Preface to the Seventh Edition
A Guide to the Book
How to Brief a Case and Prepare for Class
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§1 TRESPASS

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

A trespass under the common law is an unprivileged intentional intrusion on property possessed by another. The intent requirement is met if the defendant engaged in a voluntary act, such as walking onto the property. It is not necessary that the trespasser intended to violate the owner’s legal rights; mistaken entry on the land of another does not relieve the trespasser of liability. The intent requirement is not met if, for example, someone carries the trespasser onto the property against her will. The intrusion occurs the moment the non-owner enters the property. “The gist of an action of trespass is infringement on the right of possession.” Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238 (Utah 1998). An intrusion may occur upon physical entry by a person, an agent such as an employee, or an object such as a building that extends over the boundary onto a neighbor’s property. A trespass may occur either above or below the surface. For example, a well dug on one’s property that slants to an area underneath the neighbor’s property constitutes a trespass. Similarly, a second-story porch that overhangs the neighbor’s property also qualifies as a trespass.
A trespass is **privileged**, and thus not wrongful, if (1) the entry is done with the consent of the owner;¹ (2) the entry is justified by the necessity to prevent a more serious harm to persons or property; or (3) the entry is otherwise encouraged by public policy. Entry on property of another may be privileged, for example, if one is doing so to stop a crime or to help someone out of a burning house.

### §1.1 Public Policy Limits on the Right to Exclude

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

**State v. Shack**

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

JOSEPH WEINTRAUB, C.J.

Defendants entered upon private property to aid migrant farmworkers employed and housed there. Having refused to depart upon the demand of the owner, defendants were charged with violating N.J. Stat. §2A:170-31² which provides that “[a]ny person who trespasses on any lands . . . after being forbidden so to trespass by the owner . . . is a disorderly person and shall be punished by a fine of not more than $50.” Defendants were convicted in the Municipal Court of Deerfield Township.

Complainant, Tedesco, a farmer, employs migrant workers for his seasonal needs. As part of their compensation, these workers are housed at a camp on his property. Defendant Tejeras is a field worker for the Farm Workers Division of the Southwest Citizens Organization for Poverty Elimination, known by the acronym SCOPE, a nonprofit corporation funded by the Office of Economic Opportunity pursuant to an act of Congress, 42 U.S.C.A. §§2861-2864.³ The role of SCOPE includes providing for the “health services of the migrant farm worker.” Defendant Shack is a staff attorney with the Farm Workers Division of Camden Regional Legal Services, Inc., known as “CRLS,” also a nonprofit corporation funded by the Office of Economic Opportunity pursuant to an act of Congress, 42 U.S.C.A. §2809(a)(3). The mission of CRLS includes legal advice and representation for these workers.

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¹. One who enters property with the permission of the owner or possessor is called a *licensee* and has a property interest called a *license*. If the owner revokes the license, the non-owner must leave the land within a reasonable time; failure to do so will constitute a trespass.

². This statute has been superseded by N.J. Stat. §2C:18-3. — Eds.

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

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

I

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

It is urged that the First Amendment rights of the defendants and of the migrant farmworkers were thereby offended. Reliance is placed on *Marsh v. Alabama*, 326 U.S. 501 (1946), where it was held that free speech was assured by the First Amendment in a company-owned town which was open to the public generally and was indistinguishable from any other town except for the fact that the title to the property was vested in a private corporation. Hence a Jehovah’s Witness who distributed literature on a sidewalk within the town could not be held as a trespasser. Later, on the strength of that case, it was held that there was a First Amendment right to picket peacefully in a privately owned shopping center which was found to be the functional equivalent of the business district of the company-owned town in *Marsh*. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). *(Logan Valley rests) upon the fact that the property was in fact opened to the general public.*[^2] There may be some migrant camps with the attributes of the company town in *Marsh* and of course they would come within its holding. But there is nothing of that character in the case before us, and hence there would have to be an extension of *Marsh* to embrace the immediate situation.

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

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

II

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

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

The migrant farmworkers are a community within but apart from the local scene. They are rootless and isolated. Although the need for their labors is evident, they are unorganized and without economic or political power. It is their plight alone that summoned government to their aid. In response, Congress provided under Title III-B of the Economic Opportunity Act of 1964 (42 U.S.C.A. §§2701 et seq.) for “assistance for migrant and other seasonally employed farmworkers and their families.” Section 2861 states “the purpose of this part is to assist migrant and seasonal farmworkers and

5. That clause states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.” — Eds.
their families to improve their living conditions and develop skills necessary for a productive and self-sufficient life in an increasingly complex and technological society.” Section 2862(b)(1) provides for funding of programs “to meet the immediate needs of migrant and seasonal farmworkers and their families, such as day care for children, education, health services, improved housing and sanitation (including the provision and maintenance of emergency and temporary housing and sanitation facilities), legal advice and representation, and consumer training and counseling.” As we have said, SCOPE is engaged in a program funded under this section, and CRLS also pursues the objectives of this section although, we gather, it is funded under §2809(a)(3), which is not limited in its concern to the migrant and other seasonally employed farmworkers and seeks “to further the cause of justice among persons living in poverty by mobilizing the assistance of lawyers and legal institutions and by providing legal advice, legal representation, counseling, education, and other appropriate services.”

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

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

The subject is not static. As pointed out in 5 Powell, Real Property §745, at 493-494 (Rohan 1970), while society will protect the owner in his permissible interests in land, yet such an owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies. The necessity for such curtailments is greater in a modern industrialized and urbanized society than it was in the relatively simple American society of fifty, 100, or 200 years ago. The current balance between individualism and dominance of the social interest depends not only upon political and social ideologies, but also upon the physical and social facts of the time and place under discussion.
Professor Powell added in §746, at 494-496:

As one looks back along the historic road traversed by the law of land in England and in America, one sees a change from the viewpoint that he who owns may do as he pleases with what he owns, to a position which hesitatingly embodies an ingredient of stewardship; which grudgingly, but steadily, broadens the recognized scope of social interests in the utilization of things.

To one seeing history through the glasses of religion, these changes may seem to evidence increasing embodiments of the golden rule. To one thinking in terms of political and economic ideologies, they are likely to be labeled evidences of "social enlightenment" or of "creeping socialism" or even of "communistic infiltration," according to the individual's assumed definitions and retained or acquired prejudices. With slight attention to words or labels, time marches on toward new adjustments between individualism and the social interests.

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

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

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

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

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

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

It follows that defendants here invaded no possessory right of the farmer-employer. Their conduct was therefore beyond the reach of the trespass statute. The judgments are accordingly reversed and the matters remanded to the County Court with directions to enter judgments of acquittal.

Commonwealth v. Magadini
52 N.E.3d 1041 (Mass. 2016)

Geraldine Hines, J.

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

6. The criminal trespass statute, G.L. c. 266, §120, provides in relevant part: "Whoever, without right enters or remains in or upon the dwelling house, [or] buildings . . . of another . . . after having been forbidden so to do by the person who has lawful control of said premises . . . shall be punished." — Eds.
Four charges related to the defendant’s presence at Barrington House. On February 21, March 4, and March 6, police found the defendant lying in a hallway by a heater during the evening, nighttime, or early morning hours of days described as “cold” or “very cold.” At approximately noon on April 8, a day described as “cool,” police responded to a report and observed the defendant walking through a common area in the Barrington House toward the front door. Two charges stemmed from the defendant’s presence at Castle Street, where police had found the defendant lying on the floor in the lobby next to a heater during periods of cold weather. The first incident occurred between 8 a.m. and 10 a.m. on February 20, 2014; the defendant was awake. The second incident occurred at approximately 6:30 a.m. on March 28; the defendant was sleeping. The seventh charge was based on conduct that occurred on June 10, 2014, when the defendant entered SoCo Creamery, ignored requests by the clerk to leave the premises, and used the bathroom for ten to fifteen minutes. The defendant did not dispute that he violated all of the trespass orders, focusing his case instead on the necessity defense in cross-examination and his direct testimony.

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

For a two- to three-month period in the winter of 2007, the defendant stayed at the local homeless shelter, called the Construct. Three days before he began staying there, he had gone to that shelter at approximately 3 a.m. following a blizzard. He was refused entry, and he stayed on the porch for about an hour before being asked to leave. A few days later, he spoke with someone from the shelter, and he was allowed to stay for a few months before he was told to leave because of “certain issues.” Therefore, the defendant had no other place to stay in Great Barrington. For a period of “three to four years,” he lived outdoors, first at Stanley Park and later at the outdoor gazebo behind the Great Barrington Town Hall, where he had been living at the time of the trespass incidents. He considered the gazebo his home and registered to vote from that address.7

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

1. Necessity Defense

The defendant claims that the judge erroneously denied his request for a jury instruction on the defense of necessity and that he improperly excluded evidence relevant to the defense. The common-law defense of necessity "exonerates one who commits a crime under the 'pressure of circumstances' if the harm that would have resulted from compliance with the law . . . exceeds the harm actually resulting from the defendant's violation of the law." Commonwealth v. Kendall, 451 Mass. 10, 13, 883 N.E.2d 269 (2008), quoting Commonwealth v. Hood, 389 Mass. 581, 590, 452 N.E.2d 188 (1983). As such, the necessity defense may excuse unlawful conduct "where the value protected by the law is, as a matter of public policy, eclipsed by a superseding value. . . ." Kendall, supra.

For a defendant to be entitled to a necessity defense instruction, he or she must present "some evidence on each of the four underlying conditions of the defense," Kendall, 451 Mass. at 14, 883 N.E.2d 269: "(1) a clear and imminent danger, not one which is debatable or speculative"; (2) [a reasonable expectation that his or her action] will be effective as the direct cause of abating the danger; (3) there is [no] legal alternative which will be effective in abating the danger; and (4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue." Id. at 13-14, 883 N.E.2d 269. If the defendant satisfies these foundational conditions, "the burden is on the Commonwealth to prove beyond a reasonable doubt the absence of necessity." Commonwealth v. Iglesia, 403 Mass. 132, 134, 525 N.E.2d 1332 (1988).

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

a. Clear and Imminent Danger

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

There appears to be little question that the weather conditions on the dates of the offenses in February and March presented a "clear and imminent danger" to a homeless person. The temperatures on the dates of the offenses were not admitted at trial, but the weather on the February and March dates was described as "cold," "really cold," and "very cold." Moreover, the timing of each of those incidents, in the early morning or late evening hours when the defendant was either sleeping or lying down, suggests the dangerousness of the circumstances where sleeping may place one in the same position for an extended period and, thus, increases the potential harm from the
weather. See *Jones v. Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006) (“involuntary sitting, lying, or sleeping on public sidewalks . . . is an unavoidable consequence of being human and homeless without shelter”). See also *In re Eichorn*, 69 Cal. App. 4th 382, 389, 81 Cal. Rptr. 2d 535 (1998) (“Sleep is a physiological need, not an option for humans”). Moreover, the Commonwealth concedes that the defendant met his burden of demonstrating a “clear and imminent danger” for these six incidents.

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

b. Availability of Lawful Alternatives

We have explained previously that satisfaction of the third element requires a defendant to demonstrate that he “ma[d]e himself aware of any available lawful alternatives, ‘or show[ed] them to be futile in the circumstances.’” *Kendall*, 451 Mass. at 15, 883 N.E.2d 269, quoting *Commonwealth v. Pike*, 428 Mass. 393, 401, 701 N.E.2d 951 (1998). On that point, the defendant must present “some evidence,” enough that “supports at least a reasonable doubt” whether the unlawful conduct was justified by necessity. *Kendall*, 451 Mass. at 14, 883 N.E.2d 269. In other words, the defendant must present enough evidence to demonstrate at least a reasonable doubt that there were no effective legal alternatives available before being entitled to an instruction on the necessity defense. This does not require a showing that the defendant has exhausted or shown to be futile all conceivable alternatives, only that a jury could reasonably find that no alternatives were available. See *Kendall, supra* at 19, 883 N.E.2d 269 (Cowin, J., dissenting), citing *Iglesia*, 403 Mass. at 135, 525 N.E.2d 1332.

Here, the defendant’s evidence was sufficient to meet his burden. . . . In determining whether there has been sufficient evidence of the foundational conditions to the necessity defense, “all reasonable inferences should be resolved in favor of the defendant, and, no matter how incredible his testimony, that testimony must be treated as true.” *Pike*, 428 Mass. at 395, 701 N.E.2d 951. Taken in this light, there is at least “some evidence” that the defendant lacked effective legal alternatives to trespass during cold days and nights. *Kendall*, 451 Mass. at 15, 883 N.E.2d 269. The defendant testified that he stayed at an outdoor gazebo “[p]retty much” year round, that in 2007 he was told to leave the only local homeless shelter and had previously been denied entry to the shelter in the middle of the night following a blizzard, that no other places “want [him] in . . . their facility,” that he was unable to rent an apartment despite repeated attempts, and that there was nowhere besides public parks where he could stay. Additionally, the officer who asked the defendant to leave the Barrington House at approximately 9:30 P.M. on February 21 testified that the defendant had to go back outside, and the judge sustained an objection to defense counsel’s question about whether the officer offered to transport him to any other shelter or facility. The manager of Castle Street corroborated the defendant’s attempt to rent an apartment by his testimony that he
called police to have the defendant removed from the building after the defendant “forced his way onto the third floor of the building, flashing money in hand, demanding I rent him an apartment.”

The Commonwealth argues that the defendant failed to meet his burden because he presented no evidence that he was unable to rent an apartment outside of Great Barrington, that he was unable to gain entry to the Pittsfield shelter, and that he would still be excluded from the local homeless shelter in 2014. The Commonwealth’s argument is unavailing. We do not require an actor facing a “clear and imminent danger” to conceptualize all possible alternatives. Kendall, 451 Mass. at 16 n.5, 883 N.E.2d 269. So long as the defendant’s evidence, taken as true, creates a reasonable doubt as to the availability of such lawful alternatives, the defendant satisfies the third element. Contrast Kendall, supra; Pike, 428 Mass. at 401, 701 N.E.2d 951. The defendant has done so here.

Additionally, we note that the options proposed by the Commonwealth do not appear to be effective alternatives on the record before us. Where the only local homeless shelter had previously denied the defendant entry at 3 a.m. following a blizzard and had later told him he had to leave, the law does not require the defendant to continue to seek shelter there in order to demonstrate that doing so is futile. Moreover, the defendant’s conduct is viewed at the time of the danger, and actions that the defendant could have taken to find shelter before the dangerous condition arose do not negate the conclusion that there were no lawful alternatives available at the time of his unlawful conduct. See United States v. Kpomassie, 323 F. Supp. 2d 894, 901 (W.D. Tenn. 2004) (alternatives not available at time of crime when their availability was “sufficiently far in the past”).

We do not view the requirement that a defendant consider lawful alternatives as broadly as suggested by the Commonwealth. Our cases do not require a defendant to rebut every alternative that is conceivable; rather, a defendant is required to rebut alternatives that likely would have been considered by a reasonable person in a similar situation.\(^7\) Moreover, we are not prepared to say as a matter of law that a homeless defendant must seek shelter outside of his or her home town in order to demonstrate a lack of lawful alternatives.\(^8\) Our law does not permit punishment of the homeless simply

\(^7\) As the level of harm that could arise from the unlawful conduct increases, so does the requirement for considering lawful alternatives. See Commonwealth v. Hutchins, 410 Mass. 726, 731-732, 575 N.E.2d 741 (1991) (discussing weighing of “competing harms”). We recognize that the defendant’s conduct may not have been appreciated by owners, managers, and residents of the private buildings in which the defendant sought cover, but there was no evidence that the defendant’s presence did, or had the potential to, cause physical harm to any persons. Accordingly, the requirement to consider alternatives may be viewed more leniently where the potential harm was only property-related than it would be viewed where the unlawful conduct, as in Kendall, 451 Mass. at 15, 883 N.E.2d 269, had the potential to harm both persons and property. The doctrine of necessity has its roots in the notion that “[t]he law deems the lives of all persons far more valuable than any property.” United States v. Ashton, 24 F. Cas. 873, 874 (C.C.D. Mass. 1834) (No. 14,470).

\(^8\) The viability of this option proposed by the Commonwealth is hampered for the additional reason that the defendant had no driver’s license or any other apparent method to make the twenty-mile trek to Pittsfield.
for being homeless. See Commonwealth v. Canadyan, 458 Mass. 574, 579 (2010) (setting aside finding that defendant violated condition of probation where homeless shelters did not have technology required for compliance). Once the foundational requirements are met, the necessity defense allows a jury to consider the plight of a homeless person against any harms caused by a trespass before determining criminal responsibility.9

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

. . .

Conclusion

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

Notes and Questions

1. Criminal trespass. Shack and Tejeras were charged with criminal trespass as defined by the New Jersey statute, N.J. Stat. §2A:170-31.10 Tedesco invoked the crim-

9. Allowing a defendant to defend his trespassing charges by claiming necessity will not, of course, condone all illegal trespass by homeless persons. It simply allows a jury of peers to weigh the "competing harms" to determine criminal responsibility. See Hutchins, 410 Mass. at 730, 575 N.E.2d 741. In Hutchins, this court reviewed different circumstances where the balance of harms was considered. Id. at 731-732, 575 N.E.2d 741, discussing Commonwealth v. Thurber, 383 Mass. 328, 418 N.E.2d 1253 (1981), and Commonwealth v. Iglesia, 403 Mass. 132, 525 N.E.2d 1332 (1988). Specifically, the court noted that a prison escape would likely be justified where a prisoner was in imminent danger at the prison and submitted himself directly to authorities after escape or where an individual who was unlawfully carrying a firearm would likely be justified where the carrier "wrested the gun" from an attacker and immediately went to the police station. Id. Here, whether a homeless person’s trespass in a privately-owned building where he previously had been barred from entry is a greater or lesser harm than the intrusion suffered by the owner and occupiers of the building is a question properly decided by a jury where the defendant met the foundational elements for the necessity defense. Iglesia, supra at 135, 525 N.E.2d 1332 (jury instructed on whether defendant made “better choice” by acting illegally).

