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**Adam Mossoff,
George Mason University School of Law**

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The False Promise of the Right to Exclude

Adam Mossoff¹

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This symposium addresses a debate of recent vintage within property theory. Since the early twentieth century, anyone asking if property was a “bundle of rights” would have been answered as if one was asking if the sky is blue. How this came to be is a topic I have explored in my scholarship (Mossoff 2003 and 2010). I am a critic of the bundle conception of property, as property rights have disintegrated under the acid wash of a nominalism first popularized in the law by the legal realists.

In this essay, however, I want to explore an issue emerging within the criticism of the “bundle.” Among scholars who reject the bundle conception of property, there have been two different and opposing positions. On the one hand, I and others have sought to recover the earlier concept of property that was buried by the realists, recognizing that it refers to a specific relationship between someone and something in the world. Thus, the *right to property* secures a use-right in, agenda-setting control over, or a sphere of liberty in using this thing (Mossoff 2003; Katz 2008; Claeys 2009). A “property right” refers to the conceptually and normatively integrated rights of possession, use, enjoyment, and disposal, which implies as a logical corollary that such rights are secured formally by making them exclusive against others.

On the other hand, Tom Merrill and Henry Smith advance an alternative approach to recovering the right to property. They accept the legal realists’ social conception of rights—the view of “property as social relationships” (F. Cohen 1954)—but they see this as important to staunching the nominalist, disintegrative

1. George Mason University School of Law, Arlington, VA 22201.

effect of the bundle conception. Embracing the Hohfeldian analysis of property that led many legal realists to acknowledge that “the essence of private property is always the right to exclude others” (M. Cohen 1927), Merrill and Smith argue that property is at core a right to exclude (Merrill 1998; Merrill and Smith 2001). Although Merrill and Smith share with us a disapproval of the bundle conception of property, their neo-realist solution, which I call the “exclusion conception of property,” is different (Mossoff 2003; Mossoff 2010, 2009-2013).

Merrill and Smith’s exclusion conception of property has captured the attention of many legal scholars, especially those who do work in the field of “law and economics,” because it claims to both identify and model how property rights function in the world, as apart from other legal rights or entitlements. While rejecting the bundle conception of property implicit in Coasian economic analysis of the law, they arguably are following in the footsteps of Harold Demsetz, who recognized that “[p]rivate ownership implies...the right of the owner to exclude others” (Demsetz 1967, 354). Demsetz’s positive analysis of property rights concludes that “ownership of land will internalize many of the external costs associated with communal ownership, for now an owner, *by virtue of his power to exclude others*, ...[has] incentives to utilize resources more efficiently” (ibid., 356, emphasis added). Working within this tradition of the positive economic analysis of property, Merrill and Smith offer a normative account of how the right to exclude provides determinate resolutions to real-world legal disputes over property rights.

But this is a false promise, at least in terms of its normative claim to determinative guidance in the adjudication of property rights. Merrill and Smith believe that their exclusion conception of property avoids the inevitable consequences of the bundle conception of property, which disintegrates property into specific, use-based entitlements that are governed by regulatory-style legal regimes (Merrill and Smith forthcoming, 2). Unfortunately, the exact opposite occurs; their exclusion conception of property leads to the same results. Historically, this is why Progressives eagerly embraced the exclusion conception of property, because it served their goal in creating and justifying the modern regulatory state (Mossoff 2010).

In an essay, I can only briefly describe how the exclusion conception of property leads in *doctrinal practice* to the same results as the bundle conception of property. This first requires me to explain the exclusion conception of property, and then I will discuss how the model developed by Merrill and Smith from this positive account of property—the “exclusion strategy”—leads to the same results in practice as the bundle conception of property: the indeterminate disintegration of property into permissive grants by courts and agencies of particular uses and social relationships concerning specific resources and assets. Thus, lawyers and economists should be wary of the theoretical promise of practical determinacy that is offered by the exclusion conception of property.

A Brief Summary of the Exclusion Conception of Property

The exclusion conception of property captures the imagination of legal scholars because it claims to frame how property rights function in the world. Broadly speaking, it defines the set of variables by which legal scholars and economists can model the what, how, and why of property rights. The key, according to Merrill and Smith, is the *in rem* nature of the right to exclude: property is good against the world (Merrill and Smith 2001). This is opposed to *in personam* rights, such as torts and contracts, which comprise specific rights and duties in highly contextualized personal relationships. Contrary to *in personam* rights, *in rem* rights are exclusive against everyone in all social contexts.

