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BIKINIS AND EFFICIENT TRESPASS LAW

John Martinez*

Abstract

Current trespass law at times emphasizes that a mere physical intrusion suffices, whereas at other times it focuses on the right to use, and instead seeks to determine whether an intrusion interferes with the present beneficial use of the landowner's premises. Using economic efficiency analysis, this Article suggests that the right to exclude approach leads to fewer transaction costs and therefore is the economically efficient and thereby the preferable legal rule.

I. INTRODUCTION

On Valentine's Day, 2013, Laura Christensen and her two daughters walked into a Barnes & Noble bookstore and proceeded to put sticky notes strategically on the cover of the 2013 *Sports Illustrated* swimsuit issue featuring Kate Upton in a revealing bikini.¹ Laura and her daughters were acting in response to an online campaign by Beauty Redefined, a Utah nonprofit that promotes a healthy body image for women. Beauty Redefined had urged supporters to cover Kate Upton with sticky notes sold by Beauty Redefined.² The trio worked through almost the whole stack of magazines before the manager asked them to leave and followed them to the door. Laura said, "We would never do anything illegal, but putting them on a product felt a little protest-y."³

Did Laura and her daughters trespass on Barnes & Noble's premises? The inquiry depends on whether we should emphasize a landowner's⁴ *right to exclude* or instead the landowner's *right to use* land. This Article examines the history and

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¹ Jennifer Napier-Pearce, *Utah Twins Launch Sticky Note Protest of Sports Illustrated Swimsuit Issue*, SALT LAKE TRIB. (Feb. 15, 2013, 9:42 AM), www.sltrib.com/sltrib/money/55833695-79/beauty-issue-notes-sports.html.csp. For photographs from the *Sports Illustrated* swimsuit issue, see *Swimsuit 2013, Kate Upton*, SPORTS ILLUSTRATED, http://sportsillustrated.cnn.com/2013_swimsuit/models/kate-upton/13_kate-upton_17.html (last visited May 31, 2013).

² See *Our Issue with Swimsuits (or Lack Thereof) in Sports Illustrated*, BEAUTY REDEFINED, <http://www.beautyredefined.net/our-issue-with-the-swimsuit-issue> (last visited May 31, 2013).

³ Napier-Pearce, *supra* note 1.

⁴ Throughout this Article the term "landowner" refers to anyone in lawful possession of land. Thus, it includes fee owners as well as lessees.

evolution of common law trespass and considers whether trespass law should emphasize the right to exclude or the right to use.

To answer that question, this Article examines trespass legal doctrine through the lens of economic efficiency. Economic efficiency is the idea that rules of law should promote efficient resource allocation.⁵ A legal rule is efficient if it reduces “transaction costs,” defined as the costs incurred by the parties, the legal system, and society generally in resolving a legal dispute when it arises.⁶ Thus, economic efficiency demands that we assign property rights in such a manner that the transaction costs of resolving property rights disputes will be minimized.⁷

This Article suggests that emphasizing the right to exclude would allow landowners greater autonomy to determine whom to allow entry and reduce the transaction costs of ascertaining when a trespass has occurred. In most situations, whether a physical intrusion has occurred is relatively straightforward. In contrast, emphasizing the right to use would reduce landowners’ autonomy and increase transaction costs. Determining whether the landowner’s use is detrimentally affected turns on the uses the landowner has made of the land and the impact on that use by the intruder’s conduct. Accordingly, this Article recommends that courts emphasize the right to exclude.

Part II of this Article compares the right to exclude with the right to use theories of the law of trespass. Part III reviews the thirteenth-century origins of the law of trespass. Part IV considers how modern courts weigh private autonomy with social obligation in the context of the law of trespass. Part V concludes.

II. THE RIGHT TO EXCLUDE AND THE RIGHT TO USE IN THE LAW OF TRESPASS

The Restatement (Second) of Torts, adopting the right to exclude approach, provides that merely intentionally intruding on the land of another constitutes a trespass.⁸ The Restatement states:

One who intentionally enters land in the possession of another is subject to liability to the possessor for a trespass, although his presence on the land

⁵ Joseph M. Steiner, *Economics, Morality, and the Law of Torts*, 26 U. TORONTO L.J. 227, 227–28 (1976).

⁶ See Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 7 (1992) (recognizing “transaction costs” as broadly defined); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1096–97 (1972).

⁷ See R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 6–7 (1988) (claiming that transaction costs determine the behavior of market participants).

⁸ RESTATEMENT (SECOND) OF TORTS § 158 (1965) (“One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove.”).

causes no harm to the land, its possessor, or to any thing or person in whose security the possessor has a legally protected interest.⁹

Under the Restatement, a trespass occurs even if the actor is under a reasonable—albeit mistaken—belief of law or fact which is not induced by the landowner.¹⁰ Under the Restatement, Laura and her daughters undoubtedly committed a physical intrusion and therefore trespassed.

