2. Some Basic Aspects of Ownership

a. The Right to Exclude

It is often said that the right to exclude is one of the most important incidents of ownership. But no property right is absolute, including the right to exclude. The two cases that follow illustrate both the importance of the right to exclude and its limits.

JACQUE v. STEENBERG HOMES, INC.

Supreme Court of Wisconsin, 1997
563 N.W.2d 154

BABLITCH, J. Steenberg Homes had a mobile home to deliver. Unfortunately for Harvey and Lois Jacque (the Jacques), the easiest route of delivery was across their land. Despite adamant protests by the Jacques, Steenberg plowed a path through the Jacques' snow-covered field and via that path, delivered the mobile home. Consequently, the Jacques sued Steenberg Homes for intentional trespass. Although the jury awarded the Jacques $1 in nominal damages and $100,000 in punitive damages, the circuit court set aside the jury's award of $100,000. The court of appeals affirmed, reluctantly concluding that it could not reinstate the punitive damages because . . . an award of nominal damages will not sustain a punitive damage award. We conclude that when nominal damages are awarded for an intentional trespass to land, punitive damages may, in the discretion of the jury, be awarded. . . .

I.

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

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

On the morning of delivery, Mr. Jacque observed the mobile home parked on the corner of the town road adjacent to his property. He decided to find out where the movers planned to take the home. The movers, who were Steenberg employees, showed Mr. Jacque the path they planned to take with the mobile home to reach the neighbor's lot. The path cut across the Jacques' land. Mr. Jacque informed the movers

that it was the Jacques' land they were planning to cross and that Steenberg did not have permission to cross their land. He told them that Steenberg had been refused permission to cross the Jacques' land. . . .

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

At trial, one of Steenberg's employees testified that, upon coming out of the Jacques' home, the assistant manager stated: "I don't give a _____ what [Mr. Jacque] said, just get the home in there any way you can." The other Steenberg employee confirmed this testimony and further testified that the assistant manager told him to park the company truck in such a way that no one could get down the town road to see the route the employees were taking with the home. The assistant manager denied giving these instructions, and Steenberg argued that the road was blocked for safety reasons.

The employees, after beginning down the private road, ultimately used a "bobcat" to cut a path through the Jacques' snow-covered field and hauled the home across the Jacques' land to the neighbor's lot. One employee testified that upon returning to the office and informing the assistant manager that they had gone across the field, the assistant manager reacted by giggling and laughing. The other employee confirmed this testimony. The assistant manager disputed this testimony.

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

This case presents [two] issues: (1) whether an award of nominal damages for intentional trespass to land may support a punitive damage award and, if so; (2) . . . whether the $100,000 in punitive damages awarded by the jury is excessive. . . .

II.

. . . Steenberg argues that, as a matter of law, punitive damages could not be awarded by the jury because punitive damages must be supported by an award of compensatory damages and here the jury awarded only nominal and punitive damages. The Jacques contend that the rationale supporting the compensatory damage award requirement is inapposite when the wrongful act is an intentional trespass to land. We agree with the Jacques.

[After noting that the traditional rule in Wisconsin had been that a plaintiff may not recover punitive damages where only nominal compensatory damages are found, the court continued:]

The Jacques argue that the rationale for not allowing nominal damages to support a punitive damage award is inapposite when the wrongful act involved is an intentional trespass to land. The Jacques argue that both the individual and society have significant interests in deterring intentional trespass to land, regardless of the lack of measurable harm that results. We agree with the Jacques. An examination of the individual interests invaded by an intentional trespass to land, and society's interests in preventing intentional trespass to land, leads us to the conclusion that the Barnard rule should not apply when the tort supporting the award is intentional trespass to land.

We turn first to the individual landowner's interest in protecting his or her land from trespass. The United States Supreme Court has recognized that the private landowner's right to exclude others from his or her land is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). . . . This court has long recognized "[e]very person['s] right to the exclusive enjoyment of his own property for any purpose which does not invade the rights of another person." Diana Shooting Club v. Lamoreux, 114 Wis. 44, 59 (1902). Thus, both this court and the Supreme Court recognize the individual's legal right to exclude others from private property.