The right to exclude, according to Merrill and Smith, explains the *in rem* nature of property and ultimately this explains why property rights are normally secured through what they identify as “exclusion strategies” (Merrill and Smith 2007, 29-30; Smith 2002). Exclusion strategies are rule-based legal doctrines, such as trespass, that leave questions about resource-use decisions to a “gatekeeper,” i.e., a property owner, through property-rule remedies (injunctions) (Smith 2004a, 1755-1756; Smith 2002, S454-S455). An exclusion strategy is appealing normatively because it models precisely how property serves an important social function: the bright-line rules and injunctive remedies that secure a right to exclude reduce information costs in social interactions over scarce resources (Smith 2004b, 978-990). This reduces transaction costs, which facilitates efficient uses of resources. A right to property is at its “core” a right to exclude, which means it serves an important social function in facilitating efficient transactions.

One immediate concern with this model is that there is a heterogeneity problem, as property doctrines are more varied and complex than merely securing assets through bright-line legal rules of exclusion. The notoriously messy, multi-factor property doctrines like adverse possession, nuisance, easements by implication, and myriad other legal doctrines attest to this fact. To their credit, Merrill and Smith acknowledge this in their distinction between *exclusion strategies* and *governance strategies* (Merrill and Smith 2007, 29-30; Smith 2002). In contrast to exclusion strategies, governance strategies comprise multi-factor tests or contextualized legal standards, such as reasonableness, which require courts to make highly granular assessments of particular uses or *in personam* relationships (Merrill and Smith 2007, 29-30). Governance regimes can be costly, especially in their administration, given the institutional limitations in a court’s ability to understand

complex transactions concerning the use of scarce resources. This heightens the risk of errors in mandating or prohibiting particular uses of property.

In sum, the exclusion conception of property, according to Merrill and Smith, is not merely academic property theory; its virtue is that it has cash value in the real world. It explains why an exclusion strategy broadly secures the right to exclude through *in rem* legal rules and property-rule remedies, as opposed to governance strategies that intensively regulate the rights of use or disposition through *in personam* legal regimes and liability-rule remedies. As Smith explains: “Exclusion allows courts to avoid dividing rights into component use rights. Thus, exclusion carries with it information-cost savings even where transaction costs are high” (Smith 2004, 982). Although both exclusion and governance strategies are found throughout property law—think trespass versus nuisance—the key, according to Merrill and Smith, is to recognize that property represents at its core the right to exclude and thus governance strategies function only at the “periphery” of property rights or in “borderline” cases (Smith 2009, 964-965; Smith 2004, 980). When talking about the core of property, exclusion strategies predominate; governance strategies are the exception, not the rule.

The Exclusion Conception of Property in Practice

As lawyers know all too well, governance strategies are omnipresent throughout property law. This point is often lost in the elegant reductionism of the exclusion conception of property and its correspondingly simple model of how an *in rem* exclusion strategy functions in reducing information costs in the use of resources in the world. The now-classic example in the academic literature of an *in rem* exclusion strategy is of a parked car: one does not have to know anything about the owner, the owner’s uses of the car, or of the owner’s personal relationships with others in order to know that one should leave the car alone (Claeys 2009, 625; Smith 2009, 968; Penner 1997, 75-76). The fact that the car is *property* signals to everyone: “Hands off!”

Similarly, in the case of land, property rights serve the same *in rem* signaling function: “Keep out!” (Smith 2004b, 978). One of the principal examples of how an exclusion strategy secures the core of property is the now-famous case of *Jacque v. Steenberg Homes, Inc.* (1997). In *Jacque*, a mobile-home company brazenly disregarded an elderly couple’s request that it not drive their trucks across their unused farmland to access a nearby development site. Since the Jacques’ snow-covered field was currently unused at the time of the trespass, they suffered no actual damage, but the jury awarded the Jacques \$100,000 in punitive damages. In upholding the

punitive damages award, the Wisconsin Supreme Court explained that the “right to exclude” is the essential right in property and thus a property owner “has a strong interest in excluding trespassers” (ibid., 159).

Jacque is reprinted in almost every modern property law textbook, and Merrill and Smith (2007, 1-7, 29-30) rely on it in their own textbook as evidence of how the exclusion strategy functions in securing private decision-making to landowners in determining how and in what manner their property will be accessed and used. They use the nuisance case of *Hendricks v. Stalnaker* (1989) to illustrate a governance strategy, in which conflicting claims over competing uses of property lead “courts or other officials [to] determine directly how the property will be used along one or more dimensions singled out as critical” (Merrill and Smith 2007, 30). They explain that the distinction between trespass and nuisance is “one of the clearest examples” of the difference between exclusion and governance strategies.

