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# Reconceptualizing Trespass

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# Essay

## RECONCEPTUALIZING TRESPASS

*Gideon Parchomovsky\* & Alex Stein\*\**

INTRODUCTION.....	1823
I. TWO FACES OF TRESPASS.....	1828
A. <i>The Ex Ante View of Trespass</i> .....	1830
B. <i>The Ex Post View of Trespass</i> .....	1831
II. RETROFITTING THE CATHEDRAL.....	1837
A. <i>Propertizing Compensation</i> .....	1841
B. <i>Disgorgement of Profits</i> .....	1845
C. <i>The Market-Rent Exception</i> .....	1849
III. PUNITIVE DAMAGES.....	1859
CONCLUSION.....	1862

### INTRODUCTION

This Essay addresses an anomaly in the law's protection of property ownership. *Ex ante*, the owner's right to exclude others from her property receives the highest degree of protection. An owner who anticipates an unauthorized entry by a third party can secure an injunction against that person. The same is true of an owner who discovers an ongoing intrusion. In

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this case, a court will order the trespasser to vacate immediately, thereby restoring the owner's "sole and despotic dominion" over her property.<sup>1</sup>

The protection owners enjoy *ex ante* is an example of what Guido Calabresi and Douglas Melamed famously termed property rule protection.<sup>2</sup> Under the Calabresi–Melamedian definition, property rule protection gives an entitlement holder the right to set the price for the use of her entitlement. More generally, it empowers the entitlement holder to transact with others on her own terms. Therefore, property rule protection also provides immunity against forced transactions. The point and purpose of this protection is to discourage third parties from attempting to circumvent market transactions and encourage them to negotiate with the rights holders. Accordingly, a person interested in using another's private property must either transact on the owner's terms or forego his plan.

*Ex post*, however, things change dramatically. After a trespass ends, the typical remedy an aggrieved owner can receive in court is compensation measured by the market value of the unauthorized use. Courts ordinarily set the compensation amount equal to the rent that owners of similar properties can obtain on the market.<sup>3</sup> This measure applies to all trespass cases except the most egregious ones, where courts are authorized to grant punitive damages.<sup>4</sup> *Ex post*, therefore, the owner must suffice herself with lesser protection than she originally had, namely, market-value compensation. Under current law, the trespasser effectively holds a call option on the owner's property.<sup>5</sup> By trespassing, he can impose a market-price rental transaction on the owner. In Calabresi and Melamed's terminology, the protection

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<sup>1</sup> See 2 WILLIAM BLACKSTONE, COMMENTARIES \*2. For an influential discussion of the Blackstonian view's effect on contemporary theories of property rights, see Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 360–64 (2001) [hereinafter Merrill & Smith, *What Happened?*]. For discussions of the limits of the right to exclude, see THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 439–80 (2007); Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1286–1412, 1450–77 (1996) (analyzing antidiscriminatory and other limitations to the right to exclude). See also *State v. Shack*, 277 A.2d 369 (N.J. 1971) (famously holding on policy grounds that a farm owner cannot deny a worker living on the farm an opportunity to receive aid from volunteers).

<sup>2</sup> See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

<sup>3</sup> See 4 RESTATEMENT (SECOND) OF TORTS § 931 cmt. b (1979) (stating that common law courts predominantly use market-based rent as a benchmark for determining property owners' compensation for trespass); DAN B. DOBBS, 1 LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION, § 5.12(1) at 827–29 (2d ed. 1993) (attesting that, except in special cases, "[g]eneral damages recoveries for harm to interests in land are usually based on the diminished market value or diminished rental value of land" and summarizing relevant caselaw). For a recent court decision applying the market-priced rent criterion, see *Franco v. Piccilo*, 853 N.Y.S.2d 789, 790 (N.Y. App. Div. 2008) (instructing the court below to assess plaintiff's compensation for trespassory parking of vehicles on his driveway based on a "reasonable rental value").

<sup>4</sup> See *infra* Part III.

<sup>5</sup> See Ian Ayres, *Protecting Property with Puts*, 32 VAL. U. L. REV. 793 (1998) (importing the taxonomy of "call" and "put" options to explain the protections of liability and property rules).

afforded to owners *ex post* is an example of liability rule protection. This category includes all cases in which an entitlement owner does not get to set the price for the use of the entitlement and instead a state actor, such as a court, an administrative agency, or the legislature sets the price.

The switch from an injunctive remedy, *ex ante*, to compensatory relief, *ex post*, should not trouble us in and of itself. After all, once a violation of a right ends, money damages are the only means of redressing the violation. What is troubling is the choice of market value as the measure of the owner's compensation. Indeed, from the vantage point of property theorists, it presents an anomaly.

To see why, it is necessary to understand the impact of the weakened *ex post* protection on the *ex ante* protection of the owner against trespass. Setting compensation at market value effectively erases the power of the owner to determine the price for the use of her entitlement. Similarly, it annuls the owner's immunity against forced transactions. Worse yet, it undermines the incentive for third parties to initiate negotiations with property owners. Why would third parties even attempt to negotiate with owners and risk a negative answer when they can simply take matters into their own hands, act unilaterally, and pay the official market price after the fact?<sup>6</sup> The prevalent remedial regime fails to provide third parties with an adequate motivation to elect negotiations over unilateral action. The weak *ex post* protection encourages willful blindness with respect to private ownership interests and renders the strong *ex ante* protection ownership enjoys rather meaningless. The result is a mismatch between right and remedy: the most important right associated with property is protected with a remedy typical of the domain of accidents in the law of torts.

One might suggest that this sorry state of affairs was born of necessity. Compensation at market value—so the argument goes—is the only practical remedy after a trespass ends. Restoring the property rule protection of the owner after the fact by attempting to reconstruct her asking price is a futile and wasteful exercise. The owner's asking price is private nonverifiable information. At the time of the trial, after a trespass occurs, there may not be enough evidence regarding the owner's asking price, and her testimony on the matter cannot be trusted since she has an inherent incentive to shade up the real price in order to increase her compensation.

This argument is overstated, however. The problem of private information is present in all areas of litigation, and evidence law deals with it reasonably well. Evidentiary mechanisms that include burdens of proof and presumptions deliver workable solutions to this problem.<sup>7</sup> Therefore, the

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<sup>6</sup> Cf. Yuval Feldman & Doron Teichman, *Are All "Legal Dollars" Created Equal?*, 102 NW. U. L. REV. 223, 236–50 (2008) (demonstrating experimentally that a person is generally more willing to engage in conduct perceived as transactional, for which she expects to pay the set price, than to commit a "violation" triggering an identical payment in the form of a penalty).

<sup>7</sup> See ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 157–71 (2005).

challenge of private information does not necessitate setting the owner's compensation at market value. To demonstrate this point, we introduce in this Essay two superior remedies. The first remedy, and also the one that we recommend most, is "propertized compensation."<sup>8</sup> This remedy approximates, *ex post*, the protection level enjoyed by owners *ex ante*. Propertized compensation seeks to reinstate, to the extent feasible, the owner's right to exclude others and to set any price for occupation and use of her property. Although propertized compensation cannot always accurately replicate the owner's preferred asking price, it goes a long way towards adequately restoring the integrity of ownership and protecting owners against trespass. Importantly, we will show that propertized compensation outperforms not only market-value compensation but also punitive damages and disgorgement, our second recommended remedy.

To operationalize our proposal of propertized compensation, we turn to an evidentiary mechanism for expedient determination of compensation in real world trials. We use the famous case of *Armory v. Delamirie*<sup>9</sup> as a blueprint for our design. In *Armory*, a chimney sweep found a valuable jewel and entrusted it to a jeweler for appraisal. The jeweler took the find and refused to return it to the chimney sweep. When the chimney sweep sued for replevin, the jeweler argued that he was no longer in possession of the jewel and refused to disclose what happened to it. Instead of awarding the chimney sweep market-value compensation, the court ordered that the jeweler either adduce reliable evidence regarding the actual price for which he sold the jewel or pay compensation commensurate with the price of the most valuable jewel fitting the socket that contained the original jewel.

Generalizing from this case, we propose a set of rules to allocate burdens of proof among the parties involved. The aggrieved owner will bear the production burden with respect to her *ex ante* price. This burden will require her to adduce evidence concerning her asking price, or property valuations from which this price can be extrapolated, for the period preceding the trespass. This evidence will create a strong presumption that the owner's *ex ante* price is real. To rebut this presumption, the trespasser will need to prove by a preponderance of the evidence that the owner deliberately overstated her *ex ante* price. If he fails to prove this, the court will affirm the owner's price and use it as a basis for calculating her compensation. If the court finds the trespasser's evidence convincing, it will award the owner the going market rent. These rules will uphold the right to exclude by reinstating the primacy of the owner's voice in fixing the price for another person's use of her property. They will eradicate the call option that anomalously benefits the trespasser under the current law and give the own-

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<sup>8</sup> See *infra* Part II.A.

<sup>9</sup> (1722) 93 Eng. Rep. 664 (K.B.).

er a remedial put option instead.<sup>10</sup> This option will allow the owner, after the event, to align the trespasser's compensation duty with the rental price she would have requested before the trespass.<sup>11</sup>

A possible, albeit imperfect, alternative to propertized compensation is disgorgement of the trespasser's profit.<sup>12</sup> Broadly defined, disgorgement would allow the aggrieved owner to force the trespasser to hand over all his trespass-related profits. Under our proposed standard, any profit facilitated by the trespass would be subject to disgorgement. Full enforcement of this remedy would protect ownership by eliminating a prospective encroacher's incentive to trespass.

Disgorgement has a number of shortcomings, however. First, as a compensatory device, disgorgement is inadequate because the trespasser's profits and the owner's losses from the trespass are not equal. Therefore, the owner's ex post recovery amount will either be excessive or insufficient relative to her actual losses.<sup>13</sup> Of course, full enforcement of the disgorgement remedy would make this undesirable scenario extremely rare since potential trespassers would be deterred from entering others' property. A rational trespasser would never choose to commit trespass knowing that he would have to disgorge all trespass-related gains. In reality, however, full disgorgement is unlikely to occur as it necessitates an accounting procedure that is both very costly and highly uncertain for the aggrieved party.<sup>14</sup> These twin problems necessarily reduce the probability of enforcement and the amount trespassers will expect to disgorge.

For these reasons, we recommend the disgorgement remedy as a fall-back for cases in which the owner's ex ante price is unascertainable and, consequently, propertized compensation cannot be awarded. In such cases, instead of forcing the owner into a market-price rental transaction with the trespasser, courts should protect ownership by allowing the owner to collect the trespasser's profit. This substitution of remedies would increase the costs of adjudication and law enforcement. We believe, however, that the erosion of ownership effected by the current remedial regime costs society even more.

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<sup>10</sup> A call option in relation to an asset gives its holder the power to purchase the asset from the owner at a price set in advance (e.g., the market price). Conversely, a put option entitles the owner to force another person into a purchase of the asset at a reserved price. The two options allocate control over asset-related transactions. The call option obliterates the owner's control over those transactions, while the put option makes this control absolute. See Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1444 (2009).

<sup>11</sup> Cf. Ayres, *supra* note 5, at 798–813 (rationalizing other put options as property rule protections); see also Madeline Morris, *The Structure of Entitlements*, 78 CORNELL L. REV. 822, 854–56 (1993) (describing put options as reverse liability rules).

<sup>12</sup> See *infra* Part II.B.

<sup>13</sup> This problem explains the law's reluctance to recognize disgorgement as a remedy for trespass. See *infra* notes 76–81 and accompanying text.

<sup>14</sup> See *infra* notes 73–75 and accompanying text.

After introducing the concepts of propertized compensation and disgorgement, we use them to reorder, or reconceptualize, the law of trespass. We demonstrate that propertized compensation should be the preferred and standard remedy in trespass cases. Disgorgement should function as an alternative remedy in cases where the owner cannot recover propertized compensation.

Market-value compensation should not be abolished completely, however. Rather, it should be reserved for two exceptional categories of cases: where the presence of an exigency makes it impossible for the trespasser to approach the owner for permission, as in the case of necessity, or where no voluntary transaction could be expected between the owner and the trespasser and the unauthorized entry stands to produce a significant benefit to society while causing only minimal proprietary harm to the owner, as in the case of media trespass. Market-value compensation should also apply in cases involving good faith encroachment, where the encroacher had no cost-effective way to find out about the trespass and thus acted upon a reasonable belief in the rightfulness of his actions.

Our Essay makes four contributions to legal theory. First, it identifies the hitherto underappreciated mismatch between rights and remedies in the law of trespass. Second, it introduces the concept of propertized compensation, explains how it may be implemented, and outlines how it can serve as an organizing principle for trespass law. Third, the discussion of remedies in this Essay provides an important complement to the analytical framework established by Calabresi and Melamed in their Cathedral article<sup>15</sup> by highlighting the important nexus between property and liability rules and by developing a fuller and more nuanced understanding of the remedial options they grouped together under the rubric of liability rules. Fourth, our account underscores the centrality of evidentiary mechanisms to the design of substantive rights and remedies in private law.