10. This law has been superseded by N.J. Stat. §2C:18-3, which provides, at §2C:18-3(b), that a “person commits a petty disorderly persons offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place to which notice against trespass is given by: (1) Actual communication to the actor; or (2) Posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or (3) Fencing or other enclosure manifestly designed to exclude intruders.”
inal system by calling the police and filing a criminal complaint against Shack and Tejeras. Criminal proceedings are generally initiated by federal, state, or local government officials rather than by private citizens, and their purpose is to deter wrongful activities and to punish those who engage in them. These proceedings may include arrest, criminal complaint, or indictment by the prosecutor, arraignment (bringing formal charges against the accused in court), plea bargaining, and trial. Punishment may include imposition of a fine payable to the state, probation (continued supervision), and incarceration. How did the charge of criminal trespass in *Shack* differ from the common law definition of trespass?

2. **Legal basis for Shack decision.** Did the court in *Shack* rest its ruling on the U.S. Constitution, a federal statute, a state statute, or the state common law? If the court rested its opinion on only one of these sources of law, what role did the others play in determining the outcome of the case?

3. **Incomplete defense of necessity.** As the Massachusetts Supreme Judicial Court observes in *Magadini*, necessity is a defense to a trespass claim. If someone takes refuge on your property to escape a flood, as happened in New Orleans during Hurricane Katrina, there is no trespass. If a trespasser damages the property, the law imposes on the trespasser a duty to compensate the owner for the damage, but does not require the trespasser to pay for the mere privilege of access. See Restatement (Second) of Torts §197 (1965). Thus, in *Ploof v. Putnam*, 71 A. 188 (Vt. 1908), a couple and their children moored a small sailboat to the dock of the defendant during a sudden storm that threatened to overturn the boat and placed them in fear of their lives. But the defendant’s servant unmoored the boat, which was driven on the shore by the storm, destroying it and casting the occupants into the lake. The court held that necessity justifies a trespass when needed to save lives or property and that defendant committed a tort (a wrongful act) against the plaintiffs by unmooring the boat. In *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (Minn. 1910), however, the court held that a steamship moored to a private wharf to avoid a severe storm was required to pay for the damage when the wind thrust the ship onto the wharf. Why do you think the trial court in *Magadini* tried so hard to keep the defendant’s necessity defense away from the jury?

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

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

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

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

Do the examples of airplane overflights and drilling deep underground show that,
in the modern world, the ad coelum maxim is outmoded? Can we reconcile the re-
sults in these cases with continued adherence to the ad coelum understanding of the
dimensions of an owner’s property? In answering the question, it is important to re-
member that the issue of whether there has been an entry is just the first step in evalu-
ating whether there has been an actionable trespass.

5. The significance of the right to exclude. In recent years, a number of lead-
ing legal scholars (and some courts) have argued that the right to exclude is not just
one of the most important rights but is in fact a defining feature of the very concept of
property. Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730,
is a right to exclude others from things which is grounded by the interest we have in
the use of things.”); see also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S.
419, 434 (1982) (describing “the right to exclude” as one of the most “treasured” and
“important” sticks in the owner’s “bundle of rights”); Kaiser Aetna v. United States,
444 U.S. 164, 179 (1979) (same).

In a similar vein, some scholars have suggested that the right to exclude — and
therefore the law of trespass — is uniquely important for how property operates as a
legal institution. Protecting the right to exclude with a relatively simple law of trespass,
they argue, creates a broad zone of discretion for owners to choose what to do with
their property. This ensures that owners are empowered to put their property to its
most productive use. In addition, a clear law of trespass also economizes on “infor-
mation costs” by sending a relatively simple message to people other than the owner,
making it easy for them to navigate through a world of privately owned property with-
out violating the rights of others. See, e.g., Thomas W. Merrill & Henry E. Smith, What
Happened to Property in Law and Economics?, 111 Yale L.J. 357, 389 (2001). As Thom-
as Merrill and Henry Smith put it, “messages about everyday property must be very
simple — messages such as ‘keep off’ or ‘don’t touch’ — couched in concepts readily
comprehensible to remote people with little special legal or asset-specific informa-
tion.” Thomas W. Merrill & Henry E. Smith, Making Coasean Property More Coasean,
54 J.L. & Econ. 77, 90 (2011).

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

As long as non-owners (like the aircraft pilot navigating over privately owned land) must accommodate their activities to the owner’s use decisions (e.g., by keeping their distance from whatever buildings an owner happens to put up), qualifying the right to exclude does not by itself seem to undermine an owner’s power to put the property to its most productive use. As for the cost of navigating through a world of owned property, placing too much importance on the law of trespass may cloud the issue. After all, trespassing is just one way of violating the property rights of others. And many owners wish to convey messages other than “keep off!” or “don’t touch!” In particular, the owners of commercial property often want to say “come in! take a look!” Giving owners too much discretion with respect to the content of their “come in” messages may drive up information costs for non-owners rather than reducing them. See Gregory S. Alexander & Eduardo M. Peñalver, *An Introduction to Property Theory* 138 (2012).

6. The right to roam. At one time in the United States, most unenclosed and undeveloped land was open to the public for the purpose of hunting, gathering kindling and berries, and walking. Eric Freyfogle, *The Lost Right to Roam*, in *On Private Property: Finding Common Ground on the Ownership of Land* 29 (2007); Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 Temp. L. Rev. 665, 675-679 (2011). Today, about half the states still allow hunting on private land unless the owner has posted “no trespassing” signs. Mark R. Sigmon, *Hunting and Posting on Private Land in America*, 54 Duke L.J. 549 (2004). Moreover, owners who wanted to protect their fields from wandering cattle originally had to fence them out; they had no right to complain that a trespass had occurred when cattle wandered onto their property. Nor could railroads insist that cattle owners prevent them from intruding on train tracks. See, e.g., Sawers, supra, at 677 (“Free-roaming hogs and cattle were an important source of meat and income for farmers, particularly smaller farmers.”); *Nashville & Chattanooga Railroad Co. v. Peacock*, 25 Ala. 229 (1854); *Macon & Western Railroad Co. v. Lester*, 30 Ga. 911 (1860). Over time, the rules changed to place liability on cattle owners for damage to crops on the neighbors’ property and denied cattle owners remedies if their cattle wandered onto railroad tracks, effectively changing to a fencing-in system by which owners had the duty to keep their cattle from invading neighboring property.

The right to roam has long been recognized in Finland, Norway, and Sweden. Known as the allemansraat (“everyman’s right”) in Sweden, it entitles everyone to hike across or camp in the countryside on the property of another as long as they do not damage the land, interfere with the owner’s use, or intrude on the privacy of

7. Graves. Individuals may have rights of access to cemeteries to visit the graves of their loved ones even if those graves are located on private property that has been sold to a subsequent owner. \textit{Kentucky Department of Fish & Wildlife Resources v. Garner}, 896 S.W.2d 10 (Ky. 1995) (cemetery on public land has duty to give a key to the locked gate to an individual for his use and that of his heirs to visit the graves of their family members); \textit{David v. May}, 135 S.W.2d 747 (Tex. Ct. App. 2003) (plaintiff has the right of access to land to visit the graves of her grandparents). See Alfred L. Brophy, \textit{Grave Matters: The Ancient Rights of the Graveyard}, 2006 BYU L. Rev. 1469.

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

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

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How to distinguish the two classes of case . . . ? The answer can have nothing to do with fraud; there is fraud in all the cases. It has to do with the interest that the torts in question protect . . . . There was no invasion in the present case of any of the specific interests that the tort of trespass seeks to protect. The test patients entered offices that were open to anyone expressing a desire for ophthalmic services and videotaped physicians engaged in professional, not personal, communications with strangers (the testers themselves). The activities of the offices were not disrupted. Nor was there any “invasion of a person’s private space,” as in our hypothetical meter-reader case, as in the famous case of De May v. Roberts, 9 N.W. 146 (Mich. 1881) (where a doctor, called to the plaintiff’s home to deliver her baby, brought along with him a friend who was curious to see a birth but was not a medical doctor, and represented the friend to be his medical assistant), as in Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971), on which the plaintiffs in our case rely. Dietemann involved a home. True, the portion invaded was an office, where the plaintiff performed quack healing of nonexistent ailments. The parallel to this case is plain enough, but there is a difference. Dietemann was not in business, and did not advertise his services or charge for them. His quackery was private.

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

Desnick, 44 F.3d at 1352-1353.

In a somewhat similar case, Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999), aff’g in part and rev’g in part 887 F. Supp. 811 (M.D.N.C. 1995), the Primetime Live show sent two ABC television reporters to use false résumés to get jobs at Food Lion supermarkets. While working there, they secretly videotaped “what appeared to be unwholesome food handling practices” for later broadcast on television. Food Lion sued ABC, claiming, among other things, that ABC had committed the tort of fraud, that it had violated the duty of loyalty owed by employees to employers, and that its intrusion onto Food Lion’s property constituted a trespass. The trial court held that ABC had committed a trespass when its reporters had entered the property because defendants had engaged in “wrongful conduct which could negate any consent
to enter given by Food Lion,” 887 F. Supp. at 820. Finding ABC liable for both fraud and trespass, the jury awarded Food Lion $1 nominal damages for trespass and $1 for violation of the duty of loyalty. It imposed $1,400 damages for the tort of fraud and a whopping $5,545,750 in punitive damages to punish and deter ABC from engaging in this kind of fraudulent deception in the future. The trial judge reduced the punitive damages to $315,000.

The Fourth Circuit reversed in part, agreeing with the Seventh Circuit in Desnick that the initial entry was consensual despite having been obtained by fraud so no trespass occurred when the reporters initially entered the property. However, the court found that a trespass had occurred after the initial entry when the reporters secretly videotaped the meatpacking process because this action exceeded the scope of the initial invitation. The court threw out the fraud claim. Although the fraud had caused Food Lion to hire the employees, it could not demonstrate any harm resulting from thehirings themselves. As at-will employees, they could leave at any time and had made no promises to work for any particular length of time. Thus Food Lion could not complain that they stayed for only two weeks. Any harm to Food Lion was caused by the broadcast and not by the fraud. The first amendment generally protects the right to publish truthful information, allowing remedies only for defamation — false statements that injure reputation — and even then, only in restricted circumstances. Because the punitive damages judgment had been premised on the fraud, and the fraud claim had now been thrown out, the Fourth Circuit also threw out the punitive damages judgment, leaving defendants with a nominal damages judgment of $2. Accord, American Transmission, Inc. v. Channel 7 of Detroit, Inc., 609 N.W.2d 607 (Mich. Ct. App. 2000) (agreeing with Desnick and holding that despite the existence of fraudulent misrepresentations by employees of the television station investigating dishonest practices in transmission repair shops, the shop owners had validly consented to the investigators’ presence on their premises and that no specific interests relating to the peaceable possession of land were invaded). But see Medical Laboratory Management Consultants v. ABC, Inc., 30 F. Supp. 2d 1182 (D. Ariz. 1998); Shiffman v. Empire Blue Cross & Blue Shield, 681 N.Y.S.2d 511, 512 (App. Div. 1998) (reporters who gained entry to medical offices by posing as potential patients could not assert consent as defense to trespass claim "since consent obtained by misrepresentation or fraud is invalid"); Restatement (Second) of Torts §892B(2) (1965) ("if the person consenting to the conduct of another . . . is induced [to consent] by the other’s misrepresentation, the consent is not effective for the unexpected invasion or harm").

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

In Intel Corp. v. Hamidi, 71 P.3d 296 (Cal. 2003), a former employee sent numerous e-mails to his former co-employees criticizing the employer. The e-mails breached no security barriers nor disrupted the employer’s e-mail system. The lower courts held that the former employee had committed trespass to chattels on the ground that the former employee was “disrupting [the employer’s] business by using its property.” Id. at 302. The California Supreme Court reversed, holding that no trespass could be shown in the absence of dispossession unless the communication damaged the recipient’s computer system or impaired its functioning. Accord, CompuServe v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1022 (S.D. Ohio 1997). Cf. eBay, Inc. v. Bidder’s Edge, Inc., 100 F. Supp. 2d 1058, 1071 (N.D. Cal. 2000) (finding damage when defendant Bidder’s Edge’s Internet-based auction aggregation site sent 80,000 to 100,000 information requests per day to eBay’s auction trading site by “diminishing the quality or value of eBay’s computer systems [by consuming] at least a portion of [eBay’s] bandwidth and server capacity”).

10. Trespass and government searches. The fourth amendment of the United States Constitution says that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” But what is a search? After the U.S. Supreme Court’s landmark decision in Katz v. United States, 389 U.S. 347 (1967), it seemed that whether a particular government action would be deemed a “search” depended on whether the defendant had a “reasonable expectation of privacy” that was violated by the government’s activity. In United States v. Jones, 123 S. Ct. 945 (2012), however, the Court seemed to change gears, turning towards the law of trespass for an alternative definition of searches. The case involved a defendant who had been convicted of possessing several kilograms of cocaine with the intent to distribute. Part of the evidence used against the defendant came from a small GPS tracking device that federal agents attached to the underside of the defendant’s wife’s car. At trial, data from the GPS device was used to link the defendant to the location of a drug stash house. Instead of looking into the defendant’s expectations of privacy (with regard to either the exterior of the vehicle or his presence on public streets), the Supreme Court asked whether the government’s behavior constituted a trespass (to chattels). “The text of the Fourth Amendment,” Justice Scalia wrote for the Court, “reflects its close connection to property. . . .” Id. at 950. Although the Court conceded its more recent cases had “deviated from that exclusively property-based approach, . . . for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas (‘persons, houses, papers and effects’) it enumerates.” Id. Because, in Jones, “[t]he Government physically occupied private property,” its actions constituted a trespass on an enumerated category of property, and because it did so to obtain information, its actions amounted to a search within the meaning of the fourth amendment. After Jones,
actions that are not a trespass might still implicate the fourth amendment under a *Katz* expectation-of-privacy analysis. And police action that would appear to involve trespass, but that occurs on categories of property not enumerated within the fourth amendment (such as “open fields”), might not violate the fourth amendment. *See Hester v. United States*, 265 U.S. 57 (1924). But, with respect to enumerated property (“houses, papers, and effects”), trespass provides a minimal threshold of fourth amendment protection.

The Court in *Jones* assumes that attaching a GPS device to a car is an obvious case of trespass to chattels. Do you agree? As Justice Alito noted in his concurring opinion in *Jones*, most courts would require some damage to the chattel in order to find a trespass. “Attaching to the bottom of a car a small, light object that does not interfere in any way with the car’s operation . . . is generally regarded as so trivial that it does not provide a basis for recovery under modern [trespass] law.” *Id.* at 961 (Alito, J., concurring in the judgment). Do you agree with Justice Alito that attaching a GPS device to a car does not harm the owner’s interest in use or possession of the vehicle? Or do you think a car owner would be able to obtain an injunction to remove a GPS tracker installed on her car by a private party against her wishes, even if the tracker did not physically damage the car or interfere with its operation?

In *Florida v. Jardines*, 133 S. Ct. 1409 (2013), the Court considered a challenge to a “search” in which police officers (acting on an anonymous tip and without a warrant) brought a drug-sniffing dog onto the front porch of the defendant’s home. In finding the act of bringing a drug dog onto the front porch to constitute a search, the Court acknowledged that an invitation to approach the front door “may be implied from the habits of the country.” *Id.* at 1415. Notwithstanding this implicit license, the Court ruled out the notion that the police were acting under such an implicit license to approach the defendant’s front door, since there is no customary invitation to bring a drug dog onto the front porch to sniff for contraband. Applying this logic, could a police officer approach the front door, knock, and ask the defendant a few questions without first obtaining a warrant? If the law of trespass defines (in part) the scope of fourth amendment protection, to whose law should courts look in order to determine whether some government action constitutes a trespass (and therefore a fourth amendment search)? The law of the jurisdiction where the putative search occurs? The law of the jurisdiction in which the criminal charges are brought? Some federal “constitutional common law” standard of trespass? What if different jurisdictions reach different conclusions about whether a particular sort of activity constitutes a common law trespass or instead falls within an implicit license?

**Problems**

1. A tenant in a three-unit apartment building allows his girlfriend to move into the apartment with him. The landlord, who occupies one of the three apartments, objects. Stating that she rented to him alone and not to his girlfriend, she asks him to have the girlfriend leave. After he refuses, the landlord sues to evict him. He argues
that, like all other tenants, he has the right to receive visitors, see Commonwealth v. Nelson, 909 N.E.2d 42 (Mass. App. Ct. 2009); State v. DeCoster, 653 A.2d 891, 894 (Me. 1995), and that this right encompasses the right to choose to have family members or intimate associates stay with him at his home. What arguments can you make on both sides of this question? What rule of law would you promulgate if you were the judge?

2. Were Desnick and Food Lion decided correctly?
   a. Consent. Should fraudulently obtained consent be a defense to a trespass claim as Desnick held, or should such consent be ineffective as a defense to a trespass claim as Shiffman held? Was the Fourth Circuit in Food Lion correct to find a trespass when the reporters exceeded the scope of the invitation by secretly videotaping, or was Desnick correct to find no trespass based on the secret videotaping?
   b. Public policy. Should trespasses by investigative journalists be privileged because they further a strong public policy of protecting consumers from harmful products and services?
   c. Punitive damages. If a trespass can be shown either because entry is obtained by fraud or because secret videotaping exceeds the scope of the permission to enter, should punitive damages be available for trespass to deter investigative journalists from entering property on false pretenses and thus obtaining embarrassing information they can broadcast to the world? Punitive damages are generally to punish and deter “outrageous” or “egregious” conduct, including conduct that displays a willful or reckless disregard of the rights of others. JCB, Inc. v. Union Planters Bank, NA, 539 F.3d 862, 872-877 (8th Cir. 2008). Does intentional trespass rise to that level? Did the conduct in Desnick and Food Lion rise to that level? If the actual damages are only $1, is a $100,000 punitive award excessive in relation to the harm?

3. Imagine that you are a juror in a case with facts very similar to Magadini. Would you conclude that the defendant’s presence on private property was justified by necessity on a very cold night if the property in question were:
   a. the heated vestibule of a shopping mall after closing time? during business hours?
   b. an empty, foreclosed home that the defendant had broken into?
   c. the detached garage of an occupied, private home?

4. Imagine that instead of attaching a GPS unit directly to the defendant’s car, as in Jones, the government had hidden the GPS device inside a tire that the defendant purchased from a store that (prior to sale of the tire) had allowed the government to install the device. Should the defendant’s consent to the presence of the tire on his car (without knowledge of the GPS device) shield the government from a finding that it had committed a trespass/search? See United States v. Karo, 468 U.S. 705 (1984) (installing a tracker in a can of ether sold to the defendant and then tracking that can to a locker in a public warehouse did not violate the fourth amendment).
§1.2 Limits on the Right to Exclude from Property Open to the Public

Uston v. Resorts International Hotel, Inc.
445 A.2d 370 (N.J. 1982)

Map: 1133 Boardwalk, Atlantic City, New Jersey

MORRIS PASHMAN, J.

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

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

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

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

e. All gaming shall be conducted according to rules promulgated by the commission. All wagers and pay-offs of winning wagers at table games shall be made according to rules promulgated by the commission, which shall establish such minimum wagers and other limitations as may be necessary to assure the vitality of casino operations and fair odds to and maximum participation by casino patrons.
The ability of casino operators to determine how the games will be played would undermine this control and subvert the important policy of ensuring the "credibility and integrity of the regulatory process and of casino operations." N.J.S.A. 5:12-1(b). The Commission has promulgated the blackjack rules that give Uston a comparative advantage, and it has sole authority to change those rules. There is no indication that Uston has violated any Commission rule on the playing of blackjack. N.J.A.C. 19:47-2.1 to -2.13. Put simply, Uston's gaming is “conducted according to rules promulgated by the Commission.” N.J.S.A. 5:12-100(e).

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

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

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

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

The current majority American rule has for many years disregarded the right of reasonable access,14 granting to proprietors of amusement places an absolute right arbitrarily to eject or exclude any person consistent with state and federal civil rights laws.

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

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14. The denial of freedom of reasonable access in some States following passage of the Fourteenth Amendment, and the creation of a common law freedom to arbitrarily exclude following invalidation of segregation statutes, suggest that the current majority rule may have had less than dignified origins. See Bell v. Maryland, supra.
In view of the substantially uniform approval of, and reliance on, the decision in *Wood v. Leadbitter* in our state adjudications, it must fairly be considered to be adopted as part of our jurisprudence, and whatever views may be entertained as to the natural justice or injustice of ejecting a theater patron without reason after he has paid for his ticket and taken his seat, we feel constrained to follow that decision as the settled law. 83 A. at 371.

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

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

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

In *State v. Shack*, 277 A.2d 369 (N.J. 1971), the Court held that although an employer of migrant farmworkers “may reasonably require” those visiting his employees to identify themselves, “the employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens.” The Court reversed the trespass convictions of an attorney and a social services worker who had entered the property to assist farmworkers there.

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

No party in this appeal questions the right of property owners to exclude from their premises those whose actions “disrupt the regular and essential operations of the [premises],” or threaten the security of the premises and its occupants. In some circumstances, proprietors have a duty to remove disorderly or otherwise dangerous persons from the premises. These common law principles enable the casino to bar from its entire facility, for instance, the disorderly, the intoxicated, and the repetitive petty offender.
Whether a decision to exclude is reasonable must be determined from the facts of each case. Respondent Uston does not threaten the security of any casino occupant. Nor has he disrupted the functioning of any casino operations. Absent a valid contrary rule by the Commission, Uston possesses the usual right of reasonable access to Resorts International’s blackjack tables.

Notes and Questions

1. Historical background. Uston is an outlier. Most modern courts have come out the other way, affirming the right of owners to exclude others from their commercial property for any reason not specifically prohibited by, for example, civil rights laws. See Madden v. Queens County Jockey Club, Inc., 72 N.E.2d 697 (N.Y. 1947). This was not always the case. Before the Civil War, it was well established that certain business owners had a duty to serve anyone who sought their services and was able to pay.

The reach of this duty is a matter of some confusion. Blackstone noted in 1765 that “if an inn-keeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler.” 3 William Blackstone, *Commentaries on the Laws of England* 164 (Univ. of Chicago reprint 1979) (1768). For centuries, this duty applied to “anyone who held himself out [as open to the public] to serve all who might apply,” and any such business was liable if, having so held itself out as open to the public, it refused to serve any member of the public who applied. See Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 Colum. L. Rev. 514, 515-516 (1911); see also Norman F. Arterburn, *The Origin and First Test of Public Callings*, 75 U. Pa. L. Rev. 411, 421 (1927) (describing fourteenth-century laws, enacted in the wake of the Black Death, requiring all to work who were able, at a reasonable rate, and that none could refuse to practice his calling to whomever applied).

The duty to serve extended beyond the modern categories of common carriers and innkeepers and encompassed other businesses as well. See Burdick, *supra*, at 514-516, 522 (describing farriers, tailors, and even surgeons as potentially “common” in the relevant sense of being subject to a duty to serve the general public). Early U.S. cases affirmed the obligation on public accommodations to serve the public. *Adams v. Freeman*, 12 Johns. 408 (N.Y. Sup. Ct. 1815). The usual justification for this obligation was the assumption underlying the traditional law of “common callings” that an owner assumes certain duties when he holds himself out as open to the public. See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1315-1316 (1996).

The limitation of the duty to serve to the categories of innkeepers and common carriers is a later development. The first case to clearly assert that places of entertainment holding themselves out as open to the general public had no common law duty to serve the public was decided in 1858 in Massachusetts. The court held that the Howard Athenæum, a well-known lecture hall near the State House, had the power to exclude African Americans. *McCrea v. Marsh*, 78 Mass. 211 (1858); see also Burton
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citing 

v. Scherpf, 83 Mass. 133 (1861) (allowing an African American to be ejected from a theater after he had bought a ticket). The apparent connection between the (relatively recent) narrowing of the duty to serve and the motive to exclude free African Americans led the New Jersey Supreme Court to comment in a footnote in Uston that the “the current majority rule may have less than dignified origins.” 445 A.2d at 374. After the Civil War, most southern states adopted public accommodations laws prohibiting exclusion on the basis of race, but those laws were repealed when Reconstruction ended. The repeals began a long period of racial segregation in many states that ended only with passage of the federal public accommodations law in 1964. See below §2.1.

2. Current law. Although Uston follows the early common law rule in affirming that members of the public enjoy a right of reasonable access to all businesses that hold themselves out as open to the public, this is now a minority position. By the late nineteenth century, the right of access had been narrowed to innkeepers and common carriers (planes, trains, and buses). Most states continue to adhere to the newer version of the rule, recognizing an absolute right by owners to exclude without cause and limiting the duty to serve the public (the right of reasonable access) to innkeepers and common carriers. For example, five years before the New Jersey Supreme Court’s decision in Uston v. Resorts International, Kenneth Uston had filed an almost identical case against a casino in Las Vegas, Nevada. The U.S. Court of Appeals for the Ninth Circuit, applying Nevada law, upheld the casino’s right to exclude card counters. Confining the businesses with a duty to serve to innkeepers and common carriers, it observed that “the relationship [between the casino and Uston] was not one of innkeeper and patron, but rather one of casino owner and prospective gambler. The policies upon which the innkeeper’s special common law duties rested are not present in such a relationship.” Uston v. Airport Casino, Inc., 564 F.2d 1216, 1217 (9th Cir. 1977).

The leading case affirming the majority rule is Madden v. Queens County Jockey Club, Inc., 72 N.E.2d 697 (N.Y. 1947). In that case, the defendant barred the plaintiff “Coley” Madden from attending races at its racetrack on the mistaken belief that he was “Owney” Madden, a well-known bookmaker. Plaintiff sued the racetrack, claiming that he had a right “as a citizen and a taxpayer — upon paying the required admission price — to enter the race course and patronize the pari-mutuel betting there conducted.” Id. at 698. The court concluded that places of amusement and resort enjoyed “an absolute power to serve whom they pleased.” Id. Although New York’s Civil Rights Law prohibited discrimination on account of race, creed, or national origin, because Coley Madden was not excluded for any of these reasons he had no right of access, and the defendant did not need to explain why it excluded him.

3. Policy. The court in Uston gave a series of policy arguments for extending the right of access to all businesses open to the public rather than limiting this obligation to innkeepers and common carriers. What policies could justify the majority rule, imposing a duty to serve the public on innkeepers and common carriers but granting most businesses a broad right to exclude?

Three justifications have traditionally been offered for the special obligations on innkeepers and common carriers. First, inns and common carriers were more likely
to be monopolies than other businesses, so denial of service was tantamount to denying the ability to travel or to find a place to sleep away from home. Second, these businesses provided necessities whose denial would place individuals at risk from the elements or bandits on the highway. Third, innkeepers and common carriers hold themselves out as ready to serve the public and the public relies on this representation. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. Rev. 1283, 1305-1331 (1996). Do these rationales distinguish innkeepers and common carriers from other businesses, such as retail stores?

In *Brooks v. Chicago Downs Association, Inc.*, 791 F.2d 512, 517, 518-519 (7th Cir. 1986), the Seventh Circuit Court of Appeals explained the basis for the modern doctrine as follows:

> [P]roprietors of amusement facilities, whose very survival depends on bringing the public into their place of amusement, are reasonable people who usually do not exclude their customers unless they have a reason to do so. What the proprietor of a race track does not want to have to do is prove or explain that his reason for exclusion is a just reason. He doesn’t want to be liable to [an excluded patron] solely because he mistakenly believed he was a mobster. The proprietor wants to be able to keep someone off his private property even if they only look like a mobster. As long as the proprietor is not excluding the mobster look-alike because of his national origin (or because of race, color, creed, or sex), then the common law, and the law of Illinois, allows him to do just that.

> [I]t is arguably unfair to allow a place of amusement to exclude for any reason or no reason, and to be free of accountability, except in cases of obvious discrimination. In this case, the general public is not only invited but, through advertising, is encouraged to come to the race track and wager on the races’ outcome. But the common law allows the race track to exclude patrons, no matter if they come from near or far, or in reasonable reliance on representations of accessibility. We may ultimately believe that market forces would preclude any outrageous excesses — such as excluding anyone who has blond hair, or (like the plaintiffs) who is from Pennsylvania, or (even more outrageous) who has $250,000 to spend in one day of betting. But the premise of the consumer protection laws [is] that the reality of an imperfect market allows numerous consumer depredations. Excluding a patron simply because he is named Adam Smith arguably offends the very precepts of equality and fair dealing expressed in everything from the antitrust statutes to the Illinois Consumer Fraud and Deceptive Business Practices Act.

> But the market here is not so demonstrably imperfect that there is a monopoly or any allegation of consumer fraud. Consequently, there is no such explicit legislative directive in the context of patrons attending horse races in Illinois — so the common law rule, relic though it may be still controls.

> Does this argument from competition distinguish innkeepers and common carriers from other businesses in the modern economy? If not, can you imagine a better distinction? If there is no reasonable distinction between those businesses with a duty to serve the public and those that have no such duty, what should the rule be? Should businesses have a duty to serve the public without unjust discrimination, or should

15. As the New Jersey Supreme Court noted in *Uston*, the rise of the American common law right to exclude without cause alarmingly corresponds to the fall of the old segregation laws....
they have an absolute right to exclude? Do proprietors in a competitive market have an incentive to act on the dominant prejudices of the majority? Cf. Joel Waldfogel, *The Tyranny of the Market* (2007) (arguing businesses with high fixed costs will—rationally—target their production at majority preferences). What factors would a hypothetical proprietor seeking to exclude “mobsters” employ when deciding whether a potential customer “look[s] like a mobster” (to use the Seventh Circuit’s example in *Brooks*)? If the proprietor does rely on national origin (*e.g.*, the customer “looks Italian”), what effect (if any) does recognizing a right to exclude without having to offer reasons have on the ability of the customer to prove that he was the victim of unlawful discrimination?

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

I was enraged. At that moment I literally wanted to break all of the windows in the store and take lots of sweaters for my mother. In the flicker of his judgmental grey eyes, that sales child had reduced my brightly sentimental, joy-to-the-world, pre-Christmas spree to a shambles. He had snuffed my sense of humanitarian catholicity, and there was nothing I could do to snuff his, without simply making a spectacle of myself.

I am still struck by the structure of power that drove me into such a blizzard of rage. There was almost nothing I could do, short of physically intruding upon him, that would humiliate him the way he humiliated me. No words, no gestures, no prejudices of my own would make a bit of difference to him. His refusal to let me into the store was an outward manifestation of his never having let someone like me into the realm of his reality. He had no connection, no compassion, no remorse, no reference to me, and no desire to acknowledge me even at the estranged level of arm’s length transactor. He saw me only as one who would take his money and therefore could not conceive that I was there to give him money.

The violence of my desire to have burst into that store is probably quite apparent to the reader. I wonder if the violence and the exclusionary hatred are equally apparent in the repeated public urging that blacks put themselves in the shoes of white store owners, and that, in effect, blacks look into the mirror of frightened white faces to the reality of their undesirability; and that then blacks would “just as surely conclude that [they] would not let [themselves] in under similar circumstances.”

*Id.* at 129. Is the use of buzzers consistent with the New Jersey Supreme Court’s decision in *Uston*?

Consider Walter E. Williams’s defense of the practice of store owners’ racial profiling of customers:
Imagine you are challenged to a basketball game and must select five out of 20 people who appear to be equal in every respect except race and sex. There are five black and five white females, five black and five white males. You have no information about their basketball proficiency. There is a million-dollar prize for the contest. How would you choose a team? If you thought basketball skills were randomly distributed by race and sex, you would randomly select. Most people would perceive a strong associative relationship between basketball skills on the one hand, and race and sex on the other. Most would confine their choice to males, and their choice would be dominated by black males.

Can we say such a person is a sexist/racist? An alternative answer is that he is behaving like an intelligent Bayesian (Sir Thomas Bayes, the father of statistics). Inexpensively obtained information about race and sex is a proxy for information that costs more to obtain, namely, basketball proficiency.

There is a large class of human behavior that generally falls into the same testing procedures. Doctors can predict the probability of hypertension by knowing race, and osteoporosis by knowing sex. A white jeweler who does not open his door to young black males cannot be labeled a racist any more than a black taxi driver who refuses to pick up young black males at night. Black females and white females and white males commit holdups, but in this world of imperfect information cab drivers and jewelers play the odds. To ask them to behave differently is to disarm them.

Walter E. Williams, *The Intelligent Bayesian*, The New Republic, Nov. 10, 1986, at 18. Is there a principled difference between considering race in choosing a basketball team and using race in deciding who to admit to a store or who to search?

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

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

To legislatures and courts, rigid rules often look good at the planning stage. When an actual dispute arises, however, rigid rules often bring unanticipated, and substantial, injustice. Time and again, confronted with an actual conflict in which the application of the rigid rule seems unfair, courts have shown themselves to be unwilling to mechanically apply the rule. These courts often adjust relationships in ways that more closely approach the judges’ intuitions about the just results in particular cases. They often do so by introducing standards, such as reasonableness, that increase flexibility.
Some scholars argue that the law of property cycles back and forth between rules and standards as judges and (especially) legislatures periodically try to clarify the law, which judges then muddy up with standards and exceptions. See Rose, supra. Others see in the modern law of property a steady shift from rules to standards as society becomes more complex and property rights more frequently butt up against each other. See Joseph William Singer, The Rule of Reason in Property Law, 46 U.C. Davis L. Rev. 1375 (2013). Is it possible to generalize about when rules (or standards) are likely to be appropriate? See, e.g., Felix Cohen, Dialogue on Private Property, 9 Rutgers L. Rev. 357 (1954) (suggesting that clear rules are likely to arise in property law when numerous normative considerations line up in favor of a particular outcome).

Problems

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

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

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

§1.3 Trespass Remedies

Injunctions are available to remedy a trespass where the trespass is continuous in nature. See, e.g., Cowles v. Shaw, 2 Clarke 496 (Iowa 1856). A trespass is continuing where someone is personally present on the land of another or where they leave some object (such as a structure) on the land. Sometimes, courts will grant injunctions for trespasses that, while not strictly continuous, are so repetitious that it would put an unfair burden on the landowner to require her to bring repeated lawsuits. See, e.g., Planned Parenthood of Mid-Iowa v. Maki, 478 N.W.2d 637, 639-640 (Iowa 1991); Therios v. Phillips, 256 N.W.2d 852 (Minn. 1977). The law occasionally departs from the presumption in favor of injunctive relief, even for continuing trespasses. See Chapter 5, §4.1. What if the trespass alters the land in some way? How should the law make the injured landowner whole? What happens when a trespass does not alter the land, is a one-off event, and is not likely to be repeated? Is the owner without a remedy? Consider the following cases.

Glavin v. Eckman


Joseph Grasso, J.

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

After trial on Glavin’s claim against the Eckmans and Fragosa for the wrongful cutting of his trees, see Mass. Gen. Laws ch. 242, §7,\(^{17}\) a jury rendered a special verdict in favor of Glavin. The jury found that (1) Fragosa wilfully cut trees on Glavin’s land; (2) Fragosa did not have good reason to believe that he was lawfully authorized to cut the trees on Glavin’s land; (3) the Eckmans wilfully cut trees on Glavin’s land by directing Fragosa to do so; and (4) the Eckmans did not have good reason to believe that they were lawfully authorized to cut the trees on Glavin’s land. The jury assessed $30,000 in damages as “the reasonable cost of restoring the property as nearly as reasonably

\(^{17}\) Mass. Gen. Laws ch. 242, §7 provides:

A person who without license wilfully cuts down, carries away, girdles or otherwise destroys trees, timber, wood or underwood on the land of another shall be liable to the owner in tort for three times the amount of the damages assessed therefor; but if it is found that the defendant had good reason to believe that the land on which the trespass was committed was his own or that he was otherwise lawfully authorized to do the acts complained of, he shall be liable for single damages only.
possible to its original condition.” The judge trebled those damages as required by
the statute.

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

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

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

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

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

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

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

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

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

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

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

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

When applying a restoration cost measure of damages, a test of reasonableness is imposed. “Not only must the cost of replacement or reconstruction be reasonable, the replacement or reconstruction itself must be reasonably necessary in light of the damage inflicted by a particular defendant.” *Id.* Here, the evidence supported the inference that restoration of Glavin’s lot to its predamaged condition was reasonable and reasonably necessary in light of the damage inflicted by the defendants. The cutting down of ten mature oak trees was not a slight injury, and was wilfully undertaken by the defendants to achieve a previously denied view from their property to the ocean. The cost of restoring the lot, while substantial, was not a “very large and disproportionate expense to relieve from the consequences of a slight injury.” See *id.* Glavin’s use of his property was neither uneconomical nor improper. Likewise, restoration of the property to its predamaged condition was neither uneconomical nor improper.
We also cannot say as matter of law that the jury erred in concluding that because direct restoration of the affected area was either physically impossible or so disproportionately expensive that it would not be reasonable to undertake such a remedy, $30,000 was “the reasonable cost of restoring the property as nearly as reasonably possible to its original condition” (emphasis omitted). Id. The jury’s award was a reasonable determination from the evidence presented. As discussed further below, this was a case where making an actual restoration would be uneconomical. The assessment of damages is traditionally a factual undertaking appropriate for determination by a jury as the representative voice of the community. Likewise, the jury are equipped to evaluate and eliminate any claimed damages that appear excessive. So long as the damages assessed represent a reasoned weighing of the evidence by the jury, fairly compensate the plaintiff for the loss incurred, and do not penalize the wrongdoer, the object of compensatory damages is accomplished. Given the unique value of the trees to Glavin, their integral role in his intended landscaping project, and the expert evidence as to the restoration costs, the jury’s award cannot be said to be unreasonable.

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

5. Trebling damages under G.L. ch. 242, §7. The defendants argue that even were we to conclude that the damages awarded by the jury were reasonable, when trebled under Mass. Gen. Laws ch. 242, §7, such damages are unreasonable. As noted previously, the restoration cost damages awarded by the jury fall within the range of what is reasonable. The trebling of those damages “ineluctably flows from the plain language of the statute,” Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc., 864 N.E.2d 518, 540 (Mass. Ct. App. 2007), and does not render the damages unreasonable. The mandated trebling of damages represents a legislative judgment as to the punitive measure required to dissuade wrongdoers. A court should not interfere in that determination.

Jacque v. Steenberg Homes, Inc.
563 N.W.2d 154 (Wis. 1997)

William A. Bablitch, J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§25 In sum, the individual has a strong interest in excluding trespassers from his or her land. Although only nominal damages were awarded to the Jacques, Steenberg’s intentional trespass caused actual harm. We turn next to society’s interest in protecting private property from the intentional trespasser.
Society has an interest in punishing and deterring intentional trespassers beyond that of protecting the interests of the individual landowner. Society has an interest in preserving the integrity of the legal system. Private landowners should feel confident that wrongdoers who trespass upon their land will be appropriately punished. When landowners have confidence in the legal system, they are less likely to resort to “self-help” remedies.

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

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

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

Notes and Questions

1. How robust is the right to exclude? The Jacques said that the reason they were reluctant to give Steenberg Homes the right to cross their land was because they had lost land to adverse possession and wanted to guard their property rights carefully. Adverse possession is a doctrine that allows a longtime occupant of someone else’s land to obtain title to it; the usual case is a border dispute in which both parties mistakenly place the boundary in a place different from that noted in the deeds to their parcels. See Chapter 5, §4.2. But permission is a defense to an adverse possession claim; the Jacques were in little danger of losing any of their property rights by this neighborly gesture. Should their reasons for refusing access matter? Suppose the request was to drive the mobile home over a road on the Jacques’ land, causing no damage to it, and the cost to the neighbor of using a different route was $15,000 because a structure on the land had to be removed to bring the mobile home in. Should
the Jacques have an obligation to allow access? Or does their status as owners give them the absolute power to exclude others from their land regardless of the reason and regardless of the neighbor’s need?

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

### §1.4 Hohfeldian Terminology

What do we mean when we talk about “property rights”? In a highly influential article published in 1913, Professor Wesley Hohfeld identified eight basic kinds of legal rights: four primary legal entitlements (rights, privileges, powers, and immunities) and their opposites (no-rights, duties, disabilities, and liabilities). Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913). **Rights** are claims, enforceable by state power, that others act in a certain manner in relation to the rightholder. **Privileges** are permissions to act in a certain manner without being liable for damages to others and without others being able to summon state power to prevent those acts. **Powers** are state-enforced abilities to change legal entitlements held by oneself or others, and **immunities** are security from having one’s own entitlements changed by others.

The four negations or opposites of the primary legal entitlements refer to the absence of such entitlements. One has **no-right** if one does not have the power to summon the aid of the state to alter or control the behavior of others. **Duties** refer to the absence of permission to act in a certain manner. **Disabilities** are the absence of power to alter legal entitlements, and **liabilities** refer to the absence of immunity from having one’s own entitlements changed by others.

The eight terms are arranged in two tables of correlatives and opposites that structure the internal relationships among the different fundamental legal rights.

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<th><strong>Jural Correlatives</strong></th>
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Hohfeld’s concept of **opposites** conveys the message that one must have one or the other but not both of the two opposites. For example, with regard to any class of acts, one must either have a right that others act in a certain manner or no right. Similarly, one must have either a privilege to do certain acts or a duty not to do them.

The concept of **correlatives** is harder to grasp. Legal rights, according to Hohfeld, are not merely advantages conferred by the state on individuals. Any time the state confers an advantage on some citizen, it necessarily changes the situation of others.
Legal rights are not simply entitlements but jural relations among people. The concept of correlatives expresses legal relations from the point of view of two parties, though they can be scaled up to incorporate larger groups. “[I]f X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.” If A has a duty toward B, then B has a right against A. The expressions are equivalent. Similarly, privileges are the correlatives of no-rights. “[W]hereas 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; or in equivalent words, X does not have a duty to stay off.” If A has no duty toward B, A has a privilege to act and B has no right against A. Thus, if A has the privilege to do certain acts or to refrain from doing those acts, B is vulnerable to the effects of A’s actions. B cannot summon the aid of the state to prevent A from acting in such a manner no matter how A’s actions affect B’s interests.

The concepts identified and systematized by Wesley Hohfeld are useful in analyzing property rights (and other legal rights) for two reasons. First, they serve as a reminder that legal rights entail relations among persons. A’s right not to be harmed in a certain way implies duties on others not to harm A in that way. A’s privilege to act implies that others have no right to prevent A from acting and therefore may be vulnerable to negative effects of A’s actions, so long as A keeps her conduct within the scope of her privilege. In thinking about legal rights, it is important to identify (a) who has the entitlement, (b) against which specific individuals does the entitlement run, and (c) what specific acts are encompassed by the entitlement.

Second, Hohfeld’s concepts help disentangle bundles of rights into their constituent parts. For example, the owner of a restaurant has the privilege of entering the property; non-owners have no right to prevent the owner from so doing. Does the owner’s privilege to enter also mean that the owner has the right to exclude non-owners from the property? Yes and no. We have seen that the owner has the right to exclude patrons for certain reasons. But (as we will see in the next section) federal civil rights statutes provide that the owner has no right to exclude patrons on account of their race; on the contrary, such persons have a privilege to enter the restaurant and be served. The owner’s privilege to enter does not necessarily mean that others have a duty not to enter. Both the owner and the patron have a privilege to enter the restaurant — the owner to run the place and the patron under an implicit invitation to obtain the service the owner is offering.

§2 DISCRIMINATION AND ACCESS TO “PLACES OF PUBLIC ACCOMMODATION”

§2.1 The Antidiscrimination Principle

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

A. Federal Antidiscrimination Law

Civil Rights Act of 1964, Title II
42 U.S.C. §§2000a, 2000a-6

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

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

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

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

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

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

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

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

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

(b) . . . Nothing in this subchapter shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this subchapter, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.
§2 Discrimination and Access to “Places of Public Accommodation”

Civil Rights Act of 1866

§1981. Equal Rights Under the Law

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

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

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

§1982. Property Rights of Citizens

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

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Notes and Questions

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

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

2. The Civil Rights Act of 1866. Unlike the 1964 act, the Civil Rights Act of 1866, 42 U.S.C. §§1981 to 1982, regulates race discrimination only. Also, unlike the 1964 public accommodations law, damages are available for violations of the Civil Rights Act of 1866. Although §1981 was already in effect at the time the Civil Rights Act of 1964 was passed, it had not yet been interpreted by the courts to regulate private conduct, such as the refusal by a restaurant owner to serve a patron. Rather, it was thought in 1964 that §1981 merely regulated state conduct, prohibiting (for example) state statutes that deprived black citizens of the capacity to enter binding contracts. In important opinions in 1968 and 1976, the Supreme Court held that the Civil Rights Act of 1866 applied to private conduct as well as to legislation passed by state legislatures. Jones v. Alfred Mayer Co., 392 U.S. 409 (1968) (holding that §1982 prohibits discrimination in the market for selling or leasing real property); Runyon v. McCrary, 427 U.S. 160 (1976) (holding that §1981 prohibits commercially operated, nonreligious schools from excluding qualified children solely on the basis of race). The Supreme Court reaffirmed the applicability of the Civil Rights Act of 1866 to private conduct in Patterson v. McLean Credit Union, 491 U.S. 164 (1989). The Civil Rights Act of 1991, Pub. L. No. 102-166, tit. I, §101, 105 Stat. 1071 (1991), amended §1981 for the first time since 1870. This act approved the Supreme Court’s interpretation of §1981 by providing that §1981 reaches private conduct, but the act also clarified §1981 by stating that it regulates the terms and conditions of contracts and not just the “right to make and enforce” contracts. As you will see in the notes that follow, courts continue to struggle with questions concerning the proper relationship between the Civil Rights Act of 1866 and the Civil Rights Act of 1964.
3. What is a “place of public accommodation”? Is the list of covered establishments in the 1964 public accommodations law exhaustive or merely illustrative? See Denny v. Elizabeth Arden Salons, Inc., 456 F.3d 427 (4th Cir. 2006) (holding that the list in §2000a is exhaustive). Accord, Rhone v. Loomis, 77 N.W. 31 (Minn. 1898) (holding that a state statute prohibiting discrimination in inns, taverns, restaurants, and places of “refreshment” did not prohibit a “saloon” from excluding an African American customer). But see Sellers v. Philip’s Barber Shop, 217 A.2d 121 (N.J. 1966) (interpreting a state public accommodations statute providing that public accommodations “shall include” a long list of business establishments as covering barber shops even though they were not listed) and In re Cox, 474 P.2d 992 (Cal. 1970) (list of types of discrimination is illustrative).

Some courts have recently held that the Civil Rights Act of 1866 regulates establishments that are not listed in the 1964 act, such as retail stores and service establishments, and that such stores may be liable for damages if they deny the right to contract under §1981 or the right to purchase property under §1982. See Denny v. Elizabeth Arden Salons, Inc., 456 F.3d 427 (4th Cir. 2006) (§1981 would be violated if a salon refused service because it did not “do black people’s hair”); Perry v. Command Performance, 913 F.2d 99 (3d Cir. 1990) (§1981 may have been violated when a salon refused to cut the hair of an African American woman); Watson v. Fraternal Order of Eagles, 915 F.2d 235, 240 (6th Cir. 1990) (noting that a “department store . . . is not directly covered by Title II but would be amenable to suit under §1981”); Washington v. Duty Free Shoppers, Ltd., 710 F. Supp. 1288 (N.D. Cal. 1988) (§1981 prohibits retail store from refusing to serve customers because of race).

The Supreme Court has never addressed the question of whether the Civil Rights Act of 1866 regulates the conduct of public accommodations such as restaurants, innkeepers, or retail stores. Although the refusal to serve a patron because of that person’s race arguably comes within the language of both §1981 and §1982, it is important to know that a public accommodations law, much like the 1964 act, was passed in 1875. After doubts were expressed about the constitutionality of the Civil Rights Act of 1866, it was re-passed in 1870 after passage of the fourteenth amendment in 1868 with its prohibition against state deprivations of “equal protection of the laws.” U.S. Const. art. XIV. Five years later, Congress passed the Public Accommodations Act of 1875, 18 Stat. 335, ch. 114, clearly regulating private actors. The Supreme Court struck down the Public Accommodations Act as unconstitutional in The Civil Rights Cases, 109 U.S. 3 (1883), on the ground that the fourteenth amendment authorized Congress to regulate state action but not private action by owners of private property, such as inns and restaurants. If the Civil Rights Act of 1866 regulates the conduct of public accommodations, wouldn’t this have made the 1875 statute superfluous and unnecessary? If §1981 or §1982 regulates public accommodations, why did Congress pass the 1875 statute?

Because of the holding of The Civil Rights Cases that the fourteenth amendment authorizes regulation of state action but not private action, Congress passed the Civil Rights Act of 1964 pursuant to the commerce clause, which authorizes Congress to regulate “interstate commerce.” See Heart of Atlanta Motel, Inc. v. United States, 379
U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964) (both upholding the act as a valid exercise of Congress’s power to regulate interstate commerce). Remember that the Civil Rights Act of 1866 was not interpreted to apply to private conduct until 1968. But what private conduct is regulated by §§1981 and 1982? Can you think of a reason §§1981 and 1982 should be interpreted to regulate public accommodations when Congress passed a more specific statute regulating them in 1964 — a statute that clearly omits any provision for damages?

4. Racially discriminatory surveillance. The courts appear to agree that the “right to make contracts” under §1981 includes the right to enter a store or other service provider. Causey v. Sewell Cadillac-Chevrolet, Inc., 394 F.3d 285 (5th Cir. 2004); Christian v. Wal-Mart Stores, Inc., 252 F.3d 862 (6th Cir. 2001); Ackaa v. Tommy Hilfiger, 1998 WL 136522 (E.D. Pa. 1998). Can you think of a way to interpret the language or purpose of §1981 in a way that would not view it as creating an obligation to allow individuals to enter retail stores to purchase goods or services? Assuming §1981 does require stores to allow individuals to enter without regard to race, does §1981 prohibit stores from discriminatorily following African American, Latino, or American Indian patrons around the store, searching them, and subjecting them to insults?

A minority of courts hold that such conduct violates the right to contract under §1981 and/or the right to purchase personal property under §1982. Chapman v. Higbee, 319 F.3d 825 (6th Cir. 2003) (equal benefits clause in §1981 gives right to equal treatment in seeking contract); Phillip v. University of Rochester, 316 F.3d 291 (2d Cir. 2003) (equal benefits clause of §1981 applies to private university whose security guards detained African American students but not their white friends in library lobby, calling police who arrested them and kept them detained overnight); McCaleb v. Pizza Hut of America, Inc., 28 F. Supp. 2d 1043 (N.D. Ill. 1998) (family denied “full benefits” of the contract when denied utensils and harassed and threatened while at restaurant); Nwakpuda v. Falley’s, Inc., 14 F. Supp. 2d 1213 (D. Kan. 1998) (§1981 claim for store patron who was wrongfully detained because he was thought to be individual who had previously robbed the store); Turner v. Wong, 832 A.2d 340 (N.J. Super. Ct. App. Div. 2003).

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

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

In Watson v. Fraternal Order of Eagles, 915 F.2d 235 (6th Cir. 1990), a private club was held to have violated §1981 when it refused to serve drinks to African American guests at a party held at the club. Because defendant was clearly a private club under 42 U.S.C. §2000a(e), its actions were not covered by the 1964 act. Nonetheless, Judge Merritt held that, although the defendant was immune from liability under that act, the plaintiff could bring an independent claim for relief under §1981. He noted that later, more specific statutes generally limit the interpretation of earlier, more general ones. Nonetheless, the earlier, broader statute continues in force if the legislature that passed the later act intended the general act to retain independent force.

However, in Cornelius v. Benevolent Protective Order of the Elks, 382 F. Supp. 1182 (D. Conn. 1974), Judge Blumenfeld held that an irrevocable conflict between a statute that authorizes conduct and one that prohibits it must be adjudicated by applying the later act. Thus §1981 could not be applied to a private club. Judge Blumenfeld argued that “the provisions of one statute which specifically focus on a particular problem will always, in the absence of express contrary legislative intent, be held to prevail over provisions of a different statute more general in its coverage.” Id. at 1201. Moreover, when Congress passed the 1964 act, it believed it was enacting the first federal legislation prohibiting private discrimination in public accommodations. “Prior to Jones v. Mayer, 392 U.S. 409 (1968), sections 1981 and 1982 were thought to apply only to ‘state action.’ . . . Thus, the absence of express language in the 1964 Act limiting the 1866 Act is hardly evidence of an intention not to have that effect.” Id. Accord, Durham v. Red Lake Fishing & Hunting Club, Inc., 666 F. Supp. 954 (W.D. Tex. 1987). Should Congress’s intent in 1964 with respect to the reach of Title II have decisive bearing on the proper interpretation of the 1866 law? Can you think of an argument that it should? That it should not?

6. Common carriers. Common carriers engaged in interstate commerce are regulated by the Interstate Commerce Act and are prohibited from all forms of unreasonable discrimination, not just discrimination based on race, religion, and national origin. 49 U.S.C. §§10741(b), 11101(a).

7. Unequal treatment and exclusion through “vibes.” Civil rights laws require more than bare admission. They protect the rights of protected groups to equal
treatment once admitted. A recent opinion of the Massachusetts Commission Against Discrimination, for example, found that a restaurant owner violated Massachusetts antidiscrimination law by requiring a black customer (who turned out to be an undercover police officer) to pay before receiving his food while not demanding payment in advance from the officer’s white colleagues (who were also undercover). See Massachusetts Commission Against Discrimination v. Capitol Coffee House, No. 05-BPA-03196, Apr. 26, 2013.

Lior Strahilevitz has observed that owners often use indirect strategies to deter certain classes of people from even trying to enter an establishment. He describes owners who create “exclusionary vibes” (making people feel unwelcome by creating an environment unlikely to appeal to them) and “exclusionary amenities” (making people less likely to seek entry by bundling a product—say, housing in a particular community—with a product that members of a particular racial group are unlikely to want to consume—e.g., mandatory membership in a community golf club). See Lior Jacob Strahilevitz, Information Asymmetries and the Rights to Exclude, 104 Mich. L. Rev. 1835, 1843 (2006); Lior Jacob Strahilevitz, Exclusionary Amenities in Residential Communities, 92 Va. L. Rev. 437 (2006). One bar in New York City, for example, has been investigated by the New York Human Rights Commission for enforcing a “no baggy jeans, no bling” dress code. See Douglas Quenqua, Dress Codes in New York Clubs: Will This Get Me In?, N.Y. Times, July 27, 2011, at E-1. Would it violate the federal public accommodations law, 42 U.S.C. §2000a, to call a sports arena Redskins Stadium? See Note, A Public Accommodations Challenge to the Use of Indian Team Names and Mascots in Professional Sports, 112 Harv. L. Rev. 904 (1999) (arguing that it would). If it would violate the statute, does the first amendment’s guarantee of free speech override the statute? Should the court hold that a statute that prohibits an owner from using the name Redskins is unconstitutional? Compare Urban League of Rhode Island v. Sambo’s of Rhode Island, Inc., File Nos. 79 PRA 074-06/06, 79 ERA 073-06/06, EEOC No. 011790461 (R.I. Commn. for Human Rights 1981) (restaurant violated state public accommodations law by using racially offensive name), with Sambo’s Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686 (6th Cir. 1981) (holding that the first amendment’s free speech clause protected the right to use the name Sambo’s). What about a Ku Klux Klan themed restaurant with a white hooded mannequin inside and signs in front that make frequent use of racial epithets? See Larry Keller, What’s on the Menu at Georgia Eatery? A Racist Slur, Again, Oct. 14, 2009, https://www.splcenter.org/hatewatch/2009/10/14/whats-menu-georgia-eatery-racist-slur-again (last visited July 6, 2016).

Problems

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

Definition of a “place of public accommodation” under §2000a(b), or is it a “private establishment not in fact open to the public” under §2000a(e)? Are retail stores “places of public accommodation” as defined in §2000a(b)? If retail stores are generally covered by §2000a(b), do they “serve the public” if they install a buzzer and serve selected customers who show up on their doorsteps, or are they “not in fact open to the public” and thus exempt from the statute under §2000a(e)?

2. National origin discrimination. A night club in Boston that serves liquor requires all patrons to show a driver’s license to prove they are over 21. The club refuses to allow a law student in when he shows his Puerto Rican driver’s license on the (incorrect) ground that it is not a U.S. license. Has the club engaged in national origin discrimination in violation of the Civil Rights Act of 1964? What about a restaurant that refuses to serve patrons who cannot order in English?

B. State and Local Laws

New York Executive Law, Art. 15

§292 Definitions

9. The term “place of public accommodation, resort or amusement” shall include, except as hereinafter specified, all places included in the meaning of such terms as: inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants, or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectionaries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores and establishments dealing with goods or services of any kind, dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments, barber shops, beauty parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls and public elevators of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants. Such term shall not include . . . any institution, club or place of accommodation which proves that it is in its nature distinctly private. In no event shall an institution, club or place of accommodation be considered in its nature distinctly private if it has more than one hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of a nonmember for the furtherance of trade or business.
§296 Unlawful Discriminatory Practices

2. (a) It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, including the extension of credit, or, directly or indirectly, to publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status, or that the patronage or custom thereat of any person of or purporting to be of any particular race, creed, color, national origin, sexual orientation, military status, sex or marital status, or having a disability is unwelcome, objectionable or not acceptable, desired or solicited.

Notes and Questions

1. Relation between federal and state public accommodations laws. The federal public accommodations law was passed in 1964 as Title II of the Civil Rights Act. The statute applies across the country and, under the supremacy clause of the Constitution, prevails over any contrary state law. Most states have also adopted public accommodations laws that apply within their borders. State statutes that are inconsistent with federal statutes are “preempted” by federal law and are unenforceable; state statutes not inconsistent with federal law are enforceable. State statutes and constitutional provisions may therefore go further than federal law in protecting individual rights. Is Article 15 of the New York Executive Law more protective than Title II?

For example, many state and local statutes prohibit discrimination in places of public accommodation on account of sex and sexual orientation; the federal statute, in contrast, does not prohibit discrimination in access to public places on either ground. State statutes may also be worded differently from the federal statute; they may therefore apply to more kinds of property or to more types of discriminatory acts than does federal law. Even when the wording in state and federal statutes is identical, the state statute may be interpreted by a state court to grant more protection against discrimination than does federal law. Because statutory interpretation involves interpreting the intent of the legislature, a state court could conclude from the context surrounding passage of the state law that the legislature intended to grant greater protection than did Congress when it passed the federal statute.

19. Article VI of the Constitution provides that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

In Dale v. Boy Scouts of America, the New Jersey Supreme Court considered whether the Boy Scouts of America had violated New Jersey’s law by excluding James Dale solely because of his sexuality. Dale was an “exemplary scout,” earning over 25 merit badges, being honored as an Eagle Scout, then serving as an Assistant Scoutmaster. When he went away to college, he first acknowledged to himself and his friends and family that he was gay. After a local paper interviewed him as the “co-president of the Rutgers University Lesbian/Gay Alliance,” Dale received a letter from the Boy Scouts Executive Office revoking his membership and asking him to “sever any relations [he] may have with the Boy Scouts of America.” He was later told that the Boy Scouts did not “admit avowed homosexuals to membership.”

Dale challenged the exclusion under New Jersey’s Law Against Discrimination (LAD), which provides that “all persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, . . . without discrimination because of . . . affectional or sexual orientation.” N.J. Stat. §10:5-4. The New Jersey Supreme Court found that “place” was a “term of convenience, not of limitation.” 734 A.2d at 1209. The court reasoned that any ambiguities should be decided in favor of broad application because the statute itself provided that it should be “liberally construed.” Id. at 1208. Considering factors such as the Boy Scouts’ broad solicitations to the public, its close relationships with federal government, schools, and other public accommodations, as well as its similarity to other organizations recognized as public accommodations, the court found that the organization was covered under the statute. The court also rejected the organization’s claim that it was excluded as a “bona fide club, or place of accommodation, which is in its nature distinctly private,” N.J. Stat. §10:5-5L, noting that it had over four million boys and one million adults as members at the time. The court then found that the Boys Scouts of America had denied Dale the privilege and advantage of being an Assistant Scoutmaster because of his sexuality, and had thereby violated the state law.

The U.S. Supreme Court reversed Dale in a 5-4 decision on the ground that prohibiting the Boy Scouts from excluding gay Scouts violated the first amendment’s protections for freedom of association. Boy Scouts of America v. Dale, 530 U.S. 640 (2000). Writing for the Court, Chief Justice Rehnquist noted that the Boy Scouts “engaged in instilling its system of values in young people” and “that homosexual conduct is
inconsistent with the values it seeks to instill.” *Id.* at 643. “The forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.” *Id.* at 648. Although the Supreme Court of New Jersey had concluded that “New Jersey has a compelling interest in eliminating ‘the destructive consequences of discrimination from our society,’ ” the Supreme Court found that the “state interests embodied in New Jersey’s public accommodations law do not justify such a severe intrusion on the Boy Scouts’ rights to freedom of expressive association.” *Id.* at 647, 659.

In dissent, Justice Stevens questioned whether instilling the wrongfulness of homosexuality was really part of the Scouts’ expressive purpose. He noted that nothing in the Scout Oath or Law “says the slightest thing about homosexuality” and Scoutmasters are directed “not [to] undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life. The reasons are that it is not construed to be Scouting’s proper area, and that you are probably not well qualified to do this.” *Id.* at 669. Although the Boy Scouts issued policy statements on the question, nothing on homosexuality was placed in the Boy Scout or Scoutmaster Handbook. “[N]o lessons were imparted to Scouts; no change was made to BSA’s policy on limiting discussion of sexual matters; and no effort was made to restrict acceptable religious affiliations to those that condemn homosexuality. In short, there is no evidence that this view was part of any collective effort to foster beliefs about homosexuality.” *Id.* at 675. He criticized the majority for giving deference to the Boy Scouts’ assertions regarding the nature of its expression. “To prevail in asserting a right of expressive association as a defense to a charge of violating an antidiscrimination law, the organization must at least show it has adopted and advocated an unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude.” *Id.* at 687.

3. **Evaluating the revised Boy Scouts of America policy under Article 15 of the New York Executive Law.** In 2013, the Boy Scouts of America adopted a new policy admitting gay scouts but continuing to bar gay adults from staff and leadership positions. In the resolution adopting its new policy, the Boy Scouts made the following statement: “[T]he Boy Scouts of America does not have an agenda on the matter of sexual orientation, and resolving this complex issue is not the role of the organization, nor may any member use Scouting to promote or advance any social or political position or agenda.” An Eagle Scout in New York turns 18 but is prohibited from becoming an Assistant Scoutmaster under the policy; he challenges it under Article 15 of the New York Executive Law, above. Should the New York courts find that the Boy Scouts are covered by the law? Would enforcing the New York law against the group violate its first amendment rights as articulated by the Supreme Court in *Dale*?

5. Public accommodations and same-sex weddings. In the wake of judicial decisions and legislative enactments recognizing same-sex marriage, the owners of some businesses that provide wedding-related services refused on religious grounds to extend their services to same-sex couples seeking to wed. In one New Mexico case, Vanessa Willock contacted the Elane Photography studio to determine whether it would be available to photograph her commitment ceremony to another woman. The owner of Elane Photography informed Willock that the studio would only photograph “traditional weddings.” Willock filed a complaint with the New Mexico Human Rights Commission, arguing that Elane Photography’s refusal to photograph same-sex commitment ceremonies discriminated against Willock on the basis of sexual orientation, in violation of New Mexico public accommodations law. New Mexico’s Human Rights Act prohibits discrimination on the basis of (among other categories) sexual orientation in any “public accommodation,” which the act defines as “any establishment that provides or offers its services, facilities, accommodations or goods to the public.” N.M. Stat. Ann. §28-1-2(H) (2007). Elane argued that it should not be treated a “place of public accommodation” within the meaning of New Mexico’s antidiscrimination law because of the expressive and artistic nature of the photographer’s services. By forcing the photographer to speak, Elane argued, New Mexico’s antidiscrimination laws violated Elane’s first amendment speech rights. Elane also argued that its policy did not discriminate on the basis of sexual orientation because the studio was willing to photograph gay and lesbian individuals in contexts other than same-sex weddings. The New Mexico courts rejected both of these arguments. See Elane Photography, L.L.C. v. Willock, 309 P.3d 53 (N.M. 2013).

Do you agree that businesses like photographers should not be treated as “public accommodations” for the purposes of civil rights statutes? If so, how much expression is necessary to remove an occupation from the “public accommodation” category? Would a florist qualify as sufficiently expressive? A baker? An invitation printer? If a baker refuses to decorate a bible-shaped cake with a message disapproving of homosexuality, does it discriminate against the Christian man who ordered the cake on the basis of his religion? If you were a lawyer for the baker, how might you distinguish the two cases?

In response to controversies like the Willock case, several states have enacted statutes that attempt to shield from liability religiously motivated businesses that refuse a service where the business owner believes that providing the service would constitute a substantial burden on her free exercise of religion. See, e.g., Ark. Acts of 2015, Act. 975; Ind. P.L. 3-2015, S.E.A. No. 101; Miss. Laws 2016, H.B. 1523. The laws take various forms. Some, such as the law in Arkansas, prohibit any state action that “substantially burden[s] a person’s right to exercise of religion,” with state action defined to include “the implementation or application any law,” a definition that includes state and local antidiscrimination laws. See, e.g., Ark. Acts of 2015, Act. 975. In contrast, the Mississippi law singles out views about same-sex marriage for special legal protection. See Miss. Laws 2016, H.B. 1523. As of the time of this printing, the Mississippi law has been struck down as unconstitutional. See Barber v. Bryant, ___ F. Supp. 3d ___, 2016 WL 3562647 (June 30, 2016).
Problems

1. A 300-person country club has a “balanced” membership policy with no criteria for admission except that the club seeks to maintain an even balance of Christians and non-Christians (primarily Jews, but also a few Muslims). A club member must sponsor a prospective member. Anyone wanting to become a member of the club must find one person in the club willing to invite him or her to join. Applications are marked according to whether the applicant is a Jew, a Christian, a Muslim, or the member of another faith. Nonmembers are allowed to dine at the club only if accompanied by members. Members pay for the drinks and meals consumed by themselves or their guests on a quarterly basis. A Jewish man seeks to become a member but cannot because there is a two-year waiting list for Jews seeking membership. The only spots currently open are earmarked for Christians. Does he have a legal claim under Title II? Under Article 15 of the New York Executive Law? See Mill River Club, Inc. v. New York State Division of Human Rights, 59 A.D.3d 549 (2d Dept. 2009) (finding a claim under New York law).

2. Restroom facilities for transgender persons. A restaurant has two, multiple occupancy bathrooms, one designated for men and one for women. A transgender woman attempts to enter the women’s bathroom, but the restaurant’s manager stops her, telling her that she must use the bathroom corresponding to her gender at birth. When she resists using the men’s room, the manager offers to let her use a single-occupancy bathroom normally reserved for restaurant staff. The restaurant is located in a town and state that (like federal law) do not treat sexual orientation or gender identity as protected categories under their antidiscrimination laws, but that requires “equal service” on the basis of “sex” in all “places of public accommodation,” a category that includes “restaurants.” The transgender patron files a complaint with the state’s human rights commission, alleging that the restaurant’s manager has violated the state’s human rights law. Has the restaurant violated the law? Could she have filed a federal claim as well?

§2.2 Discrimination Against Persons with Disabilities

The Americans with Disabilities Act (ADA), passed in 1990, and substantially amended in 2008, is one of the most important pieces of civil rights legislation approved by Congress since the Civil Rights Act of 1964. It differs in important respects from the prior civil rights laws. First, the broad diversity of disabilities it covers necessarily adds an enormous amount of complexity to the statute’s operation. Second, while the statute superficially resembles those earlier statutes by prohibiting discrimination on the basis of disability in both employment and public accommodations, it defines discrimination to include the failure to take affirmative steps to facilitate access by the disabled. See 28 C.F.R. §§36.101 to 36.608; 42 U.S.C. §12183, 28 C.F.R. §§36.301 to 36.406. What is required to comply with this mandate varies with the

circumstances, such as whether the facility was in existence at the time the statute went into effect or was built after its enactment. The Justice Department has promulgated regulations implementing the statute and clarifying the scope of the obligations imposed on businesses, including modification of physical premises, policies, and practices. See 28 C.F.R. §§36.301-36.311.

Americans with Disabilities Act of 1990,
Title III — Public Accommodations and Services Operated by Private Entities
42 U.S.C. §§12102, 12181-12183, 12187, 12201, 12210, 12211

§12102. Definition of Disability
As used in this chapter:
(1) Disability. — The term “disability” means, with respect to an individual —
   (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
   (B) a record of such an impairment; or
   (C) being regarded as having such an impairment (as described in paragraph (3)).
(2) Major life activities. —
   (A) In general. — For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
   (B) Major bodily functions. — For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
(3) Regarded as having such impairment. — For purposes of paragraph (1)(C):
   (A) An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.
   (B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

§12181. Definitions
(7) Public accommodation. — The following private entities are considered public accommodations for purposes of this title, if the operations of such entities affect commerce —
   (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire
and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

(9) *Readily achievable.* — The term “readily achievable” means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include —

(A) the nature and cost of the action needed under this chapter;

(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

§12182. **Prohibition of Discrimination by Public Accommodations**

(a) *General rule.* — No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) *Construction*
(1) General prohibition

(A) Activities

(i) Denial of participation. It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit. It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit. It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals. For purposes of clauses (i) through (iii) of this subparagraph, the term “individual or class of individuals” refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings. Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) Opportunity to participate. Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) Administrative methods. An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration —

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) Association. It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.
(2) Specific prohibitions

(A) Discrimination. — For purposes of subsection (a) of this section, discrimination includes —

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

(3) Specific construction

Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term “direct threat” means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

§12183. New Construction and Alterations in Public Accommodations and Commercial Facilities

(a) Application of term. Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes —
(1) a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter; and

(2) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

§12187. Exemptions for Private Clubs and Religious Organizations

The provisions of this subchapter shall not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000-a(e)) [42 U.S.C.A. §2000a et seq.] or to religious organizations or entities controlled by religious organizations, including places of worship.

§12201. Construction

(b) Relationship to other laws. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking [in] . . . places of public accommodation covered by . . . this chapter.

§12210. Illegal Use of Drugs

(a) In general. For purposes of this chapter, the term “individual with a disability” does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction. Nothing in subsection (a) of this section shall be construed to exclude as an individual with a disability an individual who . . .

(3) is erroneously regarded as engaging in such use, but is not engaging in such use.

§12211. Definitions

(a) Homosexuality and bisexuality. — For purposes of the definition of “disability” in section 3(2) [§12102(2)], homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.
Problems

1. Attendants. A man whose legs and arms are substantially paralyzed but who has some movement in his hands and lower arms, and in his neck and part of his upper torso, is admitted to law school. His wheelchair is motor-operated, and he can use his hands to move himself around in the wheelchair. He applies for and obtains a room in the law school dormitory that he can share with his trained full-time attendant. He needs to be constantly attended because he is on a respirator to enable him to breathe and may require immediate attention if something goes wrong with the breathing mechanism. The law school notifications him that he will have to pay rent (the dormitory fee) both for himself and his attendant, effectively doubling the rent he must pay, because the attendant takes a space that would otherwise go to another paying law student. Has the law school violated the public accommodations provisions of the ADA?

2. Building renovations. A law school library is being renovated. Right now the only access to the library is through an underground tunnel through the elevator, with the entrance to the library on the fourth floor. The library stacks are not accessible by wheelchair. The $20 million renovation project will move the library entrance to the first floor and create two wheelchair-accessible entrances on the south side of the building. Although these south entrances visually appear to be the “back doors” to the library, in fact 90 percent of the students enter the library through these south entrances. The north entrance has a grand staircase and is architecturally the main entrance to the building from a design standpoint, although only about 10 percent of the users enter the building this way. Installing a lift or a ramp at this northern entrance would cost $80,000 to $150,000. Is the school required by §12183 to make the north entrance accessible by wheelchair?

3. Stadium seating. A new movie theater has stadium-style seating at a sharp incline on steep stairs and provides spaces for wheelchairs only down on the lowest level in the front row just in front of the screen in a sloped area. These seats are always the last to fill up because individuals must crane their necks back to see the film and the picture is somewhat distorted at that angle. However, those seats are used by the general public when the theater is full. A Justice Department regulation under the ADA requires movie theaters and stadiums to provide “wheelchair areas” that are “an integral part of any fixed seating plan” and to ensure that they possess “lines of sight comparable to those for members of the general public.” ADA Accessibility Guidelines, 28 C.F.R. pt. 36, app. A, §4.33.3.

b. Must the theater reserve seats next to spots reserved for wheelchair users for companions who accompany them so that they can sit together, thereby requiring individuals who have taken those seats to move to other available seats in the theater? In *Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075 (9th Cir. 2004), the court held that a quadriplegic had the right to have his wife sit next to him because his condition made it necessary to have someone with him at all times, making a modification of the theater’s policy both “necessary” for him to enjoy the services and a “reasonable modification” of the theater’s policy that would not “fundamentally alter” the nature of the services being offered. It held that theaters must reserve companion seats near wheelchair spots until ten minutes before show time. See 28 C.F.R. pt. 36, app. A, §4.33.3 (“At least one companion fixed seat shall be provided next to each wheelchair seating area”).

c. Must stadiums provide wheelchair locations that allow patrons to view sports events even when spectators in front of them stand up? Recently adopted regulations say that they do. Compare *Miller v. California Speedway Corp.*, 536 F.3d 1020 (9th Cir. 2008) (holding that a facility violated the ADA and §4.33.3 when it provided wheelchair seating that did not allow lines of sight to the racetrack over standing spectators); *with Caruso v. Blockbuster-SONY Music Entertainment Centre at the Waterfront*, 193 F.3d 730 (3d Cir. 1999) (holding that neither the ADA nor §4.33.3 required sightlines over standing spectators but merely dispersal of seating). Is this a proper interpretation of the statute?

4. **Historic landmarks.** The ADA requirements for alteration of existing facilities do not apply to buildings that have been designated historic landmarks under federal or state law if the alterations will “threaten or destroy the historic significance” of the building. 42 U.S.C. §12204(a); 28 C.F.R. §36.405. A building that is now listed as a historical landmark under the *National Historic Preservation Act*, 16 U.S.C. §470 et seq., has been in continuous use as a law school classroom building since 1880. The ceilings are very high and the acoustics in the classrooms are terrible. Students have great difficulty hearing each other when they speak. The law school wants either to drop the ceilings, float panels hung from the ceiling in the rooms, or install microphones at every seat to rectify the situation. The local historic preservation board refuses to grant the school permission to do any of these things on the ground that they would impair the historical and architectural integrity of the building. How should a court reconcile the requirements of the ADA with the historic preservation laws that prohibit alterations of historic buildings that would impair their historic significance?

5. **Modifying policies.** In *PGA Tour, Inc. v. Martin*, 531 U.S. 1049 (2001), the Supreme Court ruled that the Professional Golf Association (PGA) violated the ADA when it refused to allow golfer Casey Martin to use a cart to travel between holes in a professional golf tournament, which the Court treated as a place of public accommodation. Martin has a degenerative circulatory disorder that causes pain when he walks too far, and he sought a “reasonable modification” of the policy prohibiting the use of golf carts in its competitions under §12182(b)(2)(A)(ii). The PGA claimed that this would “fundamentally alter the nature” of the game because walking induced fatigue
and was an essential part of the game at the high level of competition the PGA repre-
represented. The Court found to the contrary, concluding that waiving the rule would nei-
ther give Martin a competitive advantage nor alter the “essential character of the game of
golf,” which had always been shot-making. Justice Stevens noted that the trial court
had found that the fatigue from walking during the tournament was not significant,
thereby finding the defendant’s justification insubstantial. Justices Scalia and Thomas
dissented. Justice Scalia argued that the ADA gives individuals a right to participate in
whatever services a public accommodation offers, not to change the nature of those
services.

A law school professor gives an eight-hour take-home exam to be picked up at
8:30 A.M. and returned at 4:30 P.M. A student with dyslexia asks to be allowed to add
24 hours to the exam, picking it up at 8:30 A.M. one day and returning it at 4:30 P.M. the
next day. Is the school obligated to comply? If so, may the school note on the student’s
transcript that she was given extra time to do the exam?

A woman suffers from limb girdle muscular dystrophy, which makes it difficult for
her to walk or stand from a seated position. She seeks permission to use a Segway in
Walt Disney World, despite a policy against two-wheeled vehicles in the park. Disney
refuses to make an exception to its policy. Does its refusal violate the ADA? See Baugh-
man v. Walt Disney World Co., 685 F.3d 1131 (9th Cir. 2012) (finding the requested ex-
ception to constitute a reasonable accommoda-
tion). What sorts of arguments would
you make if you represented Disney in defense of the existing policy?

6. Virtual “places.” Do the ADA public accommodations provisions apply to
businesses that do not operate at specific physical locations but offer services over
the phone, by mail, or through the Internet? Compare Carparts Distribution Center,
Inc. v. Automotive Wholesalers Association of New England, 37 F.3d 12, 26 (1st Cir.
1994) (ADA applies to goods and services “sold over the telephone or by mail with
customers never physically entering the premises of a commercial entity to purchase
the goods or services”), with Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104,
1114 (9th Cir. 2000) (concluding that places of public accommodation are “actual,
physical places”), and Parker v. Metropolitan Life Insurance Co., 121 F.3d 1006 (6th
Cir. 1997) (public accommodations provisions of ADA require access only to physical
places). See also National Federation of the Blind v. Target Corp., 452 F. Supp. 2d 946
(N.D. Cal. 2006) (web sites are subject to the ADA only to the extent they impede ac-
cess to a physical store).

If virtual places are covered by the statute, must they be made accessible to the
blind through computer protocols that vocally describe screen images and allow navi-
F. Supp. 2d 1017 (N.D. Cal. 2012) (web sites are not places of public accommodation);
(“In a society in which business is increasingly conducted online, excluding business-
eses that sell services through the Internet . . . would severely frustrate Congress’s intent
that individuals with disabilities fully enjoy the goods, services, privileges and advan-
tages, available indiscriminately to other members of the general public.”); see also
Does the ADA require health insurance companies to offer coverage for mental illness as well as physical illness? See MacNeil v. Time Insurance Co., 205 F.3d 179, 186 (5th Cir. 2000) (insurance company does not violate ADA when it caps benefits for patients with AIDS because the ADA does not “regulate the content of goods and services that are offered”); Ford v. Schering-Plough Corp., 145 F.3d 601 (3d Cir. 1998) (no ADA violation when insurance company capped benefits for mental but not physical disabilities).

§3 FREE SPEECH RIGHTS OF ACCESS TO PUBLIC AND PRIVATE PROPERTY

Lloyd Corporation, Ltd. v. Tanner

407 U.S. 551 (1972)

Mr. Justice Lewis Powell delivered the opinion of the Court.

Lloyd Corp., Ltd. (Lloyd), owns a large, modern retail shopping center in Portland, Oregon. Lloyd Center embraces altogether about 50 acres, including some 20 acres of open and covered parking facilities which accommodate more than 1,000 automobiles. It has a perimeter of almost one and one-half miles, bounded by four public streets. It is crossed in varying degrees by several other public streets, all of which have adjacent public sidewalks. Lloyd owns all land and buildings within the Center, except these public streets and sidewalks. There are some 60 commercial tenants, including small shops and several major department stores.

The Center embodies a relatively new concept in shopping center design. The stores are all located within a single large, multi-level building complex sometimes referred to as the “Mall.” Within this complex, in addition to the stores, there are parking facilities, malls, private sidewalks, stairways, escalators, gardens, an auditorium, and a skating rink. Some of the stores open directly on the outside public sidewalks, but most open on the interior privately owned malls. Some stores open on both. There are no public streets or public sidewalks within the building complex, which is enclosed and entirely covered except for the landscaped portions of some of the interior malls.

The Center is open generally to the public, with a considerable effort being made to attract shoppers and prospective shoppers, and to create “customer motivation” as well as customer goodwill in the community. In this respect the Center pursues policies comparable to those of major stores and shopping centers across the country, although the Center affords superior facilities for these purposes. Groups and organizations are permitted, by invitation and advance arrangement, to use the auditorium and other facilities. Rent is charged for use of the auditorium except with respect to certain civic and charitable organizations, such as the Cancer Society and Boy and Girl Scouts. The Center also allows limited use of the malls by the American Legion to sell poppies for disabled veterans, and by the Salvation Army and Volunteers of
America to solicit Christmas contributions. It has denied similar use to other civic and charitable organizations. Political use is also forbidden, except that presidential candidates of both parties have been allowed to speak in the auditorium.

The Center had been in operation for some eight years when this litigation commenced. Throughout this period it had a policy, strictly enforced, against the distribution of handbills within the building complex and its malls. No exceptions were made with respect to handbilling, which was considered likely to annoy customers, to create litter, potentially to create disorders, and generally to be incompatible with the purpose of the Center and the atmosphere sought to be preserved.

On November 14, 1968, the respondents in this case distributed within the Center handbill invitations to a meeting of the “Resistance Community” to protest the draft and the Vietnam war. The distribution, made in several different places on the mall walkways by five young people, was quiet and orderly, and there was no littering. There was a complaint from one customer. Security guards informed the respondents that they were trespassing and would be arrested unless they stopped distributing the handbills within the Center. Respondents left the premises as requested “to avoid arrest” and continued the handbilling outside. Subsequently this suit was instituted in the District Court seeking declaratory and injunctive relief.

The District Court, emphasizing that the Center “is open to the general public,” found that it is “the functional equivalent of a public business district.” 308 F. Supp., at 130. That court then held that Lloyd’s “rule prohibiting the distribution of handbills within the Mall violates . . . First Amendment rights.” 308 F. Supp., at 131. In a per curiam opinion, the Court of Appeals . . . concluded that the decisions of this Court in Marsh v. Alabama, 326 U.S. 501 (1946), and Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), compelled affirmance.

Marsh involved Chickasaw, Alabama, a company town wholly owned by the Gulf Shipbuilding Corp. The opinion of the Court, by Mr. Justice Black, described Chickasaw as follows:

“Except for (ownership by a private corporation) it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a ‘business block’ on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town’s policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.” 326 U.S., at 502-503.

A Jehovah’s Witness undertook to distribute religious literature on a sidewalk near the post office and was arrested on a trespassing charge. In holding that First and
Fourteenth Amendment rights were infringed, the Court emphasized that the business district was within a company-owned town, an anachronism long prevalent in some southern States and now rarely found.

In *Logan Valley* the Court extended the rationale of *Marsh* to peaceful picketing [by a Union] of a store located in a large shopping center, known as Logan Valley Mall, near Altoona, Pennsylvania. The Court noted that . . . publicly owned streets, sidewalks, and parks are so historically associated with the exercise of First Amendment rights that access to them for purposes of exercising such rights cannot be denied absolutely. *Lovell v. Griffin*, 303 U.S. 444 (1938); *Hague v. CIO*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147 (1939); *Jamison v. Texas*, 318 U.S. 413 (1943). The Court then considered *Marsh v. Alabama* and concluded that: “The shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh.*” *Logan Valley*, 391 U.S. at 318.

The Court also took specific note of the facts that the Union’s picketing was “directed solely at one establishment within the shopping center,” *Id.* at 321. *Logan Valley* was decided on the basis of this factual situation, and the facts in this case are significantly different.21

The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd’s private property contrary to its wishes and contrary to a policy enforced against all handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only.

[T]his Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only. Even where public property is involved, the Court has recognized that it is not necessarily available for speaking, picketing, or other communicative activities.

Respondents contend, however, that the property of a large shopping center is “open to the public,” serves the same purposes as a “business district” of a municipality, and therefore has been dedicated to certain types of public use. The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use. The closest decision in theory, *Marsh v. Alabama*, involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semiofficial municipal functions as a delegate of the State. In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal functions or power.

Nor does property lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing

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store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.

Judgment reversed and case remanded.

Mr. Justice Thurgood Marshall, with whom Mr. Justice William O. Douglas, Mr. Justice William J. Brennan, and Mr. Justice Potter Stewart join, dissenting.

... Lloyd Center is even more clearly the equivalent of a public business district than was Logan Valley Plaza. Lloyd Center invites schools to hold football rallies, presidential candidates to give speeches, and service organizations to hold Veterans Day ceremonies on its premises. The court also observed that the Center permits the Salvation Army, the Volunteers of America, and the American Legion to solicit funds in the Mall. Thus, the court concluded that the Center was already open to First Amendment activities, and that respondents could not constitutionally be excluded from distributing leaflets solely because Lloyd Center was not enamored of the form or substance of their speech.

On Veterans Day, Lloyd Center allows organizations to parade through the Center with flags, drummers, and color guard units and to have a speaker deliver an address on the meaning of Veterans Day and the valor of American soldiers. Presidential candidates have been permitted to speak without restriction on the issues of the day, which presumably include war and peace. The American Legion is annually given permission to sell poppies in the Mall because Lloyd Center believes that “veterans... deserves (sic) some comfort and support by the people of the United States.”

Members of the Portland community are able to see doctors, dentists, lawyers, bankers, travel agents, and persons offering countless other services in Lloyd Center. They can buy almost anything that they want or need there. For many Portland citizens, Lloyd Center will so completely satisfy their wants that they will have no reason to go elsewhere for goods or services. If speech is to reach these people, it must reach them in Lloyd Center.

For many persons who do not have easy access to television, radio, the major newspapers, and the other forms of mass media, the only way they can express themselves to a broad range of citizens on issues of general public concern is to picket, or to handbill, or to utilize other free or relatively inexpensive means of communication. The only hope that these people have to be able to communicate effectively is to be permitted to speak in those areas in which most of their fellow citizens can be found. One such area is the business district of a city or town or its functional equivalent. And this is why respondents have a tremendous need to express themselves within Lloyd Center.

Petitioner’s interests, on the other hand, pale in comparison. It is undisputed that some patrons will be disturbed by any First Amendment activity that goes on, regardless of its object. But, there is no evidence to indicate that speech directed to topics unrelated to the shopping center would be more likely to impair the motivation of
customers to buy than speech directed to the uses to which the Center is put, which petitioner concedes is constitutionally protected under *Logan Valley*.

It would not be surprising in the future to see cities rely more and more on private businesses to perform functions once performed by governmental agencies. The advantage of reduced expenses and an increased tax base cannot be overstated. As governments rely on private enterprise, public property decreases in favor of privately owned property. It becomes harder and harder for citizens to find means to communicate with other citizens. Only the wealthy may find effective communication possible unless we adhere to *Marsh v. Alabama* and continue to hold that “(t)he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it,” 326 U.S. 276.

When there are no effective means of communication, free speech is a mere shibboleth. I believe that the First Amendment requires it to be a reality. Accordingly, I would affirm the decision of the Court of Appeals.

**Notes**

1. **State constitutions.** Most states interpret their state constitutional free speech guarantees in a manner similar to the federal constitution, thus granting shopping center owners the power to exclude people handing out leaflets or others seeking to engage in similar speech activities. See, e.g., *United Food & Commercial Workers Union, Local 919 v. Crystal Mall Associates, L.P.*, 852 A.2d 659 (Conn. 2004); *City of West Des Moines v. Engler*, 641 N.W.2d 803 (Iowa 2002) (no free speech access rights to shopping centers). However, California and New Jersey have interpreted their state constitutions in a manner that adopts the views of Justice Marshall’s dissenting opinion in *Lloyd*. While states may not adopt laws that deny constitutional rights protected by the U.S. Constitution, they may grant more expansive rights than those guaranteed by federal law either by interpretation of their state constitutions or through state statutes. Thus California held that the state constitution protected the right to hand out leaflets protesting the United Nation’s resolution defining “Zionism” as a form of racism, and the U.S. Supreme Court upheld its right to do so. See *Robins v. PruneYard Shopping Center*, 592 P.2d 341 (Cal. 1979), aff’d, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), and the New Jersey Supreme Court affirmed state constitutional rights to hand out leaflets to protest the first Iraq war. *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757 (N.J. 1994). See also *Wood v. State*, 2003 WL 1955433 (Fla. Cir. Ct. 2003) (state constitution prohibits a private owner of a "quasi-public" place from using state trespass laws to exclude peaceful political activity); *State v. Schmid*, 423 A.2d 615, 629 (N.J. 1980) (state constitution protects right to distribute literature on a private university campus).

A small number of states have found state constitutional rights to enter shopping centers seeking signatures to place a political candidate’s name on the ballot or to get an initiative or referendum question placed on the ballot, *Batchelder v. Allied Stores International, Inc.*, 445 N.E.2d 590 (Mass. 1983); *Alderwood Associates v. Washington Environmental Council*, 635 P.2d 108 (Wash. 1981).
2. **Statutory labor organizing access rights.** Although there is no federal constitutional right of access to property open to the public for free speech purposes under the first amendment, the *National Labor Relations Act* (NLRA), a federal statute governing employment relations between employees and employers, does provide for some rights of access for labor organizations. Sections 7 and 8 of the NLRA prohibit employers from engaging in certain enumerated “unfair labor practices” that interfere with the rights of employees to form unions and engage in collective bargaining and other types of concerted activities for “mutual aid or protection,” including striking and picketing. 29 U.S.C. §§157, 158. The Supreme Court has held that under some circumstances it may constitute an unfair labor practice under the NLRA for an employer to deny a right of access to certain areas of her property for purposes of picketing that property owner herself or an employer who is a lessee of a portion of that property. *Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976). Employees who are on strike or involved in a labor dispute with their employer may want access to the employer’s property to picket, communicating to the employer and the public their side in the controversy. Nonemployees may want access to the parking lot or cafeteria of a workplace to distribute information designed to encourage the employees to form or join a union. In determining whether a right of access should be provided, the courts must balance the employer’s property rights against the employees’ rights under §7 to be free of unfair labor practices. See *Lechmere v. National Labor Relations Bd.*, 502 U.S. 527 (1992) (holding that union organizers had no right to enter the parking lot of a shopping center to put leaflets on the windshields of cars when there were reasonably effective alternative means of communicating with the employees); *Seattle-First National Bank v. National Labor Relations Board*, 651 F.2d 1272 (9th Cir. 1980) (unfair labor practice for the owner of an office building to refuse to allow striking restaurant employees to picket in the foyer outside a restaurant on the forty-sixth floor of the building); *Scott Hudgens*, 230 N.L.R.B. 414 (1977) (finding that striking employees of a business located in a shopping mall had a right to enter the mall to picket in front of their employer’s place of business).

3. **Gun rights on private property.** Georgia’s concealed carry law prohibits the holder of a properly licensed concealed firearm from carrying the firearm into certain types of premises, such as bars and churches, without first reporting the firearm to the management of the property and following the management’s directions concerning the firearm. A gun-rights group sued, arguing that the statute violated the second amendment right to bear arms. On appeal from the district court’s dismissal of the claim, the U.S. Court of Appeals for the Eleventh Circuit held that a private property owner’s right to exclude people from carrying firearms on private property trumps gun-owners’ rights to carry their firearms where they want. Consequently, a law delegating to property owners the right to dictate the terms on which firearms will be allowed on their premises does not violate the second amendment. According to the court, “[a]n individual’s right to bear arms as enshrined in the Second Amendment, whatever its full scope, certainly must be limited by the equally fundamental right of
a private property owner to exercise exclusive dominion and control over its land.” *GeorgiaCarry.org, Inc. v. Georgia*, 687 F.3d 1244 (11th Cir. 2012).

**Problems**

1. A shopping mall allows members of the Republican Party to hand out leaflets urging customers to vote for Republican candidates for Congress and for the president but refuses to allow members of the Democratic Party to hand out leaflets. Assume you are in a state that has not interpreted its constitution to require owners of private property open to the public to grant rights of access for free speech purposes. A Democrat who is excluded from handing out leaflets sues the shopping center owner and claims that even though the owner has no duty to allow all members of the public to pass out leaflets, once the owner allows some members of the public to do this, it must allow others to do so on a nondiscriminatory basis. Argue both sides.

2. A large shopping mall in New Jersey is owned by a survivor of the Nazi concentration camps. The Ku Klux Klan begins peaceably handing out literature in the shopping center, praising the Nazi Party and urging shoppers to vote for a member of the KKK who is running for public office and who has stated that the United States should adopt Nazi methods to deal with African Americans, Latinos, Asian Americans, and American Jews. The owner ejects the KKK members from the mall. They subsequently sue and claim that the owner is violating their free speech rights under the state constitution, as defined in *New Jersey Coalition*. The owner defends by arguing that she has the right to prevent her property from being used as a base from which to hand out literature that preaches hatred against particular ethnic groups. What should the court do?

3. A major Internet search engine refuses to list among its search results web pages that criticize the third-world labor practices of the conglomerate that owns the search engine. The group that maintains the blocked pages complains that this violates their rights to free speech; they argue that since nearly all Internet users locate web pages using a few major search engines, these engines are the equivalent of a public square or a modern shopping mall: the central way to get a message to the public. The search engine company responds that a search engine is private property: the company can choose to make accessible whatever information it wants, and it must have this right if it is to exclude pages containing pornography from its database. The company also argues that storing information is expensive, and it must be able to exclude at will to prevent its database from growing too large. The Electronic Frontier Foundation, a nonprofit organization that promotes free speech on the Internet, proposes legislation prohibiting search engines from refusing to include any web page in their database if the page’s owner requests inclusion. If you were a member of the legislature, how would you vote and why?

4. A couple of weeks before the United States invaded Iraq in March 2003, a father and son were ousted from a mall in New York State for wearing T-shirts that protested
the decision to go to war. The father’s T-shirt said “Give Peace a Chance,” while his son’s shirt read “No War with Iraq” on one side and “Let Inspections Work” on the other. Winnie Hu, A Message of Peace on 2 Shirts Touches Off Hostilities at a Mall, N.Y. Times, Mar. 6, 2003, at B-1. As the father and son were eating lunch, security guards asked them to remove the shirts or to leave the premises. Although the son complied by removing his shirt, the father did not. It appears that he also refused to leave the premises. He was arrested and charged with criminal trespass. New York has not adopted the PruneYard rule, and no other New York law apparently limited the owner’s decision to exclude under these circumstances. The director of operations of the mall explained that the father and son were interfering with other shoppers and that “[t]heir behavior, coupled with their clothing, to express to others their personal views on world affairs were disruptive of customers.” Id. Should the law protect the owner’s right to exclude in a case like this, or should the courts recognize a right based on either the common law or the state constitution that would prohibit exclusion under these circumstances?

§4 BEACH ACCESS AND THE PUBLIC TRUST

Matthews v. Bay Head Improvement Association
471 A.2d 355 (N.J. 1984)

SIDNEY M. SCHREIBER, J.

The public trust doctrine acknowledges that the ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for the people. The public’s right to use the tidal lands and water encompasses navigation, fishing and recreational uses, including bathing, swimming and other shore activities. Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972). In Avon we held that the public trust applied to the municipally owned dry sand beach immediately landward of the high water mark.22 The major issue in this case is whether, ancillary to the public’s right to enjoy the tidal lands, the public has a right to gain access through and to use the dry sand area not owned by a municipality but by a quasi-public body.

I. Facts

The Borough of Bay Head (Bay Head) borders the Atlantic Ocean. Adjacent to it on the north is the Borough of Point Pleasant Beach, on the south the Borough of Mantoloking, and on the west Barnegat Bay. Bay Head consists of a fairly narrow strip of

22. The dry sand area is generally defined as the land west (landward) of the high water mark to the vegetation line or where there is no vegetation to a seawall, road, parking lot, or boardwalk.
land, 6,667 feet long (about 1¼ miles). A beach runs along its entire length adjacent to the Atlantic Ocean. There are 76 separate parcels of land that border the beach. All except six are owned by private individuals. Title to those six is vested in the [Bay Head Improvement] Association [(the Association)].

The Association was founded in 1910 and incorporated as a nonprofit corporation in 1932. Its certificate of incorporation states that its purposes are the improving and beautifying of the Borough of Bay Head, New Jersey, cleaning, policing and otherwise making attractive and safe the bathing beaches in said Borough, and the doing of any act which may be found necessary or desirable for the greater convenience, comfort and enjoyment of the residents. Its constitution delineates the Association’s object to promote the best interests of the Borough and “in so doing to own property, operate bathing beaches, hire life guards, beach cleaners and policemen.”

Nine streets in the Borough, which are perpendicular to the beach, end at the dry sand. The Association owns the land commencing at the end of seven of these streets for the width of each street and extending through the upper dry sand to the mean high water line, the beginning of the wet sand area or foreshore. In addition, the Association owns the fee in six shore front properties, three of which are contiguous and have a frontage aggregating 310 feet. Many owners of beachfront property executed and delivered to the Association leases of the upper dry sand area. These leases are revocable by either party to the lease on thirty days’ notice. Some owners have not executed such leases and have not permitted the Association to use their beaches. Some also have acquired riparian grants from the State extending approximately 1000 feet east of the high water line.

The Association controls and supervises its beach property between the third week in June and Labor Day. It engages about 40 employees who serve as lifeguards, beach police and beach cleaners. Lifeguards, stationed at five operating beaches, indicate by use of flags whether the ocean condition is dangerous (red), requires caution (yellow), or is satisfactory (green). In addition to observing and, if need be, assisting those in the water, when called upon lifeguards render first aid. Beach cleaners are engaged to rake and keep the beach clean of debris. Beach police are stationed at the entrances to the beaches where the public streets lead into the beach to ensure that only Association members or their guests enter. Some beach police patrol the beaches to enforce its membership rules.

Membership is generally limited to residents of Bay Head. Class A members are property owners. Class B are non-owners. Large families (six or more) pay $90 per year and small families pay $60 per year. Upon application residents are routinely accepted. Membership is evidenced by badges that signify permission to use the beaches. Members, which include local hotels, motels and inns, can also acquire badges for guests. The charge for each guest badge is $12. Members of the Bay Head Fire Company, Bay Head Borough employees, and teachers in the municipality’s school system have been issued beach badges irrespective of residency.

Except for fishermen, who are permitted to walk through the upper dry sand area to the foreshore, only the membership may use the beach between 10:00 A.M. and 5:30 P.M. during the summer season. The public is permitted to use the Association’s
beach from 5:30 p.m. to 10:00 a.m. during the summer and, with no hourly restrictions, between Labor Day and mid-June.

No attempt has ever been made to stop anyone from occupying the terrain east of the high water mark. During certain parts of the day, when the tide is low, the foreshore could consist of about 50 feet of sand not being flowed by the water. The public could gain access to the foreshore by coming from the Borough of Point Pleasant Beach on the north or from the Borough of Mantoloking on the south.

Association membership totals between 4,800 to 5,000. The Association President testified during depositions that its restrictive policy, in existence since 1932, was due to limited parking facilities and to the overcrowding of the beaches. The Association’s avowed purpose was to provide the beach for the residents of Bay Head.

There is also a public boardwalk, about one-third of a mile long, parallel to the ocean on the westerly side of the dry sand area. The boardwalk is owned and maintained by the municipality.

II. The Public Trust

In *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 51 (N.J. 1972), Justice Hall alluded to the ancient principle “that land covered by tidal waters belonged to the sovereign, but for the common use of all the people.” . . . This underlying concept was applied in New Jersey in *Arnold v. Mundy*, 6 N.J.L. 1 (Sup. Ct. 1821).

The defendant in *Arnold* tested the plaintiff’s claim of an exclusive right to harvest oysters by taking some oysters that the plaintiff had planted in beds in the Raritan River adjacent to his farm in Perth Amboy. The oyster beds extended about 150 feet below the ordinary low water mark. The tide ebbed and flowed over it.

Chief Justice Kirkpatrick . . . concluded that all navigable rivers in which the tide ebbs and flows and the coasts of the sea, including the water and land under the water, are “common to all the citizens, and that each [citizen] has a right to use them according to his necessities, subject only to the laws which regulate that use.” *Id.* at 93. Later in *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 453 (1892), the Supreme Court, in referring to the common property, stated that “[t]he State can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers.”

In *Avon*, Justice Hall reaffirmed the public’s right to use the waterfront as announced in *Arnold v. Mundy*. He observed that the public has a right to use the land below the mean average high water mark where the tide ebbs and flows. These uses have historically included navigation and fishing. In *Avon* the public’s rights were extended “to recreational uses, including bathing, swimming and other shore activities.” 294 A.2d at 54. The Florida Supreme Court has held:

The constant enjoyment of this privilege [bathing in salt waters] of thus using the ocean and its foreshore for ages without dispute should prove sufficient to establish it as an American common law right, similar to that of fishing in the sea, even if this right had not come down to us as a part of the English common law, which it undoubtedly has. It has been said that “[h]ealth, recreation and sports are encompassed in and intimately related to the general welfare of a well-balanced state.” Extension of the public trust
doctrine to include bathing, swimming and other shore activities is consonant with and furthers the general welfare. The public’s right to enjoy these privileges must be respected. White v. Hughes, 190 So. 446, 449 (Fla. 1939).

In order to exercise these rights guaranteed by the public trust doctrine, the public must have access to municipally owned dry sand areas as well as the foreshore. The extension of the public trust doctrine to include municipally owned dry sand areas was necessitated by our conclusion that enjoyment of rights in the foreshore is inseparable from use of dry sand beaches. In Avon we struck down a municipal ordinance that required nonresidents to pay a higher fee than residents for the use of the beach. We held that where a municipal beach is dedicated to public use, the public trust doctrine “dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible.” 294 A.2d at 54.

III. Public Rights in Privately Owned Dry Sand Beaches

In Avon . . . our finding of public rights in dry sand areas was specifically and appropriately limited to those beaches owned by a municipality. We now address the extent of the public’s interest in privately owned dry sand beaches. This interest may take one of two forms. First, the public may have a right to cross privately owned dry sand beaches in order to gain access to the foreshore. Second, this interest may be of the sort enjoyed by the public in municipal beaches under Avon . . ., namely, the right to sunbathe and generally enjoy recreational activities.

Beaches are a unique resource and are irreplaceable. The public demand for beaches has increased with the growth of population and improvement of transportation facilities. Furthermore the projected demand for salt water swimming will not be met “unless the existing swimming capacities of the four coastal counties are expanded.” Department of Environmental Protection, Statewide Comprehensive Outdoor Recreation Plan 200 (1977). The DEP estimates that, compared to 1976, the State’s salt water swimming areas “must accommodate 764,812 more persons by 1985 and 1,021,112 persons by 1995.”

Exercise of the public’s right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine. This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea.

[T]he particular circumstances must be considered and examined before arriving at a solution that will accommodate the public’s right and the private interests involved. Thus an undeveloped segment of the shore may have been available and used for access so as to establish a public right-of-way to the wet sand. Or there may be publicly owned property, such as in Avon, which is suitable. Or, as in this case, the
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public streets and adjacent upland sand area might serve as a proper means of entry. The test is whether those means are reasonably satisfactory so that the public’s right to use the beachfront can be satisfied.

The bather’s right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water’s edge. The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many situations eliminate the right to the recreational use of the ocean. This was a principal reason why in *Avon* and *Van Ness v. Borough of Deal*, 393 A.2d 571 (N.J. 1978), we held that municipally owned dry sand beaches “must be open to all on equal terms.” *Avon*, 294 A.2d at 54. We see no reason why rights under the public trust doctrine to use of the upland dry sand area should be limited to municipally owned property. It is true that the private owner’s interest in the upland dry sand area is not identical to that of a municipality. Nonetheless, where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public’s use of the upland dry sand area subject to an accommodation of the interests of the owner.

We perceive no need to attempt to apply notions of prescription, *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974), dedication, *Gion v. City of Santa Cruz*, 465 P.2d 50 (Cal. 1970), or custom, *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969), as an alternative to application of the public trust doctrine. Archaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be “fixed or static,” but one to “be molded and extended to meet changing conditions and needs of the public it was created to benefit.” *Avon*, 294 A.2d at 54.

Precisely what privately owned upland sand area will be available and required to satisfy the public’s rights under the public trust doctrine will depend on the circumstances. Location of the dry sand area in relation to the foreshore, extent and availability of publicly owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner are all factors to be weighed and considered in fixing the contours of the usage of the upper sand.

Today, recognizing the increasing demand for our State’s beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately owned dry sand areas as reasonably necessary. While the public’s rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand.

V. *The Beaches of Bay Head*

The Bay Head Improvement Association, which services the needs of all residents of the Borough for swimming and bathing in the public trust property, owns the street-wide strip of dry sand area at the foot of seven public streets that extends to the mean
high water line. It also owns the fee in six other upland sand properties connected or
adjacent to the tracts it owns at the end of two streets. In addition, it holds leases to
approximately 42 tracts of upland sand area. The question that we must address is
whether the dry sand area that the Association owns or leases should be open to the
public to satisfy the public’s rights under the public trust doctrine. Our analysis turns
upon whether the Association may restrict its membership to Bay Head residents and
thereby preclude public use of the dry sand area.

The general rule is that courts will not compel admission to a voluntary associa-
tion. Ordinarily, a society or association may set its own membership qualifications
and restrictions. However, that is not an inexorable rule. Where an organization is
quasi-public, its power to exclude must be reasonably and lawfully exercised in fur-
therance of the public welfare related to its public characteristics.

[A] nonprofit association that is authorized and endeavors to carry out a purpose
serving the general welfare of the community and is a quasi-public institution holds
in trust its powers of exclusive control in the areas of vital public concern. When a
nonprofit association rejects a membership application for reasons unrelated to its
purposes and contrary to the general welfare, courts have “broad judicial authority
to insure that exclusionary policies are lawful and are not applied arbitrarily or [dis-
criminatorily].” Greisman v. Newcomb Hospital, 192 A.2d 817, 820 (1963). That is the
situation here.

Bay Head Improvement Association is a non-profit corporation whose primary
purpose as stated in its certificate of incorporation is the “cleaning, policing and oth-
otherwise making attractive and safe the bathing beaches” in the Borough of Bay Head
“and the doing of any act which may be found necessary or desirable for the greater
convenience, comfort and enjoyment of the residents.” . . .

The Association’s activities paralleled those of a municipality in its operation of
the beachfront. The size of the beach was so great that it stationed lifeguards at five
separate locations. The beach serviced about 5,000 members. The lifeguards per-
formed the functions characteristic of those on a public beach. When viewed in its
totality — its purposes, relationship with the municipality, communal characteristic,
activities, and virtual monopoly over the Bay Head beachfront — the quasi-public na-
ture of the Association is apparent. The Association makes available to the Bay Head
public access to the common tidal property for swimming and bathing and to the up-
land dry sand area for use incidental thereto, preserving the residents’ interests in a
fashion similar to Avon.

There is no public beach in the Borough of Bay Head. If the residents of every mu-
nicipality bordering the Jersey shore were to adopt the Bay Head policy, the public
would be prevented from exercising its right to enjoy the foreshore. The Bay Head
residents may not frustrate the public’s right in this manner. By limiting membership
only to residents and foreclosing the public, the Association is acting in conflict with
the public good and contrary to the strong public policy “in favor of encouraging and
expanding public access to and use of shoreline areas.” Gion v. City of Santa Cruz, 465
P.2d 50, 59 (Cal. 1970). Indeed, the Association is frustrating the public’s right under
the public trust doctrine. It should not be permitted to do so.
Accordingly, membership in the Association must be open to the public at large.

The Public Advocate has urged that all the privately owned beachfront property likewise must be opened to the public. Nothing has been developed on this record to justify that conclusion. We have decided that the Association’s membership and thereby its beach must be open to the public. That area might reasonably satisfy the public need at this time. If the Association were to sell all or part of its property, it may necessitate further adjudication of the public’s claims in favor of the public trust on part or all of these or other privately owned upland dry sand lands depending upon the circumstances. However, we see no necessity to have those issues resolved judicially at this time since the beach under the Association’s control will be open to the public and may be adequate to satisfy the public trust interests.

The record in this case makes it clear that a right of access to the beach is available over the quasi-public lands owned by the Association, as well as the right to use the Association’s upland dry sand. It is not necessary for us to determine under what circumstances and to what extent there will be a need to use the dry sand of private owners who either now or in the future may have no leases with the Association. Resolution of the competing interests, private ownership and the public trust, may in some cases be simple, but in many it may be most complex. In any event, resolution would depend upon the specific facts in controversy.

We realize that considerable uncertainty will continue to surround the question of the public’s right to cross private land and to use a portion of the dry sand as discussed above. Where the parties are unable to agree as to the application of the principles enunciated herein, the claim of the private owner shall be honored until the contrary is established.

Notes and Questions

1. Public trust. In *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 435 (1892), the Supreme Court held as follows:

   It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.

Some courts have held that the state may extinguish public rights of access under the public trust doctrine by conveying property to private owners free of such rights. See, e.g., *Greater Providence Chamber of Commerce v. Rhode Island*, 657 A.2d 1038 (R.I. 1995). Other courts, however, have held that the rights encompassed by the public trust doctrine are inalienable and lands subject to those rights cannot be reduced to private property free from public trust obligations. See, e.g., *Glass v. Goeckel*, 473 Mich. 667 (Mich. 2005).
2. Uses encompassed by the public trust doctrine. The New Jersey Supreme Court notes its earlier holding that the public trust doctrine included the right to enjoy the lands over which the tides flowed (tidal lands) for a broad variety of purposes, including navigation, fishing, and recreation such as swimming. It further extended the doctrine to encompass public rights of access to the dry sand area adjacent to the tidal lands, inland from the tidal lands to the line where vegetation started on lands owned by the municipalities. See also Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc., 879 A.2d 112 (N.J. 2005) (private club that holds title to the only beach in the township could not exclude members of the public from access to the dry sand area of the beach beyond the high tide line and could not charge high fees designed to limit access). In the earlier case of Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972), Justice Hall explained the extension of the public trust doctrine to recreational uses in the following way:

We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.

In contrast, the Supreme Judicial Court of Massachusetts has limited public access under the public trust doctrine to tidal lands (defined as the lands seaward of the mean high water line) rather than the dry sand area. The court also limited public use rights to navigation and fishing purposes, specifically excluding recreational uses such as walking along the beachfront or bathing. Opinion of the Justices, 313 N.E.2d 561 (Mass. 1974). The Massachusetts court rejected the idea that the uses encompassed by the public trust doctrine could change or expand over time as social values and conditions changed. Rather, the court held that a statute redefining the public trust doctrine to allow a right of way for the public to walk along the beach on tidal lands constituted a physical invasion of the property rights of beachfront owners and could not be constitutionally required without paying just compensation to those owners for the loss of their property rights. To allow an expansion of public access would infringe on the property owners’ right to exclude. Accord, Severance v. Patterson, 370 S.W.3d 705 (Tex. 2012) (limiting the public trust doctrine to land seaward of the mean high tide line and suggesting that the extension of the public trust doctrine to adjacent dry sand areas would raise constitutional concerns); Bell v. Town of Wells, 557 A.2d 168 (Me. 1989); Opinion of the Justices, 649 A.2d 604, 609 (N.H. 1994). See also Leydon v. Town of Greenwich, 777 A.2d 552, 564 n.17 (Conn. 2001) (limiting the public trust doctrine to the land seaward of the mean high tide line); State ex rel. Haman v. Fox, 594 P.2d 1093 (Ind. 1979) (same).

Should it make a difference whether the public has customarily used the beachfront adjoining private property for recreational purposes? Does longstanding customary use justify recognizing rights of access in the public?
If there is no longstanding public use, should the courts interpret the public trust doctrine to be rigidly limited to those uses customarily enjoyed in colonial times? Or should the doctrine be interpreted to authorize uses needed by the public and considered legitimate under evolving community standards? If the common law changes over time, as we have seen in State v. Shack and Uston v. Resorts International, why should the public trust doctrine be frozen in its colonial form? Was the New Jersey Supreme Court wrong to change the law in Shack and Uston to adjust the balance between the right to exclude and the right of access?

3. Dedication, prescription, and custom. Justice Schreiber notes that state courts have relied on three common law doctrines besides public trust to grant rights of access to beaches by the general public. The doctrines are dedication, prescription, and custom.

Dedication involves a gift of real property from a private owner to the public at large. It requires an offer by the owner and acceptance by the public. Such an offer generally must be made by some unequivocal act by the property owner giving clear evidence of an intent to dedicate the land to public use. Longstanding acquiescence in use of beachfront property by the public may be interpreted as an implied dedication by the property owner and acceptance by the public. Gion v. City of Santa Cruz, 465 P.2d 50 (Cal. 1970). However, Gion was effectively overturned by the California legislature, which prohibited acquisition of public rights by implied dedication, although allowing public rights of access to arise by prescription. Cal. Civ. Code §1009.

Some states grant public rights of access to tidelands or the dry sand area of beaches under the doctrine of prescription. If the public has used property possessed by another for a particular purpose for a long time (measured by the relevant state statute of limitations), the public can acquire such rights permanently even if they never had them originally or if they had previously been reduced to private ownership. The permanent right to do something on another’s land is called an easement. Such rights are generally created by agreement. However, if the owner fails to exclude trespassers from her property, she may lose her right to sue them under the relevant statute of limitations. The public acquires what is called a prescriptive easement to continue using the property for this purpose. City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974); Concerned Citizens of Brunswick County Taxpayers Association v. Rhodes, 404 S.E.2d 677 (N.C. 1991). For more on prescriptive easements, see Chapter 5, §3.

Most courts traditionally refused to allow the public to obtain an easement by prescription. Today, most courts will recognize such easements. Jon Bruce & James W. Ely, Jr., The Law of Easements and Licenses in Land ¶5.09[1] (rev. ed. 1995). They did so partly because (a) it was difficult to show continuous use by the public at large; (b) prescription might apply only to the particular tract of land at issue in the case, necessitating cumbersome and expensive litigation about every disputed parcel along the oceanfront; and (c) when private land is used by the public, courts may infer that the use was permissive, thereby defeating an element needed for prescriptive rights to vest.
Perhaps to avoid these problems, the Oregon Supreme Court relied on the doctrine of *custom*, rather than prescription, to hold that longstanding, uninterrupted, peaceable, reasonable, uniform use of the beachfront by the public for recreational purposes conferred continuing rights of access.

The dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state’s political history. The first European settlers on these shores found the aboriginal inhabitants using the foreshore for clam-digging and the dry-sand area for their cooking fires. The newcomers continued these customs after statehood. Thus, from the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede.

*State ex rel. Thornton v. Hay*, 462 P.2d 671, 674 (Or. 1969). Applying the doctrine, the court prevented beachfront owners from enclosing the dry-sand area of their property in an attempt to limit access to members of a private beach club. In a later case, however, the Oregon Supreme Court limited the doctrine to those beaches for which proof exists of actual use by the public in the past. *See McDonald v. Halvorson*, 780 P.2d 714 (Or. 1989).


**Problems**

1. *Matthews* involved beachfront property owned by a nonprofit charitable organization. In *Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (N.J. 2005), the Supreme Court of New Jersey extended the *Matthews* ruling to require the owner of a beach club to allow anyone to become a member and prohibited the club from charging exorbitant fees designed to limit membership. The private owner had previously allowed the public to use the beach and had only recently converted it to a private beach club accessible only by members upon payment of fees higher than necessary to pay for costs of operation. The court applied the *Matthews* factors and found that the public interests in access outweighed the private interests in exclusion when there were no publicly owned beaches in the township and demand for beach access was very high. Two judges dissented on the ground that a nearby hotel allowed the public to use its beach. Did the court reach the correct result?

2. Now suppose members of the public begin using the dry sand area between the mean high water mark and the vegetation line in an area next to a private home. The
owner puts up a fence and signs warning against trespassing on the beach. A member of the public sues the beachfront owner and asks for declaratory and injunctive relief preventing the owner from interfering with the public’s right of access to the dry sand area along the beach, arguing that the state should adopt the standards used in Hawaii.

a. What arguments could you make for the plaintiff that the principle underlying the rule of Matthews applies to this case? What arguments could you make for the defendant that this case is distinguishable from Matthews and Raleigh Avenue Beach Association and that the plaintiff has no right of access to the beach adjoining a private home?

b. If you were the judge deciding this case, which rule of law would you promulgate and how would you justify it?

§5 THE RIGHT TO BE SOMEWHERE AND THE PROBLEM OF HOMELESSNESS

The American Civil Liberties Union brought a lawsuit in Miami, Florida, challenging the city’s sweep of homeless people from city parks before the 1988 Orange Bowl parade. Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992). Miami had many more homeless people than it could handle in shelters. On November 16, 1992, District Judge C. Clyde Atkins ordered the police to stop arresting homeless persons for “innocent, harmless, and inoffensive acts” such as sleeping, eating, bathing, and sitting down in public and ordered the city to establish two “‘safe zones’ where homeless people who have no alternative shelter can remain without being arrested for harmless conduct such as sleeping or eating.” Id. at 1584. The case presented a conflict between the “need of homeless individuals to perform essential, life-sustaining acts in public and the responsibility of the government to maintain orderly, aesthetically pleasing public parks and streets.” Id. at 1554. Judge Atkins explained his ruling this way:

As a number of expert witnesses testified, people rarely choose to be homeless. Rather, homelessness is due to various economic, physical or psychological factors that are beyond the homeless individual’s control.

Professor Wright testified that one common characteristic of homeless individuals is that they are socially isolated; they are part of no community and have no family or friends who can take them in. Professor Wright also testified that homelessness is both a consequence and a cause of physical or mental illness. Many people become homeless after losing their jobs, and ultimately their homes, as a result of an illness. Many have no home of their own in the first place, but end up on the street after their families or friends are unable to care for or shelter them. Dr. Greer testified that once a person is on the street, illnesses can worsen or occur more frequently due to a variety of factors such as the difficulty or impossibility of obtaining adequate health care, exposure to the elements, insect and rodent bites, and the absence of sanitary facilities for sleeping, bathing, or cooking. Both Professor Wright and Dr. Greer testified that, except in rare cases, people do not choose to live under these conditions.
According to Professor Wright’s testimony, joblessness, like physical and mental illness, becomes more of a problem once a person becomes homeless. This is so because of the barriers homeless individuals face in searching for a job. For example, they have no legal address or telephone. Also, they must spend an inordinate amount of time waiting in line or searching for seemingly basic things like food, a space in a shelter bed or a place to bathe.

In addition to the problems of social isolation, illness, and unemployment, homelessness is exacerbated by the unavailability of many forms of government assistance. Gail Lucy, an expert in the area of government benefits available to homeless people, testified that many homeless individuals are ineligible for most government assistance programs. For example, Supplemental Security Income is available only to people who are sixty-five years of age or more, who are blind or disabled, and who are without other resources. Social Security Disability Insurance is available only to workers who have paid into the Social Security fund for five of the past ten years prior to the onset of the disability. Aid to Families with Dependent Children is available only to low-income families with physical custody of children under the age of eighteen. The only benefit that is widely available to the homeless is food stamps.

Another notable form of assistance that is unavailable to a substantial number of homeless individuals is shelter space. Lucy testified that there are approximately 700 beds available in local shelters. However, approximately 200 of these are “program beds,” for which one must qualify. In addition, some of these beds are set aside for families. Given the estimated 6,000 individuals who were homeless at the time of trial and the untold number of people left homeless by Hurricane Andrew, the lack of adequate housing alternatives cannot be overstated. The plaintiffs truly have no place to go.

In sum, class members rarely choose to be homeless. They become homeless due to a variety of factors that are beyond their control. In addition, plaintiffs do not have the choice, much less the luxury, of being in the privacy of their own homes. Because of the unavailability of low-income housing or alternative shelter, plaintiffs have no choice but to conduct involuntary, life-sustaining activities in public places. The harmless conduct for which they are arrested is inseparable from their involuntary condition of being homeless. Consequently, arresting homeless people for harmless acts they are forced to perform in public effectively punishes them for being homeless. Arresting the homeless for harmless, involuntary, life-sustaining acts such as sleeping, sitting or eating in public is cruel and unusual punishment.

The City suggests, apparently in reference to the aftermath of Hurricane Andrew, that even if homelessness is an involuntary condition in that most persons would not consciously choose to live on the streets, “it is not involuntary in the sense of a situation over which the individual has absolutely no control such as a natural disaster which results in the destruction of one’s place of residence so as to render that person homeless.” The court cannot accept this distinction. An individual who loses his home as a result of economic hard times or physical or mental illness exercises no more control over these events than he would over a natural disaster. Furthermore, as was established at trial, the City does not have enough shelter to house Miami’s homeless residents. Consequently, the City cannot argue persuasively that the homeless have made a deliberate choice to live in public places or that their decision to sleep in the park as opposed to some other exposed place is a volitional act. As Professor Wright testified, the lack of reasonable alternatives should not be mistaken for choice.
Chapter 1. Trespass: The Right to Exclude and Rights of Access

Id. at 1564-1565. Accord Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006), opinion vacated due to settlement by 505 F.3d 1006 (9th Cir. 2007); Johnson v. City of Dallas, 860 F. Supp. 344 (N.D. Tex. 1994), rev’d on standing grounds, 61 F.3d 442 (5th Cir. 1995).

In 1998, Miami settled the Pottinger litigation, agreeing to expand its social services for the homeless and to refrain from arresting the homeless for “life-sustaining activities” without offering them an available bed in a shelter. In April 2013, the City of Miami’s commissioners voted to go back to court to try to undo aspects of the Pottinger settlement in order to give the police greater latitude to arrest the homeless and dispose of their possessions. See Charles Rabin & Andres Viglucci, Miami to Go to Federal Court to Undo Homeless-Protection Act, Miami Herald, Apr. 11, 2013.

Consider the following argument by Jeremy Waldron.

Everything that is done has to be done somewhere. No one is free to perform an action unless there is somewhere he is free to perform it.

One of the functions of property rules, particularly as far as land is concerned, is to provide a basis for determining who is allowed to be where.

A person who is homeless is, obviously enough, a person who has no home. One way of describing the plight of a homeless individual might be to say that there is no place governed by a private property rule where he is allowed to be.

Our society saves the homeless from this catastrophe only by virtue of the fact that some of its territory is held as collective property and made available for common use. The homeless are allowed to be — provided they are on the streets, in the parks, or under the bridges. Some of them are allowed to crowd together into publicly provided “shelters” after dark (though these are dangerous places and there are not nearly enough shelters for all of them). But in the daytime and, for many of them, all through the night, wandering in public places is their only option.

[There] is . . . increasing regulation of the streets, subways, parks, and other public places to restrict the activities that can be performed there. What is emerging — and it is not just a matter of fantasy — is a state of affairs in which a million or more citizens have no place to perform elementary human activities like urinating, washing, sleeping, cooking, eating, and standing around.

For a person who has no home, and has no expectation of being allowed into something like a private office building or a restaurant, prohibitions on things like sleeping that apply particularly to public places pose a special problem. For although there is no general prohibition on acts of these types, still they are effectively ruled out altogether for anyone who is homeless and who has no shelter to go to. The prohibition is comprehensive in effect because of the cumulation, in the case of the homeless, of a number of different bans, differently imposed. The rules of property prohibit the homeless person from doing any of these acts in private, since there is no private place that he has a right to be. And the rules governing public places prohibit him from doing any of these acts in public, since that is how we have decided to regulate the use of public places. So what is the result? Since private places and public places between them exhaust all the places that there are, there is nowhere that these actions may be performed by the homeless person. And since freedom to perform a concrete action requires freedom to perform it at some place, it follows that the homeless person does not have the freedom to perform them. If sleeping is prohibited in public places, then sleeping is comprehensively prohibited to the homeless. If urinating is prohibited in public places (and if there are

In contrast to *Pottinger*, the California Supreme Court upheld a municipal ordinance that banned camping and storage of personal property in public areas despite evidence that the number of available shelter beds was 2,500 less than the need. *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995). The court merely sustained the ordinance from a facial challenge, however, finding that it did not inevitably conflict with constitutional prohibitions; the court did not rule on the question whether, as applied to the particular facts of the case, the ordinance had the effect of infringing on constitutionally protected rights. The court held that “Santa Ana has no constitutional obligation to make accommodations on or in public property available to the transient homeless to facilitate their exercise of the right to travel,” and rejected the notion that the ordinance punished individuals for the “involuntary status of being homeless” because the ordinance regulated conduct, not merely status. *Id.* at 1166. Disagreeing with the analysis in *Pottinger*, the court concluded that “[a]ssuming arguendo the accuracy of the declarants’ descriptions of the circumstances in which they were cited under the ordinance, it is far from clear that none had alternatives to either the condition of being homeless or the conduct that led to homelessness and to the citations.” *Id.* at 1167. Concurring Justice Joyce Kennard emphasized that the ruling merely upheld the ordinance on its face and did not reject on the merits the claim accepted in *Pottinger* that “a homeless person may not constitutionally be punished for publicly engaging in harmless activities necessary to life, such as sleeping.” *Id.* *Accord, Davison v. City of Tucson*, 924 F. Supp. 989 (D. Ariz. 1996). *But cf. Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005 (C.D. Cal. 2011) (finding that city violated constitutional rights of the homeless by seizing and destroying property stored on streets without notice and an opportunity to be heard).

Do you agree with the *Pottinger* ruling?

**Problems**

Seventy convicted sex offenders live under a causeway connecting the City of Miami to Miami Beach because local laws bar them from living within 2,500 feet of where children gather, and there is apparently no place that they are allowed to live in the city. On July 9, 2009, the American Civil Liberties Union sued Miami-Dade County, arguing that its 2,500-foot restriction is preempted by state law, which provides for only a 1,000-foot protective zone. See Damien Cave, *Roadside Camp for Miami Sex Offenders Leads to Lawsuit*, N.Y. Times, July 10, 2009. Assuming the local government has the power to enact the 2,500-foot ordinance, do the sex offenders have any remedy? If you were advising the county government, what advice would you give?