Yet a right is hollow if the legal system provides insufficient means to protect it. . . . Harvey and Lois Jacque have the right to tell Steenberg Homes and any other trespasser, "No, you cannot cross our land." But that right has no practical meaning unless protected by the State, [and a nominal dollar] does not constitute state protection. . . .

In sum, the individual has a strong interest in excluding trespassers from his or her land. Although only nominal damages were awarded to the Jacques, Steenberg's intentional trespass caused actual harm. We turn next to society's interest in protecting private property from the intentional trespasser.

Society has an interest in punishing and deterring intentional trespassers beyond that of protecting the interests of the individual landowner. Society has an interest in preserving the integrity of the legal system. Private landowners should feel confident that wrongdoers who trespass upon their land will be appropriately punished. When landowners have confidence in the legal system, they are less likely to resort to "self-help" remedies. . . .

Moreover, what is to stop Steenberg Homes from concluding, in the future, that delivering its mobile homes via an intentional trespass and paying the resulting Class B forfeiture, is not more profitable than obeying the law? Steenberg Homes plowed a path across the Jacques' land and dragged the mobile home across that path, in the face of the Jacques' adamant refusal. A $30 forfeiture and a $1 nominal damage award are unlikely to restrain Steenberg Homes from similar conduct in the future. An appropriate punitive damage award probably will.

In sum, as the court of appeals noted, the [traditional] rule sends the wrong message to Steenberg Homes and any others who contemplate trespassing on the land of another. It implicitly tells them that they are free to go where they please, regardless of the landowner's wishes. As long as they cause no compensable harm, the only deterrent intentional trespassers face is the nominal damage award of $1 . . . and the possibility of a Class B forfeiture. . . . We conclude that both the private landowner and society have much more than a nominal interest in excluding others from private land. . . .

COMMONWEALTH v. MAGADINI

Supreme Judicial Court of Massachusetts, 2016
52 N.E.3d 1041

HINES, J. We recite the facts the jury could have found, reserving certain details for our discussion of the specific issues raised. In 2014, the defendant was charged with trespassing on three properties in Great Barrington—Barrington House, Castle Street,

and SoCo Creamery.[7] Barrington House is a mixed-use building with several different restaurants, an enclosed atrium, and apartments above the businesses. Castle Street is a three-story building with retail establishments, offices, and apartments. SoCo Creamery is an ice cream shop. The defendant was barred from each property by no trespass orders. The owner of the Castle Street building had the defendant served with a no trespass order in July, 2008; the manager of Barrington House had the defendant served in June, 2012; and the owner of SoCo Creamery had the defendant served in January, 2014. All of the no trespass orders were in effect at the time the charges were brought against the defendant.

Justice Geraldine S. Hines is a retired judge who served as an associate justice of the Massachusetts Supreme Judicial Court from 2014 to 2017. Born in Scott, Mississippi, she attended college at Tougaloo College in Madison County, Mississippi, and received her law degree from the University of Wisconsin Law School. From 1973 to 1976 she was a public defender with the Roxbury Defenders Committee. Throughout the 1980s and 1990s, she was in private practice. In 2001, she was appointed to the Massachusetts Superior Court and was promoted to the Massachusetts Appeals Court in 2013. Justice Hines was sworn in to the Supreme Judicial Court on July 31, 2014, becoming the first Black woman to serve on the Massachusetts high court.

7. The state criminal trespass statute reads in relevant part: "Whoever, without right enters or remains in or upon the dwelling house [or] buildings . . . of another . . . after having been forbidden so to do by the person who has lawful control of said premises . . . shall be punished." Mass. Gen. L. Ann. c. 266, § 120 (2020).

Four charges related to the defendant's presence at Barrington House. On February 21, March 4, and March 6, police found the defendant lying in a hallway by a heater during the evening, nighttime, or early morning hours of days described as "cold" or "very cold." At approximately noon on April 8, a day described as "cool," police responded to a report and observed the defendant walking through a common area in the Barrington House toward the front door. Two charges stemmed from the defendant's presence at Castle Street, where police had found the defendant lying on the floor in the lobby next to a heater during periods of cold weather. The first incident occurred between 8 A.M. and 10 A.M. on February 20, 2014; the defendant was awake. The second incident occurred at approximately 6:30 A.M. on March 28; the defendant was sleeping. The seventh charge was based on conduct that occurred on June 10, 2014, when the defendant entered SoCo Creamery, ignored requests by the clerk to leave the premises, and used the bathroom for ten to fifteen minutes. The defendant did not dispute that he violated all of the trespass orders, focusing his case instead on the necessity defense in cross-examination and his direct testimony.

