

THE RIGHT TO EXCLUDE IN THE SHADOW OF THE *CATHEDRAL*: A RESPONSE TO PARCHOMOVSKY AND STEIN

Eric R. Claeys*

INTRODUCTION: PHILOSOPHY AND ECONOMICS UNDER THE *CATHEDRAL*

Reconceptualizing Trespass,¹ by Professors Gideon Parchomovsky and Alex Stein, falls in the genre of law and economics scholarship inspired by Guido Calabresi and A. Douglas Melamed's classic article, *One View of the Cathedral* ("the Cathedral").² *Reconceptualizing Trespass* argues that, in property torts, scholarship under the *Cathedral* has focused too much on damage awards with the features of *Cathedral* liability rules, and too little on damage awards that have the features of *Cathedral* property rules. Ideally, the authors argue, property rule damages should award owners approximations of their subjective values over their property; as a second-best substitute, such damages should award owners restitution.

In this Response, I am significantly disadvantaged by the limitation that I sympathize strongly with Parchomovsky and Stein's prescriptions.³ Nevertheless, I am confident that I can offer an enlightening perspective on their essay, because I prefer to reach their prescriptions by a different method: the conceptual and moral philosophy behind property law. From the perspective of those fields, *Reconceptualizing Trespass* presents a mixed but extremely interesting picture.

If we focus closely on *Reconceptualizing Trespass*'s doctrinal proposals about trespass damages, the Essay is right: it uncovers important evidence corroborating existing philosophical scholarship on damage remedies for property torts, and it highlights an important gap in that scholarship. From a broader perspective, however, *Reconceptualizing Trespass* confirms

* Professor of Law, George Mason University. This Response was made possible by financial support from George Mason University and its Law and Economics Center. I thank Tun-Jen Chiang, Michael Krauss, Chris Newman, David Schleicher, and Gideon Parchomovsky and Alex Stein for helpful criticisms, and Adam Mossoff for inspiring this Response.

¹ Gideon Parchomovsky & Alex Stein, *Reconceptualizing Trespass*, 103 NW. U. L. REV. 1823 (forthcoming 2010). Pinpoint citations to this article are accurate as of the time of publication.

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

³ The most germane comment readers could hope for would use the same method Parchomovsky and Stein use, post-*Cathedral* economic analysis of remedies, to give a more enthusiastic defense of liability rule damage awards than they or I give.

criticisms that legal philosophers have lodged against the *Cathedral's* property/liability rule scheme. Many legal scholars regard the *Cathedral* as a landmark, and it seems to frame clearly the policy questions latent in remedies disputes without settling them in any particular way. Yet legal philosophers have raised serious questions about whether the property/liability scheme remains faithful to basic legal concepts—especially the “wrong” that damage awards are supposed to remedy in torts to victims’ autonomy interests, or the “exclusivity” that property guarantees owners in relation to their assets. Although *Reconceptualizing Trespass* makes several significant contributions, legal philosophers may fairly wonder whether its greatest contributions confirm their criticisms of the *Cathedral's* approach to remedies.

I. PROPERTY RULE DAMAGE AWARDS IN TRESPASS DOCTRINE

To explain my reactions, I am going to start with black-letter remedy doctrine and then compare how leading philosophical and law and economics accounts justify that doctrine. Assume Taney takes and keeps property that belongs to Marshall. The ideal remedy is a judgment enjoining Taney to return the property. In Calabresi and Melamed’s scheme, this injunction is a quintessential “property rule.” It ensures that “someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.”⁴ The injunction protects Marshall’s claim right not to sell except by voluntary transaction and his liberty to set the selling price.