In relying on the distinction between intentional trespass and nuisance to frame their distinction between exclusion and governance strategies, Merrill and Smith’s exclusion conception of property appears to provide a determinate framework by which to evaluate the costs and benefits of securing property rights to owners. As they explain at a somewhat high level of generality, property is at core a right to exclude. This explains the existence of *in rem* exclusion strategies, and traditional economic analysis can explain and justify why courts enforce the formalistic and bright-line rules in these governance strategies by such metrics as information costs, administrative costs, and other types of transaction costs.

But as economists recognize, a simple model such as intentional trespass sometimes has leakage—heterogeneity problems. The uses, transactions, and disputes over assets are as myriad and complex as the innovative ways by which people have created value in these assets. Practically, this means that property transactions—or more precisely, property disputes—arise in complex and ongoing interactions between individuals, firms, and the state, in which the formal right to exclude does not solely define the nature or the scope of entitlements asserted by the parties against each other. This fact is overshadowed in the academic literature by the oft-repeated examples of conversion of automobiles or intentional trespass of land, like *Jacque*, in which the assistant manager of Steenberg Homes said to his workers, “I don’t give a ---- what [Mr. Jacque] said, just get the home in there any way you can” (*Jacque* 1997, 157).

The relationship between the parties in most court cases is not one of an aggrieved property owner whose rights have been violated by an intentional trespasser, but rather of parties who have engaged in *ex ante* transactions concerning particularized uses of property. Property law accommodates this fact with numerous doctrines, all of which can be used as both swords and shields by litigants. These doctrines are employed depending on the context of the uses and

relationships concerning the property in dispute. Somewhat surprisingly, these are all doctrines that Merrill and Smith identify as merely “peripheral” governance strategies, but in reality these doctrines comprise the majority of property disputes.

This is the kernel of truth in the famous case of *State v. Shack* (1971), which is often juxtaposed against *Jacque* (Dukeminier et al 2010, 89-92). In *Shack*, the New Jersey Supreme Court reversed trespass convictions against individuals who entered a farmer’s land to inform migrant farm workers of their rights under federal law to certain government services; the court held that a “man’s right in his real property of course is not absolute” and that “rights are relative” (*Shack* 1971, 373). *Shack* is a prime example of how property rights disintegrate under the bundle conception of property; as the court emphasized, “Property rights serve human values” (*ibid.*, 372). Ultimately, this meant that property disputes require individualized assessments of these specific “human values” and the specific social context in which they arise, such as the fact that “migrant farmworkers” are “unorganized and without economic or political power” (*ibid.*). Under such an approach, there is nothing really left to property that distinguishes it from any other *in personam* legal entitlements that the government distributes and regulates.

The truth, though, is that *Shack* represents a much more common type of property dispute than that of the brazenly intentional trespass in *Jacque*; that is, property disputes often arise in contexts rooted in some ex ante agreed-upon use of assets, or at least they arise from some type of interrelated social action taken by various parties with regard to an asset. In *Shack*, for instance, the farmer granted permission to the migrant farm workers to enter his property—in legal terms, he granted them a license—and such consent is a commonly accepted defense to a trespass lawsuit. Thus, the *Shack* court did not need to disintegrate property into “relative rights” and “values.” It readily had at hand a longstanding property doctrine to resolve this dispute: the migrant farm workers had a license to be on the property, and this implied a license for any others whose presence was related to this work. To grasp this point, no one would have given the New Jersey Supreme Court’s decision any notice if it dismissed Shack’s trespass lawsuit against pizza delivery men bringing lunch to the migrant farm workers toiling away on his farm.

The exclusion conception of property cannot explain this point in any determinate manner, though, because the consent defense is a governance strategy, not an exclusion strategy. Thus, a defendant’s assertion of a license, explicit or implied, requires a court to make *in personam* assessments of the circumstances of the grant of the license between the parties, such as what was the understanding of the parties in the creation of the license. Even more important, once the governance strategy of consent is invoked by the defendant, the court inevitably will be required to consider heavily disputed evidence submitted by the litigants concerning oral statements, ex post actions or uses of the property that ratified

expansions or limitations of the license, and other assorted contested facts. These are exactly the type of fine-grained assessments of use-rights and *in personam* rights comprising governance strategies, not exclusion strategies.