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

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

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

Discussion

1. Necessity Defense

The defendant claims that the judge erroneously denied his request for a jury instruction on the defense of necessity and that he improperly excluded evidence

relevant to the defense. The common-law defense of necessity "exonerates one who commits a crime under the 'pressure of circumstances' if the harm that would have resulted from compliance with the law . . . exceeds the harm actually resulting from the defendant's violation of the law." Commonwealth v. Kendall, 883 N.E.2d 269 (Mass. 2008), quoting Commonwealth v. Hood, 452 N.E.2d 188 (Mass. 1983). As such, the necessity defense may excuse unlawful conduct "where the value protected by the law is, as a matter of public policy, eclipsed by a superseding value. . . ." *Kendall*, supra, quoting *Hood*, supra.

For a defendant to be entitled to a necessity defense instruction, he or she must present "some evidence on each of the four underlying conditions of the defense," *Kendall*, 883 N.E.2d 269: "(1) a clear and imminent danger, not one which is debatable or speculative"; (2) [a reasonable expectation that his or her action] will be effective as the direct cause of abating the danger; (3) there is [no] legal alternative which will be effective in abating the danger; and (4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue." *Id.* at 13-14, 883 N.E.2d 269, quoting *Hood*, 452 N.E.2d at 188. If the defendant satisfies these foundational conditions, "the burden is on the Commonwealth to prove beyond a reasonable doubt the absence of necessity." Commonwealth v. Iglesia, 525 N.E.2d 1332 (1988).

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

a. Clear and Imminent Danger

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

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

We agree with the Commonwealth that the defendant did not meet his burden to show a "clear and imminent danger" for the incident on June 10, where the evidence showed only that he had to use the bathroom. Accordingly, we do not include the

incident on June 10 in our analysis requirements of the availability of "legal alternatives" to trespass.

b. Availability of Lawful Alternatives

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

. . .

[T]he defendant's evidence was sufficient to meet his burden. . . . In determining whether there has been sufficient evidence of the foundational conditions to the necessity defense, "all reasonable inferences should be resolved in favor of the defendant, and, no matter how incredible his testimony, that testimony must be treated as true." *Pike*, 428 Mass. at 395, 701 N.E.2d 951. Taken in this light, there is at least "some evidence" that the defendant lacked effective legal alternatives to trespass during cold days and nights. The defendant testified that he stayed at an outdoor gazebo "[p]retty much" year round, that in 2007 he was told to leave the only local homeless shelter and had previously been denied entry to the shelter in the middle of the night following a blizzard, that no other places "want [him] in . . . their facility," that he was unable to rent an apartment despite repeated attempts, and that there was nowhere besides public parks where he could stay. Additionally, the officer who asked the defendant to leave the Barrington House at approximately 9:30 P.M. on February 21 testified that the defendant had to go back outside, and the judge sustained an objection to defense counsel's question about whether the officer offered to transport him to any other shelter or facility. The manager of Castle Street corroborated the defendant's attempt to rent an apartment by his testimony that he called police to have the defendant removed from the building after the defendant "forced his way onto the third floor of the building, flashing money in hand, demanding I rent him an apartment."

The Commonwealth argues that the defendant failed to meet his burden because he presented no evidence that he was unable to rent an apartment outside of Great Barrington, that he was unable to gain entry to the Pittsfield shelter, and that he would still be excluded from the local homeless shelter in 2014. The Commonwealth's argument is unavailing. We do not require an actor facing a "clear and imminent danger" to conceptualize all possible alternatives. So long as the defendant's evidence, taken as true, creates a reasonable doubt as to the availability of such lawful alternatives, the defendant satisfies the third element. The defendant has done so here.

Additionally, we note that the options proposed by the Commonwealth do not appear to be effective alternatives on the record before us. Where the only local homeless shelter had previously denied the defendant entry at 3 A.M. following a blizzard and had later told him he had to leave, the law does not require the defendant to continue to seek shelter there in order to demonstrate that doing so is futile. Moreover, the defendant's

conduct is viewed at the time of the danger, and actions that the defendant could have taken to find shelter before the dangerous condition arose do not negate the conclusion that there were no lawful alternatives available at the time of his unlawful conduct.

