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

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INJUNCTIONS

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*Shyamkrishna Balganesh*

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The right to exclude has for long been considered a central component of property. In focusing on the element of exclusion, courts and scholars have paid little attention to what it means for an owner to have a ‘right’ to exclude 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. This view attributes to the right a distinctively consequentialist meaning, calling into question the salience of property outside of its enforcement context. Yet, in its recent decision in eBay, Inc. v. MercExchange, LLC, the Supreme Court rejected this interpretation, declaring unequivocally that the right to exclude did not mean a right to an injunction. This Article argues that eBay’s negative declaration serves to shed light on what the right has really meant all along—as the correlative of a duty imposed on non-owners (i.e., 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.

“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 long come to identify 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 of importance outside its remedial context, it becomes important to identify what the ‘right to exclude’ does mean other than 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).

In his definition of property that has since become legendary, Blackstone defined property as that “sole and despotic dominion” exercised over external things, “in total exclusion” of the right of any other.\(^1\) Blackstone’s definition has since been ably morphed into a more general definition of property rights in the abstract, centered around the in rem right to exclude.\(^2\) The Supreme Court too has on numerous occasions, characterized the element of exclusion as a critical component of the ideal of property, in dealing with the issue of takings.\(^3\)

The idea of exclusion, in one form or the other, tends to inform almost any understanding of property—be it private, public or community.\(^4\) The only variation tends to be the person/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 and legislators to equate conceptions of property with the notion of exclusion remains all-pervasive.\(^5\)

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


5 Prominent scholarly examples include: J.E. Penner, The Idea of Property in Law 71 (1997) (defining property in terms of exclusion); J.W. Harris, Property and Justice 13 (1996)
Within the exclusionary conception of property, the right-based variant tends to dominate overwhelmingly. A little under a decade ago, Thomas Merrill argued that the “right to exclude” remains the sine qua non of what property is.⁶ The Supreme Court too, whenever it invokes the idea, speaks in terms of a “right” to exclude.⁷ While scholarship and judicial dicta over the years have attempted to understand and apply the exclusion-part of the ‘right to exclude’, the debate has tended to ignore altogether, the right-component.⁸ Why is it unsurprisingly common to speak of property in terms of a ‘right’ to exclude? Does the identification of exclusion as a ‘right’ shed light on its practical significance (i.e., as a remedy), or is it merely a rhetorical epithet emphasizing its centrality to the discourse (i.e., analogous to the ‘right to life’)?

Focusing on the right-component of the ‘right to exclude’ is more than just of theoretical value. It carries with it a deep functional relevance, one that derives from the interplay between the language of rights and remedies.⁹ For

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⁶ Thomas W. Merrill, Property and the Right to Exclude, 77 NEB. L. REV. 730, 730 (1998) (characterizing the right to exclude as the sine qua non of property) (emphasis supplied).


⁹ For an overview of some of the literature laying out the basic tenets of the debate over rights and remedies see Neil MacCormick, Rights, Claims, and Remedies, 1 LAW & PHIL. 337 (1982); Peter
quite some time now, the right to exclude in the context of both tangible and intangible property has come to be associated with an entitlement to exclusionary (i.e., injunctive) relief. Thus, interferences with an owner’s interests are thought of as entitling the owner to obtain a permanent injunction restraining such interferences. The ‘right to exclude’, in this understanding then, is a remedial attribute, one related to the automatic availability of injunctive relief for interferences with an owner’s use and enjoyment of his or her property.

In its recent decision in eBay, Inc. v. MercExchange, LLC, the Supreme Court however, effectively de-linked 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 that the traditional four-factor test used by courts of equity determined the availability of an injunction. Translated into property terms, the Court basically concluded that an interference with a property interest—continuing as it may be—doesn’t automatically entitle the owner to an injunction; the owner still has to affirmatively establish the inadequacy of ordinary (i.e., compensatory) remedies. The point was driven home most forcefully by Justice Kennedy, who observed in his concurrence that the mere “existence of a right to exclude“ in the owner, “does not dictate the remedy for a violation of that right”.

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


11 Id. at 1839.
12 Id. at 1842 (Kennedy, J. concurring).
While the Court’s holding was directed at patent injunctions in specific, the express basis of its holding remained the need to subject patent injunctions to the standard governing “other cases” where injunctions were granted. In concluding that this standard was the four-factor test, it implicitly acknowledged its universal applicability to all grants of injunctive relief. Viewed in this light, the eBay decision basically 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 the wider subjects of real and personal property, in so far as each of them 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 de-classification of intellectual property (patents, specifically) as a species of property strictu sensu, or that it dilutes the significance of the right to exclude in understanding intellectual property, or indeed all property.15

My argument in this Article is very different. In this Article, I argue that the eBay court’s de-linking of right and remedy in relation to exclusion, counter-intuitively, helps shed light on what the ‘right to exclude’ does mean in the context of intellectual property and property, more generally; and on the role it plays in structuring different elements of the legal regime governing them. The right to exclude, I argue, is best understood as a normative device, deriving from the norm of resource-inviolability. Analogous to the role of promising in contract law, the right to exclude operates as an analytic tool, seeking to transplant the norm of inviolability from morality to law, but admitting of exceptions as circumstances demand.

Part I attempts to set out different interpretations of the right to exclude, using three different theoretical frameworks. Part II then argues that

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14 Id. at 1839.
if property is to be understood as an institution of significance independent of its actual enforcement, the right to exclude needs to be understood as a correlative right deriving from the norm of inviolability. It proceeds to show that the right 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 at once both practical and simultaneously able to explain its lingering persistence in property talk. Part III then focuses on the interpretation that was at issue in the eBay case—the exclusionary remedy variant. It 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. It then focuses on the impact of eBay on this conception 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 isn’t to argue that the right to exclude is all that there is in property. While the idea of property most certainly consists of more than just exclusion, to be meaningful it must contain at minimum some element of exclusion. How such exclusion might manifest itself in property theory and practice then, forms the focus of the paper. Accepting or rejecting the centrality of the ‘right to exclude’ to property, are both conditional 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 been in existence for several centuries now. All the same,

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16 Some have made just such a claim. See Merrill, supra note 6, at 754 (“[P]roperty means the right to exclude others from valuable 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 Mosoff, supra note __. I bracket this question here and focus on disaggregating the idea.

Demystifying the Right to Exclude

one finds little to no analysis of the right to exclude in their exegesis. In almost identical vein, property scholars have tended to focus almost entirely on the exclusion element, even though they continue to routinely deploy 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. While some property theorists speak of the right as a unitary concept, others use it as representing a collective set of rights. Yet all of them consistently underplay their reasons for characterizing the situation as giving rise to a right, when ironically, it is precisely the study of these reasons that has remained the focus of rights-theorists. It is therefore rather surprising that proponents of the right to exclude have tended to neglect altogether the unique interface of their ideas with those of the rights discourse more generally.

What follows then in this Part is an attempt to describe this interface by classifying possible conceptions of the right to exclude based on their structural and functional attributes. On the face of it, a classificatory exercise of this nature may seem irrelevant and largely academic. However, given that the common law is structured as a set of events and responses to them, differentiating one event (e.g., infraction 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 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 analysis of rights (and connected elements—e.g., duties, remedies, etc.).

1. The Right-Privilege Distinction

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18 A notable exception to this remains an article written by Tony Honoré in 1960. See Anthony M. Honoré, Rights of Exclusion and Immunities Against Divesting, 34 TULANE L. REV. 453 (1960) (distinguishing between real and personal rights in the context of exclusion).
19 See Strahilevitz, 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’.”).
20 See Merrill, supra note 6, at 13.
Perhaps the most important conceptual distinction in analyzing the right to exclude is the right-privilege (also known as the right-liberty) distinction. While positivist scholars employed the distinction early on, Hohfeld is credited with laying out the distinction in its most lucid and concrete terms. Writing at the turn of the twentieth century, Wesley 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 being in personam or paucital when they involved discrete parties (i.e., a one-to-one connection such as a contractual one) or in rem or multital, when they involved a relation between an individual and multiple, indeterminate individuals. Property relations were characterized by Hohfeld as being multital, since they involved the owner interacting with an indeterminate set of individuals (potential trespassers).

In this analysis, a right (or a claim) is defined as a situation that places another individual (or group of individuals) under a correlative duty of some sort. The content of the right is defined entirely by the content of the obligation it imposes on another, i.e., the duty (its correlative). Hohfeld contrasts his idea of a right with that of a privilege, which has independent normative content, in that it privileges its holder to do certain things, quite independent of others. 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 action. Hohfeld makes the distinction most obvious with the illustration of X, a landowner, and notes that “X has a right against Y that he shall stay off the former’s land” the equivalent of which was that “Y is under a duty toward X

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23. See Hohfeld, Some Fundamental, supra note __ (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).

24. HOHFELD, supra note __, 68-74.


26. HOHFELD, supra note __, at 36-38.

27. Id. at 38.
to stay off the place”. 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.” Later, specifically in the context of property, Hohfeld makes the distinction even more clear, with the example of a hypothetical landowner.

Whereas a right is only ever brought into question 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 more than just of philosophical relevance. Whereas it is clear when the law protects a right—when it imposes a duty on another, it isn’t 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), this 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 the privilege isn’t strictly legal in the same sense as rights (and duties) are, and therefore sits rather uneasily in Hohfeld’s framework, given that it remains devoid of content, absent specific circumstances.

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28 Id.
29 Id. at 39.
30 Id. at 96. He 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.


32 See Alan R. White, Privilege, 41 Mod. L. Rev. 299, 299 (1978) (“What makes anything a privilege is a particular characteristic of the circumstances in which it occurs.”). Hohfeld’s analysis is usually associated with the ‘bundle of rights’ conception of property —that property consists of little more than a bundle of rights, privileges and powers. The aforementioned lack of specific content in relation to the privileges that form part of the bundle led some to characterize the bundle view as a meaningless rhetorical concept. See James E. Penner, The “Bundle of Rights” Picture of Property, 43 UCLA L. Rev. 711 (1996).