If it is not possible for Taney to return the property, the law may use several different monetary remedies as second- or third-best substitutes for an injunction. The most logical substitute is a judgment ordering Taney to pay Marshall what Parchomovsky and Stein call “propertized compensation”⁵—that is, damages equivalent to the value *Marshall* placed on the property at the time Taney took it.⁶ If it is impossible or impractical for the trier of fact to set propertized compensation, and if Taney is profiting from the use of Marshall’s property, courts may order Taney to disgorge his profits as a third-best solution. I will call these two monetary calculations the “owner value” awards. I do so to finesse semantic questions about whether propertized compensation and disgorgement count as “property rules” under Calabresi and Melamed’s scheme. Whether or not they are property rules,⁷

⁴ Calabresi & Melamed, *supra* note 2, at 1092.

⁵ Parchomovsky & Stein, *supra* note 1, at 1826.

⁶ Of course, there are intermediate classes of cases. For example, perhaps Taney can return the property, but only in damaged condition. Cases like these are easy enough to solve once the basic black-letter principles are clear; if the property is not *too* damaged, Taney should either repair it himself and return it or return it and pay for the property damage.

⁷ I think they are, but some readers may equate “property rules” with injunctions and “liability rules” with monetary awards of any type.

however, the owner value awards work in tandem with injunctions to secure Marshall's power to control his land and the value he places on the land's use and enjoyment. According to the *Restatement (Second) of Torts*, "A person tortiously deprived of property is entitled to damages based upon its special value to him if that is greater than its market value."⁸

Of course, in a complex legal system, it is inevitable that foundational doctrines in one area will collide with doctrines foundational elsewhere. Professors Parchomovsky and Stein identify a fault line created by one such collision. When tort law regulates accident disputes, it prefers what I will call here "market value" damage rules. Market value damage rules apply Calabresi and Melamed's "liability rules" in the realm of tort law: "Whenever someone may destroy [an] initial entitlement if he is willing to pay an objectively determined value for it, [the] entitlement is protected by a liability rule."⁹ I call such rules market value rules because the most common method of "objectively determin[ing]" the value of an entitlement is to determine how much a comparable asset would trade for on the open market. The commentary to section 931 of the *Restatement (Second) of Torts* encourages courts to award the victims of land trespasses lost rental value but not more.¹⁰ According to the commentary to section 129 of the *Restatement of Restitution*, even if Taney makes \$10,000 while trespassing on Marshall's land, the fair rental value of which is \$1,000, Marshall may request only \$1,000 in compensation.¹¹

On a strictly doctrinal level, market value principles apply in disputes over accidents but not in disputes over property. *Restatement (Second) of Torts* § 931 and *Restatement of Restitution* § 129 therefore place tort and restitution law in significant tension with general principles of property law. Parchomovsky and Stein argue that, in property disputes, the owner value approach is the bedrock principle and the market value approach a narrow exception. To the extent they make doctrinal arguments, they rely heavily on *Armory v. Delamirie*.¹² In that case, the court instructed the jury to presume that a jewel, converted by a jeweler who refused to produce it to the court or to return it to the chimney-sweep who had found it, was as valuable as the finest substitute available unless the jeweler produced it for inspection. Parchomovsky and Stein read the case to teach a general principle about property damages: An owner who suffers a conversion or trespass is entitled not merely to "market-value compensation" but also to "compensation commensurate with the price of the" highest possible believable val-

⁸ RESTATEMENT (SECOND) OF TORTS § 927 cmt. c (1979).

⁹ Calabresi & Melamed, *supra* note 2, at 1092.

¹⁰ See Parchomovsky & Stein, *supra* note 1, at 1824 n.3 (citing RESTATEMENT (SECOND) OF TORTS, *supra* note 8, § 931 cmt. b; DAN B. DOBBS, 1 LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION, § 5.12(1), at 827–29 (2d ed. 1993)).

¹¹ RESTATEMENT OF RESTITUTION AND UNJUST ENRICHMENT § 129 illus. 1 (1936).

