at the dock as a non-trespasser is implied from the circumstances.  

Under this interpretation, the doctrine of necessity seems to be an exception to the general no-duty rule that justifies an owner in excluding nonowners for any and no reason. The owner of a dock can “rescue” a sloop at no cost to the dock owner (because the doctrine of necessity requires the owner of the sloop to compensate the dock-owner for damages), and is required to do so by the doctrine of necessity, even without the dock owner’s express or implied consent. Stated in this broad way, the doctrine of necessity seems to impose a duty to rescue even though the dock owner has made no decision indicating his acceptance of the well-being of people in the sloop. If that were the content of the doctrine of necessity, it would threaten the no duty principle that protects the right to exclude.

The doctrine of necessity’s threat to the right to exclude is heightened by the remedial aspect of the doctrine of necessity. When a nonowner is privileged to use the owner’s property (by the doctrine of necessity), the nonowner is required to compensate the owner for any harm. This is the famous Vincent case, where the owner of a ship was privileged to stay at the plaintiff’s dock when a storm arose (because that was the reasonable thing to do), but the owner of the ship was nonetheless required to compensate the dock owner for damages

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60 Id.
his decision imposed. If an owner’s duty to let another use his property is determined by balancing the owner’s rights against the nonowner’s rights, and if the nonowner’s only disability is to compensate the owner for harm, then the right to exclude has been transformed into a duty to let other’s use the property whenever the nonowner is willing to compensate the owner. Certainly, the mobile home seller who wanted to deliver his mobile home across the owner’s property would be happy to compensate the owner for any harm his use caused.

In other words, the notion that an owner’s duty to allow access to the property comes from an owner’s and nonowner’s comparative interests threatens to undermine the existence of the right to exclude for any or no reason. It does little good to try to confine the doctrine of necessity to instances in which the nonowner would otherwise be in peril of physical danger, (although courts and commentators have tried to confine it on that basis). Not only is the doctrine of necessity not used in that way, but even that limited application would undermine the no-duty justification for the right to exclude for any and all reasons.

How then are we to understand the doctrine of necessity in a world in which we want to give some meaning for content to the right to exclude that is not predicted on a balancing test?

The first point is that most cases decided under the rubric of “necessity” balance the interests of owner and nonowner because the owner has the obligation to take into account the well-being of nonowners because of use or purchase decisions the owner has made. As we saw above, most “necessity” cases involve a relationship from which the obligation to think about the well-being of nonowners can be fairly implied. That leaves only a small number of “necessity” cases, like Ploof v. Putnam, that appear not to balance competing interests because of a preexisting obligation.

Cases of “necessity” in this narrow Ploof sense ought not be understood to stand for a general obligation to let another use one’s property whenever the benefit of the use outweighs the damage to the owner. Instead, the doctrine of necessity should be understood as a limitation on the self-help remedies available to the property owner when a nonowner is already on the property, a ruling limiting the owner’s remedies for protecting the right to exclude. Under this view, the right to exclude is limited because once a person is on another’s property and faces risks or barriers, the relationship between the owner and nonowner has changed. To see this, recall that an owner is not required to build a dock in order to benefit sloops on the lake that might otherwise face dangers. Nor is the owner of property on a lake prohibited from building a barrier around
her beach or dock that would make it impossible to seek shelter on the beach. The doctrine of necessity in the pure duty-to-benefit sense applies only after the nonowner has sought shelter on another’s property. It is no accident that *Ploof v. Putnam*\(^{62}\) was a case by the owner of the sloop against the owner of the dock for wrongfully casting the boat away from the dock; the case was about the remedies an owner can use against a nonowner once the nonowner is on the property.

The justification for imposing the obligation to consider the well-being of a nonowner in such cases is that once a nonowner is on the property the owner has a different relationship with the nonowner. The analogy here is to the owner’s duties to trespassers to protect them from physical injury on the property. Despite the older doctrine that an owner owes a trespasser only the most minimum level of care, it is now clear that once a trespasser is on the property, the owner who knows or reasonably should know of the trespasser’s presence cannot ignore that fact when deciding how to act in relation to the trespasser. In the context of the discussion here, to passively stand by and allow the trespasser to be injured is not a form of self-help punishment for trespassing that an owner is allowed to employ. This philosophy of other-regarding behavior animates the obligation of owners in the spring gun cases.\(^{63}\) An owner is not allowed to deter trespassers with self-help remedies that involve undue force. The law curbs self-help remedies because even when the entry is unprivileged, the fact that the trespasser came on the property establishes a relationship that the owner must respect.

An owner owes an obligation of other-regarding behavior to those on her land because the nonowner is on her land for a reason, and ownership of the land implies that the owner will take that reason into account when deciding how to act toward the potential trespasser. This is clearly true under the doctrine of attractive nuisance, when the owner is implicated in attracting the potential trespasser to the property. But it is equally true when the owner is not implicated in attracting the nonowner to the property. When a road is blocked and a traveler moves onto the adjacent land to get around the blockage, the doctrine of necessity privileges that use,\(^{64}\) and therefore limits the owner’s right to resort to self-help; the reason the trespasser is on the land creates a special bond with the owner, one that creates the obligation to act only after taking into account the well-being of the potential trespasser, and this in turn often limits the right of the owner to seek self-help when exercising the right to exclude.

\(^{62}\) *Id.*

\(^{63}\) *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971).

\(^{64}\) *See Dwyer v. Staunton*, [1947] 4 Dom.L.Rep. 393 (allowing defendant to drive across plaintiff’s field when snowstorm blocked a public road).
In such a situation, the information costs swing from justifying the right to exclude to making the owner seek more information before excluding. A nonowner’s presence on the property requires the owner to determine whether the presence is privileged. The nonowner could be on the land for any number of reasons, some benign and some trespassory. The protection of those persons requires a relatively bright-line rule protecting their interests until the owner has determined the status of their use of the property and whether non-harmful means are available to remove those who are not privileged to be there.