In recognition of this criticism, and in order to give the idea more normative traction, some preferred the term ‘liberty’ —rendering the idea circumstance-neutral. See see Glanville Williams, The Concept of Legal Liberty, 56 Colum. L. Rev. 1129 (1956). But see Albert Kocourek, The Hohfeld System of Fundamental Legal Concepts, 15 Ill. L. Rev. 24, 27-37 (1920) (arguing that Hohfeld’s construction conflated privileges, liberties and powers). Interestingly, it was Bentham who used the term ‘liberty’ to denote precisely the same thing well before Hohfeld
While a right and a privilege in this understanding then no doubt remain distinct, it is important to note that in a vast 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. This is often referred to as the ‘shielding thesis’. It helps explain why rights and privileges are often conflated and why in a vast majority of situations privileges continue to derive protection (from the law) indirectly, even if not directly. Privileges thus represent situations where the law protects behavior, by its active non-interference (or acquiescence) —it both doesn’t interfere on its own and additionally denies others a right to interfere. It must be further remembered that even though rights are usually accompanied by privileges, situations do exist where privileges remain unprotected by rights—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 our purpose is the two-tiered nature of rights, referred to as the distinction between primary and secondary rights (and duties). Alternatively characterized as the substantive/procedural or right/remedy distinction, at base the idea postulates the existence of a primary right (or duty) that is brought into existence either volitionally (e.g., contractually) or through the operation of law (e.g. tort law). Upon an infraction of the right (or the duty), the law then provides for a second right (and/or duty) to operationalize the primary one or remedy its breach. Contract law is taken as paradigmatic of this structure, where the

did. See Hart, supra note __, at 174. Bentham characterized liberties as “right[s] resulting from the absence of obligation”, to denote their specifically negative structure. Id; JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 302 (Bowring ed., 1970) (1789). Many also objected that Hohfeld’s usages contracted established linguistic conventions. See Max Radin, A Restatement of Hohfeld, 51 HARV. L. REV. 1141, 1149 (1938)


35 For a lucid elaboration of the concept see Peter Birks, Rights, Wrongs, and Remedies, 20 OXFORD J. LEGAL STUD. 1, 4 (2000). For similar views in early American scholarship see C.C. Langdell, Classification of Rights and Wrongs, 13 HARV. L. REV. 537 (1900); James Barr Ames, Disseisin of Chattels, 3 HARV. L. REV. 25, 34, 337 (1890). Hohfeld too spent some time elaborating on the primary-secondary distinction. See WESLEY NEWCOMB HOH Feld,
contract gives rise to a set of rights and duties between the contracting parties. Upon a 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 like any other, others a remedy, and yet others a remedial right. Yet, all of them 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 here liability 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, with the general view tending to be that it indeed does, even if the determination in many cases happens subsequent to the conduct because in a majority of situations (e.g., driving a car), the basic contours of the duty remain known ex ante—e.g., not to drive carelessly.

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

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FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 102 (W.W. Cook, ed. 1919) (disagreeing with the views of Ames).


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


40 See 1 BLACKSTONE, supra note 1, at 117; JOHN AUSTIN, LECTURES IN JURISPRUDENCE 787 (R. Campbell ed., 1869).
Pothier, who employed it in the context of his exposition of contract law. 41 Hohfeld too emphasized the distinction in his classification. 42

A primary right thus represents a situation where an individual is vested with a right, independent of any preceding relationship. 43 A secondary right on the other hand is always contingent on the existence of a primary relationship involving the party claiming the secondary right, and is therefore conditional. 44

3. The Entitlement Framework

In 1972 Guido Calabresi and Douglas Melamed propounded an entirely independent theory of entitlements—a unified theory of property and tort—one that would focus entirely on mechanisms of protection. 45 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 giving effect to (or to use their language “protect[ing]”) the entitlement, i.e., the jural relation. 46

Their model involved two steps. In the first, the legal system vests the entitlement in someone and in the second, it adopts one of three rules to protect the entitlement so vested. 47 Calabresi and Melamed focus almost entirely on the second of these steps (“second order decisions”)—and classified 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). 48 Calabresi and Melamed then argue that a host of considerations—economic efficiency, distributional goals and morality guide judges’ (and lawmakers’)
choice of rule. Almost all the literature on the Calabresi-Melamed model that has followed, has come to view the model as focusing almost entirely on the issue of remedies—legal, equitable or otherwise. In this understanding then, a property rule is commonly associated with *ex ante* injunctive relief, while liability protection, with an award of damages *ex post*.

The Hohfeldian model and the entitlement framework exhibit an interesting reflexive symmetry. Hohfeld focused entirely on the bare structure of conceptions (or entitlements), disregarding their actual enforcement or vindication. Calabresi and Melamed on the other hand focused entirely on remedies, disregarding the structure and content of individual entitlements. While Hohfeld cautioned against the use of remedies to understand a jural relation, Calabresi and Melamed used remedies exclusively in order to understand the functional relevance of an entitlement.

In its focus on the actual mechanisms of protection (i.e., enforcement), the entitlement framework neglects situations where jural relations (or entitlements) come to be protected not necessarily by operation of law, but rather with its acquiescence and approval. 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 recourse to enforcement mechanisms. Privileges of this sort find no place in the entitlement framework, for they do not invoke any legal mechanism and therefore aren’t protected as such.

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49 Id. 1093-1105.
51 In the past, scholars have attempted to analyze the interaction between the Calabresi-Melamed and Hohfeldian models. Most of these have however involved unpacking the former’s entitlement structure using Hohfeld’s ideas, rather than analyzing how the two actually might compliment each other. See STEPHEN MUNZER, *A THEORY OF PROPERTY* 27 (1990); Fennell, *supra* note 29, at 1406; Madeline Morris, *The Structure of Entitlements*, 78 CORNELL L. REV. 822 (1993).
52 See Calabresi & Melamed, *supra* note 45, at 1090 (“[T]he fundamental thing that the law does is to decide which of [two] conflicting parties will be entitled to prevail.”).
53 Ironically, Calabresi and Melamed didn’t even 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.
54 For an elaboration of this 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.
The entitlement framework 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 it vested and the parties between whom it operated, the entitlement framework now required analyses to focus on rights and duties primarily through the consequences of their breach. It thus focused on understanding the right through the lens of the remedy. Thus for example, it mattered little whether an entitlement had the structural attributes characteristically associated with ownership, for it to be categorized as a property right. What was needed was that the law protect the entitlement with a ‘property rule’ upon an infraction. The right in this understanding then is meaningful only when protected by a specific kind of remedy. The entitlement framework thus moved the emphasis in rights-analysis towards remedies.

This near-exclusive focus on remedialism attributed to the law a principally corrective (or restorative) function. Legal rules became relevant only when they attached consequences to individuals’ actions — i.e., as forms of enforcement, but never as independent sources of values and principles that could guide their behavior ex ante. The enforcement framework thus assumes that the law comes into play only during acts of recalcitrance (e.g., breach of contract or violations of the duty of care), but never influences behavior independent of its enforcement-function. It thus 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

(2005) (attributing some of these problems to the over-extensive use of symmetry in economic understandings of property).

55 See Merrill & Smith, supra note __, 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 this move in the economic analysis towards remedialism see Jules L. Coleman & Jody Kraus, Rethinking the Theory of Legal Rights, 95 YALE L.J. 1335, 1139 (1986).


58 Id. at 858.
contemplation of remedial consequences (i.e., sanctions). Legal rules are meaningful well before their breach is even in contemplation.

**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, building on the entitlement framework. The four versions together are: (i) the claim-right to exclude; (ii) the privilege-right to exclude; (iii) the right to vindicate one’s ownership through enforcement; and (iv) 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 Conception</th>
<th>Content</th>
<th>Example</th>
<th>Potential Drawback</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Claim Right</strong></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>
<tr>
<td><strong>Privilege-Right</strong></td>
<td>Defined by the exercise of use-privileges to achieve exclusion from resource</td>
<td>Self-help remedies</td>
<td>Impracticality of self-help – e.g., intangibles</td>
</tr>
<tr>
<td><strong>Remedial Right</strong></td>
<td>Defined by the remedy</td>
<td></td>
<td>Judicial Discretion</td>
</tr>
<tr>
<td><strong>Ownership Vindication</strong></td>
<td>Defined by entitlement to commence action</td>
<td>Availability of action for trespass</td>
<td>Contingent on vagaries of common law action</td>
</tr>
<tr>
<td><strong>Exclusionary Remedy</strong></td>
<td>Defined by equitable injunctive relief (automatic or otherwise)</td>
<td>Automatic Injunction Rule</td>
<td>Subject to the rules of equitable discretion; i.e., a four-factor test</td>
</tr>
</tbody>
</table>

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59 Indeed this ideal formed the driving force behind much of legal positivism. Hart famously characterized this idea as the “reflective critical attitude” of individuals in society. See H.L.A. Hart, The Concept of Law 88 (1961). See also infra Section III.B.2, for an elaboration of this idea.
1. The Claim Right to Exclude

One of the characteristic features of claim rights, as noted earlier, is that these rights are always correlative. Consequently, they can never be understood independent of the jural relationship they form a part of, and the correlative duty that they impose on others. Corbin provides an apt definition of a claim right, and notes that it “is a relation existing between two persons when society commands that the second of these shall conduct himself in a certain way (to act or to forbear) for the benefit of the first.”

The claim right then is to be understood entirely from the nature of the correlative duty that it imposes on others. While the term ‘correlative’ carries with it the connotation of a bond of sorts between the two elements, in reality it signifies little more than the perspective from which the relationship is viewed. Thus some have favored replacing correlative with the word ‘converse’ to signify this emphasis.

Leaving aside the precise meaning (or appropriateness) of the term correlative, what remains obvious about the claim right is that its normative content is determined by the nature and structure of the duty imposed on another. Understanding a right thus entails identifying its correlative duty and determining the origins of the said duty. A duty may originate voluntarily (e.g., contract), or merely out of volitional behavior (e.g., tort). In addition, the source of the duty may lie in morality or social practice. When this

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61 When the right imposes a duty on a determinate (or identifiable) individual or class of individuals it is a right in personam, when the group is indeterminate or open-ended, the right is in rem. It is critical however to note that the distinction isn’t merely one of numbers (i.e., single and multiple), but rather of determinacy. See Radin, supra note __, at 1153-56.
63 Yet this correlative normativity is unidirectional —for, it remains possible to have a duty without a correlative right (e.g., the tortious duty of care), whereas a claim right cannot exist absent its correlative duty. See William Markby, Elements of Law 85 (1905).
64 Interestingly Hohfeld restricted his analysis to strictly legal relations, seemingly denying the existence (or influence) of morality. See Hohfeld, supra note __, at 27. For an attempt to draw out similarities between moral rights and the idea of legal rights, as Hohfeld used them see Bruno R. Rea, The Interplay of Legal and Moral Rights, 20 J. Value Inquiry 235 (1986). Hohfeld’s structure remains readily applicable to moral relationships as well. See Kramer et al., supra note __, at 8 (“ Virtually every aspect of Hohfeld’s analytical scheme applies as well, mutatis mutandis, to the structuring of moral relationships.”). See also Corbin, supra note __, at 505-06.
happens, the correlative right remains a moral right unless a legal rule internalizes it, whereupon it gets transformed into a legal right.65

The claim right to exclude is understood then through the correlative duty it imposes on others (in rem)—to ‘exclude themselves’ from an identifiable resource. When individuals view themselves as being placed under a duty (or obligation) to keep off of a resource, its owner is said to be vested with the claim right to exclude. The source of this duty may be a legal directive (e.g., patent law) or completely independent of the law. The content of the duty (to exclude oneself) thus imparts meaning to the claim right conception.

On the face of it, the claim right to exclude may appear to be of little more than analytic value, for if it is to be understood entirely through its correlative duty, its independent value seems minimal. Consequently discussions of the right to exclude tend to ignore this conception altogether. Yet, its value lies principally in its correlativity, as we will see, which contributes to the functioning of property (and with it ownership) as a coordination device.

2. The Privilege-Right to Exclude

Unlike claim rights, which are understood entirely through their correlatives, privileges (or privilege-rights) represent specific activities, which when undertaken by their holder, remain beyond reproach or the reach of sanctions. Ordinarily, privileges tend to accompany claim-rights (and operate in their protective shadow) thereby often obscuring the important difference between them.

Understood in this vein, the privilege-right to exclude in the context of property entails the law affording the owner (or holder at times) of a resource the option of using the resource in such a way as to exclude others from it.66 The exact nature of such exclusionary use tends to vary from one resource and circumstance to another. Thus, for chattels it may be no more than

66 Indeed numerous exclusionary strategies involve the use of ‘exclusionary privileges’, where owners use a resource and its myriad attributes to exclude others from it. ‘Exclusionary amenities’ then represent no more than such privileges. For a comprehensive overview of the use of exclusionary amenities as a strategy of exclusion see Lior Jacob Strahilevitz, Exclusionary Amenities in Residential Communities, 92 VA. L. REV. 437 (2006). On occasions, use-strategies that involve exclusion are referred to as ‘rights of exclusion’, when terminologically they really represent exclusionary privileges. See Strahilevitz, supra note __, at 1859-61, 1861 n.96 (noting that “exclusionary vibes” and “exclusionary amenities” do in reality represent privileges).
exercising complete physical control over the entity, while for realty it may involve the erection of a fence or other boundary.\(^{67}\)

The rules of self-help most aptly represent the idea of exclusionary privileges.\(^{68}\) Even though self-help exists in the context of both movable and immovable property, it remains significantly more common in the context of the former. While the law tends to remain indifferent to exclusionary privileges in general (given that they derive their force \textit{de facto} and not \textit{de jure}), in the context of movables (i.e., chattels) it exhibits a preference for them. The common law of trespass to chattels consciously disfavors granting chattel owners a legal remedy for physical trespasses to the chattel in the belief that the privilege-based remedy of self-help remains sufficient, unless the owner is actually dispossessed or the chattel itself tangibly harmed.\(^{69}\) Here, the privilege right conception of exclusion thus remains central.\(^{70}\)

Exclusionary privileges aren’t without their drawbacks. First, they depend directly on the owner’s \textit{ability} to exercise them, to be of any utility. Thus, in the context of land, the effectiveness of an exclusionary privilege depends on the owner being able—financially, or otherwise—to build a fence around his land. Once, built too, the owner must be able and willing to monitor infractions and enforce trespasses. So it is with chattels as well. Second, since the exercise of the privilege is dependent on the nature of the resource, there are resources where self-help is ineffective. This is most common in the context of informational and virtual resources (that are by


\(^{70}\) As the Restatement notes: “Sufficient legal protection of the possessor's interest in the mere inviolability of his chattel is afforded by his \textit{privilege} to use reasonable force to protect his possession against even harmless interference.” \textit{RESTATEMENT (SECOND) OF TORTS} § 218 cmt. e (1965) (emphasis supplied).
Demystifying the Right to Exclude

their nature non-excludable). Consequently, the law protects exclusionary privileges here through an additional duty that it imposes on non-owners. Consequently, the law protects exclusionary privileges here through an additional duty that it imposes on non-owners.

3. Remedial Rights to Exclude

While the claim- and privilege- rights to exclude represent primary right conceptions of the right, the remedial variants derive from a secondary right conception. They thus remain premised on the existence of antecedent rights that they seek to operate in furtherance of: ubi jus, ibi remedium. Within the remedial conception of the right, two further strands can be identified — one that focuses directly on vindicating a prior right and another that focuses on enforcing it.

(i) The Vindicatory Right

The first remedial variant takes as a given the idea that exclusion (generally, as a claim right) remains an essential attribute of ownership and moves on to providing the owner of a resource with the option of reaffirming such exclusion by declaring him to be the owner of the resource. It thus derives its normative (or exclusionary) content, entirely from the logically prior primary relationship that it attempts to vindicate.

What remains crucial is that this right doesn’t seek to bring about exclusion directly (i.e., enforce it) but merely reaffirm its existence as a necessary attribute of ownership. It tracks very closely the Roman law idea of the in rei vindicatio, which provided an owner with the ability to have his dominium over a resource declared by a court of law. While several civil law jurisdictions continue to provide for a vindicatio-type remedy, the

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72 In the nature of anticircumvention or digital rights management (DRM) measures.

73 Where there is a right, there must be a remedy. See 3 BLACKSTONE, supra __, at 23.

common law instead uses the action of trespass to the same end, albeit in a less effective way.\textsuperscript{75}

The right thus consists in an owner’s ability to commence an action where his ownership/title is adjudicated upon, even if only in a relative sense.\textsuperscript{76} It is worth re-emphasizing that the right has no connection with the \textit{nature} of the remedy that the action eventually results in. Thus, if the trespassory action were to result in an award of damages, it would still have resulted in exclusion, in so far as the favorable result (to the owner) vindicates his pre-existent right to exclude, even if it doesn’t directly enforce it. The tendency to equate the right to exclude with a trespassory conception of the right often ignores this secondary nature of the right.\textsuperscript{77}

(ii) The Right to Exclusionary Relief

Of the different formulations of the right to exclude, the one that associates it with an entitlement to an exclusionary remedy — i.e., an injunction — remains the most pragmatic, and is the most popular. In this understanding, the right to exclude consists of an owner’s option not just to bring an action for trespasses, but also to obtain from a court, the equitable remedy of an injunction, restraining another (i.e., placing them under an additional duty) from interfering with the owner’s resource. The right is thus converted into an enforceable claim. Much like the vindicatory option, it too is predicated on the existence of an antecedent primary right.

Given however that injunctive relief is an equitable remedy and consequently is granted at the discretion of a court, the extent to which a property owner can be said to have a \textit{right to it} remains questionable.\textsuperscript{78} Yet on numerous occasions courts have been ready to place fetters on their discretion, identifying specific circumstances under which relief will necessarily follow and situations where it won’t. Over time thus the strong discretionary element in injunctive relief has come to be transformed into a weak one as a consequence of which it became common to speak of a ‘right

\textsuperscript{75} \textsc{Ugo Mattei}, \textsc{Basic Principles of Property Law: A Comparative Legal and Economic Introduction} 182-87 (2000); \textsc{David Ibbetson}, \textsc{A Historical Introduction to the Law of Obligations} 107-08 (1999).

\textsuperscript{76} See \textsc{David Fox}, \textit{Relativity of Title at Law and Equity}, 65 CAMB. L.J. 330, 334 (2006).

\textsuperscript{77} This is seen most clearly in the work of \textsc{Jim Harris}, who characterized all of property as consisting of \textit{inter alia} a “bounded trespassory right”. See \textsc{Harris}, supra note __, at 14.

\textsuperscript{78} See \textsc{Neil MacCormick}, \textit{Discretion and Rights}, 8 LAW & PHIL. 23 (1989). For more on this see infra Section III.B
to injunctive relief’ in specific situations. Indeed, the automatic injunction rule that was in issue in *eBay* represented precisely one such situation.

Even if the entitlement may be characterized as a right, the fact that its recognition is dependent entirely on a court’s interpretation of the circumstances remains a major drawback.

C. Unitary, Bundled, or Disaggregative?

Which of the four conceptions do we mean then, when we speak of the ‘right to exclude’ being a central part of property? One might argue that *any* of the identified formulations should suffice to constitute the right to exclude, in the context of property. In other words, if an individual were to be vested with any of the options identified above, he can be deemed to have a property right, in relation to the resource over which it operates. Yet, if any conception would be sufficiently constitutive of the right, it would imply that the right assumes different meanings in different contexts, in the process attributing to property a contextual fluidity that undermines its integrity as an institution of independent moral significance. Consequently, if we are to continue characterizing the right to exclude as an integral part of what property is (on the assumption of course, that property *is* something definite), it demands a level of consistency in our understanding of the right.

Of the two primary variants of the right, the privilege formulation is perhaps the weakest to justify as an independent (free-standing) conception of the right. Imagine a situation where a privilege (to exclude) alone exists,

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79 See Birks, *supra* note __, at 16-17. As Birks notes:

Orders for specific performance or for injunctions…are weakly discretionary. To speak of a right to specific performance or injunction…is not nonsense. We know on what facts a person is entitled to such an order.


80 For more on courts’ willingness to alter the standard of grant, depending on subjective circumstances see DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* (1991) (analyzing the conspicuous inconsistency in courts’ grants of injunctive relief in spite of the circumstances remaining identical).

81 This would in the process lend itself to a form of property skepticism —the belief that the term and institution of property are meaningless constructs whose content and significance tend to vary across time, place and resource, admitting of no unifying features. See Thomas C. Grey, *The Disintegration of Property*, in *NOMOS XXII: PROPERTY* 69 (J. Roland Pennock & John W. Chapman eds., 1980); Kevin Gray, *Property in Thin Air*, 50 CAMB. L.J. 252 (1991). My argument no doubt derives from the belief that property is indeed a meaningful concept with a few identifiable unifying features, the primary one of which remains the right to exclude.
without a claim-right. In this situation, the only thing holding the entire system of property in place would be the owners’ (or holders’) ability to exclude others from the resource. With there being no \textit{a priori} duty on others to keep-off, the law of self-help would become the default rule of law, favoring the strong and powerful to the detriment of everyone else. A potentially anarchical situation, it remains untenable as an ordered system of property. Even if the privilege were to accompany the remedial (but not claim-right) conceptions, it would present the same problems. Since the remedial alternatives remain premised on the primary one, courts would be restricted to reaffirming or enforcing the privilege alone, in turn delegating much of its application to the holder’s abilities. The shielding thesis then — whereby a privilege is always \textit{shielded} by a claim-right\textsuperscript{82} — is not just an interesting coincidence, but rather a critical default for the very existence of a privilege.

In similar vein, the vindicatory conception of the right depends almost entirely on the primary claim-right conception for its normative content and is therefore of little significance independently. Unless the right to be vindicated does indeed independently convey something, the vindication itself remains meaningless.

This leaves us then with the claim-right and exclusionary remedy variants of the right. In what follows, I argue that understanding the right to exclude as a correlative, claim right allows for an appreciation of property, outside of its remedial context. Property, remains an institution of deep social significance and the remedial variant (i.e., the exclusionary remedy conception) tends to gloss over this reality in its emphasis on functionalism.\textsuperscript{83} The correlative right variant — contrary to popular belief — remains just as functional and perhaps, more pragmatic. Ironically, the correlative right conception also best explains the holding in \textit{eBay} and its repudiation of the automatic injunction rule.

\textsuperscript{82} See supra note ___ and accompanying text.

\textsuperscript{83} In spite of it being a remedial (and therefore dependent) variant, the exclusionary remedy conception of the right to exclude continues to dominate property debates among both scholars and courts See David Frisch, \textit{Remedies as Property: A Different Perspective on Specific Performance Clauses}, 35 WM. & MARY L. REV. 1691, 1713 (1994) (“[I]f an entitlement, under appropriate circumstances, cannot be protected by [a property] rule, the entitlement (whatever else it may be) is not a property interest.”). Indeed this remains the case in other common law countries as well. See William Gummow, \textit{The Injunction in Aid of Legal Rights— An Australian Perspective}, 56 LAW & CONTEMP. PROBS. 83, 103-04 (1993) (noting how in Australia injunctions are granted only to protect property rights, but that the definition of property rights is often premised on the availability of an injunction, making the logic circular).
II. THE CORRELATIVE RIGHT TO EXCLUDE: GROUNDING PROPERTY IN SOCIAL MORALITY

The institution of property remains socially and morally significant outside of its remedial context. Individuals continue to respect the ideal of ownership by default, even when the enforcement of such ownership is known to be problematic. Exceptions certainly do exist, but the institution of ownership remains deeply entrenched in almost all societies. Surely then, the ‘right to exclude’, if indeed of centrality to the institution of property, must have some relevance outside of the enforcement context, This Part argues that the right is best understood as a correlative claim right, consisting exclusively of the duty it imposes on others to exclude themselves from resources that they don’t have a legitimate claim over. The duty in turn, derives from the moral norm of inviolability around which the institution of property is structured.

While this moral foundation informs the general structure of property (and the right to exclude), the disjoint between law and morality on the issue of enforcement tracks in almost identical manner, the right/enforcement interface that exists in contract law between contracting and promising, two interrelated, yet independent social practices. Much can therefore be learnt by examining the role of the primary/claim right within contract law and its role, bereft of remedial vindication. To be sure, contract and property law do remain distinct in several important ways; yet, the argument isn’t that what remains true for contract will necessarily carry over to property, but rather that the structural interplay between law and morality within the former sheds light on a possible equivalent within the context of exclusion in property.

A. The Right to Exclude as a Moral Norm

Exclusion and its right-based manifestation, i.e., the right to exclude, perform a function in our understanding of property almost identical to the one played by that of promising and the duty of performance in the area of contract law. The right to exclude gives property is structural basis, a structure that derives from the social and moral basis of the institution —and remains tied intrinsically to the notion of inviolability; in the exact same way that promising and the obligation (or right) to perform one’s promise form the foundation for contracting. We ought to begin then with an understanding of what the notion of inviolability is, and how it operates in law and social-morality.
1. The Principle of ‘Inviolability’

The right to exclude becomes a perfectly logical idea if it is understood entirely in its primary or correlative right conception — and thus through the lens of the duty it imposes on others. The duty in turn derives its normative content from the moral notion of *inviolability* embodied in the institution of ownership.

Attempts to derive a moral explanation for the institution of private property abound in the literature, and the attempt here certainly isn’t to add to this debate. Most often these moral constructions remain tied to attempts to develop an explanatory theory for the institution, 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 idea of the right to exclude can be understood independent of enforcement structures that give it operative content, since property as an institution has extra-legal (or social) elements that influence it and on which it is structured. Going back then to the basic structure of the correlative right, we noted that the correlative right was 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 was 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 duty? Why do we have reason to presume the existence of such a duty, so as to vest a correlative right to it in someone?

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. This default position is then lifted (or relaxed) when specific social circumstances allow for it (e.g., consent, or an acquisition).

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85 HOIFELD, supra note 22, at 96.

Sociologists and anthropologists have long argued that the idea remains basic to all cultures, at all times — albeit to differing degrees and extents.\footnote{87 Id. at 614. He 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 investigating the development of personality as it arises in and through the impact of culture upon the individual.} Anthropologists often associate the idea of inviolability with the notion of \textit{taboo} — a socially constructed meaning system where certain acts in relation to certain things are proscribed.\footnote{88 For an elaboration of the \textit{taboo} concept at the interface of law and anthropology see Lawrence K. Frank, \textit{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 this argument to its logical conclusion. Some have used anthropological studies to conclude that since \textit{taboos} connote little more than consequences that attach to certain proscribed activities, they remain independently meaningless. See Alf Ross, \textit{Ti-Tü}, 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, their ability to influence behavior in this way is precisely for our purpose, a recognition of their normative content.} Many additionally, consider the idea to be explained 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 isn’t our main concern here.\footnote{89 See, e.g., RONALD DWORKIN, \textit{Life’s Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom} 84 (1993) (offering an investment-based theory as justification for the inviolability of the person). For an elaborate critique of Dworkin’s theory see Richard Stith, \textit{On Death and Dworkin: A Critique of his Theory of Inviolability}, 56 Md. L. REV. 289 (1997).} The inviolability of \textit{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 \textit{things} unless they through some socially accepted practice (e.g., first possession, or consumption) have a legitimate claim over it. In other words, inviolability requires that unless object X belongs to A, that A stays away from X. It thus establishes affirmatively, a default position of \textit{staying away} from things over which individuals do not actually or putatively have legitimate claims. Its importance is as always, best seen through the counter-factual. In the absence of a norm of inviolability, individuals encountering objects around them would find little to hold them back from physically (or otherwise) appropriating the object, as they need and desire. A wouldn’t stay away from X unless A knew of and was convinced of B’s (or someone else’s) claim over
X. The default would therefore point in the other direction: don’t stay off unless you are made to. Inviolability thus establishes a norm that where an individual doesn’t have a legitimate claim to a resource, someone else is presumed to, and the former stays away from that resource.

2. Inviolability in Practice

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

Inviolability, as a moral norm, is inward looking. Rather than relying on sanction/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 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 of course doesn’t necessarily imply a belief in the moral legitimacy of the rule, just a readiness to view oneself as bound by it. The reasons could thus be rudimentary convenience, social mores, efficiency, and the like.

Propertizing a resource, and vesting someone with ownership over it, conveys a message of resource-inviolability to the world at large. This 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.

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90 Fried, supra note __, at 2. For a detailed analysis of the “is-ought” distinction that remains central to moral philosophy see Alan Gewirth, The Is-Ought Problem Resolved, 46 PROCS. & ADDRESSES OF THE AMER. PHIL. ASSOC’N 34 (1973).
92 Scott J. Shapiro, What is the Internal Point of View?, 75 FORDHAM L. REV. 1157 (2006)
necessitates doing otherwise. Inviolability thus serves as a behavioral guide to
individuals, whereby they regulate their conduct in a certain way, to
accommodate it. The right to exclude, is little more than the correlative of the
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 always
automatically tend to refrain from interfering with objects they see around them without inquiring to see who the owner of the object is. Referring to it
as the “duty of non-interference”, he notes that this relation is “mediated via
the things the owner owns.” Indeed, when we walk down a street lined with
parked cars, we don’t make it a point to try opening the doors of the parked
cars, even though we almost always don’t know who the owners are. We
automatically, and by default stay away. The moral norm of inviolability
explains this.

Allusions to the moral idea of inviolability run through several well-
known historical exegeses of property — most notably those of Grotius and
Pufendorf. Grotius argued that interferences with owned resources produced
an injustice analogous to affronts on a person’s life, limbs and liberty. He
thus used the idea of suum (“one’s own”) to connect a person’s self with his
resources. This is but a reference to inviolability — and the contiguity of the
idea in the context of bodily integrity and resource-ownership. Pufendorf
emphasized that an act of acquisition (“seizure”) produced a “moral effect”

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94 PENNER, supra note __, at 128.
95 Id.
96 Merrill and Smith refer to this as the “dut[y] of abstention”. Merrill & Smith, supra note __, at 4. They go on to note in the context of a similar example involving cars that “[i]t is necessary that virtually everyone recognize and consider themselves bound by general duties not to interfere with autos that they know are owned by some anonymous other – that they not take these others’ cars, steal from them, vandalize them, and so forth.” Id. at 5.
97 For a more detailed analysis of Grotius’ and Pufendorf see Mossoff, supra note __, at 379-85.
98 HUGO GROTITUS, DE JURE BELLII AC PACIS LIBRI TRES 1.2.1.5, at 53-54 (Francis W. Kelsey trans., 1925) (1625).
100 It is worth cautioning against the seemingly intuitive argument that because inviolability persists in both contexts is either (i) body parts are ownable resources and/or (ii) that resources are mere extensions of one’s body. See Stephen R. Munzer, Kant and Property Rights in Body Parts, 6 CAN. J.L. & JURISPRUDENCE 319 (1993); J.W. Harris, Who Owns My Body?, 16 OXFORD J. LEGAL STUD. 55 (1996). 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 Samual C. Wheeler III, Natural Property Rights as Body Rights, 14 NOUS 171 (1980).
which was the “obligation on the part of others to refrain from a thing”\textsuperscript{101}. This is a much more direct reference to the norm of inviolability.

It should be pointed out that 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 doesn’t seem as problematic. Similarly, touching someone’s handbag may seem less problematic in a crowded train, but not in an open field. Yet in each case the resource is clearly owned (by someone else) and forms private property. Much of this variation tends to depend on social custom. Interestingly enough, it must be noted out that the law does often factor in this variance 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,\textsuperscript{102} and situations where courts allow other values to trump the right to exclude.\textsuperscript{103}

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 in order to get to the other side of the road, even when doing so is obviously convenient and of little harm to the owner — representing a clear inefficiency in the short term. This clearly reflects how well-entrenched the idea of inviolability is.\textsuperscript{104}

3. Inviolability Manifested through the Right to Exclude

If the primary right conception does indeed derive normative value from the moral notion of inviolability, this raises an important question. Why

\textsuperscript{101}SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM 547 (C.H. Oldfather & W.A. Oldfather trans., 1934) (1688).

\textsuperscript{102}See THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 518-21 (2007) (noting how real property cannot be abandoned); RESTATEMENT OF PROPERTY § 504 cmt. a (1944) (noting how personal property can be readily abandoned).

\textsuperscript{103}Thus situations where free speech concerns or health/safety ones preclude an owner from commencing an action for trespass may, in this framework be interpreted as situations where other values trump the norm of inviolability, contextually. The strength of the norm then varies not just across resource, but also context. See State v. Shack, 58 N.J. 297 (1971); PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

\textsuperscript{104}See, e.g., Jacque v. Steenberg Homes, Inc., 563 N.W. 2d 154 (Wis. 1997) (holding a trespasser liable for punitive damages of $100,000 even though jury had found the actual damage to plaintiff’s property to be nominal and awarded the sum of $1).
is inviolability best reflected in a right rather than a duty (i.e., the right to exclude)? Since as a norm, it remains directed at individuals and attempts to modify their behavior, logic seems to dictate that it operate as a duty (of excluding oneself from certain objects) rather than a right. Why then don’t we speak of the ‘duty of exclusion’ being the most important element of property? The answer to this derives from the nature of the (right-duty) correlativity in question and the distinction between relations in rem (multital) and those in personam (paucital). Multital (or in rem) relations lack the basic symmetry of their paucital counterparts – and this point becomes crucial for our understanding of the right to exclude. If A has a claim against B for money, A has a right against B, and B is under a duty (to repay) owed to A. Defining this either in terms of A’s right or B’s duty makes little difference normatively.¹⁰⁵ When we move to multital relations however, the distinction between multital rights and multital duties begins to assume relevance. A multital duty (or in rem duty) represents a situation where an individual is under a duty (affirmative or negative) owed to an indefinite class of individuals. The duty of care, central to tort law represents just such a situation. X driving his car down the road owes a duty (to drive carefully) to anyone likely to be in the vicinity. Now, 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. But to define the relationship along these lines would detract from the intended point of normative emphasis in the law, which is X and his actions.¹⁰⁶ We remain concerned with X’s actions (and the harm it causes) and hence understand the relationship in terms of X’s duty. This explains why the language of tort law avoids focusing on a ‘right to be cared for’ instead of a ‘duty of care’.

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 to be on the consequences of a breach of this duty.¹⁰⁷ We speak of a right to exclude,

¹⁰⁵ Hohfeld, supra note __, at 73 (noting that the relationship can be viewed from “different angles”).
¹⁰⁶ Indeed, some might even argue that this typifies the situation where a duty exists without a correlative right altogether, given the source of the duty to begin with. See William Markby, Elements of Law (1889). See also Peter Birks, Rights, Wrongs, and Remedies, 20 Oxford J. Legal Stud. 1 (2000).
¹⁰⁷ For an overview of the evolution of the duty of care in tort law see W. Page Keeton at al., Prosser and Keeton on 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).
rather than a duty precisely because our focus (in so using it) is on the internal nature of property ownership and on the fact that it associates the right-holder with 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 wouldn’t be focused on the moral basis for the duty (but rather entirely on the legal 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.

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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 (i.e., the law of trespass) and yet deeply grounded in the connection between an individual and an object — central to property’s role as a coordination device. Understood then in this sense, 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. Resources tend to be defined by two criteria: rivalrousness and excludability. A resource is said to be non-rivalrous when its use by one person doesn’t interfere with its similar (or

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108 In this sense then, associating the ‘right to exclude’ with an action for trespass remains problematic. While trespass law does build on the basic notion that property entails the right to exclude, it certainly doesn’t provide an owner with the right to exclude. Trespass is concerned directly with the duty of exclusion, since its focus remains on liability. See Strahilevitz, supra note __, at 1836 (noting the tendency among scholars to focus their discussion of the right to exclude around trespassory claims).

identical) used by another and non-excludable when it doesn’t admit of being controlled in a way as to exclude others from using it.\textsuperscript{110} Tangible resources, most notably chattels, are both perfectly rival and excludable. Intangibles by contrast, are both perfectly non-rival and often non-excludable as well. The subject matter of intellectual property rights — ideas and expression — are perfectly non-rival and non-excludable (since abandoning the excludability is a pre-condition for the right being granted).

It is then but logical that as the rivalrousness and excludability of a resource reduce, 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 non-existent. Informational and intellectual property are thus characterized by low levels of intrinsic inviolability.

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 statute describes a patent as granting its holder the “right to exclude others” from making, using or selling the protected subject matter,\textsuperscript{111} 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. That it isn’t a reference to a remedial consequence is amply substantiated by the fact that the statute doesn’t use the phrase in its discussion of remedial options available to a court, but does so only in its discussion of the grant.\textsuperscript{112} 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 there being any actual imitation (i.e., by simply doing one of the acts, the exclusive right 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.\textsuperscript{113} It isn’t surprising then that the law consciously doesn’t speak of copyright in

\begin{footnotes}
\item[110] Id. at 2065.
\item[112] Id. at §§ 283-84.
\end{footnotes}
Inviolation for expressions, if any, then remains significantly attenuated. Justice Holmes’ analysis of the right to exclude in the content of copyright best expresses this:

[I]n 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 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.\(^{115}\)

Inviolation in the context of copyright, is largely a fiction.

Understood in this way then, 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 don’t) invoke the ‘right to exclude’ does in some way signify the extent of their property-ness.

\(B. \) The Analogy to Contract’s Performance Right

As noted earlier, property’s right to exclude 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 to be understood entirely through their remedial context, they soon become divested of their normative significance. Promissory theorists have long used morality to account for this anomaly.

Of the various primary rights that Hohfeld identified in his discussion, contractual rights find repeated mention,\(^ {116}\) 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. In similar vein, B has a duty to make payment to A, with A being vested with the correlative right to obtain such payment.\(^ {117}\) The critical point to remember for

\(^{114}\) *But see* Fox Film Corp. v. Doyal, 286 U.S. 123, 127-28 (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.”).


\(^{116}\) See, *e.g.*, Hohfeld, *supra* note __, at 73, 108, 110.

\(^{117}\) *Id.* at 41-42.
our purposes is that this analysis of rights and duties is independent of whether they may actually be enforced as such. In other words, \(A\) and \(B\) have these rights and duties, regardless of their enforceability before a court of law, which would involve secondary rights and claims.\(^\text{118}\)

In exhorting the separation of the primary right from its remedial counterpart, Hohfeld glossed over a rather fundamental question, and one that has puzzled legal philosophers and moral theorists for ages. In the absence of an enforcement mechanism (i.e., 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.\(^\text{119}\) But if it does remain 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 \textit{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 it? The answer seems to lie in the morality of promising.

1. The Contractual Right of Performance as a Moral Right

In the promissory understanding of contracts, contract law is viewed as a set of legal rules structured \textit{around} the norms of morality associated with the institution of promising.\(^\text{120}\) 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.”\(^\text{121}\)” Promising thus forms the foundation of contract —or put another way, its moral counterpart. The promise, in this conception, is a manifestation of

\(^{118}\) \textit{Id.} at 110 (noting how a primary right \textit{in personam} may be enforced through a proceeding \textit{quasi in rem}).

\(^{119}\) It of course isn’t readily apparent that Hohfeld was advocating for its \textit{complete} independence, for his analysis seems to be restricted to arguing that the \textit{nature} and \textit{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. \textit{Id.} at 102.


\(^{121}\) \textit{Restatement (Second) of Contracts} § 1.
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 (i.e., the promisee) to 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 the utilitarians, who use divergences (most common in the context of remedies) between contract law and promissory norms to claim instead that contract law reflects little more than considerations of transactional efficiency. Yet the fact remains that the promissory view of contract law remains one of the most dominant in the literature.

In the promissory understanding then, contractual obligations to perform (a bargain) derive from the moral norms associated with promising. To speak of a promisee’s ‘right of performance’ then is a reference to a correlative (or primary) right vested in the promisee, consisting entirely of the promisor’s duty to perform, a duty that 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 an obligation 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 non-performance, because the ideal of adhering to one’s commitments derives from norms of morality— norms that influence behavior and deter certain kinds of actions, independent of legal sanction.

122 See FRIED, supra note __, at 16 (“The obligation to keep a promise is grounded not in argument of utility but in respect for individual autonomy and in trust.”).

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 contract as the law of enforceable promises and by its formulation of the foundational questions of contract as which promises to enforce, why, and how.

125 It might of course be argued that Hohfeld would have had serious objections to the incorporation of moral elements into this classificatory structure. Earl in his work, he sought to
This moral/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. By locating the meaning of the right in contract law’s moral sub-structure, it 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 continues to cause them some problem remains the area of contractual remedies. Not surprisingly, it is precisely this area that has also given utilitarian theorists their strongest argument against the promissory basis of contractual liability.

In spite of all else, contract law to this day recognizes monetary relief (i.e., 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. This remains true of the common law in general, on both sides of the Atlantic. If promising forms the basis of contract law (and doctrine), then the morality of promising would 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 now.

make a clear distinction between legal and non-legal conceptions, though he never used the word 'morality. See supra note 64 and accompanying text.


130 See Dori Kimel, Remedial Rights and Substantive Rights in Contract Law, 8 LEGAL THEORY 313, 320 (2002).
Utilitarians of course, have made much of this. Most notable is Justice Holmes’ famous statement observing 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.”\(^\text{131}\) This has since been developed into the “efficient breach” theory of contractual remedies, which argues 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.\(^\text{132}\) Thus, the promisor is at all times given the option of breaching, upon the payment of a penalty for the same, in the form of damages. Contractual promises are thus protected, in this understanding, entirely by liability rules.\(^\text{133}\)

The utilitarian account views contract as but a sub-species 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 similar vein it argues that contract law does not forbid (or even discourage) a breach, but prefers to step in and award the injured party damages to make good any loss. Much of the recent move from the traditions of subjective intention to objective intention gives added strength to their claims.\(^\text{134}\) The efficient breach argument has met with disagreement from both utilitarians— who argue that specific performance is in general, more efficient than monetary relief;\(^\text{135}\) and promissory theorists who attribute it to the vagaries of the common law process, and as an exception to the general rule.\(^\text{136}\) Relying on a

\(^{131}\) Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 462 (1897). His next sentence is even more vitriolic, 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.”


Kantian approach to the role of morality in law, Charles Fried, one of the most notable promissory theorists argues:

Law can be, should be, but 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 partially instantiate. Contract and promise are like that.\(^{137}\)

The attempt to explain this rather major anomaly away as a menial exception may appear rather simplistic. Yet, the fact remains that in spite of the non-availability of specific performance as a remedy automatically 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.\(^{138}\) So it is, as a matter of social practice too — contracts continue to be made and performed by individuals, most of the time with little regard for the consequences of the breach.\(^{139}\)

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”)\(^{140}\) — a preference that everyday practice deriving from ordinary social morality emphasizes. The function of contract law and its underlying norms of promising, being to guide behavior (as much as, or perhaps more than, to guide judges), the absence of a direct remedial enforcement of the ideal doesn’t detract from its centrality to the institution.

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\(^{138}\) See supra note 126 and accompanying text.

\(^{139}\) See Roscoe Pound, *An Introduction to the Philosophy of Law* 237 (1922) (characterizing promising as a basic social and economic institution); David Hume, *A Treatise on Human Nature*, bk. III, pt. II, § 5, at 519-20 (P.H. Nidditch ed., 2d ed. 1978) (1740) (noting that promises are human inventions based on the “necessities and interests of society”). See also 1 Corbin, supra note __, at 2 (“[T]he law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise… it is believed to be the main underlying purpose, and it is believed that an understanding of many of the existing rules and a determination of their effectiveness require a lively consciousness of this underlying purpose.”) (emphasis added). See also Fuller & Perdue, supra note __, at 57 (noting how the law backs the sense of injury that the “breach of a promise” engenders).

\(^{140}\) 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).
The analogy to contract law serves to highlight the role that moral norms and extra-legal ideas can play in structuring legal doctrine. Much like inviolability, the norm of keeping one’s promises (i.e., *pacta sunt servanda*) forms the foundation on which the rules of contract law are structured—even if there remain points where its internalization (of the norm) 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 non-legal (i.e., moral/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 come in for harsh criticism from scholars located 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 view of conceptualism tends to view it as a largely academic exercise—one with little to no practical influence at all.

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142 See id. at 955.

143 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). Interestingly though Cohen 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. 272 (1936) (offering a defense of conceptualism in response to Cohen).
Yet, legal concepts can be of significant functional relevance. Most prominent in establishing this is the work of Jules Coleman, who in analyzing tort law using a method he terms “pragmatism” and argues that the meanings of concepts and terms are central and need to be understood in relation to other concepts and ideas (semantic non-atomism).\textsuperscript{144} 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).\textsuperscript{145}

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 (i.e., the duty of care, proximate cause, etc.) and actual tort law practice both reflect the functioning of this principle.\textsuperscript{146} In the area of contract law, others have adopted similar functional approaches to analyzing concepts.\textsuperscript{147}

Benjamin Zipursky terms this approach to conceptual analysis pragmatic conceptualism.\textsuperscript{148} 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”.\textsuperscript{149} This form of conceptualism is then perfectly compatible with consequentialist analysis, for 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 extra-legal influences.

\textsuperscript{144} JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE 6-7 (2001).
\textsuperscript{145} Id. at 8.
\textsuperscript{146} Id. at 10. See also Jody S. Kraus, Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis, 93 VA. L. REV. 287, 315 (2007).
\textsuperscript{147} See, e.g., STEPHEN A. SMITH, CONTRACT THEORY (2004).
\textsuperscript{148} Benjamin C. Zipursky, Pragmatic Conceptualism, 6 LEGAL THEORY 457 (2000). He notes: “[T]o understand the concepts and principles within an area of law is to grasp from within the practices of the law the pattern of verbal and practical inferences that constitute the relevant area of the law.” Id. at 473. Jeremy Waldron offers a similar account of the role of concepts which he terms “systematicity”. See Jeremy Waldron, “Transcendental Nonsense” and System in the Law, 100 COLUM. L. REV. 16, 25 (2000) (“The rules in which [theoretical terms] appear fit together in complex interconnections, not as coordinate purposive rules in a coherent array of purposes but as interlocking parts of different shape, each contributing a particular functional component to an overall integrated picture.”).
\textsuperscript{149} Id. at 475.
ground in social practice. It is also directly responsive to Felix Cohen’s call for functionalism, except that the functionalism looks to institutionalized social practice and not merely judicial decisions.\(^{150}\)

A pragmatism of this conceptual variety is yet to make its way fully into property law analysis.\(^{151}\) 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.\(^{152}\) Identifying a unifying principle in property would go a long way in remedying this by introducing a minimal level of consistency in all property-related talk.

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.\(^{153}\) Grounding the right to exclude in the

\(^{150}\) See Cohen, supra note __, at 829-34.

\(^{151}\) A major exception to this trend is the work of Smith and Merrill, most notably in their analysis of the doctrine of *numerus clausus* in terms of the information burdens it places on participants in the property system. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

\(^{152}\) Two obvious examples of this fragmentation are: (i) the tort of trespass (to realty and chattels) —where tort law’s corrective and distributive justice justifications have little explanatory force (see Balganesh, supra note __, at 274) and (ii) 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, taken to be the guiding principle in the area (see Kronman, supra note __, at 355). See also *Restatement (Second) of Torts* §§ 158, 217 (2007).

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 unsurprisingly 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. Pragmatic as it may seem, it tends to gloss over numerous subtleties inherent in the idea of the exclusionary remedy. Almost all of these subtleties derive from the fact that injunctive relief is 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?

Indeed, it was precisely this question that the Supreme Court took it upon itself to answer in eBay. 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 the analysis to understand the eBay holding and its aftermath.

Section III.A begins with an overview of the remedial conception of the right: the right to injunctive (exclusionary) 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 — i.e., property rights. The conversion of a routine-grant into a grant as of right was largely a rhetorical device. 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 wasn't presented with the inviolability-based (i.e., 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 courts directing a party to the proceeding to do or refrain from doing a specific act.”\(^{155}\) As a form of relief, the injunction is a preventive rather than restorative remedy;\(^{156}\) and being equitable in nature, the injunction remains rooted in the distinction between equity and common law—in spite of its popularity. As is well known, equity developed to alleviate the rigidity of the common law and in recognition of the inadequacy of common law remedies to offer the plaintiff satisfactory relief.\(^{157}\) Consequently, establishing the inadequacy of ordinary common law remedies became a necessary precondition to the grant of equitable relief. To this day, the ‘rule of inadequacy’ continues to remain an integral part of equitable doctrine, though its contours have varied over time.\(^{158}\) 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 (i.e., common law) remedies at first instance, and only when they were able to establish that such remedies were either of little use or had been exhausted, would courts proceed to consider the grant of an equitable remedy.\(^{159}\) To even consider the option of injunctive relief, courts thus had to be convinced of the inadequacy of the default (i.e., ordinary) remedy—compensatory damages.

The rule of inadequacy eventually gave rise to a requirement of irreparability.\(^{160}\) Under this formulation, plaintiffs now 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 (arising out of whatever reason) to

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\(^{157}\) See Joseph Story, Equity Jurisprudence § 33 (1836).


\(^{159}\) See Owen Fiss, The Civil Rights Injunction 1 (1978).

quantify the damage sought to be prevented.\textsuperscript{161} 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, though it isn’t clear that the content needed to satisfy each of them differs significantly at all.\textsuperscript{162}

While the rules of inadequacy and irreparability require the plaintiff to establish a need for exclusionary relief, they never factored into consideration directly 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 (i.e., 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.\textsuperscript{163} The rule thus forces courts to examine the individual circumstances of the parties before it, prior to granting relief.\textsuperscript{164} Once these three rules 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.\textsuperscript{165}

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.


\textsuperscript{162} For a comprehensive historical analysis of the inadequacy rule, concluding that historically, the Chancery Court never adhered to it, see Tomás Gómez-Arostegui, \textit{What History Can Teach Us About Copyright Injunctions} 3 (Aug. 5, 2007) (unpublished) available at http://www.law.depaul.edu/institutes_centers/ciplit/ipsc/paper/Tomas_GomezArosteguiPaper.pdf (“The Supreme Court could hold today, without running afoul of traditional equitable principles, that a copyright injunction can issue without regard to the adequacy of money damages.”).


As is apparent, the test (in its components and as a whole) gives courts a significant amount of discretion in applying it to individual cases. Indeed, the element of discretion (driven by the need for flexibility) has long been considered the defining feature of equity a whole. 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 to grant relief or not — referred to generically as ‘equitable considerations’. Doctrines such as ‘clean hands’, *in pari delicto*, or *laches* have long formed the basic building blocks of courts’ equitable jurisdiction. Given then that the grant of relief is discretionary, the crucial question for us 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, in relation to property rights however, courts have tended to exhibit a general predisposition towards granting injunctive relief. 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 a right in question could be legitimately classified as proprietary or not. In focusing on this classificatory question (albeit with significant inconsistencies in their final determinations), they operated on the assumption that legal (i.e., common law) remedies were inadequate to protect property rights and that injunctive relief was therefore often a *fait accompli*. It wasn’t 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 wouldn’t have had any. Yet almost everyone characterized the distinction as being artificial and often resulting in an abjectly unjust denial of

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166 Indeed some argue that the discretion is hard to make sense of exclusively in terms of the test. See [DOUGLAS LAYCOK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991)].


168 All of these are collectively often referred to as the “maxims of equity”. See [CHARLES NEAL BARNEY, EQUITY AND ITS REMEDIES 39 (1915) (“Underling 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 – I: Of Maxims Generally*, 34 HARV. L. REV. 809 (1921).