We do not view the requirement that a defendant consider lawful alternatives as broadly as suggested by the Commonwealth. Our cases do not require a defendant to rebut every alternative that is conceivable; rather, a defendant is required to rebut alternatives that likely would have been considered by a reasonable person in a similar situation.[8] Moreover, we are not prepared to say as a matter of law that a homeless defendant must seek shelter outside of his or her home town in order to demonstrate a lack of lawful alternatives. Our law does not permit punishment of the homeless simply for being homeless. Once the foundational requirements are met, the necessity defense allows a jury to consider the plight of a homeless person against any harms caused by a trespass before determining criminal responsibility.[9]

Accordingly, in the circumstances of this case, we conclude that the judge erred in denying the defendant's request for an instruction on the defense of necessity. As the defendant satisfied the foundational elements entitling him to the defense, the judge's failure to instruct the jury about the defendant's principal defense requires a new trial. We therefore vacate the defendant's convictions of the charges occurring in February, March, and April, 2014.

. . .

Conclusion

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

---

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

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

Notes and Questions

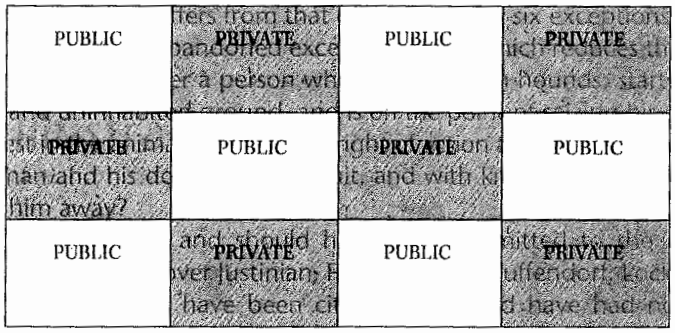
1. *Trespass.* Both *Jacque* and *Magadini* involve trespass, which is the cause of action that most obviously involves the right to exclude. *Jacque* is a case of civil trespass, while *Magadini* involves criminal trespass. Civil trespass consists of an unprivileged intentional encroachment upon property owned by another. "Intentional" simply means that the defendant engaged in a voluntary act, such as walking. It does not require that the defendant specifically intended to commit trespass. Hence, a mistaken entry upon another's land can still be trespass. Trespass is unprivileged when the encroachment is (1) without the owner's consent; (2) lacks necessity as a justification; and (3) is not otherwise justified by public policy. Simple examples of privileged intentional encroachments include firefighters entering a building to stop it from burning and police officers entering a private home to prevent a crime.

Trespass is criminal only when the defendant enters another's land knowing that he lacks a privilege to do so, or if the defendant refuses to leave another's land after being asked to do so.

2. *Despotic owners?* Did Jacque have an objectively good reason for refusing permission to cross his land? Does this matter?

William Blackstone (see pages 21-22) grandly defined the right of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 Commentaries *2. Two centuries later, the U.S. Supreme Court, in *Kaiser Aetna*, cited and quoted in *Jacque* (see page 42), described the right to exclude as an essential feature of property. Why could the owners in *Jacque* be despotic, but the owner of Barrington House in *Magadini* could not? What value or values support the idea that the right to exclude is central to ownership? For an argument that the owner in *Jacque* should not have been allowed to be despotic (i.e., to exclude Steenberg), see John Makdisi, Uncaring Justice: Why *Jacque v. Steenberg Homes* Was Wrongly Decided, 51 J. Cath. L. Stud. 111 (2012).

3. *Trespassing the air?* As we will discuss later (see page 141), landowners own the airspace directly above their land. There are limits to their airspace rights, however, as a ranch owner learned in Iron Bar Holdings LLC v. Cape, ___ F. Supp. 3d ___, 2023 WL 3686793 (D. Wyo. 2023). Throughout the West, millions of acres of public land are surrounded by private land with no means of access by road or trail. Some of this landlocked property is prime hunting area, and one of those areas is Elk Mountain, Wyoming, where North Carolina drug company founder Fred Eschelman had his large ranch. Several hunters who had been hunting on public land in Wyoming were alleged to have committed trespass upon Eschelman's property when they moved from one section of public land to another but passing through the airspace above Eschelman's land. The problem resulted from the checkerboard fashion in which public and private lots were organized in that part of the state, appearing as below:



The defendant hunters never touched the plaintiff's land, nor were there any damages. (although Eschelman asserted $3 to $7 million in property damage). They crossed at the exact point at which the corners of four lots, two public and two private, came together, using a ladder to make the crossing from public to public land without touching plaintiff's land.