Structurally, the Essay unfolds in three parts. Part I identifies the anomalous discrepancy between *ex ante* and *ex post* protections of ownership. Part II develops our propertized compensation and disgorgement proposals and delineates their respective scopes. Part III examines the existing alternative to our proposals: imposition of punitive damages upon trespassers. A short conclusion follows.

## I. TWO FACES OF TRESPASS

The right to exclude others is the most fundamental component of ownership.<sup>16</sup> This right empowers the owner to prevent others from using,

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<sup>15</sup> See Calabresi & Melamed, *supra* note 2.

<sup>16</sup> See Merrill & Smith, *What Happened?*, *supra* note 1, at 360; Glen O. Robinson, *Explaining Contingent Rights: The Puzzle of "Obsolete" Covenants*, 91 COLUM. L. REV. 546, 561–62, 573 (1991); see also Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 285 (2008) (rationalizing ownership as entrenching the owner's position as the exclusive agenda setter for the owned

occupying, or taking her property.<sup>17</sup> The owner can use various self-help measures to fend off unwanted third parties, including reasonable force.<sup>18</sup> More importantly, the owner is entitled to harness the power of the state to vindicate her right to exclude.<sup>19</sup> She can rely on the police to remove unwanted persons from her property and turn to the courts to secure injunctive relief in cases of trespass or encroachment.

This conventional account of the legal protection of ownership is unduly sanguine. There is a curious disconnect between how the owner's right to exclude is protected *ex ante*, before trespass occurs, and how it is protected *ex post*, after a trespass has been committed. *Ex ante*, the law offers a property owner an impressive array of powers and remedies, all designed to help her fend off unwanted entry onto her property. These powers and remedies protect the owner's autonomy to decide whom and what to allow on her property and at what price. Furthermore, the law respects the owner's decisionmaking power even when her choices are unreasonable or downright exorbitant. From an *ex ante* perspective, therefore, the law grants owners full discretion over the use of their property and its terms. Further, the law is committed to preventing others from usurping the owner's decisionmaking power.

*Ex post*, however, the law takes a surprisingly different tack. After a trespass is committed and removed, the law entitles the aggrieved owner to damages commensurate with the market value of the unwanted use of her property. The law thus substitutes for the near absolute power the owner enjoyed *ex ante* a much weaker form of protection *ex post*, turning the owner from the queen of her castle to just another fief—or, in economic parlance, from a price maker to a price taker.

Of course, this drop in protection after the fact undermines the strong protection granted to owners *ex ante* and erodes its deterrent effect on prospective trespassers. In the following sections, we take a close look at these two faces of the trespass doctrine. We analyze the doctrinal disconnect between the *ex ante* and *ex post* protections of ownership and identify its anomalous consequences.

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thing); see generally Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998) [hereinafter Merrill, *Exclude*] (attesting that the right to exclude is the key component of property ownership and examining its role in property law generally).

<sup>17</sup> See Merrill & Smith, *What Happened?*, *supra* note 1, at 389 (defining the right to exclude as allowing the owner "to control, plan, and invest" in the use of her property); see also Merrill, *Exclude*, *supra* note 16 at 740–45 (same); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1759 (2004) [hereinafter Smith, *Property Rules*] (same).

<sup>18</sup> See, e.g., Henry E. Smith, *Self Help and the Nature of Property*, 1 J.L. ECON. & POL'Y 69, 80–86 (2005) [hereinafter Smith, *Self Help*] (discussing the relationship between self-help and the right to exclude).

<sup>19</sup> See, e.g., Leo Katz, *Choice, Consent and Cycling*, 104 MICH. L. REV. 627, 667 (2006) (acknowledging the possibility of relying on the police to fend off trespassers).



*A. The Ex Ante View of Trespass*

The right to exclude—when protected by injunctive relief—confers upon the owner the privilege to demand any price for the use or occupation of her property.<sup>20</sup> The requested price may be completely out of touch with reality and downright preposterous. Yet the owner is legally entitled to ask for it. A prospective buyer or user, of course, is free not to transact. Alternatively, a buyer or user may try to persuade the owner to lower the price or opt to transact with other owners. But unless the owner is a monopolist whose activities violate our antitrust laws or a landlord attempting to worsen the position of a protected tenant, the prospective buyer (or user) cannot go to court and petition for an order forcing the owner to align her price with the market. The court has no authority to issue such an order. The right to exclude thus empowers the owner to offer her property on a “take it or leave it” basis at a price of her choosing. The owner thus enjoys a comprehensive immunity against forced transactions.

To illustrate, consider the following hypothetical. Olivia owns Longacre, a tract of land that adjoins a construction site where Tom works as project manager. Tom needs to park his pickup truck as close as possible to the construction site. He approaches Olivia and offers to pay \$900 a month for the right to park his truck on Longacre. This amount is well above the going rates in the area. But Olivia, a longtime environmentalist who abhors pickup trucks, turns the offer down and demands instead \$3000 a month—an utterly exorbitant amount. She tells Tom that she intends to use \$1000 of that money for monthly donations to her favorite charity, “Protect the Tree.” Olivia’s demand prompts Tom to leave the scene without customary civilities.

The following morning, unable to find a parking spot in the vicinity of the construction site, Tom decides to park his truck on Longacre and leave Olivia \$30, a prorated daily payment based on the monthly rate he offered

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<sup>20</sup> For a detailed discussion, see *infra* Part II.A. As Professor Glen Robinson explains:

The right to resist forced transfers, regardless of their efficiency, is so fundamental to our conception of property rights as to be almost definitional. If Alice refuses to sell, her reasons for refusal are irrelevant; it does not matter whether she is “irrational” in her valuation of the amenities . . . or whether she is merely being “strategic” in holding out for a greater share . . . . No one who has even a smattering of legal knowledge would dispute this account as a positive statement of the law, and few who believe in private property would dispute it as a normative statement of what the law ought generally to be.

Robinson, *supra* note 16, at 561–62.

This privilege is fundamental to a free economy. See, e.g., RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 42 (5th ed. 1989) (“The market can function only in a situation where the ‘exclusion principle’ applies, *i.e.*, where A’s consumption is made contingent on A’s paying the price, while B, who does not pay, is excluded. Exchange cannot occur without property rights, and property rights require exclusion. Given such exclusion, the market can function as an auction system. The consumer must bid for the product, thereby revealing preferences to the producer, and the producer, under the pressures of competition, is guided by such signals to produce what consumers want.”).

to pay. But as he approaches Longacre, he finds the property gate locked and a guard patrolling it. The guard ignores Tom's plea to let him in, forcing him to turn around, seek parking elsewhere, and lose two hours of work. Three days later, Tom receives in the mail a court order preliminarily enjoining him from entering Longacre.

This simple story summarizes the essence of the owner's right to exclude. Upset though Tom may be at Olivia's reaction, he has no legal recourse against her. All of Olivia's actions were perfectly within her legal rights. The injunctive relief against Tom actualizes Olivia's ownership of Longacre.<sup>21</sup> For centuries, the Anglo-American law has sided with property owners, vindicating their right to reject unwanted transactions and uses. With the notable exception of the state's eminent domain power,<sup>22</sup> any non-consensual entry, let alone taking, constitutes unlawful trespass.<sup>23</sup>

### B. *The Ex Post View of Trespass*

Curiously, the property rule protection only applies *ex ante*, before a trespass occurs. *Ex post*, the property rule protection becomes unavailable, and in its stead the aggrieved owner must settle for liability rule protection. Once a nonconsensual entry has been committed, the landowner can only receive a damage award commensurate with the market value of the unauthorized use. Specifically, the amount is set at the going rent for the period of the trespass, plus any damage to the property caused by the trespass and any ancillary losses.<sup>24</sup>

To illustrate how trespass is addressed *ex post*, let us reconstruct our previous example with Olivia and Tom. Assume this time that Tom and Olivia never negotiated or even met. Instead, one morning Tom decided to park his truck on Olivia's property, and upon getting there he was confronted by neither a locked gate nor a security guard. Rather, he found the gate open and unattended and promptly proceeded to park his truck on the property. Furthermore, he learned from a neighbor that Olivia had left town to assist her ailing mother. Tom decides to park his car on Longacre every weekday and does so for six months. At that point, Olivia brings a lawsuit against Tom. She seeks an injunction against him as well as damages in the

<sup>21</sup> For a recent account of the right to exclude and its injunctive consequences, see Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 623–27 (2008) (justifying the right to exclude on grounds of inviolability as a correlative of the obligation of inviolability casts on others).

<sup>22</sup> See Nicolle Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 109 (2006) (observing that the power of eminent domain "deprives an owner of her 'most essential right' to exclude others—including, especially, the government—from her property").

<sup>23</sup> See Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 16 (1985) (defining actionable trespass as "an invasion of the column of space that defines A's possessory interest under the *ad coelum* rule"); see also *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1351 (7th Cir. 1995) ("To enter upon another's land without consent is a trespass.").

<sup>24</sup> See *supra* note 3 and sources cited therein.

amount of \$18,000—the monthly price she would have demanded multiplied by the number of months Tom parked on her property—plus costs. Will the court award her the requested amount?

In all likelihood, it will not. Ex post, Olivia's right is subject to liability rule protection. She therefore will only be able to recover, in addition to costs, the market value of Tom's unauthorized parking. This value equals the fare that car drivers pay for parking in a location similar to Longacre. If the going fare is \$200 per month, Olivia will only be able to collect \$1200—a far cry from the \$18,000 she requested. At the end of the day, Tom was made better off by committing the trespass, and Olivia was made worse off. Ironically, by circumventing the market—that is, by not negotiating—Tom was able to deprive Olivia of her property rule protection and ensure that he paid only the court-determined market price for his unauthorized use of Olivia's lot.

This outcome is deeply problematic. Protection against forced transactions is important for preserving the property owner's dominion. Our society has made the determination that an important component of property ownership is the right to exclude third parties from an asset, which confers upon the owner the power to set the price for the use of her property. The ex post approach to trespass undermines this well-accepted concept of ownership. The only way by which an owner can preserve her property rule protection is to obtain an injunction against the trespasser before the unauthorized entry occurs, but this ex ante remedy is often unavailable or impracticable. In the regular case, owners simply cannot anticipate trespass and are unaware of the risk of its occurrence.

Some readers may attempt to defend the doctrinal switch from property rule protection ex ante to liability rule protection ex post by appealing to tort theory. The ex ante framework protects ownership against upcoming or ongoing trespass. As such, it is controlled by property doctrine. The doctrine's remedial mechanism—the injunction—restores the ownership order that was upset by the trespass. The ex post framework performs a different function: it compensates people for harms that cannot be undone. As such, it is regulated by tort doctrine. This doctrine's remedial mechanism—compensation—aims at making the victim whole and deterring future wrongdoers.

The two objectives of tort doctrine practically dictate that tort damages be based on market values. As far as victim compensation is concerned, the compensation amount should stay within the bounds of reasonableness as part of a hypothetical reciprocal arrangement—the social contract—between community members who inadvertently expose each other to different risks of harm as they go about their business and daily affairs.<sup>25</sup> The

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<sup>25</sup> This discussion draws on George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972), who advocates a complete exemption from tort liability for damages associated with reciprocal impositions of risk, rationalizes the imposition of punitive damages for intentional torts, and

reciprocal confinement of the compensation awards to market value thus determines the fair amount of recovery for victims of accidents.

Market-based valuation of damages also sets the optimal level of deterrence for tortfeasors.<sup>26</sup> A person contemplating an activity that involves a risk of harm is typically unaware of the individual damage that he might cause. The average damage is the only measure upon which such a person can rely in comparing the expected benefit of his activity with the expected harm it might produce. Reliance on the average damage is socially desirable. The total damage that a repeated activity produces over time equals, roughly, the average damage multiplied by the number of cases in which the activity was carried out. The average damage, therefore, is the right benchmark for fixing the required threshold for the activity's benefits. When those benefits exceed the average damage, the actor deserves an exemption from tort liability. Otherwise, he should be held liable for the damage caused.<sup>27</sup> Market prices, or market values, represent the best approximation of the average harm—or at the very least provide an important informational basis for guiding behavior.

The appeal to tort theory cannot carry the day in the trespass context, however. Market-based valuation of the damage is only suitable for adjudicating typical torts that involve accidents between strangers.<sup>28</sup> Tortfeasors who cause such accidents do not harm their victims deliberately. Nor can they identify those victims in advance and negotiate with them the risk of accidents and the prospect of future compensation. Some trespasses fall into the category of “accident law” as well, but those trespasses are typically bona fide or *de minimis* encroachments. Familiar examples are mistaken

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supports the objective market-based assessment of accidental damages. We also rely on Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 313–25 (1996) (updating and refining Fletcher's reciprocity thesis), and on John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 567–69 (2003) (conceptualizing tort law as fair terms of cooperation among equals).

<sup>26</sup> This criterion for assessing tort damages is dictated by the liability rule regime, rationalized by Calabresi & Melamed, *supra* note 2, at 1092 (“Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule. This value may be what it is thought the original holder of the entitlement would have sold it for. But the holder's complaint that he would have demanded more will not avail him once the objectively determined value is set. Obviously, liability rules involve an additional stage of state intervention: not only are entitlements protected, but their transfer or destruction is allowed on the basis of a value determined by some organ of the state rather than by the parties themselves.”).

<sup>27</sup> This is a restatement of the famous Learned Hand formula. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). For a recent application of the formula, see *Mesman v. Crane Pro Servs.*, 512 F.3d 352, 354–55 (7th Cir. 2008).

<sup>28</sup> See Louis Kaplow, *The Value of Accuracy in Adjudication*, 23 J. LEGAL STUD. 307, 314–17 (1994) (establishing that basing awards on average harm is efficient because it avoids costly ascertainment of individualized damages *ex ante* and *ex post*); see also Alex Stein, *Of Two Wrongs That Make a Right: Two Paradoxes of the Evidence Law and Their Combined Economic Justification*, 79 TEX. L. REV. 1199, 1216–19 (2001) (explaining the efficiency of setting liability for accidents on the expected average damage).

entry into another person's unfenced land and a U-turn by a car that inadvertently drives over privately owned grass. For these and other minimal encroachments, the liability rule protection is appropriate—a proposition we fully rationalize in Part II.C.

Continuous trespasses that constitute a serious violation of a person's ownership do not typically fall into the "accident between strangers" category. These trespasses are virtually always deliberate. Most importantly, the trespasser can almost always negotiate a transaction with the owner before trespassing. The owner's harm from a continuous trespass is different in kind from ordinary tort damages. This harm includes more than just a temporary occupation of the owner's property, damage to her land and fixtures, the cost of removing the trespass, and the psychological harm suffered from all of the above. It also includes the violation of the owner's right to exclude others.

This right and the corresponding immunity against forced transactions are the fundamentals of ownership. In our hypothetical, Olivia exercised this right when she refused to let Tom park his car on her property for \$900 a month. Olivia also exercised this right when she stated the \$3,000 monthly rental as her condition for allowing Tom to park his car on Longacre. Had she acted as she did in our original example and obtained an injunction, Tom would have been unable to park his truck on Longacre without paying her \$3,000 a month. If the law condones Tom's trespass, it will incentivize individuals to circumvent market transactions and avoid negotiations with property owners. In economic parlance, the ex post approach to trespass may be described as creating in third parties a call option on the private properties of others—a call option that is, moreover, given away for free.<sup>29</sup>

At this point, some readers may object to our analysis on the ground that it ignores the possibility of punitive damages. We are cognizant of this option.<sup>30</sup> However, punitive damages are awarded only in extreme and unusual cases.<sup>31</sup> *Jacque v. Steenberg Homes*<sup>32</sup> is unquestionably the best known example of the use of punitive damages in a case of trespass. In

<sup>29</sup> Since the strike price is market value, one should expect the option to be exercised whenever a third party values the use of someone else's property at more than market value.

<sup>30</sup> See *infra* Part III.

<sup>31</sup> See, e.g., *Hammond v. County of Madera*, 859 F.2d 797, 804 (9th Cir. 1988) ("Common law principles . . . indicate that reasonable rental value is the appropriate remedy for trespass. Damage remedies for trespass are essentially compensatory and not punitive." (citing *Bourdieu v. Seaboard Oil Corp.*, 119 P.2d 973 (1941); *United States v. Marin Rock & Asphalt Co.*, 296 F. Supp. 1213 (C.D. Cal. 1969))); *Bethlehem Steel Corp. v. Shonk Land Co.*, 288 S.E.2d 139, 149 (W. Va. 1982) (attesting that "[t]he measure of damages for trespass to realty 'is the rental value of the property wrongfully occupied and withheld, with compensation for injury to the residue thereof'" and that "[i]t is axiomatic, in the absence of statutes providing multiple damages for a tenant's willful failure to surrender leased premises, that a lessor is entitled to the reasonable rental value of property wrongfully withheld by a lessee" (citing *Lyons v. Fairmont Real Estate Co.*, 77 S.E. 525, 528 (1913))).

<sup>32</sup> 563 N.W.2d 154 (Wis. 1997).

*Jacque*, the Wisconsin Supreme Court famously emphasized that “in certain situations of trespass, the actual harm is not in the damage done to the land, which may be minimal, *but in the loss of the individual’s right to exclude others from his or her property.*”<sup>33</sup> Based on this observation, the court established a rule that a violation of the right to exclude “may be punished by a large damage award despite the lack of measurable harm.”<sup>34</sup> Correspondingly, the court reinstated an award of punitive damages in the amount of \$100,000 for intentional trespass committed by a mobile-home supplier who plowed a path through the landowners’ snow-covered field to shorten the delivery of a mobile home to their neighbor.<sup>35</sup>

The facts of this case, however, demonstrate how unrepresentative it is. The defendant discovered that the easiest delivery route crossed the plaintiffs’ field and asked the plaintiffs a number of times to allow it to take this route, but the plaintiffs repeatedly refused. The defendant’s manager was unimpressed by the plaintiffs’ right to exclude others from their property. He told his subordinates, “I don’t give a — what [Mr. *Jacque*] said, just get the home in there any way you can,”<sup>36</sup> and ordered them to deliver the home through the plaintiffs’ land.<sup>37</sup> This addition of insult to the tort of trespass brought the case into a special category of “reprehensible torts,” calling for the imposition of punitive damages.<sup>38</sup> The Wisconsin Supreme Court’s decision to reinstate the damage award to the plaintiffs underscored the reprehensibility of the defendant’s conduct.<sup>39</sup> The court’s additional and arguably more central reason for this decision, however, was the violation of the owners’ right to exclude others and the court’s inability to remedy this violation by forcing the trespasser to pay the landowner market-priced rent.<sup>40</sup> Under our theory, this reason for obligating trespassers to pay punitive damages suffices. The court’s allusion to the trespasser’s reprehensibility as another relevant factor makes *Jacque* an untidy example of propertized compensation. Other cases predominantly follow the same reprehensibility rationale.<sup>41</sup>

<sup>33</sup> *Id.* at 159 (emphasis added).

<sup>34</sup> *Id.* (citing *McWilliams v. Bragg*, 3 Wis. 424, 428 (1854)).

<sup>35</sup> *Id.* at 163–66.

<sup>36</sup> *Id.* at 157.

<sup>37</sup> *Id.*

<sup>38</sup> The court described the defendant’s actions as “egregious,” “deceitful,” and “reprehensible.” *Id.* at 164. Furthermore, the *Jacques* had previously lost part of their property as a result of adverse possession, *id.* at 157, and were therefore highly sympathetic plaintiffs.

<sup>39</sup> *See id.* at 164.

<sup>40</sup> *Id.* at 160–61.

<sup>41</sup> *See, e.g., Wilen v. Falkenstein*, 191 S.W.3d 791, 800 (Tex. App. 2006) (affirming imposition of punitive damages upon trespasser who trimmed neighbor’s tree with “specific intent to cause substantial injury to [the neighbor]” and explaining that “the cases prescribing exemplary damages for a ‘malicious’ or ‘willful’ trespass are based on the old, common law ‘actual malice’ definition requiring proof of ‘ill-will, spite, evil motive, or purposing the injuring of another’” (quoting *Clements v. Withers*, 437 S.W.2d 818, 822 (Tex. 1969))); *Mission Res., Inc. v. Garza Energy Trust*, 166 S.W.3d 301, 318–20 (Tex. App.

Another narrow exception to the general rule of setting compensation at market value is a statutory double-rent provision for holdover tenants that has been adopted by several states. Application of this provision does not depend on the holdover tenant's malice or reprehensibility. The provision simply requires a holdover tenant to pay the landowner, for the period of his unauthorized possession of the property, "double the rent which he should otherwise have paid."<sup>42</sup> The double-rent sanction, however, only applies to tenants who continue to occupy the landlord's property after the tenancy's termination. Moreover, it is available only in those few jurisdictions that have enacted special holdover tenancy statutes. Most jurisdictions have no such statutes and still follow the common law market-rent approach. Finally, even in those jurisdictions that recognize the owner's right to collect double rent, courts only award the remedy if it is clear that the owner did not explicitly or implicitly acquiesce to the tenant's stay.

At the end of the day, then, punitive damages awards are few and far between and consequently do very little to undermine the generality of market-value compensation. Furthermore, for reasons set forth in Part III below, we believe that punitive damages should be sparingly used in trespass cases because superior policy tools can bridge the *ex ante*–*ex post* gap.

The upshot of all this is that, in the standard case, a trespasser can force the landowner to transact with him based on the going market rate. Effectively, he can rent the landowner's property at the going rate until the landowner forces him out either by securing a court order against him or by self-help, if the trespass is very recent.<sup>43</sup> By occupying another's property,

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2005) (affirming punitive damage award in the amount of \$10 million against trespasser who conducted hydraulic fracturing through its well to break up rock formation and steal trapped gas underneath owners' property); *see also* Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83, 105–07 (2007) (discussing representative cases that require a showing of malice and reprehensibility as a condition for holding a trespasser liable for punitive damages).

<sup>42</sup> MISS. CODE ANN. § 89-7-25 (2009). Typical of double-rent laws, the Mississippi statute provides that "[w]hen a tenant, being lawfully notified by his landlord, shall fail or refuse to quit the demised premises and deliver up the same as required by the notice, or when a tenant shall give notice of his intention to quit the premises at a time specified, and shall not deliver up the premises at the time appointed, he shall, in either case, thenceforward pay to the landlord double the rent which he should otherwise have paid, to be levied, sued for, and recovered as the single rent before the giving of notice could be; and double rent shall continue to be paid during all the time the tenant shall so continue in possession." For additional examples, *see* N.J. STAT. ANN. 2A:42-5 (West 2009) (imposing double rent on holdover tenants); *see also* Miss. State Dep't of Pub. Welfare v. Howie, 449 So. 2d 772, 777–78 (Miss. 1984) (explaining the differences between Mississippi's double-rent statute for holdover tenants, MISS. CODE ANN. § 89-7-25, and the market-rent approach of the common law).

<sup>43</sup> We need to acknowledge the possibility of a criminal sanction. This sanction—typically a fine—is virtually never set high enough to deter trespass. *See, e.g.,* *Jacque v. Steenberg Homes*, 563 N.W.2d 154, 161 (Wis. 1997) (describing the applicable \$30 forfeiture as "halfpenny"). In some jurisdictions, a landowner can also collect treble damages from a trespasser who has intentionally cut or removed trees, timber, or vegetation. *See, e.g.,* CAL. CIV. CODE § 3346(a) (West 2009); CONN. GEN. STAT. § 52-560 (2009); LA. REV. STAT. ANN. § 4278.1.B (2009); MASS. GEN. LAWS ch. 242, § 7 (2009). Theoretically, of course, a heavy criminal sanction—imprisonment or a skyrocketing fine—would deter trespass, but its social cost would be prohibitively high. *See* Steven Shavell, *Criminal Law and the Optimal Use of*

the trespasser not only violates the owner's right to keep him off her property, he also changes the remedial baseline from a property rule to a liability rule regime. The trespasser's ability to unilaterally change the legal protections provided to the owner compromises the core element of ownership: the owner's right to exclude others and to demand any price for allowing another person to use her property.<sup>44</sup>

This mismatch between rights and remedies is disconcerting. The owner's right to exclude others deserves an equal degree of protection ex ante and ex post. This means that the compensation award should ideally equal the amount that the owner would have agreed to accept ex ante in a voluntary transaction with the defendant. This amount may be above the market prices collectively set by owners of comparable properties. But being an owner allows a person to form and act upon her own assessment of her property's potential uses and value.<sup>45</sup> In real world settings, the owner's ex ante price is often unverifiable, which presents a serious evidentiary problem for adjudicators. This problem, however, does not necessitate compensation at market value. As we will show in the next Part, courts can develop a cost-effective evidentiary mechanism that would allow them to reach a reliable approximation of the owner's ex ante price.

## II. RETROFITTING THE CATHEDRAL

In their seminal article, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, Guido Calabresi and Douglas Melamed provided a rigorous and comprehensive framework for analyzing remedies in private law.<sup>46</sup> They also developed a taxonomy consisting of three broad categories of legal rules that protect entitlements: property rules, liability rules, and inalienability rules. According to their definitions, an entitlement is protected by a property rule when its holder gets to set the price for the use of the entitlement and nonconsensual attempts to take the entitlement will be met with an injunction.<sup>47</sup> Liability rule protection, in contrast, does not entitle the holder to determine the price for the use of her entitlement,

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*Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1236–37 (1985) (explaining that imprisonment and other supracompensatory penalties are costlier than, and therefore inferior to, compensatory remedies).

<sup>44</sup> See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (holding that the 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" (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))).

<sup>45</sup> See Smith, *Property Rules*, *supra* note 17, at 1722–31, 1755–56 (defending a decentralized property system in which owners increase wealth by making individualized choices between utilizations of assets that are numerous and heterogeneous).

<sup>46</sup> See Calabresi & Melamed, *supra* note 2. For a discussion of the voluminous literature inspired by Calabresi and Melamed's article, see Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 15–25 (2002).

<sup>47</sup> See Calabresi & Melamed, *supra* note 2, at 1105.



but rather entrusts this power to a third party<sup>48</sup>—typically a court, the legislature, or an administrative agency.<sup>49</sup> Nonconsensual breaches of the entitlements protected by a liability rule will result in a damages award to the plaintiff.<sup>50</sup> Inalienability rule protection puts entitlements outside the boundaries of markets, prohibiting their holders from selling them even if they desire to do so.<sup>51</sup>

Its immense significance notwithstanding, the Calabresi–Melamedian framework obfuscates the important connection between the *ex ante* and *ex post* protection of property rights. Indeed, their discussion of damages proceeds on a fairly general level of abstraction and fails to recognize the connection between the *ex ante* protection of an entitlement and the compensation measure that should be awarded *ex post* in the case of its breach. Calabresi and Melamed classify trespass doctrine as a paradigmatic example of property rule protection—a classification based exclusively on the *ex ante* view of trespass as an imminent or ongoing transgression that must be stopped and removed. Yet they fail to address the more important challenge (at least in practical terms) of *ex post* remediation of a property right’s infringement. Likewise, they treat compensatory relief as belonging exclusively to the domain of liability rules,<sup>52</sup> again blurring the important connection between the initial protection of an entitlement and the monetary relief that should be awarded for its violation. More generally, Calabresi and Melamed’s insistence on establishing property rule protection and liability rule protection as distinct categories blinds them to the interplay between the categories and the implications thereof.

Furthermore, Calabresi and Melamed treat damages as a black box. Although they discuss damages at great length, they do not distinguish among different types of damage awards, let alone discuss the appropriate conditions for using various compensatory measures. As a result, the Calabresi–Melamedian framework is descriptively and normatively incomplete.

We seek to complement Calabresi and Melamed’s analysis by proposing a more nuanced system of remedies, predicated on a principled separation between propertized and market-based compensation. Our more general goal is to craft a comprehensive remedial framework for trespass cases. Our proposed framework is predicated on three remedial measures: (a) propertized compensation; (b) disgorgement of the trespasser’s profit; and (c) market-price compensation.

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<sup>48</sup> *Id.* at 1105–06.

<sup>49</sup> *Id.* at 1122 n.62.

<sup>50</sup> *Id.* at 1106.

<sup>51</sup> *Id.* at 1106, 1111–12.

<sup>52</sup> See *id.* at 1105–07, 1110 (situating compensation in the domain of liability rules and distributive justice).

Our main innovation lies in the introduction of the concept of “properitized compensation.” Properitized compensation, as we define it, is a damage measure that sets compensation equal to the owner’s pre-trespass asking price. We argue that properitized compensation should become a standard remedial option in trespass cases. Use of this measure will reinstate the owner in the position of a price maker, entitling her to recover the amount that she would have agreed to accept *ex ante* in a voluntary exchange. As we explain in detail below, this remedial option will be available to owners who can adduce reliable evidence concerning their pre-trespass asking price.

The remedial menu we offer to such owners, however, is not limited to properitized compensation. Rather, owners may choose among properitized compensation, disgorgement of the trespasser’s profits, and market-price compensation. Each owner will decide for herself which path she will pursue based on her expected recovery amount. In a typical case, the owner will seek properitized compensation. As we show, there will be cases in which an owner will be able to prove what that amount would be without undue cost or burden. As an alternative remedy, the owner will be entitled to collect the trespasser’s profit. The owner would typically prefer this remedy when she has no reliable evidence concerning her pre-trespass asking price. The disgorgement remedy we afford owners is geared towards deterring trespassers from attempting to circumvent market transactions and inducing them to negotiate with owners. For reasons we will explain, proving the trespasser’s profit may be harder and costlier than producing the evidence necessary to collect properitized compensation. But we leave the choice of remedy to the owner’s case-specific determination.

In addition, the aggrieved owner will always be able to recover from the trespasser the market-priced rent. The owner will seek this remedy when she cannot produce credible evidence regarding her pre-trespass asking price and when the trespasser’s profits are below the market rent.<sup>53</sup>

The owner’s remedial options are summarized in Table 1 below.

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<sup>53</sup> The owner may prefer to seek market-value compensation even when the trespasser’s profits are higher than the market rent if the cost of proving those profits far exceeds the cost of establishing the market rent.

*Table 1: Owner Type and Remedial Options*

Owners who have evidence of above-market pre-trespass asking price	Choice between: (a) propertized compensation; (b) disgorgement of trespasser's profit; and (c) market-price compensation
Owners who do not have evidence concerning above-market pre-trespass asking price	Choice between: (a) disgorgement of trespasser's profit; and (b) market-price compensation

Our proposed remedial scheme serves the dual purposes of deterrence and restoration. Our optional approach increases the owner's expected recovery amount. Consider, for example, an owner with a 75% chance of recovering propertized compensation in the amount of \$100,000, a 15% chance of collecting \$200,000 as a disgorgement amount, and a 10% chance of falling back on the market-based compensation, priced at \$70,000. The owner's suit has an expected value of \$112,000. This suit is more likely to deter trespassers than a parallel suit under the extant regime (for only \$70,000).

Our remedial scheme is suitable for most cases of trespass. There are some special cases, however, that do not call for propertized compensation or disgorgement. These cases include trespass by necessity, media trespass, and bona fide encroachments. In these cases, the owner's compensation should be scaled back to market value. These special cases have a common denominator: the impossibility or impracticality of a voluntary transaction between the parties.<sup>54</sup> For reasons we will explain, all three cases are characterized by circumstances that make a voluntary transaction between the owner and the trespasser highly unlikely. This means that the owner could never have collected her asking price *ex ante* and thus should not be entitled to propertized compensation (or disgorgement) *ex post*.

In the remainder of this Part, we elaborate on the concept of propertized compensation and explain how courts can arrive at this measure. Subsequently, we analyze the disgorgement remedy and set forth a reform proposal that will make it effectual in trespass cases. Finally, we identify the special conditions under which courts should withhold both propertized compensation and disgorgement of profits.

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<sup>54</sup> In some of these cases, trespass is also likely to augment social welfare, but this is not the cases' general characteristic.

### A. *Propertizing Compensation*

Propertized compensation, as we already explained, equals the amount that the owner of the trespassed property would have accepted prior to the encroachment for allowing the defendant to use her property. We now describe the features of this general remedial norm and design an evidentiary mechanism that would enable courts to implement this norm under real world constraints.

The amount that the wronged property owner would have agreed to accept from the defendant prior to his trespass is inherently uncertain. In real world cases, courts would generally be unable to determine this amount because it is based on private information that is neither observable nor verifiable. Asking the owner after the fact how much she would have charged is unlikely to yield an honest response because at this point the owner has a strong incentive to overstate the asking price.

The owner's pre-trespass valuations of her property for either rental or selling purposes would be far better evidence than her testimony in court. Those valuations are creditworthy because they took place in the context of actual or contemplated transactions. Of course, a property owner may anticipate future trespass as a general possibility and strategically ask for high prices in order to exact high compensation from those who trespass on her property in the future. But asking for an exorbitant rental or selling price would normally be against the owner's interest. The anticipated trespass might or might not materialize, while in the meantime her overstated demand would kill a good transaction in the real world. Property owners, therefore, would be loath to adopt this preemptive strategy.

Because asking for an exorbitant rental or selling price involves a serious downside for the owner, it constitutes "costly signaling."<sup>55</sup> The owner's signal—a statement to a potential buyer or renter of her property about the demanded price—is reliable because an attempt to cheat is costly to the owner. For example, Olivia's demand that Tom pay her \$3,000 a month for parking his pickup on her lot appears exorbitant. This demand, nonetheless, was a "costly signal," rather than "cheap talk," because by making it Olivia risked—and actually lost—an attractive rental transaction offered by Tom. Hence, Olivia's demand was likely sincere. If so, the court should use it as a basis for calculating her propertized compensation for the six-month trespass perpetrated by Tom. In the absence of counterproof, the court should obligate Tom to pay Olivia \$18,000.

The owner's ex post valuation, on the other hand, will nearly always be "cheap talk." Theoretically, of course, testifying in court subject to penalties for perjury is not completely cost free. If the owner decides to cheat,

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<sup>55</sup> For an illuminating discussion of costly signaling, as contrasted with "cheap talk," in contract negotiations, see Jason Scott Johnston, *Communication and Courtship: Cheap Talk Economics and the Law of Contract Formation*, 85 VA. L. REV. 385, 404–39 (1999).

her lies may be detected and she may consequently be prosecuted, convicted, and punished as a perjurer. But the probability of that happening is infinitesimally low: in the absence of evidence as to the owner's prior valuations that contradicts her testimony in court, proving perjury would be impossible.

The problem of private nonverifiable information is ubiquitous but not insurmountable. Evidence law deals with this problem in all areas of litigation, and it does so quite successfully. It employs mechanisms that elicit private information from self-interested litigants by creating strong incentives against cheating.<sup>56</sup> These incentives are set by burdens of proof and evidentiary presumptions.<sup>57</sup> Application of these presumptions and burdens forces a person to choose between revealing the truth, however uncomfortable it may be, and sending a signal about possibly being a cheater. This self-identifying signal would prompt the factfinder to draw an adverse inference against its sender.<sup>58</sup> If that person is a witness, the factfinder would disbelieve his testimony. If that person is a party to the underlying litigation, the factfinder would make a finding against her. The essence of this evidentiary mechanism is nicely captured by Lord Byron's observation: "And, after all, what is a lie? 'Tis but the truth in masquerade . . . ."<sup>59</sup>

In what follows, we design an evidentiary mechanism geared toward attaining three goals. The first goal is to elicit from the property owner reliable information about her *ex ante* asking price. The second goal is to reinstate the owner's status as a price maker and holder of the right to exclude. The third goal is to discourage future trespassing. This mechanism would enable courts to make adequate assessments of propertized compensation under conditions of uncertainty. Those assessments would make the property rule regime function properly not only *ex ante*, but also *ex post*.

Our proposed mechanism has three mutually dependent components. First, the aggrieved property owner would have to satisfy the burden of producing evidence. She would have to adduce evidence that, if believed, would call for a factual finding in her favor. This rule is in complete alignment with positive law.<sup>60</sup>

The mechanism's second component is meant to elicit the best available evidence of the owner's rental price. Under this rule, the owner would only be able to rely on her pre-trespass evaluations of the property. Evidence to this effect can be found in the owner's past negotiations with potential buyers and renters, in her correspondence with realtors, in surveyors'

<sup>56</sup> See STEIN, *supra* note 7, at 143.

<sup>57</sup> *Id.* at 157–71.

<sup>58</sup> *Id.*

<sup>59</sup> GEORGE GORDON LORD BYRON, DON JUAN canto XI, st. 37, at 378 (Chiltern Library 1949) (1949).

<sup>60</sup> See 2 MCCORMICK ON EVIDENCE § 337, at 473 (Kenneth S. Broun ed., 6th ed. 2006) (stating the general rule of placing the production burden on the plaintiff).

reports, and in drafts of agreements and other preexisting business records.<sup>61</sup> The owner's ex post appraisal of her would-be rental price would be inadmissible. This rule is designed to separate the owner's "costly signals" from mere "cheap talk," allowing only the former to be taken into account as evidence.

The third and last component of our mechanism concerns the allocation of the burden of persuasion. The owner would discharge her evidentiary obligations by adducing evidence concerning her ex ante price (or range of prices reflecting her pre-trespass appraisals of the property). From this point on, the onus would be on the trespasser to prove by a preponderance of the evidence that the owner's price was unreal (as opposed to being merely unrealistic from a market-based perspective). If the trespasser failed to prove this, the owner's price would be deemed valid and the court would have to use it as a basis for calculating her compensation. In other words, when the factfinder is undecided about the owner's ex ante price, it would have to accept the owner's evidence as true.

This burden-shifting rule would significantly improve the owner's position as a plaintiff in a civil suit. Normally, the plaintiff bears the burden of establishing each and every element of his suit by a preponderance of the evidence.<sup>62</sup> Evidence law shifts this burden to defendants only in special cases and on policy grounds that are overwhelmingly strong.<sup>63</sup> These grounds are present here. Adoption of our burden-shifting proposal would allow the legal system to produce three socially beneficial effects. First, the proposed rule would reinstate the owner's voice as the decisive factor in setting the price for the use of her property. The act of trespass evidences the trespasser's unwillingness or inability to bargain down the owner's asking price. The trespasser therefore should not be allowed simply to argue in his defense that the owner's ex ante price was unreal and that she would have accepted the going market price. Instead, the law should require the trespasser to prove this claim by convincing evidence. Second, our proposed rule also would not allow the trespasser to benefit from the uncertainty of the owner's ex ante price. Since the uncertainty is a direct consequence of the unlawful trespass, it is the trespasser—not the property owner—who should bear the cost of the uncertainty on the outcome of the case.<sup>64</sup> Hence, the risk of error in ascertaining the owner's ex ante price should be borne by the trespasser. Placing this risk on the owner would be manifestly unjust. Finally, having the trespasser bear the burden of persua-

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<sup>61</sup> Federal Rule of Evidence 803(6) and its many state equivalents render business records admissible as evidence of the truth of their contents. *E.g.*, FED. R. EVID. 803(6); CAL. EVID. CODE § 1271 (West 2009). The hearsay rule consequently does not block their admission into evidence.

<sup>62</sup> See 2 MCCORMICK, *supra* note 60, § 339, at 483.

<sup>63</sup> *Id.* § 343, at 500–06 (specifying paradigmatic policy grounds for shifting the persuasion burden to defendants).

<sup>64</sup> See ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY 160–84 (2001).

sion on the price issue would intensify the general deterrence against trespass. The consequent decrease in the incidences of trespass would benefit society.

Adoption of a burden-shifting rule as a means of protecting ownership has ancient roots at common law. This remedy-property measure was established in a classic property law case, *Armory v. Delamirie*,<sup>65</sup> which featured a goldsmith who converted a jewel from a ring brought to him by a chimney sweep for appraisal. In response to the goldsmith's refusal to disclose the whereabouts of the jewel, the court instructed the jurors to award the chimney sweep damages based on the price of the most expensive jewel that fitted the ring's socket.

This approach was carried over into trespass law by a few old decisions involving mine-trespassing extraction of ore and coal.<sup>66</sup> In a once frequently cited case, *Little Pittsburg*, the Colorado Supreme Court relied on the *Armory* principle as a guide for adjudicating damage claims resulting from trespass.<sup>67</sup> Specifically, the court held that:

[A] man who willfully places the property of another in a situation where . . . its true amount or value [cannot be] ascertained . . . will . . . be compelled to bear the inconvenience of the uncertainty . . . which he has produced . . . [by] responding in damages for the highest value at which the property in question can reasonably be estimated.<sup>68</sup>

Modern courts did not follow the principle announced in that case, but did not formally overrule it either.<sup>69</sup> Outside the trespass area, however, *Armory* and its underlying notion of liability for evidential damage still remain good law.<sup>70</sup>

Admittedly, under our proposed system, only owners who can produce evidence concerning their pre-trespass reserve prices will be entitled to receive property-tized compensation. It should be emphasized that property-tized compensation is an optional remedy that owners are free to forego. Thus, all owners—both those who can prove their pre-trespass asking price and

<sup>65</sup> (1722) 93 Eng. Rep. 664 (K.B.).

<sup>66</sup> See, e.g., *Little Pittsburg Consol. Mining Co. v. Little Chief Consol. Mining Co.*, 17 P. 760 (Colo. 1888).

<sup>67</sup> *Id.* at 763–64.

<sup>68</sup> *Id.* at 763 (quoting 1 JOHN WILLIAM SMITH, A SELECTION OF LEADING CASES ON VARIOUS BRANCHES OF THE LAW: WITH NOTES 679 (1888–89)).

<sup>69</sup> The last case positively citing *Little Pittsburg* for this principle is from 1926. See *Page v. Savage*, 246 P. 304, 309 (Idaho 1926).

<sup>70</sup> See *Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 517 (Cal. 1998) (associating adverse inference against spoliator of evidence with *Armory*); *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721 (Tex. 2003) (same); see also *Equitable Trust Co. v. Gallagher*, 102 A.2d 538, 541 (Del. 1954) (“It is the duty of a court, in such a case of willful destruction of evidence, to adopt a view of the facts as unfavorable to the wrongdoer as the known circumstances will reasonably admit. The maxim is that everything will be presumed against the despoiler.”).

those who cannot—will have the option of collecting the trespasser's profits or, alternatively, market-price compensation.

### B. Disgorgement of Profits

A different way to protect the owner's rights is through the remedy of disgorgement.<sup>71</sup> Allowing the owner to collect the trespasser's profits would not only improve her compensation but would also enhance the deterrent effect vis-à-vis prospective trespassers. Facing the prospect of disgorgement, a rational trespasser might decide to abandon his plan.<sup>72</sup>

The disgorgement remedy, however, does not reflect the asking price of the aggrieved owner, nor does it seek to approximate that price. There is no necessary correlation between the benefit to the trespasser and the harm to the owner. These benefits and harms correspond to each other only accidentally. As a result, in some cases, disgorgement will excessively compensate the aggrieved property owner, while in others it will inadequately protect the owner's interests. This shortcoming makes disgorgement an inferior restorative remedy to propertized compensation.

Another shortcoming of the disgorgement remedy is its high informational cost. To obtain disgorgement, the owner would need to produce evidence identifying the trespasser's profits. To get the necessary evidence, the owner would need to initiate an accounting-for-profits proceeding. Consequently, the owner's claim would become dependent on the trespasser's private information, which is both difficult to obtain and costly to verify.<sup>73</sup> Additionally, the owner might encounter obstacles in establishing a causal link between the trespasser's profits and the trespass.<sup>74</sup> These evidentiary problems have no cost-effective solutions.<sup>75</sup>

<sup>71</sup> See HANOCH DAGAN, *UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES* 18 (1997) (commending disgorgement of the invader's profits as a remedy that "vindicates the plaintiff's liberty to control the entitlement as part of her private sphere"); see also Richard R.W. Brooks, *The Efficient Performance Hypothesis*, 116 YALE L.J. 568, 583–84 (2006) (identifying conditions in breach-of-contract cases under which an efficiency-driven legal system should let the promisee choose between specific performance and disgorgement of the breacher's profits); Steven Thel & Peter Siegelman, *The Role of Disgorgement in Contract Law* (Fordham Law Legal Studies Research Paper No. 1353402, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1353402](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353402) (identifying disgorgement's advantages as a policy tool in contract law by showing that the defaulter's profit is usually ascertainable and reflects the amount sufficient for deterrence).

<sup>72</sup> Whether he actually would desist would depend on the scope and likelihood of the disgorgement remedy.

<sup>73</sup> See HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 275 (2004).

<sup>74</sup> *Id.*

<sup>75</sup> See E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1350 & n.31 (1985) (attesting that accounting for profits for purposes of disgorgement is an uncertain, complicated, lengthy, and expensive procedure); see also *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 505 (1964) (acknowledging the Patent Act's substitution of injunctive relief for profit accounting and commending it for its simplicity). *Cf.*



Remediation of trespass by disgorgement also clashes with the prevalent legal tradition. Under current law, the disgorgement remedy is applicable only in a small set of cases that satisfy a strict causation requirement. To obtain this remedy, a plaintiff must establish that the defendant's unlawful gain originated from her loss.<sup>76</sup> The defendant's liability may trigger disgorgement only when the defendant enriches himself by taking an unlawful action that erodes the plaintiff's wealth or wealth-generating capabilities. For example, when David steals a taxicab that belongs to Peter and drives paying passengers, all his gains are subject to disgorgement and recoverable by Peter. But if David drives passengers in a sedan he stole from Paula—an orthopedic surgeon—the disgorgement remedy will be unavailable. Paula will only be able to recover from David (apart from any damage to the car and the cost of the gasoline) the rental value of the car's unauthorized use or, alternatively, wear and tear.<sup>77</sup>

With respect to trespass specifically, the law has adopted the so-called “no-disgorgement” rule.<sup>78</sup> The Restatement summarizes this rule as follows:

The “No-Disgorgement” Rule

(1) A person who tortiously has taken possession of another's land without the other's consent is not thereby under a duty of restitution to the other for its value or use, except a person who, having the power to take the land by eminent domain for a particular purpose, has taken possession of it for such purpose but does not take the required proceedings.

(2) A person who has trespassed upon the land of another is not thereby under a duty of restitution to the other for the value of its use, except a person who has tortiously grazed his animals upon the other's land to which he makes no claim of right.

(3) A person who has tortiously severed and taken possession of anything in or upon the land of another to which he makes no claim of right is under a duty of restitution to the other.<sup>79</sup>

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Thel & Siegelman, *supra* note 71, at 43–44 (arguing that accounting for profits is not difficult in contract-based litigation).

<sup>76</sup> For a classic statement and analysis of this requirement, see Farnsworth, *supra* note 75, at 1343–50. For a classic case exemplifying it, see *Edwards v. Lee's Adm'r*, 96 S.W.2d 1028, 1028–33 (Ky. 1936) (ordering entrepreneur who maintained and charged admission to a scenic cave, one third of which extended under a neighbor's property, to pay the neighbor one third of his net profits). For an illuminating discussion of this case that underscores the intrinsic value of property ownership, see DAGAN, *supra* note 71, at 76–78.

<sup>77</sup> Paula also might be entitled to punitive damages, but, again, not to disgorgement of David's profits.

<sup>78</sup> For a recent example of this approach, see *Meridien Hotels, Inc. v. LHO Fin. P'ship*, 255 S.W.3d 807, 821 (Tex. App. 2008) (exempting from disgorgement management fees earned by trespasser because trespasser paid the landlord holdover rent that equaled 1.5 times the previously agreed amount and the landlord failed to explain to the court “why these damages would not make it whole”).

<sup>79</sup> RESTATEMENT (FIRST) OF RESTITUTION § 129 (1937).

This provision limits the landowner's remedy against trespassers to tort damages. As the Restatement explains:

A disseises B of Blackacre and opens a store thereon, making thereby a profit of \$10,000. The reasonable rental value of the land is \$1000 for the period occupied by A. In addition to regaining the land, B is entitled only to \$1000 in an action of tort. B is not entitled to maintain an action of assumpsit.<sup>80</sup>

This and an additional example provided by the Restatement<sup>81</sup> illustrate the inability of the disgorgement remedy to restore the ex ante property rule protection of the owner.

The strict causation standard aims at achieving restitution, the main goal of the law of unjust enrichment.<sup>82</sup> Restitution, in turn, is concerned with ill-gotten gains—specifically, gains accrued to a defendant from an unlawful action that decreased the plaintiff's wealth or economic opportunities. This causation requirement situates the defendant's self-generated opportunities and wealth beyond the reach of disgorgement. In economic terms, the defendant is entitled to keep his Pareto-improving gain to himself. This rule benefits "efficient trespassers" such as Tom and the mobile-home mover in *Jacque* (assuming neither of them pays punitive damages).

However, the ostensibly Paretian claim that the trespasser's self-enriching activity did not make the owner worse off is flawed. This claim proceeds from a narrow economic baseline that accounts for each party's pre-trespass wealth and wealth-generating opportunities, but not for the owner's right to exclude as a freestanding good. The Paretian claim is thus predicated on an unreasoned rejection of the principle of ownership. This unprincipled premise invalidates the claim.

The disgorgement remedy can be improved by relaxing the strict causation requirement to allow the aggrieved owner to capture any profit facilitated by the trespass. The adoption of a facilitation criterion, which we

<sup>80</sup> *Id.* illus. 1.

<sup>81</sup> *Id.* illus. 2 ("A uses a road across B's land without B's knowledge for a period of two years in the transportation of materials, doing so without harm to the land. A saves \$2,000 thereby. A reasonable charge for the use of the road would be \$200 per year. B is not entitled to recover for the use of the land in an action of assumpsit; in an action of tort he is entitled to recover only \$200.").

<sup>82</sup> See *id.* § 3 ("A person is not permitted to profit by his own wrong at the expense of another."); see also RESTATEMENT (SECOND) OF RESTITUTION § 1 at 7 (Tentative Draft No. 1, 1983) (summarizing positive law of restitution by attesting that "[t]he case for relief is especially compelling when the element of gain on one side is matched by loss on the other, and both result from a single wrongful act"); *id.* § 1 at 8–9 ("A person who receives a benefit by reason of an infringement of another person's interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment."); Ernest Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQUIRIES IN LAW 1, 37 (2000) (rationalizing the law of unjust enrichment as undoing the proprietary deprivation suffered by the plaintiff).

recommend, would increase the protection granted to owners.<sup>83</sup> Under the strict causation standard, Olivia, for example, would not be able to recover any fraction of Tom's earnings even though it is clear that his continual trespass of her property helped him make those earnings. Tom's work as a project manager, as opposed to his prework parking of his truck, did not utilize Olivia's property. His earnings from that work consequently escape disgorgement. Under a facilitation standard, by contrast, Tom would have to disgorge a fraction of those earnings.

By expanding the scope of trespassers' gains that are subject to disgorgement, the facilitation standard would produce two beneficial effects. First, it would depress the gainful trespassing that the prevalent market-rent remedy anomalously encourages. Second, the facilitation standard would help the disgorgement remedy function in a socially desirable way as the mirror image of perfect compensation. Full compensation makes the victim indifferent between not having her right violated and receiving compensation for the right's violation.<sup>84</sup> Correspondingly, full disgorgement makes the wrongdoer indifferent between not violating the victim's right and paying compensation for the right's violation.<sup>85</sup> The facilitation standard would prompt prospective trespassers to respect the ownership rights of others.

The adoption of a broad facilitation standard would effectively create a propertized disgorgement, the disgorgement analogue of our propertized compensation. In fact, an example of propertized disgorgement exists in

<sup>83</sup> Cf. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 (Tentative Draft No. 4, 2005). This draft proposes to substantially expand the scope of disgorgement. Under the proposed rule:

(1) A person who obtains a benefit by an act of trespass . . . is accountable to the victim of the wrong for the benefit so obtained.

(2) The measure of recovery depends on the blameworthiness of the defendant's conduct. As a general rule:

(a) A conscious wrongdoer, or one who acts despite a known risk that the conduct in question violates the rights of the claimant, will be required to disgorge all gains (including consequential gains) derived from the wrongful transaction.

(b) A person whose conduct is innocent or merely negligent will be liable only for the direct benefit derived from the wrongful transaction. Direct benefit may be measured, where such a measurement is available and appropriate, by reasonable rental value or by the reasonable cost of a license.

*Id.* The proposed rule would thus establish the facilitation standard for intentional trespasses. In cases of unintentional trespass, the strict causation requirement would continue to apply.

<sup>84</sup> See Melvin A. Eisenberg, *The Disgorgement Interest in Contract Law*, 105 MICH. L. REV. 559, 561 (2006).

<sup>85</sup> *Id.*; see also ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 234 (3d ed. 2000) (coining the concept of "perfect disgorgement" as the mirror image of perfect compensation); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1051 (1991) (explaining that "perfect disgorgement" is "a sanction that restores the *wrongdoer* to the same position that she would have been in but for the wrong" and thus "strips the agent of her gain from misappropriation and leaves her no better or worse than if she had done no wrong").

the law of California, which allows trespass victims to choose between “the reasonable rental value” of the property “for the time of that wrongful occupation” and “the benefits obtained by the person wrongfully occupying the property by reason of that wrongful occupation.”<sup>86</sup> This provision replaces the strict causation requirement with a broad standard reminiscent of our “facilitation” criterion. As one California court openly acknowledged, the disgorgement remedy in California was expanded because disgorgement’s underlying purpose—“to eliminate financial incentives for trespass by eradicating the benefit associated with the wrongful use of another’s land”—dictates that disgorgement capture any “portion of the profit earned by the trespasser [that] was tied to the decision leading to the trespass.”<sup>87</sup> This broad disgorgement can function as a suitable alternative remedy in cases in which courts cannot award propertized compensation.

### C. The Market-Rent Exception

In this section, we identify special cases in which the owner should be denied propertized compensation and recover market-priced rent instead. As we have already noted, these cases are characterized by the trespasser’s practical inability to negotiate the desired deal with the owner of the property.<sup>88</sup> If negotiating such a deal is impracticable or unduly costly, then, under certain conditions, a person should be allowed to trespass on another person’s land in exchange for market-priced rent. This impracticability is a primary reason justifying the forced market-rent transaction between the trespasser and the owner. Other conditions that legitimize this transaction constitute a tradeoff between costs and benefits. Forcing the owner into this transaction is legitimate when the social benefit from the trespass exceeds the damage to the owner.

In what follows, we examine three paradigmatic categories of these exceptional cases. One of those categories is necessity: an act of trespass that averts greater harm. Another category is media trespass: entry to a business property by an investigative reporter who poses as a patron, patient, or employee to surreptitiously monitor and document the business’s activities. The third category is bona fide encroachment: trespasses committed in good faith involving construction across boundary lines.

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<sup>86</sup> See CAL. CIV. CODE § 3334 (West 2009). The owner is also entitled to “the reasonable cost of repair or restoration of the property to its original condition, and the costs, if any, of recovering the possession.” *Id.*

<sup>87</sup> *Starrh & Starrh Cotton Growers v. Aera Energy LLC*, 63 Cal. Rptr. 3d 165, 180 (Cal. Ct. App. 2007) (quoting *Watson Land Co. v. Shell Oil Co.*, 29 Cal. Rptr. 3d 343, 351 (Cal. Ct. App. 2005)). California law, however, exempts the trespasser from disgorgement upon a showing that his occupation of another’s property originated from “a mistake of fact.” CAL. CIV. CODE § 3334(b)(2) (West 2009). The trespasser would then have to pay the owner “the reasonable rental value of the property.” *Id.*

<sup>88</sup> Cf. Merrill, *supra* note 23, at 25–26 (demonstrating how high transaction costs dictate the transition from a “mechanical” to a “judgmental” property right). Both our and Merrill’s accounts draw on Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

Before discussing these categories, we mention again the doctrine of *de minimis* that exempts trespassers from all liability for damages in appropriate cases.<sup>89</sup> Our rationale for the departure from the property rule regime explains the *de minimis* category as well. In *de minimis* cases, negotiating the owner's permission for a trivial use of her property is either impractical or unreasonably expensive. Moreover, the benefit produced by the trespassing activity is much greater than the damage to the owner.<sup>90</sup>

1. *Trespass by Necessity*.—The classic example of trespass by necessity is *Vincent v. Lake Erie Transportation Co.*<sup>91</sup> In this case, a ship was moored to a private dock without permission from the dock owner in order to prevent it from being carried away by a storm. While the unauthorized mooring salvaged the ship, it caused significant damage to the dock because the ship was repeatedly tossed against the dock by high waves. The Minnesota Supreme Court decided that the actions of the captain of the ship were justified on grounds of necessity. Yet the court ordered the ship owner to compensate the dock owner for the damage to the dock.<sup>92</sup> The compensation award was based on the market price of the repairs. The court cited with approval *Ploof v. Putnam*,<sup>93</sup> a celebrated decision of the Vermont Supreme Court that denied a similarly situated dock owner the power to fend off trespass by unmooring the salvaged vessel and held him liable in tort for preventing the ship's rescue.<sup>94</sup>

These and similar court decisions have developed a set of general rules that allow a person to enter and stay on another's property to the extent ne-

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<sup>89</sup> See, e.g., *Martin v. Reynolds Metals Co.*, 342 P.2d 790, 795 (Or. 1959) (attesting that "there is a point where the entry is so lacking in substance that the law will refuse to recognize it, applying the maxim *de minimis non curat lex*," and that "it would seem clear that ordinarily the casting of a grain of sand upon another's land would not be a trespass"); see also *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (affirming constitutionality of state power to secure free speech at shopping malls by overriding the right to exclude, provided the owner suffers no material economic disadvantage).

<sup>90</sup> Airplane overflights often fall into the *de minimis* category. See Smith, *Self Help*, *supra* note 18, at 99 (noting that "even in the case of real estate, the exclusion strategy does allow some invasions to count as *de minimis*" and mentioning airplane overflights as an example). An overflight is technically a trespass because "it involves an actual, direct, and visible entry into the column of space belonging to the surface owner." Merrill, *supra* note 23, at 36. In the most recurrent scenario, however, it causes no significant damage to the owner, who consequently cannot sue the airplane's operator. *Id.* The owner can sue the operator only when the flight interfered substantially with her use and enjoyment of the property. See 1 RESTATEMENT (SECOND) OF TORTS § 159(2), at 281 (1965). Air transportation is a socially beneficial activity. Air transportation providers are unable to negotiate overflights with landowners at an affordable cost. See Merrill, *supra* note 23, at 35–36. These two factors mark overflights as an exceptional case in which the owner's compensation should be capped by market prices.

<sup>91</sup> 124 N.W. 221 (Minn. 1910).

<sup>92</sup> *Id.* at 222.

<sup>93</sup> 71 A. 188 (Vt. 1908).

<sup>94</sup> *Id.* at 189–90.

cessary to prevent serious and imminent harm.<sup>95</sup> These rules have received near-unanimous approval from courts in all jurisdictions and are now deeply entrenched in the law.<sup>96</sup> The effect of these rules is to empower third parties operating under conditions of necessity to impose market-priced transactions on property owners, while denying the latter the ability to undo the transaction.<sup>97</sup> Courts have validated such transactions in a variety of cases involving the emergency rescue of people,<sup>98</sup> animals,<sup>99</sup> and chattels.<sup>100</sup>

We believe that the exceptional treatment of necessity cases under trespass doctrine is justified. In cases of necessity, the parties cannot be expected to negotiate a voluntary transaction *ex ante*. Facing an emergency that requires swift action, the rescuer has no time to reach out to the property owner in order to determine her subjective reserve price. The rescuer must therefore conduct a quick cost-benefit analysis based on the information available to him. He is well situated to assess the benefit he stands to

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<sup>95</sup> See, e.g., Elder Abuse and Dependent Adult Civil Protection Act, CAL. WELF. & INST. CODE § 15634(b) (West 2009) (exempting from civil liability caregivers of an elder or a dependent adult who allow law enforcement agents investigating a report of the elder's or the dependant's abuse to enter private premises without the owner's consent); *Easton v. Sutter Coast Hosp.*, 95 Cal. Rptr. 2d 316, 322 n.7, 323 (Cal. Ct. App. 2000) (construing § 15634(b) broadly as analogous to the general doctrine of necessity and affirming grant of demurrer in a trespass action against paramedics and sheriffs who forcibly entered residence after receiving report of suspected elder abuse); *Rossi v. Del Duca*, 181 N.E.2d 591, 593-94 (Mass. 1962) (same); see also *Trisuzzi v. Tabatchnik*, 666 A.2d 543, 547 (N.J. Super. Ct. App. Div. 1995) (affirming applicability of the necessity defense in trespass cases on the ground that "[t]he cry of distress is the summons to relief" (quoting *Wagner v. Int'l Ry. Co.*, 133 N.E. 437, 437 (N.Y. 1921) (Cardozo, J.))).

<sup>96</sup> These rules are incorporated in RESTATEMENT (SECOND) OF TORTS § 197, at 355 (1965), which provides that:

(1) One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to:

(a) the actor, or his land or chattels, or

(b) the other or a third person, or the land or chattels of either, unless the actor knows or has reason to know that the one for whose benefit he enters is unwilling that he shall take such action.

(2) Where the entry is for the benefit of the actor or a third person, he is subject to liability for any harm done in the exercise of the privilege stated in Subsection (1) to any legally protected interest of the possessor in the land or connected with it, except where the threat of harm to avert which the entry is made is caused by the tortious conduct or contributory negligence of the possessor.

<sup>97</sup> But the owner can often resist the transaction's initial imposition. When a person visits her cabin in the woods and finds the proverbial backpacker eating her food to avoid death from starvation, she cannot forcibly remove the food from the backpacker's mouth. Upon a more timely arrival, however, she is permitted by the law to deny the starving backpacker access to the cabin and block his entry by using reasonable force.

<sup>98</sup> See cases cited *supra* notes 91-95.

<sup>99</sup> See RESTATEMENT (SECOND) OF TORTS § 197(1), at 355, & illus. 12, at 360.

<sup>100</sup> *Id.* See also John Alan Cohan, *Private and Public Necessity and the Violation of Property Rights*, 83 N.D. L. REV. 651 (2007) (examining caselaw pertaining to the necessity doctrine and identifying uncertainty as to whether the aggrieved property owner is entitled to recover compensation from a person acting under emergency conditions to protect a societal, rather than private, interest).

gain from the rescue mission. As for the cost, the only data on which he can base his decision are market prices.

Given the unusual circumstances and the unique position of the rescuer, it makes sense for society to entrust the decision whether to commit trespass to the rescuer but force him to internalize the amount generally anticipated to be the cost of his act—namely, the market price of the use. If the rescuer and the property owner could set up a fast, cheap, and sincere negotiation channel, they would form and carry out a mutually beneficial rescue agreement voluntarily. Unfortunately, no one has yet established such a channel for emergency situations. Furthermore, the owner may try to take advantage of the situation and bargain strategically in order to increase his surplus.<sup>101</sup>

These obstacles are likely to foil the rescue effort and what otherwise could have been a welfare-improving agreement. Since the market price reflects the average asking price of property owners, in many cases the owner of the trespassed property will suffer no real loss from receiving the market price.<sup>102</sup> Only owners who place a subjective value premium on their property<sup>103</sup> will be undercompensated by this arrangement. Given that necessity cases are rather rare, and assuming that the number of owners who value their properties above market rate is relatively small, it is unlikely that the liability rule protection in necessity cases will occasion a real harm to property owners, let alone undermine the entire ownership regime.

2. *Media Trespass.*—A second category of cases in which propertized compensation should be withheld involves trespass by media reporters. To uncover a dishonest and harmful activity of a business enterprise, media reporters must often gain entry to the enterprise's property by using a fabricated identity. Reporters employ a myriad of tactics to gain access to sensitive business information, including applying for employment with a firm or pretending to be a patron, client, or patient. Once entry has been secured, the reporter monitors the enterprise's suspicious activities and documents them in photos as well as in audio or video recordings. Using such techniques, journalists have uncovered and reported cases of degrading treat-

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<sup>101</sup> See Richard A. Epstein, *Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase*, 36 J.L. & ECON. 553, 577 (1993) (attesting that under the circumstances of necessity "the bargaining range is so large that there is some risk that no deal will be struck as each side campaigns for the larger fraction of the contested domain"). Note that if the owner manages to impose on the rescuer a contractual obligation to pay her a downright exploitative amount, she might be unable to recover it. See Shahar Lifshitz, *Distress Exploitation Contracts in the Shadow of No Duty to Rescue*, 86 N.C. L. REV. 315, 324–37 (2008) (identifying legal exits from distress exploitation agreements).

<sup>102</sup> However, this will not be the case when there is significant variance in asking prices.

<sup>103</sup> Cf. David Genesove & Christopher Mayer, *Loss Aversion and Seller Behavior: Evidence from the Housing Market*, 116 QUART. J. ECON. 1233, 1235 (2001) (observing systematic refusal of homeowners to lower their asking prices during market downturns and explaining it by loss aversion).

ment of elderly residents by a nursing home,<sup>104</sup> repackaging of unsanitary meat and fish by a grocery chain,<sup>105</sup> unnecessary cataract operations performed by an eye clinic,<sup>106</sup> and other wrongdoings.<sup>107</sup>

What are the consequences of this *modus operandi* under the law of trespass? This question received Judge Richard Posner's detailed consideration in *Desnick v. American Broadcasting Companies*,<sup>108</sup> an appeal by an eye clinic of the trial court's dismissal of its trespass action against ABC. The action alleged that reporters working for ABC gained access to the clinic's facilities by posing as patients to prepare footage documenting the clinic's fraudulent practices.<sup>109</sup> ABC's footage revealed that the clinic's ophthalmic surgeons convinced elderly Medicaid patients to undergo unnecessary operations.<sup>110</sup>

Judge Posner began his analysis by stating three legal axioms. First, "[t]o enter upon another's land without consent is a trespass."<sup>111</sup> Second, "there is no journalists' privilege to trespass."<sup>112</sup> Third, "there can be no implied consent . . . when express consent is procured by a misrepresentation."<sup>113</sup> Posner then identified "a surprising result"<sup>114</sup> at which courts have arrived in adjudicating an owner's consent to an imposter's entry: the imposter's fraud vitiates the owner's consent in some cases but not in others.<sup>115</sup>

Cases in which the owner's consent was vitiated include those where a homeowner "opens his door to a purported meter reader who is in fact nothing of the sort—just a busybody curious about the interior of the home"<sup>116</sup> and where a corporate spy poses as a customer to gain entry to a rival firm's premises in order to steal its trade secrets.<sup>117</sup> Cases in which the owner's initial consent remains valid include those where a restaurant critic eats in a restaurant under a borrowed identity, a browser in a store pretends to be in-

<sup>104</sup> See James A. Albert, *The Liability of the Press for Trespass and Invasion of Privacy in Gathering the News—A Call for the Recognition of a Newsgathering Tort Privilege*, 45 N.Y.L. SCH. L. REV. 331, 333 (2002) (citing Nancy Stancill, *Deadly Neglect: Texas and Its Nursing Homes*, HOUSTON CHRON., July 22–26, 1990, at A1).

<sup>105</sup> See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 510 (4th Cir. 1999).

<sup>106</sup> See *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1347 (7th Cir. 1995).

<sup>107</sup> See Albert, *supra* note 104, at 334 (attesting that investigative reporters broke "several major stories" by resorting to trespass).

<sup>108</sup> 44 F.3d 1345, 1351–53 (7th Cir. 1995).

<sup>109</sup> *Id.* at 1348.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1351.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See *id.* at 1351–52.

<sup>116</sup> *Id.* at 1352 (citing *State v. Donahue*, 762 P.2d 1022, 1025 (Or. Ct. App. 1988); *Bouillon v. Lac-lede Gaslight Co.*, 129 S.W. 401, 402 (Mo. Ct. App. 1910)).

<sup>117</sup> *Id.* (citing *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 178 (7th Cir. 1991); *E.I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1014 (5th Cir. 1970)).



terested in merchandise he cannot afford to buy, a customer in a car dealership's showroom bargains down a salesperson by falsely claiming to be offered a cheaper car price by another vendor, and a guest fakes friendship with the host just in order to eat dinner at his home.<sup>118</sup>

Judge Posner identified a principle by which to distinguish between these two classes of cases.<sup>119</sup> The proposed principle is based on the nature of the wrongdoing to which the property owner would object in each case. In the "meter reader" case, for example, the owner would object to the unwanted person's physical presence on her property. Because trespass law is designed to fend off unwanted intruders, the owner's consent is vitiated. In the dealership case, by contrast, the owner would not mind and might even welcome the customer's presence on her property. All she would object to is the fraud, but fraud is not what trespass law protects people against. The owner's consent therefore constitutes a good defense against trespass allegations in this class of cases.<sup>120</sup> Posner acknowledges that this distinction is untidy, but in his opinion, it is sufficiently viable to do the work.<sup>121</sup>

Based on this distinction, Judge Posner (writing for the Seventh Circuit) affirmed the lower court's decision to dismiss the clinic's allegations of trespass.<sup>122</sup> These allegations, he explained, pointed to "no invasion . . . of any of the specific interests that the tort of trespass seeks to protect," as "[t]he 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)."<sup>123</sup>

This ruling and its rationalization were subsequently adopted by the Fourth Circuit in a decision that upheld a nominal \$2 award for media trespasses perpetrated by ABC and its affiliates against the Food Lion grocery chain.<sup>124</sup> In that case, reporters uncovered and videotaped food fraud<sup>125</sup> by taking advantage of their employee positions at Food Lion, which they previously obtained with the help of fake identities.<sup>126</sup> The Fourth Circuit decided that, under the applicable laws of both North Carolina and South Carolina, gaining entry to a firm's premises after securing a job with it through application misrepresentation does not constitute trespass.<sup>127</sup> The

<sup>118</sup> *Id.* at 1351.

<sup>119</sup> *See id.* at 1352.

<sup>120</sup> *Id.*

<sup>121</sup> *See id.* ("The lines are not bright . . . . They are the traces of the old forms of action, which have resulted in a multitude of artificial distinctions in modern law. But that is nothing new.").

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 517-18 (4th Cir. 1999).

<sup>125</sup> Allegedly, this fraud included mixing out-of-date beef with new beef, bleaching smelly meat to remove its odor, and re-dating products not sold before their printed expiration dates. *Id.* at 510.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 518.

court, however, also took notice of the fact that the laws of both jurisdictions require an employee to be loyal to her or his employer. Based on this separate loyalty obligation, the court held that the reporters' unauthorized filming of Food Lion's nonpublic areas had exceeded their authority to enter its premises as employees and therefore amounted to trespass.<sup>128</sup>

This approach to media trespass is predicated on a misguided view of the owner's right to exclude others from her property. The right to exclude entitles the owner not only to block another person's entry to her property entirely but also to grant her conditional entry. The owner can set countless conditions for another person's entry to her property, as well as notify any entrant, expressly or implicitly, that violation of any of those conditions would make him an unwanted trespasser.<sup>129</sup> This power of the property owner is at odds with the line drawn by Judge Posner in his attempt to establish a principled distinction between different entry-by-fraud scenarios.

Differentiating between wanted and unwanted entrants is the owner's prerogative; the court's task is limited to ascertaining how she exercised that prerogative as a matter of fact. The dishonest customer in the dealership may therefore be as unwanted from an owner's perspective as the uninvited "meter reader." The restaurant critic, Judge Posner's prime example of a nontrespasser,<sup>130</sup> would become a trespasser if she broke the owner's rule that a patron is entitled to be served only if she made a reservation under her real name. Consider, finally, the Fourth Circuit's holding in *Food Lion* that application fraud does not turn a licensee into a trespasser.<sup>131</sup> This holding, too, is contingent upon specific facts. The court might not make the same decision after learning that the employer notified prospective employees that their authorization to enter the premises was conditioned upon providing full and accurate information about themselves.

We offer a framework which offers a more promising approach to cases of media trespass. Instead of stipulating without proof that owners would willingly give up their right to exclude, we propose that such cases be dealt with by substituting market value compensation for propertized compensation. Three reasons combine to justify this policy. First, and most importantly, it is unlikely that any voluntary negotiations will yield an

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<sup>128</sup> *Id.* at 518–19. The appropriateness of the jury's \$2 damages award for this trespass was not litigated in this appeal and the court consequently did not address the matter, though it did dismiss all punitive damages as they were only awarded for the fraud claim, which the court reversed. *Id.* at 522.

<sup>129</sup> An atheist entering a church open to all prayers does not commit trespass. Yet he would commit trespass if he subsequently whispers blasphemy (even when no one else can hear it). What, if any, remedies would be available to the church in such a case is a separate question. For the possibility of recovering punitive damages, see *infra* notes 142–152 and accompanying text. Business owners, however, cannot set conditions that create racial discrimination. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding prohibitions against racial discrimination by hotels); see also Singer, *supra* note 1, at 1286–98, 1303–1412.

<sup>130</sup> See *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1351 (7th Cir. 1995).

<sup>131</sup> See 194 F.3d at 518.

agreement in those cases. Property owners are not likely to give reporters permission to uncover socially untoward practices conducted on the property. Indeed, the desire to conceal those practices from the public likely prompted the owner to conduct them on private property in the first place. Parodies in copyright law provide a useful analogy. Parodists enjoy a privileged status for purposes of fair use analysis because we do not expect copyright owners to sanction parodying of their work.<sup>132</sup> Indeed, if parodists were required to negotiate an agreement prior to engaging in their craft, parodies would lose much of their bite. The same logic applies to media reporters seeking to criticize the behavior of property owners.

Second, and relatedly, investigative journalism is a socially beneficial activity. The public has an interest in learning about hazardous, fraudulent, and unsanitary business practices. Media reports of such practices generate value for the public at large. Yet because information becomes public upon its release, media outlets cannot capture the full value of their reports to the public. Once information is disclosed to the public, spillovers become inevitable because news agencies cannot restrict access only to paying users. Given this fact, if the law were to impose on media companies the full cost of investigative journalism, they might decide to give up the practice, which would compromise the information market and deprive the public of important information.

Third, and finally, the harm to the *property* interest of the owner in media trespass cases is typically small. The property harm should be distinguished from the overall harm. The overall harm occasioned by reporters on business enterprises may be quite dramatic. When a socially harmful practice comes to light, the business that adopted it suffers reputational damage and other repercussions. Yet those consequences to the business stem from the disclosure, not from the violation of the right to exclude.<sup>133</sup>

Consider *Desnick* and other paradigmatic examples of media trespass. In each of these cases, the harm suffered by the owner from the trespass itself was relatively insignificant. What was significant was the damage to the owner's reputation and privacy, but property law—and the trespass doctrine in particular—is not designed to protect people against such damage. Furthermore, the concept of ownership does not imply a broad (let alone

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<sup>132</sup> As the Supreme Court has stated:

This distinction between potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectible derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market. "People ask . . . for criticism, but they only want praise."

*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) (quoting *WILLIAM SOMERSET MAUGHAM, OF HUMAN BONDAGE* 241 (Penguin 1992)).

<sup>133</sup> Moreover, the business has only itself to blame. Businesses that adopt fraudulent or unsafe practices should bear the consequences of their decisions rather than shelter themselves behind the right to exclude.

absolute) right to suppress information from the public. Based on the aforementioned reasons, we conclude that, as a general rule, compensation for media trespass should be based upon market prices—which in many cases may be a negligible amount, or even zero.<sup>134</sup>

3. *Bona Fide Encroachments*.—A final exception we wish to recognize concerns good faith encroachments. An encroachment occurs when a structure intrudes the space of a neighboring lot.<sup>135</sup> Real world examples of encroachments involve fences or structures that project into the surface of adjacent properties, foundations and sewage systems that protrude into neighboring ground, and balconies and staircases that invade the airspace of adjoining tracts.

In the past, courts tended to treat encroachments—even those committed in good faith—like other instances of trespass.<sup>136</sup> The encroached-upon owner was entitled to injunctive relief and could seek removal of the intruding element regardless of the size of the encroachment or the hardship to the encroacher. The classic case of *Pile v. Pedrick*<sup>137</sup> illustrates the traditional approach. Pedrick, owing to a district surveyor's mistake, built a factory whose wall encroached one and three-eighths inches into Pile's property.<sup>138</sup> Pile sued for trespass and sought removal of the projecting part. The court rejected Pedrick's request to order damages in this case and instead ordered Pedrick to either pay Pile any amount Pile named to keep the wall in place or tear down the wall.<sup>139</sup>

Although some states still adhere to the strict traditional view, many others have departed from it by enacting statutes that recognize an exception for "good faith improvers"—i.e., encroachers who inadvertently built

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<sup>134</sup> This recommendation may be at odds with some of our readers' intuitions about the "meter reader" and "corporate spy" cases. Arguably, both the meter reader and the corporate spy should pay their victims more than just a nominal compensation. We tend to agree with this argument: in our opinion, both defendants should pay their victims punitive damages. The reason they should pay those damages, however, has nothing to do with their proprietary infractions and everything to do with their general disrespect for the law. This remedy, as we explain in this Essay, is not the same as propertized compensation. See *infra* Part III.

<sup>135</sup> JOSEPH WILLIAM SINGER, *INTRODUCTION TO PROPERTY* 40 (2d ed. 2005). An encroachment may also occur when vegetation and tree parts invade the space of neighboring lots. In such cases, however, the rules and remedies are different. Most importantly, in such cases, the encroached-upon owner is entitled to use self-help to remove the projecting branches, hedges, and roots. *Id.* at 42.

<sup>136</sup> See James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 134 (1993) ("Under the common law of the early nineteenth century, a nonowner who, in good faith or otherwise, entered, possessed, and improved real property was generally not entitled to the value of those improvements if they were 'permanently affixed to real estate.'" (quoting Kelvin H. Dickinson, *Mistaken Improvers of Real Estate*, 64 N.C. L. REV. 37, 38 (1985))).

<sup>137</sup> 31 A. 646 (Pa. 1895).

<sup>138</sup> *Id.* at 647.

<sup>139</sup> *Id.* The court gave Pedrick one year to comply with its order. *Id.*

on their neighbors' land.<sup>140</sup> Good faith improver statutes mitigate the harsh consequences of the traditional approach by empowering courts to deny injunctive relief to encroached-upon owners when the encroacher acted in good faith. Instead, these statutes permit courts to give the encroached-upon owner a choice between buying the encroaching structure and selling the property on which the structure was erected to the encroacher. Essentially, such statutes confer upon the aggrieved property owner the choice between a call option (buying the structure) and a put option (selling the land).<sup>141</sup>

Good faith improver statutes often require encroachers to prove not only that they acted in good faith but also that they acted in a non-negligent manner. The case of *Raab v. Casper*<sup>142</sup> exemplifies the importance of the latter requirement. In *Raab*, the encroacher was denied "good faith improver" status under the California statute because he ignored the encroached-upon owner's warnings regarding the proper location of the boundary line between the lots and chose to continue with the construction project.<sup>143</sup> To claim good faith improver status, a defendant cannot engage in willful blindness and must inquire about the precise location of her lot's boundary lines.

We believe that good faith improvers who acted in a non-negligent manner should pay market-value compensation. Non-negligent good faith improvers did not attempt to circumvent the market. Nor did they try to compromise the integrity of their neighbors' property rights. Since good faith improvers will never seek permission from neighboring property owners, as they believe they are acting on their own properties, there is no forgone transaction here for the surrounding owners. Moreover, given that good faith improvers did not act negligently, forcing them to pay proper-tized compensation would lead them to expend excessive resources on acquisition and verification of information concerning boundary lines.<sup>144</sup>

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<sup>140</sup> See, e.g., CAL. CIV. PROC. CODE § 871.1-.7 (West 2009).

<sup>141</sup> See Ayres, *supra* note 5, at 814-16.

<sup>142</sup> 124 Cal. Rptr. 590 (Cal. Ct. App. 1975).

<sup>143</sup> *Id.* at 594-95.

<sup>144</sup> See Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285, 1313-14 (2008). As Professor Sterk explains, applications of the negligence standard are bound to be fact-intensive and vary from case to case. *Id.* at 1314. See also *id.* at 1322 ("[W]hen the stakes increase, failure to search becomes less reasonable and more negligent."). The prospect of recovering market-price compensation for innocent encroachments will also set the right "marking off" incentive for property owners. An owner will mark off her property (e.g., by surveying its boundaries and fencing them off) only when the difference between her and the market's valuation of the property exceeds the cost of marking off. *Id.* at 1314-15. For another rationalization of the rule that imposes market-price compensation on bona fide encroachers, see Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037, 1066 (2006) ("Once the structure is in place, a bilateral monopoly exists that may prevent the efficient result from obtaining through consensual market transactions.").

### III. PUNITIVE DAMAGES

As we have already noted, punitive damages may be awarded in trespass cases, yet courts rarely use them.<sup>145</sup> Imposing punitive damages on trespassers has the potential to fend off trespass as efficaciously as injunctions. Noting this point, Professor Henry E. Smith commended the use of punitive damages against trespass.<sup>146</sup> Nonetheless, there are weighty reasons not to turn punitive damages into the remedy of choice in trespass cases. At any rate, punitive damages should not be favored over propertized compensation and disgorgement. Punitive damages are a highly imprecise policy tool that would nearly always miss the mark as a remedy seeking to reinstate, *ex post*, the owner's right to exclude. As an *ex ante* remedy, on the other hand, punitive damages—given the current conditions under which they can be imposed—would systematically underdeter trespass.

The implementation of a punitive damage regime critically depends on the courts. In order to operationalize such a regime, it is necessary to entrust the courts with the power to grant supracompensatory awards. Because courts can easily abuse this power,<sup>147</sup> their power to award punitive damages must be limited in a principled way that satisfies the demands of due process.<sup>148</sup> Indeed, the Supreme Court has imposed a number of limitations on courts' ability to use this type of remedy.<sup>149</sup> Specifically, the Court has provided that the Due Process Clause of the Fourteenth Amendment prohibits the imposition of punitive damages that are grossly excessive or arbitrary.<sup>150</sup> The Court also has held that the amount of punitive damages must reflect the reprehensibility of the defendant's conduct<sup>151</sup> and has im-

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<sup>145</sup> See *supra* note 41 and cases cited therein; *Gallegos v. Lloyd*, 178 P.3d 922, 925 (Utah Ct. App. 2008) (“[B]efore punitive damages may be awarded [in a trespass case], the plaintiff must prove conduct that is willful and malicious, or that manifests a knowing and reckless indifference and disregard toward the rights of others.” (quoting *Hatanaka v. Struhs*, 738 P.2d 1052, 1054 (Utah Ct. App. 1987))); *Meighan v. U.S. Sprint Commc'ns Co.*, 924 S.W.2d 632, 642 (Tenn. 1996) (opining that punitive damages are available in “the rare, appropriate trespass case” and that “[c]oncomitant with the . . . right to sue for trespass is the corresponding remedy which may in unusual, unique cases include punitive damages”); *Walter E. Wilhite Revocable Living Trust v. Nw. Yearly Meeting Pension Fund*, 916 P.2d 1264, 1274 (Idaho 1996) (approving trial court's refusal to impose punitive damages for trespass because “punitive damages are not favored by the law and should be awarded . . . only in the most unusual and compelling circumstances,” such as “in a trespass action when the defendant acted in a manner which was outrageous, unfounded, unreasonable, and in conscious disregard of the plaintiff's property rights”).

<sup>146</sup> See Smith, *Property Rules*, *supra* note 17, at 1723, 1732–33 (rationalizing the imposition of punitive damages for trespass as part of the preferred property rule protection of ownership).

<sup>147</sup> See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 563–65 (1996) (documenting an Alabama court's award of punitive damages in the amount of \$4 million to a local doctor who purchased a new BMW sports sedan without being told that it was repainted after damage presumed to be caused by acid rain).

<sup>148</sup> See *id.* at 574–86 (voiding a punitive damage award for being excessive and determining guideposts for assessing punitive damages under the Due Process Clause).

<sup>149</sup> See *id.*; see also *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416–18 (2003).

<sup>150</sup> See *Gore*, 517 U.S. at 575–86.

<sup>151</sup> *Id.* at 575.

posed further limitations on the courts' power to award such damages.<sup>152</sup> Those limitations include the "single-digit ratio" guideline that deems unconstitutional virtually any award of punitive damages that exceeds the plaintiff's compensatory damage award by ten times or more.<sup>153</sup> The Court has exempted from this requirement cases in which the compensatory damage award is very small.<sup>154</sup> But since cases that qualify for the exemption rarely involve reprehensible infliction of harm that calls for the imposition of punitive damages in the first place, the exemption is not very meaningful in practice.

Ex post, therefore, punitive damages may fail to protect the property owner's interests in a systematic and dependable way. Due to the reprehensibility condition, punitive damages cannot be awarded in standard trespass cases. As far as the owner's remediation is concerned, punitive damages will almost always be either excessive or insufficient. *Jacque*<sup>155</sup> is, in all likelihood, an example of excessive remediation. The award of \$100,000 to the plaintiffs for a single unwanted crossing of their unoccupied land was probably above any conceivable price that they would have agreed to charge in a voluntary transaction.<sup>156</sup> On the other hand, cases featuring continuous, though not reprehensible, trespass provide examples of insufficient remediation. More generally, when the punitive element is insufficiently high, compensation awarded to the aggrieved property owner may fall short of her ex ante asking price. Conversely, when the punitive element is too high, the owner will be overcompensated. At first glance, overcompensation may not strike readers as a problem, but if we broaden our perspective and add third parties to the analysis, it becomes apparent that overcompensation of the owner is often socially undesirable as well.

This point marks the beginning of our assessment of the ex ante effects that punitive damages may have. This assessment focuses on the incentive to trespass. Under the current law, this incentive crucially depends on whether the court will perceive the trespass as reprehensible or egregious. For trespasses falling into this category, a court is likely to award punitive damages, and the amount of those damages will depend on how reprehensible the trespass was. A garden variety trespass, on the other hand, is highly

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<sup>152</sup> *Id.* at 575–86.

<sup>153</sup> *Id.* at 581–83 (noting that few awards exceeding a single-digit ratio between punitive and compensatory damages satisfy due process); see also *State Farm*, 538 U.S. at 425.

<sup>154</sup> *State Farm*, 538 U.S. at 425.

<sup>155</sup> 563 N.W.2d 154 (Wis. 1997).

<sup>156</sup> We are aware that the *Jacques* had actually refused to accept money in exchange for allowing the defendant to move its mobile home through their territory. See *id.* at 157. We still believe that there must have been a sum high enough to persuade them to give the requested permission. Cf. Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 446 (1998) (arguing that the punitive award in *Jacque* "is quite defensible on economic grounds").

unlikely to lead to a punitive damage award.<sup>157</sup> The threat of punitive damages thus deters only egregious trespassers. Regular trespassers, on the other hand, are generally exempt from punitive damages. The punitive damage doctrine, therefore, clearly fails to deter this very large category of trespassers.

The doctrine needs to be reformed so as to create a meaningful threat for all trespassers. Such a reform, however, would create a problem of its own. Because punitive damages are a highly imprecise policy tool, their amount is bound to be excessive in some cases and insufficient in others. When punitive damages are too high, they restore respect for the property rights of owners but at the cost of overdeterrence. Overdeterrence here means that third parties will fear to take any liberty with other people's property even in cases where doing so cannot be considered reprehensible and is, in fact, socially desirable. These cases, admittedly, are quite rare, but there is no reason to discount them completely.

Consider the following example. Tina runs a successful orthopedic clinic on Owen's property. Her five-year lease contract with Owen is about to expire. Tina, however, has a right of first refusal under the contract. Owen notifies Tina that Rick has offered him \$300,000 in annual rent. Tina currently pays Owen \$100,000, and her realtor tells her that even this amount is far above the market price for similar properties. Tina calls Owen to tell him that Rick's offer is a sham and accuses Owen of attempting to circumvent her right of first refusal. Owen feels offended and hangs up. The next day, he receives a letter from Tina's lawyer notifying him that she is exercising her option to rent the property for another five years and that, in the absence of competing offers, the annual rent will continue to be \$100,000. Owen files a court action, but it takes him twelve months to win the case and evict Tina. During this period, Tina pays him \$100,000, and he accepts those payments "under protest and without prejudice."

After hearing the parties' evidence, the court makes a factual determination that Rick's offer was real. The court also determines that Tina had a sincere—albeit not completely reasonable—belief, formed upon her attorney's advice, that it was within her rights to stay as a tenant on Owen's property for five additional years while paying him an annual rent of \$100,000. The court ultimately decides that Tina occupied Owen's property as a trespasser and holds that she should now pay Owen punitive damages in the amount of \$500,000. Tina's total payment to Owen for the twelve additional months of occupation thus equals \$600,000.

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<sup>157</sup> See *supra* note 145 and cases cited therein; see also *Patterson v. Holleman*, 917 So. 2d 125, 135 (Miss. Ct. App. 2005) (approving a trial court's refusal to award punitive damages because "[i]n the case of a trespass, punitive damages may be awarded if the proof shows that the trespass was willful, grossly negligent or wanton" (quoting *Teasley v. Buford*, 876 So. 2d 1070, 1078 (Miss. Ct. App. 2004))).



Under our approach, Tina must pay Owen propertized compensation in the amount of \$200,000, the difference between her payment for the twelve months of trespass and the rental sum offered by Rick. Her total payment to Owen would thus equal \$300,000. This amount creates optimal deterrence. Anticipation of a \$300,000 payment induces a person to consider her annual gain from the trespass, as well as the owner's loss. If that gain is below \$300,000, the potential trespasser will not trespass. If the gain exceeds \$300,000, she will use the land. Each of those actions enhances social welfare relative to its alternative. Under the punitive damage rule, in contrast, Tina's \$600,000 payout would deter a similarly situated person from continuing her occupation of a leased property when she stands to earn between \$300,000 and \$600,000 from doing so. This outcome is socially undesirable.

#### CONCLUSION

The maxim *ubi jus, ibi remedium* (where there is a right, there is a remedy) is a fundamental tenet of our legal system. Yet it only captures part of the complex relationship between rights and remedies. Specifically, it fails to acknowledge that the nature and scope of a legal right are defined by the restorative consequence of the remedy. In this Essay, we have demonstrated the significance of this omission by focusing on the protection of owners' right to exclude. The decision to entitle property owners to market-value compensation against trespassers is antithetical to the very idea of ownership. To fix this problem, we have introduced a new remedial concept—propertized compensation—and accompanied it with the evidentiary mechanism necessary for its implementation by the courts. We have also proposed a reform to the disgorgement doctrine that would turn it into a suitable alternative to propertized compensation. Finally, we have identified special cases in which trespass victims should receive only market-value compensation. We then showed how trespass law should be reorganized in light of those insights. Our core insight extends well beyond trespass, however. Lawmakers should identify and rectify other discrepancies between rights and remedies. The evidentiary mechanism developed in this Essay should aid them in this task.