170 Developments, supra note 157, at 1001.


relief. Soon enough, the distinction was done away with—but equity’s connection to property has ever since been considered somewhat special.

Even after the property/personal distinction became diluted, the argument that property rights necessitated injunctive relief continued to remain—and derived from the obvious inadequacy of damages as a preventive/deterrent mechanism. Central to this was the notion that if damages were to be the only (or even primary) form of relief, it would in a majority of cases allow one private individual to take the resource of another without the latter’s consent, a form of private taking.

Whereas 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 in issue. What this meant was merely that the discretion to grant was being replaced with a discretion to deny—with the onus now being 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 and implicit in this move was the belief that property’s element of exclusion could only ever be protected through injunctive relief. This became most apparent in the contexts of real property trespasses and patent infringement—and is dominant even today.

1. Real Property: Injunctions Restraining Acts of Trespass

Historically, courts exhibited a reluctance 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

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173 See, e.g., Roscoe Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 HARV. L. REV. 640 (1916).
174 5 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE § 1944 (4th ed. 1919); Henry L. McClintock, Discretion to Deny Injunction Against Trespass and Nuisance, 12 MINN. L. REV. 565, 572 (1928).
175 See, e.g., Walters v. McElroy, (1892) 151 Pa. 549, 557. As the court noted there—“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. Calif. Portland Cement Co., (1911) 161 Cal. 239; Currie v. Silvernale, (1919) 142 Minn. 254.
176 McClintock, supra note __, at 569.
177 JAMES L. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS: AS ADMINISTERED IN THE LAWS OF UNITED STATES AND ENGLAND 254 (1874); Injunctions Against Continuing or Permanent Injury to Real Property, 24 VA. L. REV. 786, 786 (1938).
relief) came to be repudiated and courts came to recognize that injunctions would issue “in aid of the legal [i.e., property] right”.178 The focus thus shifted to making sure that the right asserted was in fact legitimate — i.e., that the person claiming title (or ownership) did in fact have title over the land in question.179 Equity also developed a rule distinguishing between naked and destructive trespasses, based on the imminence of irreparable damage to the land in question.180 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 wasn’t necessarily significant physically or monetarily: a possible allusion to the normative damage such interferences were likely to result in (captured by the injury/damage distinction or the rule of *iniuriasine damno* — “legal injury without actual damage”181). 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 great damage may be done to property, though the actual damage done by the trespass is nothing.182

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) the same, whereupon they proceeded to “interfere at once” and grant a perpetual injunction.183 By contrast, where either the right or a breach of the same, remained doubtful, courts were reluctant to interfere and proceeded instead to engage in a balancing of the equities. Where both (i) the right and (ii) its breach were proven, the issuance of an injunction became in a sense, mechanical, as long as the issuance of injunctive relief wasn’t meaningless —

179 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 v. Bettle, 13 AMER. L. REG. 169 (1865) (reporting the decisions in Lowndes v. Bettle, 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).
181 See Samuel C. Wiel, INJUNCTION WITHOUT DAMAGE AS ILLUSTRATED BY A POINT IN THE LAW OF WATERS, 5 CALIF. L. REV. 199, 201 (1917) (noting how the rule transforms something into a form of liability actionable *per se*).
182 KERR, supra note __, at 149.
183 See Lowndes v. Bettle, 33 L.J. Ch. 451 (1865).
i.e., 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 became transformed into a discretion to deny in exceptional situations. As Kerr notes:

After 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.184

Following from this, once the a priori right to exclude and an interference with it are established, it therefore seems legitimate to speak of a injunctions issuing ‘as of right’.185 While scholars have tended to equate rights with entitlements ‘as of right’ in other contexts,186 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 to this day routinely deny injunctive relief remains that of good faith improvers

184 KERR, supra note 111, at 188.
185 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: Shapiro Bros., Inc. v. Jones-Festus Properties L.L.C., 205 S.W. 3d 270, 278 (Mo. App. E.D. 2006) (identifying injunctions as the “proper remedy” whenever a harassing, continuing and annoying trespass is involved); Amaral v. Cuppels, 831 N.E. 2d 915, 920, 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); Aguilar v. Morales, 162 S.W. 3d 825, 836 (Tex. App. – El Paso 2005) (identifying an injunction as the proper remedy for a repeated and continuing trespass); Warm v. State, 764 N.Y.S. 2d 483, 486 (N.Y.A.D. 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. App. Ct. 2003) (identifying exclusion as a key component of ownership and injunctive relief as the “usual remedy” for a continuing trespass). The operative presumption in all of these cases is that since the interference is continuing, damages—which are 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 so 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 supplied); 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 (2006).
In situations where the owner of an adjacent property mistakenly builds a structure on his neighbor’s, courts usually prefer damages to having him destroy the structure, in recognition of the burden and waste the destruction is likely to result in. As is to be expected, this exception is limited to mistaken improvements and is of 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 any discretion to deny.

2. Injunctions Restraining Patent Infringement

Intangible rights such as patents and copyright 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 remains rather well-developed and was directly at issue in eBay. It therefore remains apposite to examine this area.

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

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189 See Dukeminier & Krier, supra note __, at 153; Merrill & Smith, supra note __, at 55.


191 Id. § 154(a)(1).
patent adhered to the conditions for the grant (i.e., novelty, utility and non-obviousness), and 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 and here injunctive relief remains the most popular remedy.

Courts initially applied the irreparability and inadequacy criteria with significant regularity. In due course however emerged the realization 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.” Once validity and infringement are established, the norm became that a court “may interfere at once and grant an injunction.” All of this arose from the rather obvious inadequacy of damages to prevent further acts of infringement.

Equity thus came to treat intellectual property closely analogous to real property. Once title (validity) and trespass (infringement) were established, the grant of injunctive relief seemed to follow naturally. Here too though, 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 (i.e., 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 courts’ discretion.

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192 See 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA 612 (14th ed. 1918) (“It is quite plain that if no remedy could be given in cases of patents and copyrights than an action at law for damages, the inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights.”).

193 HIGH, supra note 108, at 349. See also CHARLES STEWART DREWRY, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS 220, 224 (1842).

194 KERR, supra note 91, at 296-97.
Over time, courts of equity thus began to limit their remedial discretion by presuming elements of the traditional (four-factor) test to be satisfied whenever a valid property right was in issue and it was shown to have been interfered with. What was initially a discretion to grant was transformed into a 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 came to legitimately expect that when their valid interest was interfered with, courts would, with few exceptions, find the issuance of an injunction unproblematic.

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

Now if this is indeed all that the right to exclude entailed — a 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 stronger version of the rule, one that effectively eliminated all remedial discretion.

B. De-linking Right and Remedy: Understanding eBay

It remains possible however 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 — that a court might have, and making the grant completely automatic, once title and interference are established. This approach would then 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 the circumstances of individual cases and aren’t necessarily limited to specific kinds of remedies within any category.195 To be sure, it comes in different forms and flavors, but the idea of discretion is central to it.196 Critics of discretionary remedialism focus on the

fact that it becomes problematic to speak of rights (in the remedial sense), if discretion of any kind remains an element of the remedial discourse. They in turn prefer a strict rule-based approach to the discretionary one.\footnote{Peter Birks is perhaps the most outspoken critic of the approach. See Peter Birks, Three Kinds of Objection to Discretionary Remedialism, 29 WEST. AUST. L. REV. 1 (2000).}

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 \textit{eBay}. Since its inception, the Federal Circuit had developed a rule in the context of patent injunctions, under which courts were \textit{bound} to grant plaintiffs a permanent injunction, once validity and infringement were factually proven.\footnote{See Craig S. Summers, Remedies for Patent Infringement in the Federal Circuit — A Survey of the First Six Years, 29 IDEA 333, 337 (1988) ("Once infringement has been established, an injunction normally follows.").} As a direct consequence, the right to exclude — statutorily delineated as the central element in a patent grant — came to be equated with a plaintiff’s automatic entitlement to injunctive relief in infringement actions. In \textit{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.\footnote{The Court of Appeals for the Federal Circuit was set up pursuant to the Federal Courts Improvement Act of 1982. Pub. L. No. 97-164, 96 Stat. 25. See George M. Sirilla, William P. Atkins & Stephanie F. Goeller, Will \textit{eBay} Bring Down the Curtain on Automatic Injunctions in Patent Cases?, 15 FED. CIR. B.J. 587 (2005).} While in formulating its rule, the court had retained an “exceptional circumstances” limitation — perhaps in recognition of the ‘discretion to deny’ formulation; yet in practice it had interpreted the limitation as being of application only when public health or safety were in issue.\footnote{See Xerox Corp. v. 3Com Corp., 61 Fed. Appx. 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., Inc., 56 F. 3d 1538, 1547-48 (Fed. Cir. 1995) (citing instances where the exception had been invoked).} Given its general reluctance to invoke the ‘exceptional circumstances’ rule, the issuance of injunctions came to be recognized as mechanical, once infringement and validity were proven.\footnote{See David B. Conrad, Note, Mining the Patent Thicket: The Supreme Court’s Rejection of the Automatic Injunction Rule in \textit{eBay} v. MercExChange, 26 REV. LIT. 119, 121 (2007).} In so doing, it

\textit{Doctrine and Discretion in Remedies, in} \textit{RESTITUTION: PAST, PRESENT AND FUTURE} 251 (W.R. Cornish et al. eds. 1998).
had also explicitly refused to apply the traditional four-factor test in its traditional formulation. Its rationale was, in simple terms, the pre-eminence of the right to exclude within the set of rights granted to the patentee. In one of its early cases, it 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. In this understanding then, a refusal to grant an injunction in situations where validity and infringement had been affirmatively established without question, would amount to a denial of the basic right to exclude.

Interestingly though, in laying down the rule, the Federal Circuit had adopted a rather counter-intuitive 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”. The automatic rule, mandating the grant seemingly disregarded the unequivocally discretionary language used by Congress. It isn’t at all surprising then that in 2005, a legislative effort was mounted unsuccessfully to remedy this anomaly— by requiring courts to apply the four-factor test in patent cases. The automatic rule thus concretized the connection between property and injunctive relief, through the right to exclude.