Moreover, in the back-and-forth arguments in the heat of litigation, property owners do not merely tuck their tails between their legs and run when faced with such affirmative defenses. The law provides a counter-argument to a consent defense: the licensee's use of the property exceeded the bounds of the scope of permission granted by the property owner. This adds a new governance strategy (scope of license) on top of the existing governance strategy (consent in a license). Now a court must assess the reasonable construction of the terms of the license as to its scope of permissive use, including both express and implied permissions. To wit, the logical and predictable development of the litigation stances of the parties in a dispute concerning property rights inevitably leads courts to have to make contextualized inquiries into disputed facts concerning particular actions or statements by the parties.

This is but one example involving a single legal defense representing a governance strategy (consent). It shows that, contrary to the claim that governance strategies are deployed merely at the periphery or borderline of property law, governance strategies are quite common and easily proliferate in property cases. Significantly, the exclusion strategy model gives no determinate guidance to courts in these cases, and it cannot do so on its own terms. Its emphasis on the formal right to exclude—which Merrill and Smith correctly argue is empty of any reference to specific uses—does not positively frame the more substantive metrics that courts must use in assessing such governance strategies. As Judge Richard Posner recognized in a recent trespass case involving a highly contextualized assertion of consent as a defense, such cases are ultimately resolved based on the “specific interests” at stake in the property dispute (*Desnick v. ABC, Inc.* 1995, 1352).

And consent is only one of many countervailing doctrines within the broad category of governance strategies that are available to defendants in trespass cases. In addition to consent, a defendant may argue that he has title to the property through adverse possession, he may invoke numerous equitable defenses, such as estoppel, laches, and unclean hands, or he may claim the defense of necessity, which gives trespassers a free pass for saving a life or for preventing harm to the public, such as stopping a house fire from becoming a conflagration. Outside of rare cases of deliberate trespass like *Jacque*, parties invariably make arguments from available legal doctrines that mandate that courts shift to more complex and heterogeneous governance strategies concerning the nature of use-rights and specific relationships between the parties.

So far, we have been discussing only the ways in which the exclusion strategy in a trespass lawsuit shifts in almost all court cases into a variety of governance

strategies. And trespass is supposed to be the best example of the determinate application of the exclusion conception of property! The reality is that intentional trespass cases like *Jacque* represent just a microcosm of property cases. Most property disputes arise from run-of-the-mill social situations in which parties have ex ante interactions concerning the use of property, addressing such legal issues as easements, restrictive covenants, relations among joint tenants, leases, conveyances, and many others. Given that these legal disputes arise from *in personam* relationships concerning rights of use or possession of property, governance strategies are inevitably asserted in the back-and-forth exchanges within the crucible of a court action. This is the stuff of litigation.

To be clear, the point is not that *Shack*, *Desnick*, and the multitude of other property cases representing governance strategies were decided correctly. The point here is more limited: the claim to determinacy in the exclusion-strategy model of the exclusion conception of property is a false promise. Although Smith and Merrill frame governance strategies as applying only at the periphery of property law, suggesting that they are derivative to exclusion strategies, governance strategies are in fact omnipresent throughout all property law cases. In fact, Smith implicitly concedes this point by attempting to reframe how some prominent governance strategies, such as nuisance, actually function as de facto exclusion strategies (Smith 2004b). Assuming for the sake of argument that this exclusion account of nuisance and of a few other governance strategies is correct, this does little to establish how the many other myriad governance strategies function within the model of the *in rem* right to exclude.

Conclusion

The exclusion conception of property seems appealing because it promises to bring back determinacy in the real-world adjudication of property rights. To their credit, Merrill and Smith's rejection of the bundle conception is correct, and their exclusion conception of property does much to highlight the long-neglected role of information costs in explaining why certain legal doctrines, such as trespass and the highly formal estates system, are structured and enforced through exclusion strategies. But their generalization of the exclusion conception of property into a determinate model for all property rights cannot succeed. It is perhaps time for lawyers and economists to reconsider the legal presumptions built into property doctrines from the historical concept of property in Anglo-American property law: the integrated concept that secured the exclusive rights of possession, use, and disposition (Mossoff 2011; Claeys 2010).

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About the Author



Adam Mossoff is a Professor of Law at George Mason University School of Law. His scholarship focuses primarily on the intersection between property theory and intellectual property law, with a special emphasis on the intellectual history of patent rights. His email is amossoff@gmu.edu.

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