Under this interpretation, the doctrine of necessity creates no general duty to take into account the well-being of potential nonowners; nor does it impose a broad exception to the notion that in the absence of a special relationship one has no duty to benefit others. The difference between accepting reasonable responsibility for those who come on your property and accepting responsibility for those who are not on your property but would like to be is the difference between owing a general duty to benefit others and owing a duty to the special class of entrants on land. Admittedly, in cases of duty to trespassers and the doctrine of necessity, the duty seems to be thrust upon the owner because it requires the owner reasonably to take into account the well-being of others, even though the owner has made no prior decision that would itself imply this obligation. But it is justified by the fact of ownership. The benefits of owners are matched by the burden of thinking differently toward those who are on the land (whether lawfully or unlawfully) because once nonowners are on the land their well-being is, in many ways, in the hands of the owner.

C. Remedies and The Scope of the Right to Exclude

The concept of duty that shapes the right to exclude also tells us a great deal about remedies for trespass. A court’s choice of remedy, like the privilege to use another’s property, reflects the concept of duty that underlies property law.65 The right to exclude may be protected by a property rule (an injunction or punitive damages), so named because the remedy requires the nonowner to pay a price set by the owner (that is, to buy the right to avoid the injunction or punitive damages). Sometimes, the right to exclude is protected only by a liability rule (that is, a judicially determined price for the invasion of the right (generally, compensatory damages)). If a nonowner’s entry is continuing or can be

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65 For alternative views of remedies in exclusion cases, see Gideon Parchomovsky & Alex Stein, (2009) (identifying discrepancies between ex ante and ex post protection of ownership, developing proposals about compensation and disgorgement, and imposition of punitive damages upon trespassers).
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apprehended ahead of time, the right to exclude is generally protected by an injunction.66 Ex ante, unless access is privileged, the nonowner must buy the right of access from the owner. If the entry has already occurred, the court must choose between compensatory damages67 (because there is nothing to enjoin) and some form of punitive damages (which functions much as an injunction).68 It is


68 See JCB, Inc. v. Union Planters Bank, NA., 539 F.3d 862, 876 (8th Cir. 2008) (reducing a punitive award against a bank for trespassing on debtor’s property); Shell Oil Co., v. Murrah, 493 So.2d 1274 (Miss. 1986) (awarding punitive damages against defendant when ran a seismic line across plaintiff’s premises); Fareway Hgts. Inc. v. Hillock, 300 A.D.2d 1023 (N.Y. App. Div. 2002) (awarding punitive damages against developers who intentionally excavated a ditch without a landowner’s consent); Maint. Equip. Co. Inc., v. Godley Builders, 420 S.E.2d
the remedy for past incursions that interests us. If the entry was unlawful and the court awards only compensatory damages, the defendant is privileged to use the property as long as the defendant compensates the owner for the harm done. This is a far different kind of right to exclude than a right that leads to an injunction or punitive damages. When and why does a court use a compensatory remedy rather than a punitive remedy?

The choice of remedies, like the right to exclude itself, turns on the concept of duty—this time on the nonowner’s duty to the owner. Nonowners have a duty to respect the owner’s right to exclude and the boundaries of the owner’s property. This duty to the owner is the mirror side of the owner’s no-duty principle (the principle that nonowners have no claim against owners simply because owners have something that nonowners want). A court’s choice of remedy will reflect the nonowner’s respect for that duty. When the trespass is non-privileged and intentional courts always impose at least compensatory damages. But whether courts move beyond a liability rule to a property rule depends on whether the nonowner has been appropriately other-regarding. When courts believe that a nonowner is acting without reasonable regard for the rights of the property owner, they invoke a property rule. When the nonowner has acted under a reasonable and honest mistake, courts impose only compensatory damages. A court’s choice of remedy measures whether the nonowner has been reasonably other-regarding.

A nonowner’s duty to avoid trespassing invokes the duty to seek permission for non-privileged entry, as well as the duty to make reasonable decisions about boundary lines and the validity of privileged and permissive entry. For nonowners, property rights present formidable information issues. A nonowner

199, 203 (N.C. Ct. App. 1992) (awarding punitive damages for a trespass action against a builder who graded and dumped dirt on plaintiff’s property); Jacque v. Steenberg Homes Inc., 563 N.W.2d 154, 165 (Wis. 1997) (awarding $100,000 in punitive damages for intentional trespass by mobile home company); Doyle v. Arthur, 222 Wis.2d. 624 (Ct. App. 1998) (awarding punitive damages for intentional trespass by neighbor).

69 This is a weak requirement of intention, requiring only the intention to do the act. See RESTATEMENT (SECOND) TORTS § 158 (1965) (“One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, of (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove.”).

70 See Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 110 YALE L. J. 8 (2000). (“When property rights are created, third parties must expend time and resources to determine the attributes of these rights, both to avoid violating them and to acquire them from present holders. The existence of unusual
must decide whether access is privileged by custom or implied consent. Other information requirements surround the location of the boundary; the nonowner must assess where the boundary is and how much effort to expend to verify the boundary. Still other information requirements surround putative permission the nonowner has received. The nonowner must ask whether putative permissions she has received are authentic and authoritative. In addressing these issues, an actor must determine whether it is reasonable to rely on the information she has, or whether she must get more information before going ahead. The choice of remedy largely turns on that decision. The failure to get information that a reasonable person would get, or acting in the face of information that would reasonably induce forbearance, makes the entry in bad faith, and justifies a court in granting property rule protection.71 On the other hand, acting on the basis of the information a reasonable person would rely on under the circumstances makes the entry in good faith (albeit mistaken). 72 If entry is in bad faith, courts award punitive damages; if it is in good faith, they award compensatory damages.