The court held that the defendants were entitled to summary judgments as to the corner crossing that did not involve any physical touching of the plaintiff's private land and did not otherwise damage plaintiff's private property. Although the plaintiff possesses a property interest in the airspace above its land up to a certain height and generally holds the right to exclude others from its property, that interest is subject to a reasonable way of passage over the plaintiff's unenclosed tracts of land. Congress purposely created the checkerboard, the court reasoned, and "'[i]n such a situation the law fixes the relative rights and responsibilities of the parties. It does not leave them to the determination of either party.' *Mackay* [v. Uinta Development Co., 219 F. 116, 118 (8th Cir. 1914).]" For full background on the case, see Ben Ryder Howe, It's Public Land. But the Public Can't Reach It, N.Y. Times, Nov. 28, 2022, https://www.nytimes.com/2022/11/26/business/hunting-wyoming-elk-mountain-access.html (last visited June 13, 2023).

4. *Limits on the right to exclude.* No right is absolute, including the right to exclude. Even in Blackstone's time, there were limitations on the right to exclude. Today there are many more. *Magadini* illustrates one important defense to criminal trespass, i.e., necessity. In a famous case, State v. Shack, 277 A.2d 369 (N.J. 1971), the New Jersey Supreme Court recognized another limit on trespass. In that case, two employees of government-funded organizations entered upon a private farm for the purpose of providing aid, medical and legal, to migrant farm workers who were living on the farm owner's land. When the owner demanded that they leave, they refused, and he summoned state police to eject them. He initiated criminal prosecution for trespass. The New Jersey Supreme Court overturned their convictions, finding that their entry was privileged under state law. The court stated, "Property rights serve human values. They are recognized to that end, and are limited by it. . . . Here we are concerned with a highly disadvantaged segment of our society. . . . [W]e find it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well-being. The farmer, of course, is entitled to pursue his farming activities without

interference, and these defendants readily concede. But we see no legitimate need for a right in the farmer to deny the worker the opportunity for aid available from federal, state, or local services, or from recognized charitable groups seeking to assist him." Id. at 372, 374.

You will encounter other examples of limits on the right to exclude as you work your way through this book. Here are a few: civil rights legislation forbidding various forms of discrimination; rent controls and other limitations on a landlord's right to evict tenants; the law of adverse possession; bodies of doctrine granting public rights of access to private beaches (which we will encounter in this chapter); and legislation protecting homeowners who have defaulted on mortgage payments.

Homelessness in America. The plight of David Magadini has become all too familiar in the United States today. The problem of homelessness is visible from coast to coast and everywhere in between. Numbers can hardly tell the entire story, of course, but they tell us something. The most recent Homeless Assessment Report from the U.S. Department of Housing and Urban Development (2022) stated that on a single night in 2022, roughly 582,500 people were experiencing homelessness in the United States. U.S. Department of Housing and Urban Development Office of Community Planning and Development, The 2022 Annual Homeless Assessment Report (AHAR) to Congress 1 (December 2022). Nationally, homelessness slightly declined (by less than 1 percent) between 2020 and 2022. California continues to take the lead, accounting for half of all unsheltered people in the country (115,491 people). People who identify as Black made up just 12 percent of the total U.S. population but comprised 37 percent of all people experiencing homelessness.

The roots of homelessness are complex and varied, including structural problems in the housing market affecting both the supply and the demand side, mental illness and substance abuse problems, and other factors.

b. The Right to Transfer

ANDRUS v. ALLARD

Supreme Court of the United States, 1979
444 U.S. 51

BRENNAN, J. The Eagle Protection Act and the Migratory Bird Treaty Act are conservation statutes designed to prevent the destruction of certain species of birds.[10] Challenged in

10. The Eagle Protection Act, § 1, 54 Stat. 250, as amended, as set forth in 16 U.S.C. § 668(a), provides in pertinent part:

> "Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly