Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions

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DEMystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions

SHyAMKRISHNA BALGANESH

The right to exclude has long been considered a central component of property. In focusing on the element of exclusion, courts and scholars have paid little attention to what an owner's right to exclude means and the forms in which this right might manifest itself in actual property practice. For some time now, the right to exclude has come to be understood as nothing but an entitlement to injunctive relief—that whenever an owner successfully establishes title and an interference with the same, an injunction will automatically follow. Such a view attributes to the right a distinctively consequentialist meaning, which calls into question the salience of property outside of its enforcement context. Yet, in its recent decision in eBay Inc. v. MercExchange, L.L.C., the Supreme Court rejected this consequentialist interpretation, declaring unequivocally that the right to exclude did not mean a right to an injunction. This Article argues that eBay's negative declaration sheds light on what the right has really meant all along—the correlative of a duty imposed on non-owners (the world at large) to keep away from an ownable resource. This duty (of exclusion) in turn derives from the norm of inviolability, a defining feature of social existence, and accounts for the primacy of the right to exclude in property discourses. This understanding is at once both non-consequentialist and of deep functional relevance to the institution of property.
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"The notion of property...consists in the right to exclude others from interference with the more or less free doing with it as one wills."

"The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."

"[T]he creation of a right [to exclude] is distinct from the provision of remedies for violations of that right."

INTRODUCTION

What does it mean to speak of property in terms of the "right to exclude"? As a direct consequence of equity's avowed preference for property (over personal) rights in the grant of exclusionary relief, courts and scholars have developed a view that identifies property's right to exclude as meaning little more than an entitlement to injunctive relief against a continuing (or repeated) interference with a resource. This view attributes to the right an entirely consequentialist meaning, under which the right—and indeed all of property—is normatively meaningless except when sought to be enforced in a court of law. If property, as a fundamental social institution, is important outside
its remedial context, it is important to identify what the right to exclude means apart from the availability of an injunction. This Article attempts to do this by locating its meaning in the norm of inviolability and the obligation it casts on non-owners to stay away from resources that are owned (and capable of being owned) by someone else.

In his now-legendary formulation, Blackstone defined property as “that sole and despotic dominion . . . exercise[d] over the external things . . . in total exclusion of the right of any other.”4 Blackstone’s definition has since been morphed into a more general definition of property rights in the abstract, centered around the in rem right to exclude.2 On numerous occasions, in dealing with the issue of takings, the Supreme Court too has characterized the element of exclusion as a critical component of the property ideal.3

The idea of exclusion, in one form or the other, tends to inform almost any understanding of property, whether private, public, or community.4 The only variation tends to be the person or group in whom it is vested. Private property entails vesting it in an individual; public property, in a government or other agency on behalf of a wider set of individuals; and community property, in members of a community against non-members. Consequently, the tendency among scholars, courts,

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3. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (referring to the right to exclude as “one of the most treasured strands” of the property rights bundle); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (characterizing the right to exclude as “one of the most essential sticks”); id. at 179–80 (describing the right to exclude as a “universally held . . . fundamental element” of property); see also Dolan v. City of Tigard, 512 U.S. 374, 384 (1994); Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 831 (1987).

4. See RICHARD A. EPSTEIN, Takings: Private Property and the Power of Eminent Domain 63 (1985) (noting that the idea of “exclusive possession” is implicit in the basic conception of property); see also JAN G. LAITOS, LAW OF PROPERTY RIGHTS PROTECTION: LIMITATIONS ON GOVERNMENTAL POWERS § 5.03[A] (Supp. 2006).
and legislators to equate conceptions of property with the notion of exclusion remains pervasive.\(^5\)

Within the exclusionary conception of property, the right-based variant tends to dominate overwhelmingly. A decade ago, Thomas Merrill argued that the "right to exclude" remains the *sine qua non* of property.\(^6\) The Supreme Court, whenever it invokes the idea, also speaks in terms of a "right" to exclude.\(^7\) Although scholarship and judicial dicta over the years have attempted to understand and apply the exclusionary component of the right to exclude, the debate has tended to ignore altogether the right component.\(^8\) Why is speaking of property in terms of a right to exclude unsurprisingly common? Does the identification of exclusion as a right shed light on its practical significance (as a remedy), or is it merely a rhetorical epithet emphasizing its centrality to the discourse (analogous to the right to life)?

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Focusing on the right component of the “right to exclude” is of more than just theoretical value. This focus carries with it a deep functional relevance, one that derives from the interplay between the language of rights and remedies. For quite some time, the right to exclude in the context of both tangible and intangible property has come to be associated with an entitlement to exclusionary (injunctive) relief. Thus, interferences with an owner’s interests are thought to entitle the owner to a permanent injunction restraining such interferences. The right to exclude, according to this understanding, is a remedial attribute related to the automatic availability of injunctive relief for interferences with an owner’s use and enjoyment of her property.

In eBay Inc. v. MercExchange, L.L.C., however, the Supreme Court effectively unlinked the right to exclude from any entitlement to exclusionary relief. In eBay, the Court concluded that an affirmative finding of validity and infringement did not automatically entitle a patentee to an injunction against the infringer, and held that the traditional four-factor test used by courts of equity determined the availability of an injunction. Put differently (in property terms), the Court concluded that an interference with a property interest, even a continuing interest, does not automatically entitle the owner to an injunction. The owner must still affirmatively establish the inadequacy of ordinary compensatory remedies. The point was driven home most forcefully by Justice Kennedy, who observed in his concurrence that an owner’s “right to exclude does not dictate the remedy for a violation of that right.”

Almost all analyses of eBay thus far have focused on its impact on patent law (or intellectual property), and have tended to ignore the relevance of the Court’s holding for property law.

11. Id. at 1840.
12. See id. at 1839-40.
13. Id. at 1842 (Kennedy, J., concurring).
more generally. Although the Court’s holding was directed specifically at patent injunctions, the express basis of its holding remained the need to subject patent injunctions to the standard governing “other cases” where injunctions were granted. By finding the four-factor test to be the correct standard, the Court implicitly acknowledged its universal applicability to all grants of injunctive relief. Viewed in this light, the eBay decision concluded that a grant of injunctive relief, regardless of context, could never be automatic or ensue as a matter of right.

The eBay decision thus calls into question, rather starkly, the meaning and relevance of the right to exclude, both within the domain of intellectual property and in the wider subjects of real and personal property, at least insofar as each remains premised on the idea of exclusion. If property is no longer automatically associated with exclusionary relief, is it meaningless to continue characterizing the right to exclude as its central attribute? Taking the functional interpretation of the right to exclude as a given, some have readily concluded that the eBay decision heralds the declassification of intellectual property (specifically, patents) as a species of property strictu sensu, or that it dilutes the significance of the right to exclude in understanding intellectual property, and thus all property.

My argument in this Article is very different: I argue that the eBay Court’s unlinking of right and remedy in relation to exclu-


15. eBay, 126 S. Ct. at 1841.

sion counterintuitively helps to shed light on what the right to exclude means in the context of intellectual property and property more generally, and to illuminate the role it plays in structuring different elements of the governing legal regime. The right to exclude, I argue, is best understood as a normative device, which derives from the norm of resource inviolability. Analogous to the role of promising in contract law, the right to exclude operates as an analytic tool, which seeks to transplant the norm of inviolability from morality to law (admitting of exceptions as circumstances demand).

Part I sets out different interpretations of the right to exclude, and uses three different theoretical frameworks. Part II then argues that if property is understood as an institution of significance independent of its actual enforcement, the right to exclude must be understood as a correlative right deriving from the norm of inviolability. Part II proceeds to show that the right to exclude can indeed have independent normative traction regardless of whether it is actually enforced, much like the performance right in contract law. Understanding the right along these lines is not only practical; it also explains its lingering persistence in property discourse. Part III focuses on the interpretation at issue in the eBay case: the exclusionary remedy variant. Part III.A examines the mechanical availability of injunctions in the context of tangible and intellectual property and the interface between equity courts’ discretion and the status of the right. Part III.B then focuses on the impact of eBay on this interpretation of the right, and attempts to show that the eBay decision may be seen as foreshadowing the move towards a theory of efficient infringement or efficient trespass.

The objective of this Article is not to argue that the right to exclude is all that there is in property. Although the idea of property most certainly consists of more than just exclusion, to be meaningful it must contain, at a minimum, some element of exclusion. How such exclusion might manifest itself in property theory and practice, then, serves as the focus of the Article.

17. Some have made just such an argument. See, e.g., Merrill, supra note 6, at 754 (“[P]roperty means the right to exclude others from valued resources, no more and no less.”). Others have argued equally persuasively that the right to exclude is an “essential but insufficient component” of what property means. See, e.g., Adam Mossoff, What is Property? Putting the Pieces Back Together, 45 ARIZ. L. REV. 371, 377 (2003) (offering an “integrated theory of property,” of which exclusion is an essential part).
Accepting or rejecting the centrality, for property, of the right to exclude is conditioned upon a basic understanding of what the right means and entails. This Article is an attempt to further that very understanding.

I. CONCEPTUALIZING THE RIGHT TO EXCLUDE: A TAXONOMY

Comprehensive philosophical theories on the nature and function of legal rights have existed for several centuries now. Yet, one finds little to no analysis of the right to exclude in their exegesis. At the same time, property scholars have tended to focus almost entirely on the exclusion element, even though they continue to use the language of rights theorists. Few have sought to pay close attention to both elements, with the result that the precise meaning of the phrase, in spite of its persistent usage, remains largely obscure. Although some property theorists speak of the right as a unitary concept, others use it to represent a collective set of rights. Ironically, virtually all property theorists consistently underplay their reasons for characterizing the situation as giving rise to a right when it is precisely the study of these reasons that remains the focus of rights theorists. It is therefore rather surprising that proponents of the right to exclude tend to neglect altogether the unique interface of their ideas with those of the rights discourse more generally.

This Part attempts to describe that interface by classifying possible conceptions of the right to exclude based on their structural and functional attributes. While a classificatory exer-

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20. See, e.g., Merrill, supra note 6.

21. See Strailevitz, supra note 5, at 1836 ("[F]or all its centrality, in the minds of courts and legal scholars, there is substantial conceptual confusion about the nature of the "right to exclude.").

22. See, e.g., Merrill, supra note 6, at 730-31.
This nature may seem irrelevant and largely academic, given that the common law is structured as a set of events and responses to them, differentiating one event (for example, instruction of a specific right) from another invariably dictates the law’s response to it. Characterizing something as a right—absolute or conditional—brings with it certain well-defined legal consequences. Therefore, understanding the basis of such a characterization helps to shed light on the kind of consequences that do and ought to follow.

A. Three Models of Analysis

This section sets out three independent conceptual devices that courts and scholars regularly employ in their analyses of rights and connected elements (duties, remedies, and so on).

1. The Right-Privilege Distinction

Perhaps the most important conceptual distinction in analyzing the right to exclude is the right-privilege (also known as the right-liberty) distinction. Although positivist scholars employed the distinction early on, Wesley Hohfeld is credited with laying out the distinction in its most lucid and concrete terms. Writing near the turn of the twentieth century, Hohfeld developed a comprehensive scheme for classifying legal concepts in the common law, which he called “jural relations.” Relations were thus classified into rights, duties, privileges, no-rights, powers, immunities, liabilities, and disabilities using two independent matrices. In addition, legal relations were identified as in personam (or “paucital”) when they involved


25. See Hohfeld, Some Fundamental Legal Conceptions, supra note 24, at 30 (laying out the matrices in some detail). For an application of the several concepts to tort law, see Albert J. Harno, Tort-Relations, 30 YALE L.J. 145 (1920).
discrete parties, such as contractual one-to-one connections\(^\text{26}\) or as *in rem* ("*multital"*) when they involved a relation between an individual and multiple, indeterminate individuals.\(^\text{27}\) Hohfeld characterized property relations as multital, because they involved the owner interacting with an indeterminate set of individuals (potential trespassers).\(^\text{28}\)

In Hohfeld's analysis, a right (or a claim) is defined as a situation that places another individual (or group of individuals) under some sort of correlative duty.\(^\text{29}\) The content of the right is defined entirely by the content of the correlative duty (or obligation) that it imposes on another. Hohfeld contrasts his idea of a right with that of a privilege, which has independent normative content in that it *privileges*, or allows its holder to do certain things, quite independent of others.\(^\text{30}\) Its correlative is thus a "no-right," a position that represents the absence of a right in anyone else to stop the holder’s privileged (or allowed) action. Hohfeld makes the distinction most obvious with the illustration of landowner X, noting that "X has a right against Y that he shall stay off the former’s land" and, equivalently, "Y is under a duty toward X to stay off the place."\(^\text{31}\) He further observes in the context of the right-privilege distinction that "whereas X has a right or claim that Y, the other man, should stay off the land, he himself has the privilege of entering on the land."\(^\text{32}\) Later, specifically in the context of property, Hohfeld makes the distinction even clearer with the example of a hypothetical landowner.\(^\text{33}\)

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\(^{26}\) Hohfeld, *Fundamental Legal Conceptions*, supra note 24, at 50-53.

\(^{27}\) See id. at 53-54.


\(^{29}\) Hohfeld, *Fundamental Legal Conceptions*, supra note 24, at 38.

\(^{30}\) Id. at 38-39.

\(^{31}\) Id. at 38.

\(^{32}\) Id. at 39.

\(^{33}\) Id. at 96. Hohfeld observes:

First, A has multital legal rights, or claims, that others, respectively, shall *not* enter on the land, that they shall not cause physical harm to the land, etc., such others being under respective correlative legal duties. Second, A has an indefinite number of legal privileges of entering on the land, using the land, harming the land, etc. . . . he has privileges of doing on or to the land what he pleases.
Whereas a right is brought into question only upon a breach of its correlative duty, a privilege offers its holder the opportunity to perform a positive act unfettered by another’s claims or actions. The right-privilege distinction is, then, little more than a positive-negative distinction. Yet the distinction is of more than just philosophical relevance. Although it is clear when the law protects a right—when it imposes a duty on another—it is not readily apparent when the law protects a privilege. If a privilege is understood as the absence of rights in others to restrict the privileged action, the negative definition does little to clarify the circumstances under which an action may be considered privileged. Consequently, scholars have been quick to point out that a privilege is not strictly legal in the same sense as rights (and duties), and therefore sits rather uneasily in Hohfeld’s framework, given that it remains devoid of content absent specific circumstances.

Although a right and a privilege in this understanding no doubt remain distinct, it is important to note that in a vast ma-
majority of situations a privilege comes to be protected by a right. In other words, a privilege becomes capable of being exercised because of the existence of an overarching right that shadows it and requires others to abstain from interfering with the privileged area of action.36 This is often referred to as the “shielding” thesis.37 This thesis helps explain why rights and privileges are often conflated and why in a vast majority of situations privileges continue to derive at least indirect protection from the law. Privileges thus represent situations where the law protects behavior by its active non-interference (or acquiescence)—it both does not interfere on its own and additionally denies others a right to interfere. Even though rights are usually accompanied by privileges, situations do exist where privileges remain unprotected by rights,38 and it is here that the distinction begins to assume practical significance.

2. The Two-Tiered Structure of Rights (and Duties)

The second analytic device of relevance for the purpose of this Article is the two-tiered nature of rights, often referred to as the distinction between primary and secondary rights (and duties). Alternatively characterized as the substantive-procedural or right-remedy distinction, the idea postulates the existence of a primary right that is brought into existence either volitionally (that is, contractually) or through the operation of law (tort law, for example). Upon an infraction of the right, the legal structure then provides for a secondary right to operationalize the primary one or remedy its breach.39 Contract law is taken as paradigmatic of this structure, where the contract gives rise to a


37. Kramer et al., supra note 36, at 12.


39. For a lucid elaboration of the concept, see Peter Birks, supra note 9, at 4–5. For similar views in early American scholarship, see James Barr Ames, Dissection of Chattels, 3 HARV. L. REV. 23 (1890); C.C. Langdell, Classification of Rights and Wrongs, 13 HARV. L. REV. 537 (1900). Hohfeld also spent some time elaborating on the primary-secondary distinction. See HOHELD, FUNDAMENTAL LEGAL CONCEPTIONS, supra note 24, at 102 (disagreeing with Ames).
set of rights and duties between the contracting parties. Upon breach of the contract's terms, the law then provides the non-breaching party with the option of bringing an action for the breach, coupled with remedies for the same. Scholars have tended to disagree on their characterization of the secondary right; some call it a right, others a remedy, and yet others a remedial right. All of them, however, refer to the idea that an interference with a primary relationship gives rise to a secondary one.

While contract law remains the paradigm of the tiered structure, problems begin to emerge when one enters the domain of tort law, for liability in this area is premised on a primary duty of care, the existence of which the law determines ex post, upon an alleged interference with it. The primary relationship is thus determined at the stage of the secondary one. This artificial construction has resulted in some debate over whether tort law does embody the two-tiered structure. The general view is that indeed it does, even though the determination often happens after the conduct, because, in a majority of situations, the basic contours of the duty remain known ex ante. When driving a car, for example, the driver knows not to drive carelessly.

The exact origins of the tiered structure remain somewhat unclear. Although both Blackstone and Austin employed the primary-secondary framework routinely, some trace it to the French philosopher Robert Pothier, who employed it in the


41. See Kit Barker, Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right, 57 CAMBRIDGE L.J. 301, 319 (1998) (advocating the use of "rights" to describe remedies); Birks, supra note 9, at 9 (observing that the term "remedy" remains obscure).


44. See 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 787 (Robert Campbell ed., 3d ed. 1869); 1 BLACKSTONE, supra note 1, at 117–21.
context of his exposition of contract law. Hohfeld too emphasized the distinction in his classification.

A primary right thus represents a situation where an individual is vested with a right, independent of any preceding relationship. A secondary right, on the other hand, is always contingent on the existence of a primary relationship involving the party asserting the secondary right, and is therefore conditional.

3. The Entitlement Framework

In 1972, Guido Calabresi and Douglas Melamed propounded an independent theory of entitlements—a unified theory of property and tort—that focused entirely on mechanisms of protection. Whereas Hohfeld had sought to lay out individual jural relations as they existed prior to any court pronouncement, Calabresi and Melamed focused on rules adopted by courts in "protect[ing]" the entitlement.

The entitlement model involves two steps: in the first, the legal system vests the entitlement in someone; in the second, it adopts one of three rules to protect the entitlement so vested. Calabresi and Melamed focus almost entirely on the second of these steps—"second order decisions"—and classify forms of protection as property rules (when the law protects against involuntary transfers), liability rules (when the law allows involuntary transfers), and inalienability (when the law disallows all transfers). Calabresi and Melamed then argue that a host of considerations—including economic efficiency, distributional

46. Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS, supra note 24, at 108-09. Indeed, Hohfeld seems to hint at the possibility of a tertiary right as well, in situations where the breach of a primary right gives rise to a secondary right (of enforcement), which in turn results in a court decision that gives a party a tertiary right against the party in breach. See id. at 108.
47. See Corbin, supra note 38, at 171-72.
48. See id. at 171; see also Arthur L. Corbin, Rights and Duties, 33 YALE L.J. 501, 511 (1924) [hereinafter Corbin, Rights and Duties].
50. Id. at 1092.
51. See id.
52. Id. at 1092-93.
goals, and morality—guide judges' and lawmakers' choice of rules. Almost all the literature on the Calabresi-Melamed model has come to view it as focusing almost entirely on the issue of remedies, whether legal, equitable, or otherwise. According to this literature, a property rule is commonly associated with ex ante injunctive relief, whereas liability protection is associated with an award of damages ex post.

The Hohfeldian model and the entitlement framework exhibit an interesting reflexive symmetry. Hohfeld focuses entirely on the bare structure of conceptions (or entitlements), and disregards their actual enforcement or vindication. Calabresi and Melamed, on the other hand, focus entirely on remedies and disregard the structure and content of individual entitlements. Whereas Hohfeld cautions against the use of remedies to understand a jural relation, Calabresi and Melamed exclusively use remedies to understand the functional relevance of an entitlement.

In its focus on the actual mechanisms of protection (that is, enforcement), the entitlement framework neglects situations where jural relations (or entitlements) come to be protected not necessarily by operation of law, but rather with the acquiescence and approval of law. The distinction between a right and a privilege represents just such a situation. The effective exercise of a privilege, unlike a right, requires absolutely no re-

53. Id. at 1093–105.
55. Although in the past, scholars have attempted to analyze the interaction between the Calabresi-Melamed and Hohfeldian models, most of the attempts have involved unpacking the former's entitlement structure using Hohfeld's ideas rather than analyzing how the two actually might complement each other. See, e.g., STEPHEN R. MUNZER, A THEORY OF PROPERTY 27 n.14 (1990); Fennell, supra note 34, at 1406; Madeline Morris, The Structure of Entitlements, 78 CORNELL L. REV. 822 (1993).
56. See Calabresi & Melamed, supra note 49, at 1090 ("[T]he fundamental thing that law does is to decide which of the conflicting parties will be entitled to prevail.").
57. Ironically, Calabresi and Melamed do not so much as reference Hohfeld’s work, even though they note that their project is aimed at integrating “legal relationships,” a phrase that had formed the focus of Hohfeld’s seminal study. See id. at 1089.
course to enforcement mechanisms. Privileges of this sort find no place in the entitlement framework, for they do not invoke any legal mechanism and therefore are not protected as such.58

The entitlement framework has had the effect of moving the discussion of rights away from its conceptualist traditions. Whereas the discussion of rights and duties had hitherto focused on issues such as the manner in which they vested and the parties between whom they operated, the entitlement framework now requires analyses to focus on rights and duties primarily through the consequences of their breach. This framework thus focuses on understanding the right through the lens of the remedy. For example, it matters little whether an entitlement has the structural attributes characteristically associated with ownership for it to be categorized as a property right.59 All that is needed is that the law protect the entitlement with a property rule upon an infraction. In this framework, the right is meaningful only when protected by a specific kind of remedy. The entitlement framework thus effectively moves the emphasis in rights-analysis towards remedies.60

This near-exclusive focus on remedialism attributes to the law a principally corrective (or restorative) function. Legal rules become relevant only when they attach consequences to individuals' actions—as forms of enforcement—but never as independent sources of values and principles that could guide their behavior ex ante.61 The enforcement framework thus as-

58. For an elaboration of the problem in the context of the owner's remedy of self-help (a use-privilege), see Henry E. Smith, Self-Help and the Nature of Property, 1 J.L. ECON. & POL'y 69 (2005) (attributing some of these problems to the overextensive use of symmetry in economic understandings of property).
59. See Merrill & Smith, supra note 2, at 379-83 (noting how the Calabresi-Melamed framework contributed to the demise of the traditional understanding of property as an in rem right). For more on the move in the economic analysis towards remedialism, see Jules L. Coleman & Jody Kraus, Rethinking the Theory of Legal Rights, 95 YALE L.J. 1335, 1339 (1986).
60. See Emily Sherwin, Introduction: Property Rules as Remedies, 106 YALE L.J. 2083, 2083-84 (1997) (emphasizing how the entitlement framework has shifted legal analysis in the direction of remedies).
sumes that the law comes into play only during acts of recalcitrance (for example, breaches of contract or violations of the duty of care), but never influences behavior independent of its enforcement function. It thereby ignores the fact that legal rules do elicit compliance and cooperation, most often out of a belief in the legitimacy and fairness of legal authority and not merely in contemplation of remedial consequences, such as sanctions. Legal rules can be meaningful well before their breach is contemplated.

B. Possible Formulations of the Right to Exclude

Applying these three analytic devices to the right to exclude provides us with four possible conceptions of the right. The first two remain distinctly non-remedial and involve the claim-right and the privilege-liberty. The remaining two adopt a remedial approach to the right and build on the entitlement framework. The four versions together are: (1) the claim-right to exclude; (2) the privilege-right to exclude; (3) the right to vindicate one’s ownership through enforcement; and (4) the right to an exclusionary remedy. Each is described in more detail below.

Table 1: A Conceptual Taxonomy of the Right to Exclude

<table>
<thead>
<tr>
<th>Attribute</th>
<th>Content</th>
<th>Example</th>
<th>Potential Drawback</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claim-Right</td>
<td>Defined by the correlative duty (of non-interference) imposed on others</td>
<td>Patent law’s “right to exclude” 35 U.S.C. § 154(a)(1)</td>
<td>Content dependent on independent normative source</td>
</tr>
</tbody>
</table>


63. Indeed, the ideal formed the driving force behind much of legal positivism. Hart famously characterized this idea as the “critical reflexive attitude” of individuals in society. H.L.A. HART, THE CONCEPT OF LAW 56, 88 (1961). See also infra Part II.A.2 for an elaboration of this idea.
Attempts to derive a moral explanation for the institution of private property abound in the literature, and the attempt here certainly is not to add to that debate. Most moral constructions attempt to develop an explanatory theory for property so as to justify its continued existence as an institution of independent significance. In referring to the norms of morality surrounding the institution of property, the emphasis here is merely on establishing that the right to exclude can be understood independent of the enforcement structures that give it operative content, because property as an institution has extra-legal (or social) elements that influence it and give it structure. As noted earlier, the correlative right is defined by its placing others (in rem or the world at large) under a duty to exclude themselves from the object over which the right is to operate. The right is thus defined entirely by its imposition of correlative duties on others. What, then, are the origins of such a right and its correlative duty?

Scholars have long noted that the principle of inviolability remains one of the most basic elements of social existence. Inviolability refers to the idea that certain entities (things and persons) are considered off-limits, by default, to everyone. The default position is then lifted or relaxed when specific social circumstances allow for it (for example, consent or an acquisition). Sociologists and anthropologists have long argued that the idea remains basic to all cultures, at all points in history, albeit to differing degrees and extents. Anthropologists often

90. See supra notes 24–33 and accompanying text.
91. See supra note 24 at 614–15. Frank notes: [A] careful, detailed exposition of the concept of inviolability, in its multitudinous ramifications and implications, will provide at once a basic scheme for the study of comparative culture, comparative law, and indeed all the social studies and a peculiarly significant program for
associate the idea of inviolability with the notion of taboo—a socially constructed meaning system whereby certain acts are proscribed. Many seek to explain the idea biologically.

The two most obvious and prominent areas where inviolability manifests itself in human behavior are in relation to persons and things. The inviolability of the person marks a basic tenet of social life, but is not directly relevant here. The inviolability of things, however, remains equally well entrenched.

In relation to physical objects (as opposed to persons), the norm of inviolability requires individuals to stay away from things unless, through some socially accepted practice (such as first possession, or consumption), they have a legitimate claim over them. In other words, inviolability requires that unless object X belongs to A, A stays away from X. It thus establishes affirmatively a default position of staying away from things over which individuals actually or putatively do not have legitimate claims. Its importance is best seen through the counterfactual. In the absence of a norm of inviolability, individuals encountering objects around them would find little to prevent them from physically (or otherwise) appropriating an object that they need or desire. For example, A would not stay away from X unless A knew and was convinced of B’s (or someone else’s) claim over X. The default would therefore point in the other direction: do not stay away from X unless you are made

investigating the development of personality as it arises in and through the impact of culture upon the individual.

93. For an elaboration of the “taboo” concept at the interface of law and anthropology, see Lawrence K. Frank, An Institutional Analysis of the Law, 24 COLUM. L. REV. 480, 481 (1924) (“[E]verything used or useful in living which has been appropriated by someone, or has come from something appropriated, is taboo to all others . . . .”). Caution, however, needs to be exercised in taking the argument to its logical conclusion. Some have used anthropological studies to conclude that, because taboos connote little more than consequences that attach to certain proscribed activities, they remain independently meaningless. See Alf Ross, ته ته, 70 HARV. L. REV. 812, 819 (1957) (noting how the rules of ownership are capable of being expressed without actual use of the word). Yet, for our purpose, the rules’ ability to influence behavior in this way is precisely a recognition of their normative content.

94. See Frank, supra note 91, at 614.

to do so. Inviolability thus establishes the norm that, where an individual does not have a legitimate claim to a resource, he presumes that someone else has a legitimate claim, and stays away from that resource.

2. Inviolability in Practice

Morality is concerned with the ways in which people lead their lives and how they treat and interact with each other—often moving from the descriptive (the “is”) to the prescriptive (the “ought”). In the process, morality sets certain ground rules—rules that may, of course, come to be modified through legal processes. This process is precisely how the norm of inviolability operates. It sets a default rule of noninterference, subject to alteration through specific avenues in both law and morality.

As a moral norm, inviolability is inward looking. Rather than relying on sanction or enforcement for its continued validity, its operation may be understood in terms of what H.L.A. Hart called the “internal point[] of view.” Writing in opposition to the views of consequentialists such as Oliver Wendell Holmes, who believed that obligations and duties were to be understood exclusively through the liability structure that they imposed on the holder, Hart argued that rules—and the duties and obligations that they imposed—come to be followed because individuals who are subject to them accept them as “guides to conduct.” Acceptance does not necessarily imply a belief in the moral legitimacy of the rule, but merely indicates a readiness to view oneself as bound by it. The reasons could be rudimentary convenience, social mores, efficiency, and the like.

96. For a detailed analysis of the “is-ought” distinction that remains central to moral philosophy, see Alan Gewirth, The ‘Is-Ought’ Problem Resolved, 47 PROC. & ADDRESSES AM. PHIL. ASS’N 34 (1973).
98. Id.; see also Scott J. Shapiro, What is the Internal Point of View?, 75 FORDHAM L. REV. 1157 (2006).
Propertizing a resource and vesting someone with ownership over it conveys to the world a message of resource inviolability. That message, in turn, is understood as placing individuals under an obligation (or duty) to keep away from the resource by default, unless some other exception necessitates doing otherwise. Inviolability thus serves as a behavioral guide to individuals whereby they regulate their conduct in a certain way so as to accommodate it. The right to exclude is little more than the correlative of this obligation that inviolability casts on individuals.

The primacy of inviolability as a default norm is more than apparent in the context of property. James Penner, for instance, in his theory of property structured around the primacy of objects, notes that individuals automatically tend to refrain from interfering with objects they see around them without inquiring into the identity of an object’s owner.\footnote{100. PENNER, supra note 5, at 128.} Referring to it as the “duty of non-interference,” he notes that the relation is “mediated via the things the owner owns.”\footnote{101. Id.} Indeed, when we walk down a street lined with parked cars, we do not make it a point to try opening the doors of the parked cars, even though we almost never know who the cars are owned by. We automatically, and by default, stay away. The moral norm of inviolability explains such behavior.\footnote{102. Merrill and Smith refer to this duty as the “dut[y] of abstention.” Merrill & Smith, supra note 88, at 1852. They go on to note in the context of a similar example involving cars that “virtually everyone must recognize and consider themselves bound by general duties not to interfere with autos that they know are owned by some anonymous other.” Id. at 1854.}

Allusions to the moral idea of inviolability run through several well-known historical exegeses of property—most notably, those of Grotius and Pufendorf.\footnote{103. See Mossoff, supra note 17, at 379–85 (offering a more detailed analysis of Grotius and Pufendorf).} Grotius argues that interferences with owned resources produce an injustice analogous to affronts on a person’s life, limbs, and liberty.\footnote{104. HUGO GROTIUS, DE JURE BELLi AC PACI S LIBRI TRES 53–54 (Francis W. Kelsey trans., 1925) (1625).} He thus uses the idea of suum (“one’s own”) to connect a person’s self with his...
Grotius’s explanation is nothing more than a reference to inviolability and the contiguity of the idea in the context of bodily integrity and resource ownership. Pufendorf similarly emphasizes that an act of acquisition ("seizure") produces a "moral effect" that is the "obligation on the part of others to refrain from a thing." This is a much more direct reference to the norm of inviolability.

The precise strength of the norm tends to vary across resource and context. If walking across someone’s front yard remains unambiguously objectionable behavior, touching someone’s parked bicycle while walking along the street certainly does not seem as problematic. Similarly, touching someone’s handbag may seem less problematic in a crowded train than in an open field. Yet in each case the resource is clearly owned by someone else and forms private property. Much of the variation depends on social custom. Interestingly enough, it must be noted that the law often contributes to this variation in the norm of inviolability. The variance explains the divergence between realty and chattels on issues of trespass, the ease with which the law readily presumes an abandonment of ownership, and those situations in which courts allow other values to trump the right to exclude.


106. It is worth cautioning against the seemingly intuitive argument that because inviolability persists in both contexts, either (1) body parts are ownable resources or (2) that resources are mere extensions of one’s body. See J.W. Harris, Who Owns My Body, 16 Oxford J. Legal Stud. 55 (1996); Stephen R. Munzer, Kant and Property Rights in Body Parts, 6 Can. J.L. & Jurisprudence 319 (1993). This contiguity has formed the basis of the argument that property is nothing more than a logical extension of the control individuals exert over their bodies. See Samuel C. Wheeler III, Natural Property Rights as Body Rights, 14 Nous 171 (1980).


108. See Restatement of Property § 504 cmt. a (1944) (noting how an easement can be readily abandoned); Thomas W. Merrill & Henry E. Smith, Property: Principles and Policies 518–21 (2007) (noting how real property cannot be abandoned).

109. Thus, situations in which free speech considerations or health and safety concerns preclude an owner from commencing an action for trespass may, in this framework, be interpreted as situations in which other values trump the norm of inviolability, contextually. The strength of the norm varies not just across resource, but also across context. See PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); State v. Shack, 277 A.2d 369 (N.J. 1971).
The norm of inviolability may have had its origins in rudimentary convenience, associated with abjectly rival resources. Yet over time, it seems to have developed into a complex device to coordinate human behavior across a vast array of resources, often in situations lacking such obvious convenience. Thus, we still hesitate to set foot on a stranger's land to get to the other side of the road, even when doing so is obviously convenient and of little harm to the owner—a hesitation that represents a clear inefficiency in the short term. Such behavior reflects how deeply entrenched the idea of inviolability is.\textsuperscript{110}

3. Inviolability Manifested Through the Right to Exclude

If the primary right conception does indeed derive normative value from the moral notion of inviolability, it raises an important question. Why is inviolability best reflected in a right rather than a duty \textit{(the right to exclude)}? Because, as a norm, it remains directed at individuals and attempts to modify their behavior, logic seems to dictate that inviolability operate as a duty \textit{(of excluding oneself from certain objects)} rather than a right. Why, then, do we not speak of the duty of exclusion as being the most important element of property? The answer derives from the nature of the \textit{(right-duty) correlativity in question and the distinction between relations in rem (multital) and those in personam (paucital)}. Multital \textit{(or in rem)} relations lack the basic symmetry of their paucital counterparts, which is a point that becomes crucial for our understanding of the right to exclude. If \textit{A} has a claim against \textit{B} for money, \textit{A} has a right against \textit{B}, and \textit{B} owes a duty \textit{(to repay)} to \textit{A}. Defining the relationship either in terms of \textit{A}'s right or \textit{B}'s duty makes little normative difference.\textsuperscript{111} When we move to multital relations, however, the distinction between multital rights and multital duties begins to assume relevance. A multital duty \textit{(or in rem duty)} represents a situation in which an individual is under a duty \textit{(affirmative or negative)} owed to an indefinite class of individuals. The duty of care, central to tort law, represents just

\textsuperscript{110} See, e.g., Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997) (holding an intentional trespasser liable for punitive damages of $100,000 even though the jury had found the actual damage to plaintiff's property to be nominal and awarded a sum of $1).

\textsuperscript{111} See HOBIFIELD, FUNDAMENTAL LEGAL CONCEPTIONS, supra note 24, at 73 (noting that the relationship can be viewed from "different angles").
such a situation, X driving his car down the road owes a duty (to drive carefully) to anyone likely to be in the vicinity. For analytical convenience, one might argue that this duty results in anyone actually or potentially in X's vicinity being vested with a "right" against X. To define the relationship along these lines, however, would detract from the intended point of normative emphasis in the law, which is X and his actions. We remain concerned with X's actions (and the harm they cause) and hence understand the relationship in terms of X's duty. Accordingly, the language of tort law focuses on a "duty of care" instead of a "right to be cared for."

In analogous terms, the right to exclude is a multital right that operates against an indefinite set of individuals by placing them under an obligation of exclusion. Focusing on the duty of exclusion instead of the right to exclude would make sense, along the lines of tort law, if our emphasis were on the consequences of a breach of this duty. We speak of a right to exclude, rather than a duty precisely because our focus is on the internal nature of property ownership and on the association between the right-holder and the resource. A duty-based conception would make perfect sense were the focus of the inquiry entirely on a liability structure and on events triggering liability. By focusing instead on the right and its holder, the idea serves a coordination function: one of denoting that the holder of the right is responsible for it in more ways than one. This coordination function, in turn, assumes major relevance for a vast majority of resources that are by their nature both rival and exclusive. Whereas a duty analysis would not be focused on the moral basis for the duty (but rather entirely on the legal

112. Indeed, some might even argue that this typifies the situation where a duty exists without a correlative right altogether. See Markby, supra note 67, at 90–91.

113. For an overview of the evolution of the duty of care in tort law, see W. Page Keeton et al., Prosser and Keeton on the Law of Torts 357 (5th ed. 1984) (noting how the idea developed as negligence began to become an independent basis of liability in order to establish a causal connection between the plaintiff and the defendant).

114. In this sense, associating the right to exclude with an action for trespass remains problematic. Although trespass law does build on the basic notion that property entails the right to exclude, it certainly does not provide an owner with the right to exclude. Trespass is concerned directly with the duty of exclusion because its focus remains on liability. See Strahilevitz, supra note 5, at 1836 (noting the tendency among scholars to focus their discussion of the right to exclude around trespassory claims).
consequences of the breach), the right to exclude remains inward-looking and focuses on its origins and the distinctively social role of the institution of property as a coordination device.

Inviolability thus remains a normative ideal that is best captured by the right to exclude. It remains at once both forward-looking, in being capable of representation as a correlative duty, which when breached gives rise to liability (that is, the law of trespass), and yet deeply grounded in the connection between an individual and an object that is central to property’s role as a coordination device. Understood in this way, the right to exclude begins to assume significance outside the context of enforcement. One sees why it is indeed the sine qua non of property, for it remains a manifestation of the norm of inviolability, on which the entire institution of property is centered.

4. Simulations and Extensions: Intangibles

As noted earlier, the norm of inviolability tends to operate differently depending on the resource in question. Intangible resources such as knowledge and information tend to be defined by two criteria: non-rivalrousness and non-excludability.115 A resource is said to be non-rivalrous when its use by one person does not interfere with its use by another (or in other words, when such additional use entails no marginal cost) and non-excludable when it cannot easily be controlled in such a way as to exclude others from using it.116 Tangible resources, most notably chattels, are both perfectly rival and excludable. Intangibles, by contrast, are perfectly non-rival and often non-excludable. The subject matter of intellectual property rights—ideas and expression—are perfectly non-rival and non-excludable.

It is only logical that as the rivalrousness and excludability of a resource decline, so too does the strength of the norm of inviolability that attaches to it. Consequently, for resources that are both non-rivalrous and non-excludable, the norm of inviolability is practically nonexistent. Informational property and intellectual property are thus characterized by low levels of intrinsic inviolability.

116. Id. at 308-10.
To compensate for this—and to thereby imbue the intangible resource in question with a genuine property-like character—the law artificially envelopes the resource in question with the element of inviolability. Thus, when the United States Code describes a patent as granting its holder the “right to exclude others” from making, using, or selling the protected subject matter, it ought to be understood as doing little more than stipulating that others are placed under a correlative duty to exclude themselves from performing those activities in relation to the identified resource. It is not a reference to a remedial consequence because the statute does not use the phrase in its discussion of remedial options available to a court, but does so only in its discussion of the grant. This is most certainly then a reference to the primary substantive right and not the secondary.

When we move from patent to copyright, things begin to change. Unlike patent rights that can be infringed without any actual imitation (that is, by simply doing one of the acts to which is vested in the patent owner), liability in copyright is contingent on a showing of actual copying, with independent creation being a complete defense. It is not surprising that the law consciously avoids referring to copyright in terms of the right to exclude as it does for patents. Inviolability for expressions remains significantly attenuated. Justice Holmes’s analysis of the right to exclude in the context of copyright best expresses this difference:

[...] In copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is in vacuo, so to speak. It restrains the spontaneity of men where but for it there would be nothing

120. See generally Henry E. Smith, Intellectual Property as Property: Delineating Entitlements in Information, 116 Yale L.J. 1742, 1800 (2007) (observing how copyright law tends to place less reliance on exclusion than patent law and is thus less “property-like”). But see Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (“The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property.”).
of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right.\textsuperscript{121}

Inviolability in the context of copyright is largely a fiction. Understood in this way, the use of the right to exclude in the patent statute begins to appear logical and deeply functional. Given that intellectual property statutes seek to mimic the attributes of tangible property in more ways than one, the manner in which they do (or do not) invoke the right to exclude in some way signifies the extent of their property-ness.

\textbf{B. The Analogy to Contract’s Performance Right}

The right to exclude in property law closely resembles the idea of a contractual performance right. Both remain ideals around which entire institutions are structured (and understood) and yet, if they were understood entirely through their remedial context, they would become divested of their normative significance.

Of the various primary rights that Hohfeld identified in his discussion, contractual rights find repeated mention,\textsuperscript{122} establishing a right-duty relationship between two or more individuals. In the ordinary bilateral contract between $A$ and $B$, where $A$ agrees to do something in return for $B$ paying him a fixed sum of money, $A$ has a duty to perform his end of the bargain, the correlative of which is a right to the performance vested in $B$. Conversely, $B$ has a duty to make payment to $A$, and $A$ is vested with the correlative right to obtain such payment.\textsuperscript{123} The critical point to remember for our purposes is that this analysis of rights and duties is independent of whether they may actually be enforced \textit{as such}. In other words, $A$ and $B$ have these rights and duties regardless of their enforceability in a court of law, which would involve secondary rights and claims.\textsuperscript{124}

\textsuperscript{121} White-Smith Music Publ’g Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J., concurring).

\textsuperscript{122} See, e.g., HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, supra note 24, at 73, 108, 110.

\textsuperscript{123} Id. at 41-42.

\textsuperscript{124} Id. at 110 (noting how a primary right \textit{in personam} may be enforced through a proceeding \textit{quasi in rem}).
In exhorting the separation of the primary right from its remedial counterpart, Hohfeld glossed over a rather fundamental question, one that has puzzled moral philosophers for ages. In the absence of an enforcement mechanism (that is, a secondary right), why would individuals bother performing their duties? In other words, if the viability of the primary right is predicated on the existence of a secondary right, then its normative independence becomes meaningless. But if it remains distinct, why do we have reason to assume continued adherence to contracts? Thus, in the example above, Hohfeld would seemingly argue that A’s duty to B (and vice-versa) arises independent of B’s ability (or A’s in the converse) to enforce the same in a court of law. Now, if A knows this ex ante—that is, that his duty to B is normatively independent of B’s ability to enforce it—why does A still adhere to his contractual duty? The answer seems to lie in the morality of promising.

1. The Contractual Right of Performance as a Moral Right

Under a promissory theory, contract law is viewed as a set of legal rules structured around the norms of morality associated with the institution of promising. Under the law, contracts are generally understood as “promise[s] ... for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” Promising thus forms the foundation of contract—or, put another way, its moral counterpart. The promise, in this conception, is a manifestation of individual moral agency, used to give effect to the ideal of trust. It is a moral commitment as to a future act, one that allows the person to whom it is made (the promisee) to

125. It is not readily apparent that Hohfeld was advocating for its complete independence; his analysis seems to be restricted to arguing that the nature and character of the primary right were to be understood independent of the nature and character of the secondary right that comes into play to enforce the former. See id. at 102.


128. See FRIED, supra note 126, at 16 (“The obligation to keep a promise is grounded not in arguments of utility but in respect for individual autonomy and in trust.”).
convert his hope into an expectation. Contract law, then, remains nothing more than a set of legal rules directed at giving effect to the norms surrounding the institution of promising.

The body of literature attempting to so situate contract within the skein of promising has grown rapidly over the last several decades. To be sure, it has its skeptics as well—most notably utilitarians, who use divergences between contract law and promissory norms (most common in the context of remedies) to argue instead that contract law reflects little more than considerations of transactional efficiency.\(^\text{129}\) Still, the promissory view of contract law remains one of the most dominant in the literature.\(^\text{130}\)

In accordance with the promissory understanding, contractual obligations to perform a bargain derive from the moral norms associated with promising. To speak of a promisee's "right of performance" is a reference to a correlative (or primary) right vested in the promisee, consisting entirely of the promisor's duty to perform. In turn, the promisor's duty to perform derives not from any recourse to sanction (for that would entail secondary obligations) but rather from the institution of promising, on which contract law is premised. The understanding of the contractual primary right as the correlative of a duty to perform tracks the view of contract as a set of mutual promises. Individuals perform their primary duties to one another, independent of the remedial consequences of nonperformance, because the ideal of adhering to one's commitments derives from norms of morality—norms that influence behav-


\(^{130}\) See Seana Valentine Shiffrin, The Divergence of Contract and Promise, 120 Harv. L. Rev. 708, 721 (2007). As Shiffrin notes:

"In U.S. law, promises are embedded within contracts and form their basis... The language of promises, promisees, and promisors saturates contract law—in decisions, statutes, and the Restatement. It also permeates the academic literature through its common characterization of contracts as the law of enforceable promises and by its formulation of the foundational questions of contract as which promises to enforce, why, and how."
ior and deter certain kinds of actions, independent of legal sanction.\textsuperscript{131}

This moral or promissory understanding of the performance right allows one to make perfect sense of the law's reluctance to order performance of a contractual obligation by default upon a breach. Locating the meaning of the right in contract law's moral substructure avoids the need to deny the very existence of any right to actual performance.

2. Enforcing the Promise: The Specific Performance Riddle

While promissory theories of contract law continue to dominate the landscape, one major anomaly within contract doctrine that such theories often struggle to account for is the area of contractual remedies.\textsuperscript{132} Not surprisingly, this area has also given utilitarian theorists their strongest argument against the promissory basis of contractual liability.\textsuperscript{133}

In spite of all else, contract law to this day recognizes monetary relief (damages) as the default remedy for breach and specific performance to be the clear exception, available only in extraordinary cases where monetary damages are inadequate.\textsuperscript{134} This remains true of the common law in general on both sides of the Atlantic.\textsuperscript{135} If promising forms the basis of contract law and doctrine, then the morality of promising would

\textsuperscript{131} It might be argued that Hohfeld would have had serious objections to the incorporation of moral elements into this classificatory structure. Early in his work, he sought to make a clear distinction between legal and nonlegal conceptions, though he never used the word "morality." See HOHFEID, FUNDAMENTAL LEGAL CONCEPTIONS, supra note 24; see also supra note 68 and accompanying text.


\textsuperscript{133} See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 118–26 (7th ed. 2007).


\textsuperscript{135} See GARETH JONES & WILLIAM GOODHART, SPECIFIC PERFORMANCE 2 (2d ed. 1996); see also Andrew Phang, Specific Performance—Exploring the Roots of 'Settled Practice,' 61 MOD. L. REV. 421, 423 (1998) (noting that under English law the grant of specific performance remains the exception, unlike in civil law jurisdictions).
obviously require enforcement of the promise as the default remedial measure upon a breach. Yet, specific performance remains the exception—hinting at the possibility of the law’s divergence from morality. The reason for this divergence has baffled scholars for quite some time.

Utilitarians, of course, have made much of this. Most notable is Justice Holmes’s famous statement that the “confusion between legal and moral ideas” was manifest in the law of contract and that “[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.” This has since been developed into the “efficient breach” theory of contractual remedies, which is based on the argument that in situations where a promisor’s profits from a potential breach are in excess of the promisee’s loss from such breach, the breach should be encouraged (or at the very least, not deterred)—with no restraints whatsoever imposed by morality. Thus, the promisor is at all times given the option of breaching, conditioned upon the payment of a penalty for the same, in the form of damages. Contractual promises are protected, in this understanding, entirely by liability rules.

The utilitarian account views contract as a subspecies of tort law, where the law refrains from proscribing certain activities, preferring instead to interfere at the back end in the interests of corrective justice. In a similar vein, utilitarians argue that contract law does not forbid (or even discourage) a breach, but prefers to step in and award the injured party damages to make

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136. See Dori Kimel, Remedial Rights and Substantive Rights in Contract Law, 8 LEGAL THEORY 313, 320 (2002).
137. Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 462 (1897). Justice Holmes is even more vitriolic later in the same paragraph when he notes, in the context of efficiency, that “such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.” Id.
good any loss.\textsuperscript{140} The recent move from traditions of subjective intention to objective intention provides added strength to their claims.\textsuperscript{141}

The efficient breach argument has met with disagreement from both utilitarians, who argue that specific performance is, in general, more efficient than monetary relief,\textsuperscript{142} and promissory theorists, who attribute it to the vagaries of the common law process and as an exception to the general rule.\textsuperscript{143} Relying on a Kantian approach to the role of morality in law, Charles Fried, one of the most notable promissory theorists, argues:

\begin{quote}
Law can be, should be, but \textit{need not be} a set of institutions that underwrite, facilitate, and enforce the demands and aspirations of morality in our dealings with each other. It is therefore entirely appropriate that various legal institutions resemble the moral institutions which they \textit{partially} instantiate. Contract and promise are like that.\textsuperscript{144}
\end{quote}

The attempt to explain this rather major anomaly away as a menial exception may appear rather simplistic. Yet, \textit{in spite of} the nonavailability of specific performance in every case, promising continues to form the basis of contracting—both as a matter of law and practice. Contract doctrine continues to understand itself in reference to the practice of promising and the moral precepts that underlie it.\textsuperscript{145} Contracts continue to be made and performed by individuals, most of the time with little regard for the consequences of the breach.\textsuperscript{146}


\textsuperscript{141} For an overview of this change, see LARRY A. DI MATTEO, CONTRACT THEORY: THE EVOLUTION OF CONTRACTUAL INTENT (1998).

\textsuperscript{142} For a more recent utilitarian criticism of the idea, see Richard R.W. Brooks, The Efficient Performance Hypothesis, 116 YALE L.J. 568 (2006).


\textsuperscript{145} See Linzer, supra note 132; see also supra notes 132–33 and accompanying text.

\textsuperscript{146} See DAVID HUME, A TREATISE OF HUMAN NATURE, bk. III, pt. II, §5, at 519-21 (P.H. Nidditch ed., 2d ed. 1978) (1740) (noting that promises are human inventions based on the "necessities and interests of society"); ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 237 (1922) (characterizing promising as a basic social and economic institution); see also 1 ARTHUR CORBIN, CORBIN ON CONTRACTS § 1.1, at 2 (Joseph M. Perillo ed., rev. ed. 1993) ("[T]he law of contracts
Again, the internal point of view and the guidance function of law provide an explanation for the apparent anomaly. By employing the language of promising, contract law implicitly exhibits a preference for performance over breach and the ideal of *pacta sunt servanda* ("pacts must be respected")\(^{147}\) — a preference that everyday practice deriving from ordinary social morality emphasizes. Since the function of contract law and its underlying norms of promising is to guide behavior (as much as, or perhaps more than, to guide judges), the absence of a direct remedial enforcement of the ideal does not detract from its centrality to the institution.

The analogy to contract law serves to highlight the role that moral norms and extralegal ideas can play in structuring legal doctrine. Much like the norm of inviolability in property law, the norm of keeping one's promises (that is, *pacta sunt servanda*) forms the foundation on which the rules of contract law are structured—even if there remain points where its internalization is incomplete. Rather than clouding doctrine in unintelligible abstraction, these moral norms remain rooted in social practice and are of great significance to understanding the operation of the system, be it contract or property.

C. Toward a Pragmatic Conceptualism of Property

Quite apart from emphasizing the role of nonlegal (that is, moral or social) norms in property law doctrine, using inviolability as a defining principle directs attention to something far more important: the role of conceptual thinking in comprehending the structural and functional attributes of property. Conceptualism (or formalism), the attempt to understand and analyze an institutional practice using its core concepts, has over the decades received harsh criticism from scholars located

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\(^{147}\) See Malcolm P. Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783 (1941) (describing the norm as deriving from the practical need for dependability in commercial interactions).
in the realist or utilitarian tradition. Central to this criticism has been the notion that legal ideas and institutions always exist in furtherance of some goal external to the law and that, consequently, a focus on law's concepts alone tends to be overly myopic. This idea of conceptualism tends to view it as a largely academic exercise—one with little to no practical influence at all.

Yet, legal concepts can be of significant functional relevance. In analyzing tort law, Jules Coleman uses a method he terms "pragmatism" in arguing that the meanings of concepts and terms are central and need to be understood in relation to other concepts and ideas (semantic non-atomism). Most importantly though, he argues that concepts need to be analyzed in terms of the role they play in actual social practice (inferential role semantics) and that an institution contains several concepts tied together through a general principle that is then at once both an embodiment of the practice in which the concepts operate and an explanation of it (explanation by embodiment).

Having set out this general method, Coleman then uses it to analyze tort law and concludes that all of tort law can be understood through the principle of "corrective justice," and that the law's core concepts in the area (that is, the duty of care, proximate cause, and so on) and actual tort law practice both

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149. See Weinrib, supra note 148, at 955.

150. Perhaps the most scathing attack on conceptualism in the first half of the twentieth century came from Felix Cohen, who characterized it as a form of "transcendental nonsense." See Felix Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809 (1935). Cohen, however, seemed sympathetic to Hohfeld's project, including it in the functionalist paradigm along with the ideas of Holmes. See id. at 828. This likely ignores Hohfeld's primary-secondary distinction, where he sought to understand the former entirely outside the judicial paradigm. See also Walter B. Kennedy, Functional Nonsense and the Transcendental Approach, 5 FORDHAM L. REV. 222 (1936) (offering a defense of conceptualism in response to Cohen).


152. Id. at 8.
reflect the functioning of this principle. In the area of contract law, others have adopted similar functional approaches to analyzing concepts.

Benjamin Zipursky terms this approach to conceptual analysis pragmatic conceptualism. He further highlights a major advantage inherent in this strand of conceptualism: it offers a "way of grasping the domain of moves that in some sense are built into the concepts of law." This form of conceptualism is perfectly compatible with consequentialist analysis because it allows for the possibility that purely consequentialist reasons may have contributed to the development of the concept to begin with. It remains equally compatible with ideas from morality and other extralegal influences grounded in social practice. It is also directly responsive to Felix Cohen's call for functionalism, except that functionalism looks to institutionalized social practice and not merely judicial decisions.

A pragmatism of this conceptual variety has yet to make its way fully into property law analysis. It is indeed plausible that the fragmentation of property doctrine has contributed to this. This fragmentation is the result of different property-constitutive doctrines being classified as elements of either tort or contract law and analyzed under the guiding principles of those areas (such as corrective justice or utilitarianism), where they fit most
uneasily. Identifying a unifying principle in property would go a long way in remedying this by introducing a minimal level of consistency into all property-related discourse.

The previous analysis of inviolability—a functional attribute—and its connection to the idea of the right to exclude, fits perfectly within the skein of pragmatic conceptualism. The right to exclude remains a conceptual tool that finds a place in both property practice and doctrine, with inviolability operating as an explanatory principle. The right to exclude, centered around inviolability, explains not just how courts construct an owner’s legal entitlements, but also how individuals understand the institution of property as constraining their actions and, at times, imposing affirmative obligations.

Conceptual analysis of property doctrine along these lines is likely to be beneficial across a broad spectrum of areas, with it becoming increasingly common to transplant property ideas and concepts from one context to another for instrumental purposes. Grounding the right to exclude in the principle of inviolability and seeking its meaning in the duty it casts on others remains a modest first step in that direction.

III. THE REMEDIAL VARIANT: EXCLUSIONARY RELIEF AS A RIGHT

As noted earlier, it remains common in modern times to equate the right to exclude with an entitlement to exclusionary or injunctive relief. This approach is largely functional and developed from the realist idea that it is meaningless to speak of a right in the absence of a remedy capable of enforcing it.

159. Two obvious examples of this fragmentation are: (1) the tort of trespass (to reality and chattels), where tort law’s corrective and distributive justice justifications have little explanatory force, see Shyamkrishna Balganesh, Common Law Property Metaphors on the Internet: The Real Problem with the Doctrine of Cybertrespass, 12 MICH. TELECOMM. & TECH. L. REV. 265, 274 (2006), and (2) the enforcement of contracts relating to the sale of land and identifiable goods, where in contrast to other forms of contract, courts readily award specific performance, even in the absence of an obvious efficiency gain, see Kronman, supra note 139, at 355; see also RESTATEMENT (SECOND) OF TORTS §§ 158, 217 (2007).

160. See, e.g., Balganesh, supra note 159, at 331–33.

161. As Karl Llewellyn, a well-known realist scholar, noted, “[A] right is best measured by effects in life. Absence of remedy is absence of right. Defect of remedy is defect of right.” KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 94 (1960).
Pragmatic as it may seem, this view tends to gloss over numerous subtleties inherent in the idea of the exclusionary remedy. Almost all of these subtleties derive from the nature of injunctive relief as an equitable remedy. Since its inception, equitable relief has been considered subject to an independent set of doctrinal constraints, all of which result in it being characterized as an "extraordinary remedy" by courts. Talk of a right to exclusionary relief tends to ignore the unique role of equity in this conception of the right. What does it really mean, then, to speak of a right to an exclusionary remedy?

It was precisely this question that the Supreme Court took up in eBay.162 This Part focuses on the equitable remedy conception of the right to exclude, examining the interface between equity and the rights discourse in the context of real and intangible property, and then attempts to use this analysis to understand the eBay holding and its aftermath.

Part III.A begins with an overview of the remedial conception of the right to injunctive relief, and concludes that the reference to a right here is little more than an expectation of a specific outcome given the nature of the subject matter involved: property rights. The conversion of a routine grant into a grant as of right was largely a rhetorical device. Part III.B then analyzes eBay and the Court’s rejection of the routine-grant version of the right to injunctive relief.

The Court in eBay certainly was not presented with the inviolability-based (claim-right) conception of the right to exclude. Yet, its holding alludes to the possibility that this is indeed what the right has meant all along. Critics who fault the holding tend to ignore altogether the conceptualist construction of the right and the possibility of the Court implicitly endorsing it.

A. The Traditional Test and the Right to an Injunction

An injunction is best defined as “an order of the court directing a party to the proceedings to do or refrain from doing a specified act.”163 As a form of relief, the injunction is a preventive rather than restorative remedy;164 and being equitable in nature, the injunction is rooted in the distinction between eq-

uity and common law. As a historical matter, equity developed to alleviate the rigidity and inadequacy of the common law's system of remedies. Consequently, establishing the inadequacy of ordinary common law remedies became a necessary precondition to the grant of equitable relief. Though its contours have varied over time, the "rule of inadequacy" remains an integral part of equitable doctrine. In an indirect way, however, the rule of inadequacy worked to establish an implicit hierarchy in remedial forms: courts (and plaintiffs) were mandated to look to ordinary (common law) remedies in the first instance, and only after courts were able to establish that such remedies were either of little use or had been exhausted would they consider the grant of an extraordinary (equitable) remedy. To even consider the option of injunctive relief, courts thus had to be convinced of the inadequacy of the default remedy—compensatory damages.

The rule of inadequacy eventually gave rise to a requirement of irreparability. Under this formulation, plaintiffs had to establish that ordinary remedies were inadequate because the harm to be prevented was irreparable through ordinary compensation. Termed the irreparable injury rule, it is today associated with an inability (for whatever reason) to quantify the damage sought to be prevented. While scholars often use the inadequacy and irreparability rules as synonyms, some formulations tend to list them as independent factors that need to be satisfied separately, though it is far from obvious that the content needed to satisfy each of them differs significantly.

165. See 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 33 (1836).
170. For a comprehensive historical analysis of the inadequacy rule, concluding that historically, the Chancery Court did not have to adhere to it in copyright cases, see Tomás Gómez-Arostegui, What History Teaches Us About Copy-
Although the rules of inadequacy and irreparability require the plaintiff to establish a need for exclusionary relief, they never directly take into consideration the interests of anyone else—most notably, the defendant. In due course, therefore, courts developed the doctrine of "relative hardship," or "balancing of the equities." In simple terms, this rule prevents a court from granting a plaintiff injunctive (equitable) relief when "the cost to the defendant of obeying the injunction is substantially greater than the objective benefit to the plaintiff" from the same.\(^{171}\) The rule thus forces courts to examine the individual circumstances of the parties before it, prior to granting relief.\(^{172}\)

Once the rules of inadequacy, irreparability, and relative hardship are satisfied, courts are then required to ensure that the grant of the injunction would not run contrary to the public interest. The public interest requirement is a catch-all category that enables courts to factor in considerations that might ordinarily have been deemed extraneous to the dispute between the parties—such as whether the issuance of the injunction would impose costs on society as a whole, or whether it would defeat the purposes of the law.\(^{173}\)

Together, these four rules—inadequacy, irreparability, relative hardship, and public interest considerations—constitute the traditional "four-factor" test for the grant of an injunction, which courts are obligated to apply. As is apparent, the test gives courts a significant amount of discretion in individual cases.\(^{174}\) Indeed, the element of discretion (driven by the need for flexibility) has long been considered the defining feature of equity as a whole.\(^{175}\) Quite apart from these injunction-specific
rules, the rules of equity grant courts broad authority to factor in a host of other considerations in deciding whether or not to grant equitable relief. These other considerations are referred to generically as "equitable considerations." Doctrines such as "clean hands," in pari delicto, and laches have long formed the basic building blocks of courts' equitable jurisdiction. Given that the grant of relief is discretionary, the crucial question is whether it becomes credible to speak of a right to injunctive relief.

In spite of their adherence to these four rules in other contexts, courts have tended to exhibit a general predisposition towards granting injunctive relief in relation to property rights. Deriving from the maxim that "equity protects property rights, not personal rights," courts began recognizing that they were "bound to protect" property rights and focused their attention on whether or not a right in question could be legitimately classified as proprietary. In focusing on this classificatory question (albeit with significant inconsistencies in their final determinations), courts operated on the assumption that legal (common law) remedies were inadequate to protect property rights and that injunctive relief was therefore often a fait accompli. It was not until much later that courts moved away from the property-personal distinction as the main focus of their inquiry.

Equity's historical preference for property over personal rights is itself the subject of some controversy. Some attribute it to a misinterpretation of historical precedent, while others argue that it arose as a consequence of equity's use of property rights to establish its jurisdiction in situations where it otherwise would not have had any. Yet, almost everyone characterized the distinction as being artificial and often resulting in

176. These concepts are collectively referred to as the "maxims of equity." See Charles Neal Barney, Equity and Its Remedies 39 (1915) ("Underlying the doctrines of equity and at the basis of this system of jurisprudence are certain general principles called maxims."); Roscoe Pound, The Maxims of Equity—1: Of Maxims Generally, 34 Harv. L. Rev. 809 (1921).
178. Developments in the Law, supra note 166, at 1001.
an abjectly unjust denial of relief. Soon enough, the distinction was done away with, but ever since, equity’s connection to property has been considered somewhat special.

Even after the property-personal distinction became diluted, the argument that property rights necessitated injunctive relief remained, deriving its force from the obvious inadequacy of damages as a preventive-deterrent mechanism. Central to this argument was the notion that if damages were to be the only (or even the primary) form of relief, in a majority of cases one private individual would effectively be allowed to take the resources of another without the latter’s consent—a form of private taking. Where the grant of equitable relief (of any kind) had long been considered a matter “of grace,” by the nineteenth century, courts had begun to expressly repudiate this rule and replace it instead with a rule that injunctions would issue “of right” whenever property rights were at issue. What this meant was merely that the discretion to grant was being replaced with a discretion to deny—with the onus now on courts to justify their decisions refusing relief rather than granting it. Invariably, this derived from the “balancing of equities” part of the test. When property rights were involved, courts deemed the irreparability and inadequacy components satisfied; implicit in that determination was the belief that property’s element of exclusion could be protected only through injunctive relief. This approach became most apparent in the contexts of real property trespasses and patent infringement, and remains dominant even today.

181. See, e.g., Roscoe Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640, 641 (1916).
182. 5 John Norton Pomeroy, Equity Jurisprudence and Equitable Remedies § 1944 (2d ed. 1919); Henry L. McClintock, Discretion to Deny Injunction Against Trespass and Nuisance, 12 Minn. L. Rev. 565, 572 (1928).
183. See, e.g., Walters v. McElroy, 25 A. 125, 127 (Pa. 1892) (“The phrase ‘of grace’ . . . has no rightful place in the jurisprudence of a free commonwealth, and ought to be relegated to the age in which it was appropriate.”); see also Hulbert v. Cal. Portland Cement Co., 118 P. 928, 931 (Cal. 1911); Currie v. Silvernale, 171 N.W. 782, 784 (Minn. 1919).
184. McClintock, supra note 182, at 569.
1. Real Property: Injunctions Restraining Acts of Trespass

Historically, courts were reluctant to grant injunctions preventing trespasses unless an element of waste was involved. In due course, however, the waste-trespass distinction (in the context of injunctive relief) came to be repudiated and courts came to recognize that injunctions would issue “in aid of the legal [property] right.” The focus thus shifted to determining whether the right asserted was in fact legitimate—that is, whether the person claiming title or ownership did in fact have title over the land in question.

Equity also developed a rule that distinguished between naked and destructive trespasses, based on the imminence of irreparable damage to the land in question. In due course, however, the irreparable damage element became linked to the vitality of the plaintiff’s legal right. Thus, courts came to recognize that trespassory interferences could be legitimately restrained even when the damage was not necessarily significant physically or monetarily, a possible allusion to normative damages (captured by the injury-damage distinction, or the rule of *injuria sine damno*—“legal injury without actual damage”). Kerr thus notes that “[a]n act of trespass, not in itself amounting to serious damage, may from its continuance, amount in the opinion of the Court to trespass attended by irreparable damage,” and that situations could exist “where

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187. Courts thus developed the distinction between trespasses by strangers to the property and trespasses by those acting under color of right. Ironically though, the law favored the grant of injunctive relief in the case of the latter and not the former. See V.C. Kindersley's Court: Lowndes vs. Bettie, 13 Amer. L. Reg. 169, 170 (1865) (reporting the decisions in Lowndes v. Bettie, (1864) 33 L.J. Ch. 451, where the distinction was described most lucidly); see also William Draper Lewis, Injunctions Against Nuisances and the Rule Requiring the Plaintiff to Establish his Right at Law, 56 U. Pa. L. Rev. 289 (1908).
189. See Samuel C. Wiel, Injunction Without Damage As Illustrated by a Point in the Law of Waters, 5 Cal. L. Rev. 199, 201 (1917) (noting how the rule transforms something into a form of liability actionable per se).
In relation to trespasses, therefore, courts began to focus on assuring themselves of the plaintiff’s legal right and a breach of or interference with that right, whereupon they proceeded to “interfere at once” and grant a perpetual injunction.191 By contrast, where either the right or a breach of the right remained doubtful, courts were reluctant to interfere and proceeded instead to engage in a balancing of the equities. Where both (1) the right and (2) its breach were proven, the issuance of an injunction became in a sense mechanical, as long as the issuance of injunctive relief was not meaningless—that is, where the act complained of had ended, such as where the trespass was isolated. In such situations, the court’s discretion came to be limited severely (to exceptional circumstances meriting a denial), and the law came to recognize the plaintiff as being entitled to the relief sought. The discretion to grant was transformed into a discretion to deny in exceptional situations. As Kerr notes, "[a]fter the establishment of his legal right and the fact of its violation, a man is entitled as of course to a perpetual injunction to restrain the recurrence of the wrong, unless there be something special in the circumstance of the case."192

Following from this, once the a priori right to exclude and an interference with it were established, it soon became legitimate to speak of an injunction issuing as of right.193 While scholars

190. Kerr, supra note 188, at 149.
192. Kerr, supra note 188, at 188.
193. For some recent instances where courts identify the grant of injunctive relief as the default norm, evidencing a move to the “discretion to deny” formulation, see: Amaral v. Cuppels, 831 N.E.2d 915, 920 n.10 (Mass. App. Ct. 2005) (identifying injunctive relief as the “appropriate remedy” when a repeated trespass occurs and recognizing that “exceptional circumstances” might merit the denial of such relief); Shapiro Bros., Inc. v. Jones-Festus Props., L.L.C., 205 S.W.3d 270, 278-79 (Mo. Ct. App. 2006) (identifying injunctions as the “proper remedy” whenever a harassing, continuing, and annoying trespass is involved); Warm v. State, 764 N.Y.S.2d 483, 486 (App. Div. 2003) (identifying injunctive relief as a proper remedy, but noting that “equity may withhold the use of such discretionary authority if warranted by the circumstances”); Young v. Lica, 576 S.E.2d 421, 424 (N.C. Ct. App. 2003) (identifying exclusion as a key component of ownership and injunctive relief as the “usual remedy” for a continuing trespass); Aguilar v. Morales, 162 S.W.3d 825, 836 (Tex. App. 2005) (identifying an injunction as the “proper remedy” for a repeated and continuing trespass). The operative presumption in all of these cases is that since the interference is continuing, damages—which are
have tended to equate rights with entitlements as of right in other contexts, it bears emphasizing that the right here always remained discretionary. Courts never abdicated their discretion, but merely came to limit it to exceptional circumstances. Perhaps the most well-recognized "exceptional circumstance" where courts still routinely deny injunctive relief is that of good faith improvers (innocent encroachments). In situations where the owner of an adjacent property mistakenly builds a structure on the property of his neighbor, courts usually prefer damages to having him destroy the structure. This preference for damages recognizes the burden and waste the destruction is likely to cause. As is to be expected, the innocent encroachment exception is limited to mistaken improvements and has no application to intentional or "bad faith" encroachments.

All of this is in contrast with the rule that was at issue in eBay, where the exceptional circumstances limitation had become redundant, with the right being in a sense absolute and courts devoid of discretion to deny.

by their nature one time, or would alternatively require multiple actions—are intrinsically inadequate, making injunctive relief the default. See also 42 AM. JUR. 2D Injunctions § 110 (2007) ("Generally, an injunction will lie to restrain repeated trespasses as to prevent irreparable injury and a multiplicity of suits. Indeed, it has been held that even the threat of continuous trespass entitles a party to injunctive relief." (emphasis added)); 43A C.J.S. Injunctions § 138 (2007) ("The general rule permits injunctive relief for repeated or continuing trespasses, even in cases where the damage is nominal and no single trespass causes irreparable injury."); JAMES C. SMITH & JACQUELINE P. HAND, NEIGHBORING PROPERTY OWNERS § 3.13 (2007).

2. Injunctions Restraining Patent Infringement

Intangible rights such as patents and copyrights remain different from other forms of property in more respects than one. Yet, here too we see the idea of exclusion forming the core around which the proprietary significance of the rights revolves. The law relating to patent injunctions was directly at issue in eBay.

A patent grants its holder a set of exclusive rights in relation to a “new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement” of the same. More importantly, though, a patent’s functionality is understood in terms of the right to exclude. Once granted, a patent gives its holder the “right to exclude others from making, using, offering for sale, or selling the invention” in question.

In most claims for patent infringement, two issues are almost always in play: the validity of the patent grant, and the fact of infringement. The former involves determining whether the administrative agency issuing the patent adhered to the conditions for the grant: novelty, utility, and non-obviousness. The latter entails proving that the defendant performed one or more of the activities that the patent holder is granted an entitlement to perform exclusively. Once both validity and infringement are established, the court then proceeds to the issue of remedies, where injunctive relief remains the most popular.

Courts initially applied the irreparability and inadequacy criteria with significant regularity. In due course, however, the realization emerged that, in situations where an infringement did in fact exist (and was continuing), denying the holder an injunction was tantamount to rendering the patent’s grant of exclusivity meaningless. Irreparability and inadequacy thus came to be presumed as a matter of course each time a valid patent was proven to have been infringed. Even though the traditional test remained in place, in practice, when “the right
[was] well established and the violation clear, neither considerat­ions of public or private convenience, or hardship to the defendant, [prevented] the court from interfering.” 201 Once val­idity and infringement were established, the norm thus be­came that a court “may interfere at once and grant an injunc­tion.” 202 All of this arose from the rather obvious inadequacy of damages to prevent further acts of infringement.

In this way, equity came to treat intellectual property analogously to real property. Once title (validity) and trespass (in­fringement) were established, the grant of injunctive relief seemed to follow naturally. Here too, however, courts never openly eliminated their discretion except to admit to exclusion­ary relief becoming the default option. The frequency with which this occurred created an expectation among plaintiffs (patent holders) that injunctive relief would always follow (once validity and infringement were no longer in issue), notwithstanding the traditional test and the vestige of judicial discretion.

Over time, courts of equity thus began to limit their remedial discretion by presuming elements of the traditional (four­factor) test to be satisfied whenever a valid property right was at issue and was shown to have been interfered with. What was initially discretion to grant was transformed into discretion to deny. Yet, the discretion always remained—however minimal it may have been. The right to injunctive relief (as a variant of the owner’s right to exclude) is then, at best, a strongly conditional right. Property holders legitimately came to expect that when their valid interest was interfered with, courts would, with few exceptions, find the issuance of an injunction unproblematic.

It must be emphasized that even in situations where they readily came to limit their discretion and recognize that injunci­tive relief was the necessary, natural, or proper remedy, courts do not seem to have ever considered themselves legally bound to grant the injunction.

If the right to exclude truly entailed no more than this discretion-laden entitlement to injunctive relief, one might be justified in characterizing property law’s emphasis on it to be misplaced. Yet, in eBay, the Court was confronted with a significantly

201. High, supra note 185, at 349; see also CHARLES STEWART DREWRY, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS 220, 223–24 (1841).
stronger version of the rule, one that effectively eliminated all remedial discretion.

B. Unlinking Right and Remedy: Understanding eBay

It remains possible to envisage an even stronger variant of the rule favoring the grant of injunctive relief for property violations. This would involve eliminating any possible discretion to deny the injunction, making the grant fully automatic once title and interference are established. This approach would involve abandoning altogether the idea of discretionary remedialism that once formed the central feature of equitable remedies.

Discretionary remedialism is the view that courts have the discretion to award plaintiffs an “appropriate remedy” in an individual case and are not necessarily limited to specific kinds of remedies within any category. To be sure, it comes in different forms and flavors, but the idea of discretion is central to its conception. Critics of discretionary remedialism argue that it becomes problematic to speak of rights (in the remedial sense) if discretion of any kind persists as an element of the remedial discourse. They, in turn, prefer a strict rule-based approach to the discretionary one.

It was precisely this conflict—between a discretionary approach and a rule-based one—that the Court encountered in the context of the automatic injunction rule in eBay. Since its inception, the Federal Circuit had developed a general rule in the context of patent injunctions, under which courts granted plaintiffs a permanent injunction once validity and infringement were factually proven. As a direct consequence, the right to exclude—statutorily delineated as the central element


205. Peter Birks is perhaps the most outspoken critic of discretionary remedialism. See Peter Birks, Three Kinds of Objection to Discretionary Remedialism, 29 W. AUSTR. L. REV. 1 (2000).

in a patent grant—came to be equated with a plaintiff’s automatic entitlement to injunctive relief in infringement actions. In eBay, the Court unanimously rejected the Federal Circuit’s rule.

1. The Automatic Injunction Rule

A few years after its establishment in 1982, the Federal Circuit formulated a general rule that, in suits for patent infringement, a permanent injunction would automatically issue upon a finding that the patent was infringed and that it was not invalid. Although in formulating its rule the court had retained an exceptional circumstances limitation—perhaps in recognition of the discretion to deny formulation—in practice, it had interpreted the limitation as applicable only when public health or safety were at issue. Given the court’s general reluctance to invoke the exceptional circumstances rule, the issuance of injunctions came to be recognized as mechanical once infringement and validity were proven. In so doing, the Federal Circuit had also explicitly refused to apply the traditional four-factor test in its standard formulation. The court’s rationale, in simple terms, relied upon the preeminence of the right to exclude within the set of rights granted to the patentee. In one of its early cases, the court noted that, without an injunction, the patentee’s right to exclude would be diminished, the owner would lack leverage, and the patent would have only a fraction of the value it was intended to have. Under this understanding, a refusal to grant an injunction in a situation where validity and infringement had been affirma-


208. See, e.g., Xerox Corp. v. 3Com Corp., 61 F. App’x 680, 685 (Fed. Cir. 2003) (“The important public needs that would justify the unusual step of denying injunctive relief, however, have typically been related to public health and safety.”); Rite-Hite Corp. v. Kelley Co., 56 F.3d 1538, 1547–48 (Fed. Cir. 1995) (citing instances where the exception had previously been invoked).


tively established without question would amount to a denial of the basic right to exclude. 211

In laying down this rule, the Federal Circuit adopted a rather counterintuitive interpretation of the patent statute, which provides that “courts having jurisdiction of [patent] cases . . . may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent.” 212 The automatic rule mandating the grant seemingly disregarded the unequivocally discretionary language used by Congress. It is therefore not surprising that, in 2005, a legislative effort was mounted to remedy this anomaly by requiring courts to apply the four-factor test in patent cases. 213 The automatic rule articulated by the Federal Circuit thus concretized the connection between property and injunctive relief through the right to exclude.

Although the Supreme Court, before eBay, had never directly considered the automatic rule, nearly a century ago it did expound on the philosophy behind injunctive relief in patent cases. In so doing, it seemed to both endorse the rule and attribute its primacy to a patent’s conferral of the right to exclude. In Continental Paper Bag Co. v. Eastern Paper Bag Co., 214 the defendant questioned the court’s authority to issue an injunction when the patent had not been put to use, even though validity and infringement had been affirmatively established. Although the Court did not rule on the automatic injunction rule, it went on to observe:

> From the character of the right of the patentee we may judge of his remedies. It hardly needs to be pointed out that the right can only retain its attribute of exclusiveness by a prevention of its violation. Anything but prevention takes 211. See, e.g., Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1246–47 (Fed. Cir. 1989) (“Infringement having been established, it is contrary to the laws of property, of which the patent law partakes, to deny the patentee’s right to exclude others from use of his property.”); W.L. Gore & Assoc. v. Garlock, Inc., 842 F.2d 1275, 1281 (Fed. Cir. 1988) (“[A]n injunction should issue once infringement has been established unless there is a sufficient reason for denying it.”).


213. This was part of the Patent Reform Act of 2005, H.R. 2795, 109th Cong. (2005). See Sirilla, Atkins & Goeller, supra note 207, at 588–89 n.5. The legislation was eventually unsuccessful.

away the privilege which the law confers upon the patentee.... Whether, however,... in view of the public interest, a court of equity might be justified in withholding relief by injunction, we do not decide.215

The Court's use of the terms "right" and "prevention" makes clear that it is, indeed, referencing the right to exclude. The privilege to which the Court refers is that of exclusive use, part of the patent grant that is shielded by the right to exclude. What is also clear from the Court's analysis is the implicit recognition that any judicial discretion is only the discretion to deny and not to grant, and that an injunction remains the default remedy when the right to exclude (property) is involved.216 It is the existence of this discretion to deny an injunction that the Court seems unsure of, thereby implicitly endorsing the automatic rule in the context of patent infringements.

2. The Supreme Court and the Automatic Injunction

In eBay, the plaintiff MercExchange brought an action against the defendant, alleging infringement of its business method patent. The defendant had sought to license the patent from the plaintiff, but negotiations eventually broke down, and the plaintiff ultimately sued in the United States District Court for the Eastern District of Virginia.217 At trial, the jury found the patent in suit to be valid and that the defendant had indeed infringed it. The district court, however, denied the plaintiff's motion for a permanent injunction to restrain the defendant's infringement, instead awarding damages. Applying the four-factor test to the facts before it, the court concluded that damages provided the plaintiff with an adequate remedy and would best serve the public interest.218 Much of the district court's concern seems to have stemmed from three elements: one, that the patent in question was a business-method patent, the growing issuance of which had made the Patent and Trademark Office (PTO) introduce an additional level of review

215. Id. at 430.
216. The Court additionally noted that "exclusion may be said to have been of the very essence of the right conferred by the patent, as it is the privilege of any owner of property to use or not use it, without question of motive." Id. at 429.
218. Id. at 710-15.
prior to issuance; two, that the plaintiff was not actually using (working) the patent, but was merely seeking to license it; and three, that the plaintiff had sought to license it to the defendant and made public its intent merely to seek damages.

On appeal, the Federal Circuit characterized the district court’s concerns as unpersuasive. Restating the general rule that “courts will issue permanent injunctions against patent infringement absent exceptional circumstances,” it reversed the district court’s decision. In so doing, it noted that injunctions were not reserved for inventors who intended to practice their inventions and that “the statutory right to exclude is equally available to both groups, and the right to an adequate remedy to enforce that right should be equally available to both as well.” The Supreme Court agreed to review the matter.

During oral argument before the Court, Justice Scalia seemed most defensive of the Federal Circuit’s approach. When the petitioner sought to argue that equity had systematically rejected the idea that relief might ensue categorically in particular circumstances, Justice Scalia retorted that this was not the case with the use of someone else’s property, noting that “we’re talking about a property right here . . . the right to exclude others . . . [t]hat’s what the patent right is. And all he’s asking for is ‘give me my property back.’” Later, in response to the government’s intervention, Justice Scalia reemphasized the inconsistency between characterizing the right as a property right and providing only for damages, noting that this conveyed the message “[h]ere, take your money, and you . . . go continue to violate the patent.”

219. Id. at 713–14.
220. Id. at 712.
221. Id. at 712–13.
223. Id. (emphasis added).
224. Id.
226. Transcript of Oral Argument at 6, eBay, 126 S. Ct. 1837 (No. 05-130).
227. Id. at 33.
Yet, when the Court eventually handed down its decision, its opinion side-stepped the property issue almost completely. In three separate opinions (one for the Court and two concurrences), the Court reversed the Federal Circuit. Without deciding on the facts of the case before it, the majority opinion merely reiterated that the grant (or refusal) of injunctive relief was a matter of equitable discretion, and one that had to be "exercised consistent with traditional principles of equity." In other words, the Court reaffirmed the centrality of the four-factor test.

Chief Justice Roberts's short two-paragraph concurrence did little more. While noting the difficulty inherent in "protecting a right to exclude through monetary remedies," he nevertheless concluded that this "does not entitle a patentee to a permanent injunction or justify a general rule that such injunctions should issue." This categorical language seemingly eliminates both variants of the automatic injunction rule discussed above—the weaker variant (converting the discretion to grant into a mere discretion to deny) and the stronger one (eliminating all discretion). Surprisingly, however, the Chief Justice's concurring opinion went on to draw a distinction between an exercise of equitable discretion and writing on a clean slate, observing that such discretion may indeed be limited by legal standards in order to ensure consistency. This observation was presumably intended to set out the practical consequences of the Court's elimination of the automatic injunction rule: that even though the discretion does exist, to ensure consistency, it may only be applied according to well-established standards that result in consistent outcomes.

Justice Kennedy's concurring opinion added very little except to note that historical practice may provide courts with some guidance in the exercise of their discretion. It attempted to identify the problems inherent in the automatic injunction rule—particularly that an injunction would grant undue lever-

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230. Id. at 1841.
231. Id. at 1841 (Roberts, C.J., concurring).
232. Id. at 1841–42.
233. Id. at 1842 (Kennedy, J., concurring).
age to companies merely interested in obtaining licensing fees—that may be detrimental to the public interest.234

The Court was seemingly motivated by the need to curb the practice of companies making their revenues by simply licensing out inventions without actually working them—often referred to as “patent trolls.” The petitioner made much of this during oral argument235 and the Court seems to have been motivated by a similar concern, as Justice Kennedy’s opinion makes amply clear.236

Whether legitimate or not, the concern over patent trolls ought to have been the subject of congressional intervention rather than judicial concern. The statute in its current form specifically recognizes the possibility of such trolling and expressly disables courts from denying a party relief for the refusal to license or use the patent in question.237 In taking the matter into its own hands, the Court’s opinion seemingly contradicts the express language of the statute. Property rights always introduce the problem of holdouts, and when this remains a genuine concern, legislative—not judicial—intervention can alleviate the problem.238

Potentially even more significant is the difficulty in reconciling the Court’s decision in eBay with its decision in Continental Paper Bag. It is probably for this reason that the opinions make almost no reference at all to that case, even though the Court suo moto requested to be briefed on the matter and in fact heard oral argument on the same. The single isolated reference to the case is used to make the point that the district court’s position—denying the patentee an injunction categorically because of its attempt to license the invention—was impermissible.239 The Court thus implicitly affirmed its prior position in Con-

234. Id. at 1842-43.
235. See, e.g., Transcript of Oral Argument at 25-26, eBay, 126 S. Ct. 1837 (No. 05-130).
236. eBay, 126 S. Ct. at 1842 (Kennedy, J., concurring).
239. eBay, 126 S. Ct. at 1840-41.
nental Paper Bag, even while its express holding remains irreconcilable with it.

3. The End of Automatic Injunctions: Intellectual Property and Beyond

If there is one point that the Court’s excessively narrow holding does affirmatively establish, it is that the automatic injunction rule for patents no longer exists. In its zeal to invalidate the stronger version of the rule, however, the Court eliminated the weaker version as well. The big question is whether its holding applies beyond the realm of intellectual property, to tangible property as well.240

The Court’s ruling now requires courts to apply the traditional four-factor test, even after the issues of validity and infringement have been found for the plaintiff-patentee. Part of the test requires the patentee to establish that “remedies available at law . . . are inadequate to compensate” for the injury.241 The test is thus founded on the idea that, ordinarily, damages (compensatory remedies) are the default option, and exclusionary remedies (injunctive relief) are to be invoked only in extraordinary circumstances. The weaker version of the automatic injunction rule would have merely altered the default by, in some sense, shifting the burden onto the defendant-infringer

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240. In an amicus brief filed by fifty-two intellectual property law professors in support of the petitioners’ position in eBay, the argument was made that such a hierarchy was well-established in the cases of real and chattel property as well. As they observed:

Courts apply the traditional principles of equity to real and personal property, and consider such factors as adequate remedy at law, the balance of hardships to the parties, and the public interest in deciding whether to grant an injunction. . . . Courts regularly award damages rather than injunctive relief against invasion of real property when the circumstances warrant.


Interestingly, another brief filed by various law and economics professors in support of the respondents’ position points out that the above-stated position was based on a misunderstanding and overreading of the law. See Brief of Various Law & Economics Professors as Amici Curiae in Support of Respondent at 10–11, eBay v. MercExchange, 126 S. Ct. 1837 (2006) (No. 05-130), 2006 WL 639164.

241. eBay, 126 S. Ct. at 1839.
to prove that injunctive relief was inappropriate in light of the circumstances. The holding effectively reintroduces the ancient remedial hierarchy that equity practice had come to dilute significantly over the course of the last century or so, specifically in relation to property rights.

Most importantly, the Court’s holding is not restricted to the domain of patent or, indeed, intellectual property law, and would seemingly apply to automatic injunctions in the context of tangible property as well. The logic of the Court’s rejection of the rule was the need to treat injunctive relief in the context of patents on equal terms with injunctive relief in other contexts. The Court’s observation that the traditional factors “apply with equal force” to patent disputes is aptly indicative of the same.242 Additionally, and perhaps of more relevance, is that in support of its holding that patent injunctions need to follow the traditional test, the Court relied on two cases, neither of which had any connection whatsoever to patents or intellectual property, but nonetheless did involve automatic injunctions.243 Consequently, there remains good reason to believe that the Court’s holding applies to the entire gamut of automatic injunctions, not just those related to patents.

Under this reading of eBay, the automatic injunction rule—in both variants and in connection with both intellectual and tangible property—stands abrogated. In its place, the traditional four-factor test and the preference for damages to all other remedies remains the norm.

4. Moving to Efficient Infringement (and Trespass?)

If the absence of a direct recourse to specific performance in the context of contract law serves as doctrinal evidence of a theory of efficient breach, does the eBay holding now signal a move towards a normative theory of efficient trespass or infringement in the context of property rights?

The four-factor test, with its emphasis on inadequacy and irreparability, has long been understood as involving little more

242. Id.
243. See id. The cases cited were Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982), which involved the issuance of an injunction to restrain water pollution, and Amoco Production Company v. Gambel, 480 U.S. 531 (1987), which involved an injunction for noncompliance with a statute aimed at preserving lands in Alaska.
than a cost-benefit analysis. In situations where it is inefficient to coerce performance of the contract, courts award damages. If this is precisely what the four-factor test entails, then mandating a rigid adherence to it in the context of property implies a similar emphasis on efficiency.

To be sure, the idea of "efficient trespass" or "efficient conversion" has been in existence for a long time, with some using it as a logical extrapolation of the efficient breach theory to illustrate the incompatibility of the theory with the idea of property. This approach, however, tracks the remedial emphasis on the right to exclude; as we have seen, the centrality of the right to exclude does not derive from its actual enforcement. Others have raised the idea of efficient trespass in the context of other property doctrines (such as adverse possession), but have stayed clear of offering a normative account of the theory, given the general structure of equity practice before eBay.

Even if one doubts that the Court's holding has implications outside of intellectual property, within that context at least, it certainly signals a move towards a doctrine of efficient trespass of intangibles, or of efficient infringement. In situations where the infringement of a patent (or other intellectual property) right appears to have short- and possibly long-term efficiency gains (especially in the social welfare sense), courts are now not just allowed but actually mandated to avoid granting


247. id. at 1081 n.164 ("It bears emphasis that I am not advocating a generalized normative theory of 'efficient theft.'"). For a more recent attempt, however, see Stewart E. Sterk, Property Rules, Liability Rules, and Uncertainty About Property Rights, 106 Mich. L. Rev. (forthcoming 2008) (manuscript at 3) (arguing that courts should look to the "costs and social value" involved in obtaining additional information about property rights in choosing between property and liability rule protection).

exclusionary relief. This is borne out most distinctively in the Court’s concern with patent trolls—entities that hold the right without actually using it directly. Even though the statute explicitly recognizes the possibility of such activity and requires courts to avoid factoring it into their decision on remedies, the Court thought it appropriate to incorporate the matter into its standard analysis. Factoring in trolling is undoubtedly an efficiency or utilitarian calculation, premised on the belief that the public is somehow benefited by the actual working of a patent (even if by an infringer), rather than its non-working.

The move from trolling in the intangible world to other obvious utility-enhancing activities in the context of realty and chattels is not really that difficult. Take the case of an absentee landowner and a squatter (assuming of course, that the period of limitation for adverse possession has not passed), or that of a landowner who seeks to prevent someone (or the public) from crossing his land for reasons that cannot be justified on economic terms. In each of these cases, the four-factor test would presumably militate against the grant of injunctive relief. In some areas of property doctrine, equity already recognizes just such an efficiency calculation in its grant of relief—the most obvious being that of unintentional building encroachments. Its direct incorporation into the four-factor test, however, makes the efficiency trade-off applicable to all property disputes.

eBay thus signals a clear move towards efficiency concerns influencing the grant of injunctive relief in cases involving property and intellectual property rights. The previous presumption that property rights were intrinsically efficiency enhancing, which, therefore, obviated the need for a secondary

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249. 35 U.S.C. § 271(d) (2005) (“No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: . . . (4) refused to license or use any rights to the patent . . .”). Indeed, this affirmatively establishes the nonexistence of a duty to use the patented invention at all—a principle that even before codification had been established in case law. See Herbert Hovenkamp, Mark D. Janis & Mark A. Lemley, Unilateral Refusals to License, 2 J. COMPETITION L. & ECON. 1, 2–3 (2006).

250. See, e.g., Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997) (involving a landowner who sought to prevent defendant from traversing unused field to get to the other side, even though it was the shortest possible route and would not have interfered with the owner’s actual use).

251. See Merrill & Smith, supra note 158, at 54–55.
efficiency calculation at the time of their enforcement, no longer holds true.

Regardless of whether eBay’s formulation of equity’s test for injunctions is consistent with the historical trend in the area, the Court’s holding does conclusively establish that the remedial conception of the right to exclude is not what property entails. Ironically, then, at the same time that the Court’s holding moves the law in the direction of a utilitarian approach to injunctive relief, it also rejects an exclusively consequentialist understanding of the right to exclude. To be sure, the Court did not hint at what an alternative conception of the right might be—and perhaps with good reason.

Central to the ambivalence surrounding eBay is that patents remain (by both structure and intent) a form of private property built around the right to exclude. Yet, if this did not entail exclusion by injunctive relief, it seemed futile, at first blush, to continue emphasizing the centrality of exclusion. The inward-looking conception of the right to exclude—deriving from inviolability—provides a complete answer to this apparent disconnect. Viewed in this light, the Court in eBay might have implicitly acknowledged the simple, yet often-overlooked reality that property (and with it the right to exclude) is a meaningful institution independent of its judicial enforcement.

CONCLUSION

Taken at one time as axiomatic of what the idea of property meant, the right to exclude has in recent times receded into the background. While the antiformalism that has characterized the modern property discourse has undoubtedly contributed to this development,252 it is also the result of the insufficient attention that courts and scholars have paid to disaggregating the idea and its meaning. Consequently, it has indeed become increasingly common to characterize the idea as a “trope,” or rhetorical epithet, devoid of functional relevance.253

Although the Court’s holding in eBay may be interpreted by some as contributing to this move, this Article has argued that eBay actually directs attention to what the right to exclude has

252. See Merrill & Smith, supra note 2.
253. See, e.g., Rose, supra note 1, at 604 (characterizing the right to exclude and the “Exclusivity Axiom” as a trope).
meant all along. Understanding the institution of property to be grounded in the norms associated with the principle of inviolability casts the right as nothing more than the correlative of the duty to keep away from a resource over which the norm applies. This, in turn, focuses attention on the role of property (and ownership) as a coordination device for scarce and rival resources. Counterintuitively, then, the Court’s holding strengthens the normative significance of the idea.

The holding in eBay closed the door on but one conception of the right—the remedial version. The automatic injunction rule that the Court rejected had resulted in the right to exclude coming to be understood as the right to exclusionary relief. Yet, just as the absence of a right to specific enforcement is not considered indicative of the nonexistence of a contractual right to performance, the absence of a right to exclusionary relief has similarly little bearing on the centrality of exclusion to property. The primary right conception of exclusion, much like the primary right conception of contractual performance, derives its normative content from an underlying moral ideal on which the institution of property bases itself: inviolability. Inviolability represents a principle central to peaceful coordinated social existence, and the right to exclude, as a correlative to the duties that derive from it, converts it into a legal (as opposed to moral) norm.

The right to exclude, then, remains the defining ideal of property. If the idea of property is understood outside of its remedial (or enforcement) context, and instead is viewed as a social institution that coordinates access to and use of scarce resources, the primary or correlative right conception begins to make logical sense. Recasting the right to exclude along these lines, it is hoped, will contribute towards moving property debates away from their singular emphasis on remedialism and towards a broader analytical framework for the institution.