C.1 The Nonowner’s Duty to Ask; The Owner’s Right to Make a Decision

Our focus on owner as decision maker suggests that ancillary to the right to exclude is the right to make the decision about whether to exclude, and that this imposes an obligation on nonowners to seek permission before using the property. If a person wrongfully uses another’s property but does not seek permission, the nonowner is not only trespassing, the nonowner is also taking away the owner’s right to decide whether to allow the use.

A useful distinction is between the owner’s right to decide and her scope of authorized decision-making. Thus far, this article has considered the scope of the property rights increases the cost of processing information about all property rights.”).

71 See Seismic Petroleum Serv., Inc. v. Ryan, 450 So.2d 437, 440 (Miss. 1984) (allowing a punitive damages question to the jury when the defendant’s trespassed after two of the defendant’s employees had already been arrested and charged with trespass on the same land); Hood v. Adams, 334 S.W.2d 206, 208-09 (Tex. Civ. App. 1960) (awarding punitive damages when defendant had actual knowledge of his trespass).
72 See Horn v. Corkland Corp. 518 So.2d 418, 420 (Fla. Dist. Ct. App. 1988) (holding that punitive damages are not appropriate for mistaken trespass); Cheeser by Hadley v. Hathaway, 439 S.E.2d 459, 464 (W.V. 1993) (refusing punitive damages when defendants were unaware that they were not the owners of the trespassed land at the time of the trespass); Eischen v. Hering, 622 N.W.2d 771 (Wis. App. 2000) (refusing punitive damages when plaintiff mistakenly believed that tree line, not stone fence, was the property line); Crowe v. Bellsouth Telecomm., Inc., 2009 WL 3241847, at *5 (M.D. Ala. Oct. 2, 2009) (refusing punitive damages when trespass was committed by mistake and construction employees believed no permission was needed to enter plaintiff’s property).
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decision maker’s authority to exclude. Another implication of the decision-making focus is that the owner has the right to make the decision of whether to exclude, and that a nonowner’s violation of that right justifies a court in awarding punitive damages. The owner’s right to decide implies a nonowner’s obligation to give the owner the opportunity to decide. Unless the right to use is fairly implied by custom or usage, the potential nonowner must seek permission to use the resource. This is the other-regarding obligation of nonowners, shaped so that they respect the decision making autonomy of owners and give owners an opportunity to grant permission. It is grounded in simple respect for the position of others, a common and reciprocal social obligation that nonowners expect to be applied to their own property. Unless the nonowners proposed use is among the usages implied by the norms of the community (such as the implied permission to knock on another’s door at reasonable times), an owner’s right to exclude includes the right to make the decision about another’s use.

Under this analysis, we can understand why commentators sometimes refer to trespass as a strict liability offense. Even if the owner was not harmed by the trespass, the trespass always violates the owner’s right to make a decision. The violation without harm is not because physical intrusion is per se harmful, or that harm is assumed. The harm of trespass is in making the incursion when the nonowner failed to take an opportunity to first ask for permission, for this takes away the owner’s authority to make the decision. Many trespass cases that appear to be strict liability cases are best explained as the nonowner’s violation of the owner’s right to be asked. 73

This also explains why courts sometimes award punitive damages for entry over the objection of the owner, as in Jacque v. Steenberg Homes Inc.74 while in other cases of deliberate trespass over the objection of the owner, punitive damages are not imposed? 75 The crucial and determinative fact from the

73 See Shell Oil Co. v. Murrah, 493 So.2d 1274, 1275 (Miss. 1986) (company liable for trespass when company only obtained permission to conduct seismic exploration of plaintiff’s property yet proceeded to run a seismic line across plaintiff’s property without additional permission); Crook v. Sheehan Enter., Inc., 740 S.W.2d 333, 337 (Mo. Ct. App. 1987) (granting punitive damages when defendant entered property without plaintiff’s permission); Fareway Heights, Inc. v. Hillock, 300 A.D.2d 1023, 1024 (N.Y. App. Div. 2002) (defendant’s attempt to gain permission from son-in-law of the plaintiff’s president was insufficient to justify trespass); Maint. Equip. Co. Inc. v. Godley Builders, 420 S.E.2d 199, 202 (N.C. Ct. App. 1992) (requiring construction company to get permission from tenant, who occupied land owned by railroad, before grading and bulldozing adjacent property).
74 Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997).
75 Friess v. Quest Cherokee, L.L.C., 209 P.3d 722 (Kan. App., 2009) (gas company proceeded to install natural gas pipelines on landowner’s property with knowledge of encroachment and thus plaintiffs were entitled to injunction but court declined to award punitive damages); Chesser by
Steenberg Homes case is when the nonowner, mobile home seller, asked the owner for permission. The owner’s denial of permission may have had as much to do with the timing of the defendant’s request as it did with the substance of the request. The defendant knew he needed to secure the owner’s permission (for defendant had no claim of privilege to cross the property). Yet the defendant did not seek permission before he set the price for delivery of the home (even though the cost of delivery would depend on whether defendant could go across the property). The owner was entitled to be asked for permission at the time the nonowner decided how much to charge for delivery. Instead, the defendant either assumed he would get permission, a sign of disrespect for the owner, or charged the buyer a high price for delivery and then lowered his cost of delivery by seeking a shortcut. A mobile home seller with the appropriate regard for the rights of owners would have asked for permission to cross the property when determining how much to charge for delivery.

C.2 The Nonowner’s Duty to Investigate

Not surprisingly, trespassing with knowledge of the trespass violates a duty to the owner and courts impose punitive damages. In other cases, the nonowner’s level of knowledge about the trespass may justify only compensatory damages. The obligation to ask the owner’s permission to enter property does not apply if the nonowner believes that she will not be trespassing, which occurs if the nonowner thinks that custom authorizes her use, or that she has permission to have made a mistake or have reasonable grounds for believing that the owner had given permission.

Hadley v. Hathaway, 439 S.E.2d 459, 464 (W.V. 1993) (refusing to award punitive damages despite defendant being warned by plaintiff about timbering on the property since defendant’s believed they had permission despite warnings); Eischen v. Hering, 622 N.W.2d 771 (Wis. App.2000) (not awarding punitive damages when defendant removed stone fence on plaintiff and defendant’s property line, despite warnings that the fence was on the boundary line and not solely on the defendant’s property, since removing the fence despite these warnings was not outrageous enough to warrant punitive damages); Dwyer v. Staunton, 4 D.L.R. 393 (1947) (refusing to award punitive damages despite defendants driving across the plaintiff’s field to get around a blocked public road despite the fact that plaintiffs had been warned they did not have permission to do so).

One conjecture is that the homeowner intuitively understood that the defendant had put him in an unfair position by seeking permission to use the land only after the terms of the contract has been negotiated. One can also conjecture that the homeowner would have felt differently about the use of the land if the permission had been sought before the deal closed.

See Seismic Petroleum Serv., Inc. v. Ryan, 450 So.2d 437, 440 (Miss. 1984) (allowing a punitive damages question to the jury when the defendant’s trespassed after two of the defendant’s employees had already been arrested and charged with trespass on the same land); Hood v. Adams, 334 S.W.2d 206, 208-09 (Tex. Civ. App. 1960) (awarding punitive damages when defendant had actual knowledge of his trespass); Doyle v. Arthur, 222 Wis.2d 624 (Ct. App. 1998) (Oct. 22, 1998) (holding that punitive damages are justified when defendant lied to logging company about property lines).
enter the property, or that she is not crossing a boundary. But the nonowner is required to take reasonable steps to verify that she has permission and has correctly identified the boundary line, and this implicates the nonowner’s duty to investigate. If the nonowner does not undertake a reasonable investigation, a court will generally award punitive damages; if the nonowner undertakes a reasonable investigation, the court will award only compensatory damages.

The cases come in several patterns. In one pattern, the trespasser believes the boundary was in one location when it was, in fact, in another location. In a second pattern, the trespasser claims that he had permission to enter the property, either because someone connected with the property had given him permission or because he assumed that the permission to do one thing on the property gave him permission to do something else. In a third set of cases, the entry is ancillary to the nonowner protecting a different right, either to take control of property that was pledged in a debt or to get rid of what the trespasser considered to be a

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78 See Vick v. Tisdale, 324 So.2d 279 (Ala. Civ. App. 1975) (holding that defendant was not liable for punitive damages when defendant mistakenly entering plaintiff’s land using an out-of-date map); Wood v. Neuman, 979 A.2d 64 (D.C. 2009) (holding that in a neighborly feud the plaintiff was entitled to five thousand dollars in compensatory damages despite the fact that the trespasser defendant mistakenly believed the condominium associated granted the defendant permission to enter the plaintiff’s yard space); Goshgarian v. George, 161 Cal.App.3d 1214 (1984) (allowing punitive damages when defendant siphoned water from his swimming pool onto an adjoining lot which he believed he had the right to); Horn v. Corkland Copr., 518 So.2d 419 (Fla.App. 2 Dist. 1988) (holding plaintiff was not entitled to $25,000 in punitive damages when defendant got written permission from a person he thought was property owner and was unaware that waterway crossed plaintiff’s property); Lanier v. Burnette, 538 S.E.2d 476 (Ga. Ct. App. 2000) (awarding compensatory damages but not punitive damages when defendant erected fence on the plaintiff’s property without consent but there was no evidence of willfulness and intention); Weaver v. Stafford, 8 P.3d 1234 (Idaho 2000) (holding that punitive damages were appropriate when defendant removed fence between defendant’s and plaintiff’s property, filled in direct irrigation ditch running in plaintiff’s property, and erected new fence that encroached on plaintiff’s land); Pehrson v. Saderup, 498 P.2d 648 (Utah 1972) (denying treble damages when defendant mistakenly thought lilacs were growing on his property but instead were growing on plaintiff’s property); RESTATEMENT (SECOND) TORTS § 164 (Intrusions Under Mistake).

79 See Beetschen v. Shell Pipe Line Corp., 253 S.W.2d 785 (Mo. 1952) (regardless that employees of the defendants mistakenly believed they had a right to fence a ten-foot strip of land the court awarded punitive damages because the defendant’s easement over the strip of land did not include the right to fence and that fact was evident from the proceedings in the condemnation suit); Maint. Equip. Co. v. Godley Builders, 420 S.E.2d 199, 205 (N.C. Ct. App. 1992) (holding that permission from a third party does not excuse trespass and awarding both punitive and compensatory damages); Dahlstrom Corp. v. Martin, 582 S.W.2d 159, 164 (Tex. Civ. App. 1979) (refusing to grant punitive damages when company did not know, even though the company should have known, the company was not leasing the land from the landowners because the company mistakenly believed the lease had already been executed).
In each of these factual patterns, the good faith of the nonowner depends on whether the nonowner acted reasonably considering the information they had before them. If the nonowner enters the property without a reasonable basis for believing that putative permission is authentic, or that he is on his side of the boundary, the jury can impose punitive or exemplary damages. However, where entry results from an honest and reasonable belief about the location of the boundary or that the defendant gave permission to enter, the owner is not entitled to have the jury consider punitive damages. Thus, where the defendant hires people to log his property, lies about the boundary line, and expresses disregard for where the boundary line is, the defendant is subject to punitive damages. On the other hand, good faith (albeit mistaken) belief about the location of the boundary line, where the defendant has no reason to doubt his own belief, results in only compensatory damages. Even when the defendant is taking down a stone wall, as long as the defendant reasonably believes that the boundary is beyond the wall (where a line of trees was) the defendant is responsible only for compensatory damages.

In short, the remedy for a completed trespass very much depends on whether

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80 See JCB, Inc. v. Union Planters Bank, NA, 539 F.3d 862, 874 (8th Cir. 2008) (awarding punitive damages against bank trespassing on debtor’s property to repossess property); Yearian v. Columbia Nat. Bank of Columbia, 408 N.E.2d 63 (Ill. Ct. App. 1980) (reversing award for punitive damages, but allowing compensatory damages for physical damage to car, when bank agent mistakenly repossessed the plaintiff’s car, instead of similar looking car, when bank agents did not act willfully or wanton despite the fact they did not check the license plate); Kibbe v. Rohde, 427 A.2d 1163 (Penn. 1981) (awarding punitive damages against defendants for intentional trespass when defendant mistakenly believed they had security interest enforceable against the plaintiff’s farm equipment).

81 See Weaver v. Stafford, 8 P.3d 1234 (Idaho 2000) overruled on other grounds by Weitz v. Green, 230 P.3d 743 (Id. 2010) (holding defendant liable for trespass and punitive damages for disregarding boundary lines and erecting a fence encroaching feet onto the neighbor’s property); Wilen v. Falkenstein, 191 S.W.3d 791, 802-803 (Tex. App. 2006) (awarding punitive damages when defendant knowingly directed tree trimmers to trim neighbor’s tree).

82 See Russell v. Irby, 13 Ala. 131, 136 (1848) (holding that the trespasser was only liable for compensatory damages when trespasser accidentally cut timber on another’s land); Isle Royale Mineral Co. v. Hertin, 37 Mich. 332, 335-36 (1877) (holding good faith trespasser liable for only compensatory damages). Cf., Cubit v. O’Dett, 16 N.W. 679, 680 (Mich. 1883) (“Absence of bad faith can never excuse a trespass, though the existence of bad faith may sometimes aggravate it.”).

83 See Stearns & Culver Lumber Co. v. Cawthon, 56 So. 555, 557-58 (Fla. 1911) (holding that when a trespasser makes no ascertainable line the trespasser cannot claim unintentional or mistaken trespass); Wimberly v. Barr, 597 S.E.2d 853, 858 (S.C. Ct. App. 2004) (holding defendant liable for punitive damages when defendant trespassed after being told of the property line on at least three occasions); Doyle v. Arthur, 222 Wis.2d 624 (Ct. App. 1998) (holding defendant liable for disregarding property lines and knowingly instructing loggers to plow a logging road and destroy trees on the plaintiff’s property).

the nonowner has successfully exercised her duty to the owner by reasonably investigating to determine whether her action will constitute a trespass. If the nonowner knows she is crossing the boundary without privilege the failure to ask permission justifies a property-rule remedy. If the nonowner fails to take reasonable precautions to ascertain whether boundaries are or whether any putative permission is authentic, a property-rule remedy is justified. The duty to investigate requires that the nonowner have an honest and reasonable belief in the lawfulness of the entry and that the nonowner have no basis for thinking that more information to clarify the situation would be worth the additional effort in terms of the accuracy of the decision to enter. But if the nonowner acts on the basis of a reasonable and honest belief that she is not trespassing, courts award compensatory damages only.

Section IV: Implications for Property Law Theory

Understanding the right to exclude as the implementation of private law’s no-duty principle suggests new ways of thinking about the idea of property. First, it suggests that the image of owner-as-decision-maker is the central and essential attribute of ownership. This supports the contention of recent essentialist scholarship that would shift the essentialist’s focus from exclusion to exclusivity. Second, it suggests that the debate between essentialist and bundle-of-stick views of property can be reconciled around the image of the owner-as-decision-maker. Once we recognize that an owner’s decision-making scope is self-limited in certain contexts, then property law revolves around something essential (the owner as decision maker) while also recognizing that the owner/decision maker will create and exercise a context specific bundle of sticks.

A. The Owner as Decision Maker

To provide a concept of ownership that allows us to integrate, along normative dimensions, the interests of owner and nonowners, we ought to envision the owner as a decision maker, while recognizing that the law requires the owner to integrate appropriately her interests with the interests of nonowners. Under this view, the essence of ownership is the right to make decisions; but some aspects of an owner’s decisions limit the owner’s right to exclude by suggesting that the owner has taken on the obligation to treat others reasonably.

This is the concept of constrained decision making, for it suggests that owners can make decisions but that some of an owner’s decisions constrain the owner’s right to exclude others.

The intuition behind this vision of ownership lies in the analysis in the prior section. A mobile home seller asks a farmer for permission to go across the farmer’s property to deliver a mobile home to a neighbor, which would save the seller the expense (and perhaps risk) of taking an alternate route. The owner says “no” and the decision is upheld because, having no duty to the mobile home seller, the law allows the owner to make that decision for any and no reason. But when an owner hires migrant workers and refuses permission for social workers to visit them, the law limits the decision to exclude because the decision to hire migrant workers implies the obligation to treat them reasonably (given the employer-employee relationship). The owner has the right to make the decision to exclude, but the owner has limited the scope of that right by its prior decision to hire migrant workers; that prior decision is the self-imposed source of the obligation limiting the right to exclude.