In contrast to the Restatement, in *Geller v. Brownstone Condominium Association*,¹¹ the court adopted the right to use approach.¹² In *Geller*, an owner of a single-family residence (SFR) sued the owner of an adjacent condominium for trespass because the condo owner used temporary scaffolds that overhung the SFR on the side of the condo.¹³ The court held the condo owner had not trespassed because, although there was a physical intrusion, the intrusion did not interfere with the present beneficial use and enjoyment of either the airspace above the SFR or of the surface on which the SFR stood.¹⁴

Under *Geller*, Laura and her daughters' conduct would be analyzed to determine whether the (undoubted) physical intrusion interfered with the present beneficial use by Barnes & Noble of its premises for a bookstore. It is arguable that even under that standard, Barnes & Noble's ability to sell *Sports Illustrated* was diminished by the sticky note censorship of the racy cover, since the covers on *Sports Illustrated* swimsuit issues are presumably made that way to attract the attention of prospective buyers.

The right to use approach, however, requires consideration of the landowner's actual use of the land and the intruder's impact on the beneficial uses involved. The inquiry turns into a balancing approach with all its indeterminacy and added transaction costs. In order to evaluate whether the right to use approach warrants the extra costs, Part III considers the origins and evolution of common law trespass.

⁹ *Id.* § 163.

¹⁰ *Id.* § 164 (“One who intentionally enters land in the possession of another is subject to liability to the possessor of the land as a trespasser, although he acts under a mistaken belief of law or fact, however reasonable, not induced by the conduct of the possessor, that he (a) is in possession of the land or entitled to it, or (b) has the consent of the possessor or of a third person who has the power to give consent on the possessor's behalf, or (c) has some other privilege to enter or remain on the land.”).

¹¹ 402 N.E.2d 807 (Ill. App. Ct. 1980).

¹² *Id.* at 809 (“[T]o constitute an actionable trespass, an intrusion has to be such as to subtract from the owner's use of the property.”).

¹³ *Id.*

¹⁴ *Id.* *Geller* is often used as a springboard for the teaching of common law trespass. See DAVID L. CALLIES, J. GORDON HYLTON, JOHN MARTINEZ, DANIEL R. MANDELKER, CONCISE INTRODUCTION TO PROPERTY LAW 159–61 (2011).

III. BRIGANDS AND ANGLO-SAXONS

A thorough examination of the history of trespass concluded: “The subject is one which is very obscure, so obscure in fact, that it may never be possible to determine the origin of trespass on the basis of incontrovertible historical evidence.”¹⁵ The existence of a connection between trespass and felony—a breach of the king’s peace—however, is fairly certain.¹⁶ Once having conquered England, one of William the Conqueror’s principal concerns was to ensure that his nobles were protected from roving bands of brigands and Anglo-Saxons. Intrusion, occupation of castles, displacement of the Norman occupants, personal injury to such occupants, and asportation or destruction of chattels or crops all undermined the power of the King.¹⁷ It is not surprising, therefore, that the King would view any of these as an injury to himself, and hence would make them crimes against the Crown.

As the thirteenth century wore on, bits and pieces of the elements of such crimes became civil actions.¹⁸ Mere intrusion disturbed the King’s peace, but would mere intrusion violate civil peace sufficient to be actionable as well? That is, would it suffice that the right to exclude alone had been violated, or would trespass offer protection only if both the right to exclude and the right to use were violated?¹⁹ The history of trespass gives no definitive answers, and, as discussed in Part IV, modern courts go both ways.

IV. PRIVATE AUTONOMY AND SOCIAL OBLIGATION

Property rights in general—and the right to exclude in particular—establish “a sphere of private autonomy”: the freedom to choose without external constraint.²⁰ In contrast, the right to use is shaped by the owner’s social obligations.²¹ The

¹⁵ George E. Woodbine, *The Origins of the Action of Trespass* (pt. 1), 33 YALE L.J. 799, 799–800 (1924).

¹⁶ *Id.* at 801.

¹⁷ George E. Woodbine, *The Origins of the Action of Trespass* (pt. 2), 34 YALE L.J. 343, 344–45 (1925).

¹⁸ Woodbine, *supra* note 15, at 800–01.

¹⁹ Compare RESTATEMENT (SECOND) OF TORTS § 163 (1977), with *Geller*, 402 N.E.2d 807.

²⁰ *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 93 (1980) (Marshall, J., concurring).

²¹ See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 748–751 (2009) (proposing the social obligation theory as an alternative approach to the more widely used law and economics theory). The extent to which a landowner’s “social obligation” is greater when the landowner is engaged in “state action” that triggers the constitutional rights of the intruder is beyond the scope of this Article. See generally Jennifer A. Klear, *Comparison of the Federal Courts’ and the New Jersey Supreme Court’s Treatments of Free Speech on Private Property: Where Won’t We Have the Freedom to Speak Next?*, 33 RUTGERS L.J. 589 (2002) (describing expanding free speech rights on private property in light of *Pruneyard*); Kevin Cole, *Federal and State*

converse is at least partly true as well: the right to exclude entails some social obligation. Thus, one cannot exclude a police officer with a warrant. And the right to use also entails autonomy concerns: one can choose to grow vegetables, flowers or a lawn on one's land. However, there is a close connection—if not one-to-one correspondence—between the right to exclude in order to protect autonomy, on one hand, and the right to use as shaped by social obligation, on the other.

In *Loretto v. Teleprompter Manhattan CATV Corporation*,²² the United States Supreme Court used the “right to exclude” approach, holding that an apartment building owner had suffered a taking of her property through governmental authorization of a private company to place cables and relay boxes on her building without her consent, even though she had suffered no significant harm to her use of the building.²³ Significantly, the Court viewed as irrelevant whether a social objective would have been achieved by the cables and relay boxes, but focused only on whether the owner had suffered a permanent physical occupation.²⁴ Similarly, in *Purkey v. Roberts*,²⁵ the Utah Court of Appeals adopted the right to exclude approach.²⁶ Citing the Restatement, the court held that the mere existence of a fence on a neighbor's property constituted trespass regardless of whether the fence diminished the neighbor's use of his land.²⁷

In contrast, in *United States v. Causby*,²⁸ the Court took the right to use approach, holding that planes in a flight pattern regularly flying over plaintiff's farm came so close as to *detrimentally affect* plaintiff's use of the surface of the land to raise chickens.²⁹ Similarly, in *Pruneyard Shopping Center v. Robins*,³⁰ the Court

“State Action”: *The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327 (1990) (analyzing the state action doctrine on the state and federal levels).

²² 458 U.S. 419 (1982).

²³ *Id.* at 437–38 (“The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute. Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due. For that reason, moreover, there is less need to consider the extent of the occupation in determining whether there is a taking in the first instance.”).

²⁴ *Id.* at 454–56 (Blackmun, J., dissenting) (specifying that, although the Court of Appeals determined that the state law enabling installation of cable boxes on private property served a legitimate public purpose, “[i]t is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid”). See generally JOHN MARTINEZ, GOVERNMENT TAKINGS § 2:10, n.1 (2012) (identifying cases where the issue of permanent physical occupation was analyzed); JOHN MARTINEZ, LOCAL GOVERNMENT LAW, § 16:61, n.68 (2013) (surveying state court decisions applying permanent physical occupation analysis in the takings context).

²⁵ 285 P.3d 1242 (Utah Ct. App. 2012).

²⁶ *Id.* at 1247–48.

²⁷ *Id.*

²⁸ 328 U.S. 256 (1946).

²⁹ *Id.* at 262 (“The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value.”).

held that a mall owner whose operations were *not detrimentally affected* by students seeking signatures for a petition did not have the right to exclude them.³¹ And, in *Kaiser Aetna v. United States*,³² the Court held that the federal government could not force the owner of a private pond to allow the general public to use it because it *would interfere* with the exclusive use of the pond by fee-paying owners of residences surrounding the pond.³³

Two state cases also illustrate the right to use approach. In *Ploof v. Putnam*,³⁴ the court held that a dock owner had no right to exclude a boat owner from tying his boat to the dock during a storm that threatened the boat owner with personal injury.³⁵ Similarly, in *State v. Shack*,³⁶ the court held that a farmer could not exclude a lawyer and social worker paid by the government to provide services to migrant farm workers from visiting their intended clients on the farm where such visits could be conducted without interfering with the farm operations.³⁷

V. CONCLUSION

Laura Christensen and her two daughters' entry into the Barnes & Noble bookstore solely to place sticky notes on the cover of the *Sports Illustrated* swimsuit issue magazines certainly violates the bookstore's right to exclude. If autonomy to exclude is paramount, then violation of the right to exclude is sufficient. The transaction costs of proving an intrusion has occurred are comparatively minimal: either there has been a physical intrusion or not. Alternatively, in this case, it is also certainly arguable that the sticky notes interfere with the beneficial use of a bookstore's ability to sell them. Thus, even under the right to use approach, a trespass may have occurred as well.

The difference is that the outcome under the right to use approach is much less certain or ascertainable and, indeed, forces the landowner to justify being able to keep people out, thus reducing landowner autonomy. The transaction costs of proving interference with use are comparatively much more substantial: What uses are reasonable under the circumstances? What degree of interference with those uses suffices? Has the landowner met the burden of showing that there is no reasonable "time, place and manner" regulation that would allow the intrusion, yet also preserve the landowner's enjoyment of reasonable use?

³⁰ 447 U.S. 74 (1980).

³¹ *Id.* at 83–84.

³² 444 U.S. 164 (1979).

³³ *Id.* at 178–79.

³⁴ 71 A. 188 (Vt. 1908).

³⁵ *Id.* at 189–90.

³⁶ 277 A.2d 369 (N.J. 1971).

³⁷ For a recent article I wrote discussing both *Ploof v. Putnam* and *State v. Shack*, see John Martinez, *No More Free Easements: Judicial Takings for Private Necessity*, 40 REAL EST. L.J. 425 (2012).

The right to use approach thus entails greater transaction costs and is therefore economically inefficient. Economic efficiency thus dictates that courts should adopt the Restatement's right to exclude approach and reject the right to use approach.