Now while the Supreme Court, prior to eBay, 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., the defendant questioned the court’s authority to issue an injunction when the patent hadn’t been put to use – even when validity and infringement had been affirmatively established. While the Court didn’t rule on the automatic injunction rule, it went on to observe:

203 See, e.g., Richardson v. Suzuki Motor Co., Ltd., 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 & Assocs., Inc. v. Garlock, Inc., 842 F.2d 1275, 1281 (Fed. Cir. 1988) (“[A]n injunction will issue when infringement has been adjudged, absent a sound reason for denying it.”).
205 This was part of the Patent Reform Act of 2005 (H.R. 2795). See Sirilla et al., supra note __, at 588-89 n.5.
206 210 U.S. 405 (1908).
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 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.\textsuperscript{207}

The Court’s use of “right” and “prevention” make it clear that it is indeed a reference to the right to exclude. The privilege that the Court refers to is, is the privilege of exclusive use — part of the patent grant (and one that is shielded by the right to exclude). What is also clear from the Court’s analysis is the implicit recognition that the discretion if any, is only a discretion to deny and not one to actually grant and that an injunction remains the default remedy, when the right to exclude (i.e., property) is involved.\textsuperscript{208} It is the existence of this discretion (to deny) 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, ultimately resulting in the plaintiff bringing the action in Federal District Court in Virginia.\textsuperscript{209} 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 it damages. Applying the four-factor test to the facts before it, it concluded that damages provided the plaintiff with an adequate remedy and would best serve the public interest.\textsuperscript{210} Much of the District Court’s concern seems to have stemmed for three elements: one, that the patent in question was a business-method patent, the growing issuance of which had made the PTO introduce an additional level of

\textsuperscript{207} Id. at 430.

\textsuperscript{208} 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.” See id. at 429.


\textsuperscript{210} Id. at 710-15.
review prior to issuance;\textsuperscript{211} two, that the plaintiff wasn’t actually using (i.e., 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 to merely seek damages.\textsuperscript{212}

On appeal, the Federal Circuit characterized the District Court’s concerns as unpersuasive.\textsuperscript{213} Restating the general rule that “courts \textit{will} issue permanent injunctions against patent infringement absent exceptional circumstances”, it reversed the District Court.\textsuperscript{214} In so doing, it went on to note that injunctions weren’t reserved for inventors who intended to practice their inventions and that “the 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”.\textsuperscript{215} The Supreme Court then agreed to review the matter.\textsuperscript{216}

During oral argument, 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 wasn’t 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….that’s what the patent right is. And all he’s asking for is give me my property back.”\textsuperscript{217} Later, in response to the government’s intervention, Justice Scalia re-emphasized 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”.\textsuperscript{218}

Yet, when it eventually handed down its decision, the Court’s opinion side-stepped almost completely, the property issue.\textsuperscript{219} In three separate opinions (one for the court and two concurrences), the Court reversed the Federal Circuit.\textsuperscript{220} Without deciding on the facts of the case before it, the

\textsuperscript{211} Id. at 713-14.
\textsuperscript{212} Id. at 712-13.
\textsuperscript{213} MercExchange, L.L.C. v. eBay, Inc., 401 F. 3d 1323 (Fed. Cir. 2005).
\textsuperscript{214} Id. at 1339 (emphasis supplied).
\textsuperscript{215} Id.
\textsuperscript{216} eBay, Inc. v. MercExchange, L.L.C., 126 S. Ct. 733 (2005) (granting certiorari to hear the case).
\textsuperscript{217} Transcript of Oral Argument at 6, \textit{eBay}, 126 S. Ct. 1837 (No. 130).
\textsuperscript{218} Id. at 33.
\textsuperscript{220} \textit{eBay}, 126 S. Ct. 1837 (2006).
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 basically reaffirmed the centrality of the four-factor test. Chief Justice Roberts’ short two-paragraph concurrence does little more. While noting the difficulty inherent in “protecting a right to exclude through monetary remedies”, it nevertheless concludes that this “does not entitle a patentee to a permanent injunction or justify a general rule that such injunctions should arise.” 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 opinion goes 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 is presumably intended at setting out the practical consequences of the Court’s elimination of the automatic rule: that even though the discretion does exist, in order to ensure consistency, it may be applied according to well-established standards that result in consistent outcomes.

Justice Kennedy’s concurring opinion too adds very little, except to note that historical practice may provide courts with some guidance on the exercise of their discretion. It attempts to identify the problems inherent in the automatic injunction rule – noting that an injunction would grant companies merely interested in obtaining licensing fees, undue leverage – which may be detrimental to the public interest.

The Court was thus seemingly motivated by the need to curb the practice of companies that made 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 argument and the Court seems to have been motivated by this concern, as Justice Kennedy’s opinion makes amply clear.

Whether legitimate or not however, the concern with patent trolls ought to have been the subject of Congressional intervention. The statute in its current form specifically recognizes the possibility of such trolling and

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221 Id. at 1841.
222 Id (emphasis supplied).
223 Id. at 1841-42.
224 Id. at 1842-43.
225 See, e.g., Transcript of Oral Argument at 25-26, eBay, 126 S. Ct. 1836 (No. 130).
expressly disables courts from denying a party relief upon a refusal to license or use the patent in question. In taking the matter into its own hands, the Courts opinion seemingly contradicts the express language of the statute. Property rights always introduce the problem of holdouts into the picture and when this remains a genuine concern, legislative intervention alleviates the problem.

Perhaps more importantly though, the Court’s opinion is hard to reconcile with its decision in Continental Paper Bag, discussed earlier. It is probably for this reason that the opinions make no reference at all to that case, even though the Court suo moto requested to be briefed on the matter and in fact did hear oral argument on the same. The one isolated reference to the case, uses it 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. The Court thus implicitly affirmed its prior position in Continental Paper Bag, even though 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, it eliminated with it the weaker version as well. The big question is whether its holding applies beyond the realm of intellectual property, to tangible property as well.

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228 eBay, 126 S. Ct. at 1840-41.
229 In an amicus brief filed by 52 intellectual property law professors, in support of the petitioners’ position in the eBay case, 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.

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. The test is thus founded on the idea that ordinarily damages— or compensatory remedies— are the default option, and exclusionary remedies, i.e., 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 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 though, 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. Indeed, its observation that the traditional factors “apply with equal force” to patent disputes, is aptly indicative of the same. Additionally, and perhaps of more relevance, is the fact that in support of its holding (that patent injunctions needed to follow the traditional test) the Court relied on two cases, neither of which had any connection whatsoever with patents or intellectual property, but nonetheless did involve automatic injunctions.

Consequently, there remains good reason to believe that the Court’s holding


Another brief however, this time filed by various law and economics professors in support of the respondents’ position, was quick to point 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, eBay v. MercExchange, 126 S. Ct. 1836 (2006) (No. 05-130), 2006 WL 639164, at 10-11. This latter position does seem to have more merit, given that the intellectual property law professors’ position wouldn’t rule out the possibility of injunctive relief being the default remedy, even if not necessarily granted automatically – i.e., the weaker variant of the rule.

230 Id. at 1839.
231 Id.
232 See id. These were the cases of Romero-Barcelo, which involved the issuance of an injunction to restrain water pollution, and Amoco Production, which involved an injunction for non-compliance with a statute aimed at preserving lands in Alaska. See Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982); Amoco Production Co. v. Gambell, 480 U.S. 531 (1987).
applies to the entire gamut of automatic injunctions, not just those related to patents.

In this reading of *eBay* then, 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 with it, 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/infringement in the context of property rights?

The four-factor test, with its emphasis on inadequacy and irreparability has long been analyzed, as involving little more than a cost-benefit analysis.\(^{233}\) 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 long, 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.\(^{234}\) This approach however tracks the remedial emphasis on the right to exclude—for as we have seen, the centrality of the right to exclude doesn’t derive from its actual enforcement. Others have raised the idea of ‘efficient trespass’ in the context of other property doctrines (such as adverse possession),\(^{235}\) but have stayed clear of offering a normative account of the theory—given the general structure of equity practice prior to *eBay*.\(^{236}\)

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236 Id. at 1081 n.164 (“It bears emphasis that I am not advocating a generalized normative theory of “efficient theft”.”).
Even if one doubts that the Court’s holding does have implications outside of intellectual property, within that context at least, it certainly signals a move towards a doctrine of efficient trespass of intangibles—or 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 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 additionally 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/utilitarian calculation—with the belief being that the public is somehow benefited by the actual working of a patent (even if by an infringer), rather than its non-working—one that Congress thought best to avoid in its attempt to structure patents as property rights.

The move from trolling in the intangible world, to other obvious utility-enhancing activities in the context of realty and chattels, isn’t really that far. Take the case of an absentee landowner and a squatter (assuming of course, that the period of limitation for adverse possession hasn’t 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. Now, in some areas of property doctrine, equity already recognizes just such an efficiency calculation in its grant of relief.

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238 35 U.S.C. § 271(d)(4) (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 non-existence 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).

239 See, e.g., Jacque, supra note __ (where a landowner sought to prevent defendant from use of unused field to get to the other side, even though it was the shortest possible route and wouldn’t have interfered with the owner’s actual use).
the most obvious being that of unintentional building encroachments. Its direct incorporation however into the four-factor test makes it (i.e., the efficiency trade-off) applicable across the board 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 efficiency calculation at the time of their enforcement, no longer holds true.

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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 certainly didn’t hint at what an alternative conception of the right might be—and perhaps for good reason.

Central to the ambivalence surrounding *eBay* is the fact that patents remain (by both structure and intent) a form of private property built around the ‘right to exclude’. Yet, if this didn’t 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* then 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 being axiomatic of what the idea of property meant, the idea of the right to exclude has in more recent times receded into the background. While the anti-formalism that has characterized the modern property discourse has undoubtedly contributed to this, so too has the

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240 See *Merrill & Smith*, *supra* note __, at 54-55.
241 See *Merrill & Smith*, *supra* note 2.
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.242

While the Court’s holding in eBay may be interpreted by some as contributing to this move—by rejecting the most dominant conception of the idea—I have sought to argue that in so doing, the holding in fact directs attention to what the ‘right to exclude’ has 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. Counter-intuitively 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 there, 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’ isn’t considered indicative of the very notion of a contractual right to performance being altogether non-existent, so too does the absence of a right to exclusionary relief have 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 as a social institution that coordinates access to and use of scarce resources, the primary/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.

242 See, e.g., Rose, supra note 1, at 604 (characterizing the right to exclude and the “Exclusivity Axiom” as a trope).