The image of owner as decision maker is well known in property theory. It is consistent with images of dominion and sovereignty, and is embedded in many theories of property. But the concept of decision making that I advocate is not the unconstrained decision making of the holder of an absolute right. What gives the concept of decision making its promise as a method for integrating disparate interests normatively is that it is constrained by the values that the decision maker must take into account when making decisions. The idea of constrained

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86 See, e.g. Jeremy Waldron, What is Private Property? 5 OXFORD J. OF LEGAL STUDIES 313, 327 (1985) (“In a private property system, a rule is laid down that, in the case of each object, the individual person whose name is attached to that object is to determine how the object shall be used and by whom. His decision is to be upheld by the society as final.”) (emphasis in original) and JIM HARRIS, PROPERTY AND JUSTICE 236 (Oxford University Press 1996) (referring to “choice” to describe Hegel’s concept of freedom).
87 Avihay Dorfman has independently developed a similar account. See Avihay Dorfman, Property and Collective Undertaking: The Principal of Numerus-Clausus, __ (2011). He distinguishes between the character and scopes of ownership and sees the character to involve the power to determine the nonowners’ normative standing with respect to an object. As to the scope of ownership, he says:

Once ownership (property characterized) is put to work in any given society, there arises an independent question, that of its appropriate scope. Indeed, the scope of ownership relates to the kind of ‘determinations’ that ownership’s authority entitles the owner to make with respect the nonowners’ standing in relation to an object—for example, if a private owner can confer virtually any ‘right’ she fancies upon nonowners with respect to her object, then ownership’s
decision making gives us a basis for seeking the appropriate integration of owner and nonowner interests as a unified element of decision making that appropriately weighs all relevant interests. As I have argued, private property assumes its moral force from the fact that owners make decisions and that the decisions must be of a certain kind in order to be morally justified. Under this reading, the unit of analysis for property law, and the essence of ownership, is the method and content of the decision made by the owner.

This view of ownership reconciles the rhetoric and practice of rights over exclusion. The essence of ownership is the owner’s right to make decisions about the resource (the invariant), but those decisions are constrained by the way the law requires the owner, when she has undertaken the obligation, to consider the well-being of others and to integrate her interests with the interests of nonowners when making decisions about the property (the contextual). The rhetoric of rights acknowledges the owner as decision-maker; the practice of rights acknowledges that sometimes the owner must take into account the well-being of nonowners when making decisions about the property. This vision of the essence of property also allows us to provide a normative melding of the interests underlying exclusion and access. When the owner can decide to exclude for any and no reason, the owner may adopt an exclusion strategy; if not, the owner must adopt a governance strategy. The difference depends on the owner’s duty to be other-regarding, which, as I explained in the last section, depends on when and how the owner must take into account the well-being of nonowners when making decisions about the property (the right to exclude for any and no reason).

The right to make a decision is essential in a necessary and sufficient sense. If a person has no right to make decisions about a resource, it is hard to see how we can describe the person as “owning” the resource, and if the owner can make any decision the owner wants, the owner clearly has the kind of “dominion” over the resource that is the hallmark of property.88 But the right to make the decision

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88 The right to make a decision with respect to a resource is sufficient to establish a right over the resource, and such a right becomes a property right when the decision making has sufficient longevity to satisfy the convention that property rights have permanence that other forms of rights do not have. Naturally, I have the right to decide to go across the street or to drive at a certain speed without being the owner of the street or road (except as an owner of common property). Not all decisions a person makes are sufficient for property rights. But this is a reflection of the
over a resource is essential in a broader, invariant and normative sense: the right to make a decision is invariant even if the scope of decision-making is constricted. An owner deciding whether to exclude is exercising the essence of ownership whether the owner has the right to exclude for any or no reason or whether the scope of decision making is constricted by some relevant considerations relating to the well-being of other people. The right to make the decision is invariant even if the scope of permissible decisions is not.89

The owner as constrained decision maker is also congruent with, and extends, “exclusivity” visions of the essence of ownership.90 As in Larissa Katz’s agenda-setting account, the owner has the right to set the agenda (by making decisions). But unlike the agenda-setting account, the interests of owner and nonowner are integrated through the owner’s decision, which is constrained as to content but not as to its existence. Similarly, the decision making authority of the owner allows the owner to set terms of normative standing for nonowners, as suggested by Avihay Dorfman, permitting the owner to relax her right to exclude, but also constraining the owner to take into account the interests of nonowners in determining their standing. And the decision-making vision, by affirming the owner’s right to make decisions about how the owner will use her property, also confers on the owner the right to determine which uses of the property by others are privileged and which are unprivileged, as suggested by Eric Claeys. The

custom we use to label some rights as property rights and other rights as, say, tort rights. If I decide to cross the street I am not thought to have a property right in the street but I have a right to the successive positions I take as I reasonably cross the street. This is like a property right because I have the right, constrained by the reasonableness requirement, to make the decision to be at each successive position as I cross the street, a right that trumps the rights of others to be in that spot. The convention is to call this a right protected by tort law because the right to make the decision does not imply a continuing interest in my position in the street. When the right to make decisions about a resource has a permanence that the right to cross the street does not, it is sufficient for a property right.

89 The owner-as-decision-maker is also constant regardless of the institutional form to which the resource is delegated. Whether the resource is delegated to private ownership, to ownership in common, or to government ownership (or some variation), the delegation responds to the notion that the essence of ownership is the right to make decisions about the resource. In fact, the delegation of rights over resources reflects the methodology of decisions that we want the owner to make: joint owners make decisions collaboratively, owners with present and future interests make decisions that coordinate their resource use over time, owners of common property makes decisions about exclusion and use that maximize the value of their common interest. The owner as decision maker also comports with mixed systems that lie between the standard forms of ownership. See Michael A. Heller, The Dynamic Analytics of Property Law, 2 THEORETICAL INQ. L. 79, 80 (2001) (arguing that classifying property as either private, commons, or state is outdated and impedes imagination and innovation and should be replaced by a more dynamic approach better suited for the frontiers of property).

90 See note 83, supra.
theory of obligations presented here therefore gives normative life to these “exclusivity” accounts of property.

Understood in this way, the focus on decision making appears to challenge the dominant way we understand property law (and law in general). Property law is generally thought to focus on what an owner can do with a resource; an evaluation of an owner’s right to behave in a certain way. An owner with dominion over a resource can use, exclude, transfer, mortgage, abandon, and so forth. 91 This focus on how people behave is deeply embedded in property law; indeed it is how we think about law in general. It is axiomatic that the law focuses on what people may and may not do.92 That is why some scholars have focused on the right to exclude (a behavioral trait) even if the face of evidence that an owner may not always behave by excluding others. As Larissa Katz has said: “there is, in other words, too much of a gap between the form ownership is thought to have [exclusion] and the substance of the right.”93

Focusing on behavior itself is problematic because the evaluation of behavior is always contextual. Owners of separate properties might behave in identical ways with very different normative implications. As I have emphasized, two owners of separate property may each deny a nonowner the right to use their land for a requested purpose; in one case the denial may be lawful, in the other unlawful.94 These two cases of exclusion are distinguished not by the behavior (the exclusion) but the context and, in particular, the kind of factors that an owner ought to take into account in her context when making the decision about her behavior. When the owner need not take into account the aspect of the claimant’s well-being that is threatened by the exclusion, the exclusion is lawful. When the owner has the obligation to take into account the well-being of the claimant and does not do so reasonably, the exclusion is unlawful. When the exclusion is lawful it is because the ideal decision maker would have made no different decision about her behavior. When the exclusion is unlawful, it is

92 This behavioral focus is emphasized in the prominent jurisprudential accounts of law, which understand law to be a form of social, and therefore behavioral control. See, e.g. H.L.A. Hart, THE CONCEPT OF LAW (Oxford University Press 1961). The account I espouse suggests that law serves to guide the decisions of private actors as the means of controlling their behavior. This, in turn, reflects a problem-solving, rather than a positivist, account of the law.
93 Katz, Exclusion and Exclusivity, supra note 83 at 285.
94 Jacque v. Steenberg Homes Inc., 563 N.W.2d 154 (1997) (awarding punitive damages when seller of mobile home plowed a path through the owners’ snow-covered property to deliver a mobile home to a third party); State v. Shack, 277 A.2d 369, 374 (1971) (allowing defendants to enter plaintiff’s property to aid migrant farmers).
because the behavior (the exclusion) would not have occurred had the owner taken into account the appropriate factors in the appropriate way.

The behavior \textit{qua} behavior does not vary from one context to another, but the circumstances allow us to evaluate the behavior by positing how an ideal decision maker in that context would have behaved. We can evaluate the behavior only by identifying the factors the owner should have taken into account and determining whether a person appropriately taking those factors into account would have behaved as the owner did. Context matters because context tells us what factors the actor should take into account when deciding how to behave.\footnote{This is not, of course, a property concept but a concept general to how we think about law. That is why there is no “negligence in the air.” See Palsgraf v. Long Island R. Co., 248 N.Y. 339, 341 (1928) (“Proof of negligence in the air, so to speak, will not do”) and why driving fast means one thing if done on a city street and another if done on a race track. See \textit{id.}, at 344 (“[O]ne who drives at reckless speed through a crowded city street is guilty of a negligent act . . . [i]f the same act were to be committed on a speedway or a race course, it would lose its wrongful quality.”). Assessing behavioral decisions always depends on the context. A driver is pulled over for going ninety miles an hour when the speed limit is seventy. Whether this is wrongful behavior depends on the circumstances. If the driver is taking a heart attack victim to the hospital but is not otherwise imposing undue risks on others, the driver’s behavior may be reasonable. Therefore, we can understand therefore different concepts of responsibility for objectively similar behavior only by evaluating the circumstances that led to the behavior and circumstances matter because they inform our evaluation of how an ideal actor should have made decisions. Knowing that the actor was taking a heart attack victim to the hospital and was otherwise imposing only due risks on others indicates that the actor was, like the ideal decision maker in that circumstance, taking into account appropriate factors.} By comparing actual behavior with the behavior of an actor who took due regard of the relevant factors we can identify the permissible scope of an actor’s decisions.

In short, the law is asking this sort of question: if a person in a particular context appropriately considered the factors that the decision maker ought to have considered, how would the decision maker have behaved? If the actual behavior is different from the ideal behavior, the actor has acted wrongfully. If actual behavior is consistent with ideal decision making, then the actor will have behaved correctly. The concept of ideal decision making provides the standard against which behavior is evaluated.\footnote{This approach does not ask about a decision maker’s motive; we are not asking whether the decision maker wanted to cause harm, or had an impure thought about the nonowner; we do not care whether the decision maker was spiteful, angry, optimistic or daydreaming. The reasons the owner behaved the way the owner did are irrelevant to the analysis. What matters is only the factors that a decision maker should have used and must have used to make decisions and whether those factors are ones that an appropriately other-regarding person would have used.}
B. Essentialism and Bundle of Sticks

The idea of owner as self-constrained decision maker also casts light on the debate between essentialist and the bundle-of-sticks visions of ownership. The theory presented here shows that the dueling visions to provide a false dichotomy.

The bundle of sticks approach suggests that ownership comes in a variety of flavors, each contextual and each built up from policy decisions about the relative strength of interests of various individuals in various contexts.97 Because the bundle of sticks approach emphasizes that property rights are not absolute or invariant, it is favored by those who emphasize limitations on the right to exclude, and the approach is reflected in cases that balance the interests of the owner against the interests of potential nonowners and decide on the scope of the right to exclude. It emphasizes the practice of rights rather than the rhetoric of rights.

Essentialists find that approach to be deficient because it suggests that there is nothing unique or stable about ownership,98 because it suggests an open-ended inquiry into the nature of property rights, and because by deemphasizing the in rem nature of rights it makes it look as if rights vary with the status of nonowners. Not only do these characteristics threaten property rights, but they deny the property system the informational value that would come from well-defined rights.

How might these visions be reconciled?

As many people, including the exclusion advocates recognize, 99 there is nothing incoherent about a vision of the right to exclude that combines the in rem view (a right that is good against the world) with the bundle of sticks view (except when an individual is privileged to enter another’s property). The bundle

98 J.E. Penner, The “Bundle of Rights” Picture of Property, 43 U.C.L.A. L. Rev. 711, 819 (1996) (“[T]he ’bundle of rights’ picture is powerfully amorphous, presenting a vision of property which is difficult to define precisely and so criticize with effect. The advantage of this, however, is that such a picture, whose linguistic expression can be nothing more than a slogan, has no rigorous critical power either.”);
of sticks metaphor does not necessarily mean that there are an unlimited number of sticks in the bundle with an unlimited number of ways of combining them or that the sticks are good only against some and not others.\textsuperscript{100} It could be that upon analysis, as I suggested above, the bundle breaks down into some manageable number of packages that both identify what is essential about property and meet reasonable information cost requirements. Moreover, the right to exclude could be strong against almost all nonowners of the property but limited as to particular and identifiable classes of nonowners. And we ought to recognize that in some instances it is coherent to reverse the in rem rights. In public accommodation cases, the world has a kind of in rem right to enter the property, but the owner can exclude selected individuals (shoplifters and those who might harm other customers) for reasonable cause.

The theory developed here suggests that the essentialist and bundle-of-sticks theories in fact recognize the right to exclude for any and no reason and the right to exclude that is shaped by the obligation to exclude only reasonably. Because those two rights reflect a single theory of obligations, the essentialist and bundle-of-sticks views are not in tension. They are two views of the logic of duty.

The bundle-of-sticks story was developed to counter the excessive formalism of law in general and property law in particular and carries a singular message: the contours of the law need to be understood in terms of a normative theory of justice if they are to be meaningfully interpreted and respected.\textsuperscript{101} The fundamental call of the legal realists was not to disaggregate law but to build our understanding of law around the factors that justify why the law should have one content rather than another. Once we view the bundle of sticks vision of property as the call for a normative basis for providing (and limiting) the right to exclude, we can begin to understand the right to exclude in terms that have in rem power and value-laden pull. Essentialism is important for the same reason. Essentialism allows us to identify the values that animate a system of practice, for it is the values that ultimately chart the system’s course and ground the system of practice in an understanding that people accept as morally sound. Essentialism ought to point to something about a practice that helps us understand the

\textsuperscript{100} Joseph William Singer, Democratic Estates: Property Law in a Free and Democratic Society, 94 CORN. L. REV. 1009 (2009)

\textsuperscript{101} See, e.g., Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809, 814 (1935) (decrying the “divorce of legal reasoning from questions of social fact and ethical value”) and OLIVER WENDELL HOLMES, THE PATH OF THE LAW, in COLLECTED PAPERS, 167, 184 (1920) (formalism serves “as a cover up for consideration of social advantage” that are “the very ground and foundation of judgments”),
normative forces that shape the practice. Essentialism must be justificatory, not conceptual.

The vision of owner as self-constrained decision maker does not suffer from a conceptual disability. As we have seen, the vision is essential in a necessary and sufficient sense, as well as in an invariant sense. It is also normatively justified, for it charts the boundary between circumstances in which it is just to exclude and circumstances where it is unjust to exclude.

V. Conclusion

This article has suggested that property theory ought to be unified rather than bi-polar. Instead of understanding the rights of owners and nonowners to be formed from a clash of interests, the article suggests that the scope of rights ought to be understood to flow from a set of values that owners and nonowners hold in common, so that the boundary between rights and obligations can be understood in terms of the application of common values to disparate interests. Rather than understanding property to be about the rights of owners or the rights of nonowners, or the balance between them, property theory ought to emphasize the values that determine where the law draws the boundary between rights and disabilities.

The article has used the right to exclude to illustrate a more unified approach to property theory. Under this approach, the right to exclude reflects the principle—widely accepted within society and endorsed in a wide range of non-property contexts—that in the absence of a relationship between people, no individual has a claim on the resources of another. The right to exclude embodies that value by precluding a nonowner from crossing another’s boundary to benefit from their ownership, just as in tort it proscribes claims that an actor should have rescued the victim, and in contract it proscribes the argument that a negotiating party should have concluded a deal with the person who is harmed without the deal. The value of an actor having no duty to another—so that the other has no claim on the actor—is widely shared in society and undergirds private law. That value justifies the right to exclude for any and no reason; one may not pick my apples for the same reason that one may not sue me to help them overcome their circumstances that I do not take responsibility for.

On the other hand, when people are in a relationship of a particular kind and one person, by virtue of that relationship, has accepted responsibility for the well-being of another, the obligation to take into account the well-being of another when making decisions is also widely accepted and also undergirds
private law. Tort law’s expression of that value comes when one person imposes a risk on another; contract law’s expression of that value comes when the relationship has matured to the point of reliance. In property law, an owner’s choices often create the relationship from which the duty to take into account the well-being of others can be inferred. When that is true, the owner’s right to exclude another from the property for any and no reason is limited by the owner’s obligations to reasonably account for the well-being of others, and this accounts for the law’s limitations on the right to exclude.

The theory of exclusivity articulated here therefore understands exclusion to follow the boundary between duty and no-duty and therefore to ground property law in a single value that identifies the boundary between exclusion and access.