¹² (1722) 93 Eng. Rep. 664 (K.B.).

ue.¹³ Parchomovsky and Stein argue that trespass law should institute a similar regime of propertized compensation whenever it is impossible to enjoin a trespass, and that it should require disgorgement as a third-best alternative when propertized compensation is also not feasible.¹⁴

I agree with all of these claims. Doctrinally, I have only one addition. *Armory* applies a time-honored principle going back to Roman law. When a defendant paid damages to a plaintiff, Roman law seemed to follow the market value approach. Ironically, however, “market value” was set not by the market or the trier of fact but by the *plaintiff*, who could set that value as high as he could get away with “without straying over the line between optimism and perjury.”¹⁵ For this reason and the many reasons recounted by Parchomovsky and Stein, in any case in which controlling authority does not require otherwise, I have no doubt that a judge would find that *Armory* and this principle of Roman law accord with foundational legal principles in property torts better than *Restatement (Second) of Torts* § 931 and *Restatement of Restitution* § 129.

II. PROPERTY RULE DAMAGE AWARDS IN CONCEPTUAL AND MORAL PHILOSOPHY

Yet academic lawyers are often suspicious of doctrinal arguments and contributions. When practicing lawyers or judges claim that certain policy commitments are “the law” or the “most fundamental” law, there is a risk that those commitments are crude, justified merely by “intuition and any available facts.”¹⁶ Legal scholars, particularly law and economists and other scholars with social-science training, may wonder with good reason: Does the owner value approach have anything more to say for itself than precedent and tradition going back to Roman law?

That question may be answered from many different perspectives; after all, there are many different ways to look at the *Cathedral*.¹⁷ In contemporary discussions, however, economic and philosophical analyses usually get pride of place over other interdisciplinary approaches. I prefer to start with fields of philosophy that take seriously and build on the conceptual and normative principles latent in the law sketched in the last Part.

A. Conceptual Analysis of Legal Rights

Some philosophers have tackled the questions raised by *Reconceptualizing Trespass* by explaining the theory of legal rights taken for granted

¹³ Parchomovsky & Stein, *supra* note 1, at 1826.

¹⁴ *See id.* at 1862.

¹⁵ BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 102 (1962).

¹⁶ ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 3 (3d ed. 2000).

¹⁷ *See* Calabresi & Melamed, *supra* note 2, at 1090 n.2 (“[The *Cathedral*] is meant to be only *one* of Monet’s paintings of the Cathedral at Rouen. To understand the Cathedral one must see all of them.”).

and enforced in tort law. That theory is explained by a combination of conceptual analysis and moral philosophy. The relevant conceptual analysis sounds in corrective justice, which presumes that parties enjoy rights understood as domains of freedom. The domains entitle right bearers to pursue a wide range of activities and freely to choose which specific activity or activities to pursue. When someone invades a right bearer's domain of freedom, corrective justice specifies that the bearer's loss of, and the right taker's gain of, liberty are both wrongful and must be wiped off society's books.¹⁸ The *Restatement (Second) of Torts* endorses this view of tort: "the law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort."¹⁹

This general prescription has been applied to the problems raised in *Reconceptualizing Trespass* in conceptual scholarship criticizing the property/liability rule scheme. According to Jules Coleman and Jody Kraus, that scheme rests on a serious conceptual confusion about the nature of remedy rules.²⁰ The property/liability rule scheme mistakenly assumes that the law and legal actors keep separate the substance of rights and the remedies the law uses to secure that substance. Normative analysis under the *Cathedral* assumes that property rules and liability rules are two different tools to protect rights whose content comes from some other source. In practice, however, injunctions, damages, and other remedial rules all partly inform and specify the normative content of legal rights.²¹

In addition, the property/liability rule scheme distorts remedies' norm-signaling functions. The property/liability rule scheme assumes that actors are motivated primarily by standard economic interests. When a court orders Taney to pay damages, the scheme assumes that Taney will cease his invasive conduct if doing so is cheaper than paying damages, but that he will pay damages and continue his conduct if the conduct is more profitable than the damages are costly. In contrast, the law assumes that actors are social and may be at least partially civilized to respect their political obligations. Thus, when a court orders Taney to pay damages to Marshall, it sends Taney two messages: "You have wronged Marshall," and "You must pay X dollars in damages to rectify that wrong." The property/liability rule framework ignores the condemnation inherent in the damage award and the shaming and other socializing functions it serves. Because economic analy-

¹⁸ According to some scholars, corrective justice requires the wrongdoer's wrongs and the victim's rights invasions both to be rectified in the same public proceeding. See, e.g., ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 114–44 (1995). According to others, corrective justice requires only that wrongs be annulled. See, e.g., JULES L. COLEMAN, *RISKS AND WRONGS* 311–24 (1992) (describing the annulment argument). Those disagreements do not make a difference for the issues raised in this Response.

¹⁹ RESTATEMENT (SECOND) OF TORTS, *supra* note 8, § 901 cmt. a.

²⁰ Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 *YALE L.J.* 1335 (1986). Accord Jules L. Coleman, *Some Reflections on Richard Brooks's "Efficient Performance Hypothesis,"* 116 *YALE L.J. POCKET PART* 416, 418–21 (2007), <http://www.yalelawjournal.org/images/pdfs/575.pdf> (link).

²¹ Coleman & Kraus, *supra* note 20, at 1346–47.

sis presumes that actors rationally seek to maximize their utilities concretely and selfishly construed, in the *Cathedral's* horizons a liability rule seems to send the following signal from the legal system to Taney: "If you pay X dollars in damages, you may buy Marshall's property with our sanction."²² Liability rules, as construed by law and economics scholars, legitimate forced transfers of rights.

To be clear, not all damages awards send a shaming message. A judgment does and should carry such a message when Taney deliberately trespasses on Marshall's land. It would send the same message if Taney crashed into Marshall's car negligently on a public road. If, however, Taney commandeers Marshall's dock temporarily during a storm to save his own life and boat, Taney must still pay damages, but now as part of a less condemning judgment: "If you pay Marshall X for the damage you inflicted to his dock, you will convert what would otherwise be a wrong to Marshall into a non-tortious act."²³ Obviously, this second message is much closer to the message Calabresi and Melamed assume all liability rules send. But that overlap teaches something revealing about the *Cathedral's* taxonomy. Sound legal systems distinguish common and easy cases (such as that in which a stranger invades the autonomy of an owner with no obvious justification) from rare and close ones (such as that in which an emergency gives the stranger justification he normally lacks to infringe on the owner's autonomy). When a legal theory conflates easy cases with hard emergency cases, the vigilant student should consider whether it is intended to or has the effect of diminishing the role that autonomy plays as a substantive goal in law. Private actors have less autonomy (and public actors more) if every case presents an emergency.

When Parchomovsky and Stein argue against market value rules in property torts, their criticisms resemble the criticisms Coleman and Kraus make of liability rules. Parchomovsky and Stein argue that "[t]he 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."²⁴ Their argument accords with what Coleman and Kraus say generally: "The point of conferring an entitlement arguably is to secure a domain of control, *not* to guarantee a particular level of welfare or utility."²⁵

²² See Coleman & Kraus, *supra* note 20, at 1356–57.

²³ See *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910); Coleman & Kraus, *supra* note 20, at 1358; Coleman, *supra* note 20, at 420. The law sends a slightly different message in cases involving ultrahazardous activities like blasting. See *Spano v. Perini Corp.*, 250 N.E.2d 31 (N.Y. 1969) (link); Coleman & Kraus, *supra* note 20, at 1358; Coleman, *supra* note 20, at 420. I have reservations about how Coleman and Kraus portray that message, but those reservations are too tangential to Parchomovsky and Stein's theses to consider here.

²⁴ Parchomovsky & Stein, *supra* note 1, at 1837.

²⁵ Coleman & Kraus, *supra* note 20, at 1339.

B. Conceptual Analysis of Property

There is a slight difference between Parchomovsky and Stein's criticisms of liability rules and those of Coleman and Kraus. The former are speaking specifically about property ownership, whereas the latter are appealing to the autonomy incident to any normative interest. Yet one could critique the property/liability rule scheme abstracting from the general corrective justice framework of tort and focusing solely on the conceptual content of "property." Indeed, J.E. Penner has done so, in *The Idea of Property in Law*.²⁶

When Penner distinguishes the domain of "property" law from the domains of contract, tort, and other relevant fields of law, he describes the interest in property as "the interest in exclusively determining the use of things."²⁷ Conceptually, then, when Taney hears that Marshall has "property" in his land, Taney is on constructive notice of the following social cues: Marshall claims the land; Marshall claims an interest in deciding *how* to use the land; and Marshall claims an interest in doing so exclusively, without anyone else interfering with his legitimate discretion.²⁸ If Taney is minimally socialized, he should revise his decision-making process so that, when he determines how best to advance his own projects, he structures them without counting on the use of Marshall's land. Similarly, when Marshall believes he has a property right, he assumes he may safely expect that no one else will commandeer his land. If Taney enters his land, Marshall's socialization and conscience signal to him that he may justly get angry and repel Taney. Conversely, social norms ought to signal to Taney that he should leave Marshall's property, and his conscience ought to demoralize him to lose any fight that ensues from his presence there.²⁹

Penner concludes that the property/liability rule scheme is inconsistent with "property" so understood. Calabresi and Melamed's definition of "property rules" has no necessary connection to "property"—that is, interests in deciding how to use external assets.³⁰ In Calabresi and Melamed's scheme, an order of specific performance is a property rule even if the con-

²⁶ J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* (1997).

²⁷ *Id.* at 49. Penner actually defines property differently from the passage quoted in text. He defines it as a right to exclude others from a thing, claiming that social actors assume that this right to exclude is justified in reference to a normative interest in using a thing as explained by the passage quoted in text. *See id.* at 71. I suspect Penner is overemphasizing the extent to which exclusion is essential to "property" in social practice, but my suspicions will need to be elaborated elsewhere and do not take away from the insights I attribute to him here. *See* Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617, 631 n.67 (2009) (book review).

²⁸ Of course, his choice is confined within the general parameters society sets on the legitimate use of land. The society may deem certain land uses always noxious (for example, making or selling illicit drugs). In addition, owners' rights of exclusive use determination must be designed to respect others' similar interests in use determination (so, for example, nuisance use rights should be subject to live-and-let-live exceptions for low-level pollution enlarging the common and ordinary use of land).

²⁹ *See* PENNER, *supra* note 26, at 72.

³⁰ *See id.* at 66.

tract does not require either party to transfer rights in external assets to the other. Similarly, an order restraining an abusive husband gives the wife a property rule even though it protects her normative interest in the autonomy of her body. Separately, the logic of property rights confirms for Penner the main insight of Coleman and Kraus, that the property/liability rule scheme mistakenly separates the analysis of legal remedies from the substance of rights. “[T]he law does not treat remedies as price-setting mechanisms for the violation of rights,” Penner argues, for “[w]e are guided not to murder people at all, not weigh our desire to do so against the objective price that has been fixed, say twenty years without parole.”³¹ So Penner also concludes that liability rules are inconsistent with the content of property rights. The property/liability rule distinction “completely misrepresents the actual normative guidance of the law,” because “[t]he normative guidance offered to legal subjects under [a] scheme of individuating [liability rules] is to measure their own wants against a set of prices, and act accordingly.”³² When Parchomovsky and Stein argue that liability rules “compromise[] 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,”³³ they explain Penner’s critique of liability rules in property law in terms law and economics scholars can follow.

C. *Moral Justifications for Property Rights*

Of course, conceptual philosophy has a bad reputation in some quarters for promising to explain more about the law than it actually can,³⁴ legal philosophers do well to avoid contributing to that perception. Sound conceptual theory can predict that “property” endows an owner with an exclusive domain of freedom, but it cannot by itself specify when a particular “property” interest generally excludes non-owners, or when the exclusion expires and non-owners have justification to intrude on the owner’s asset over the owner’s objection. For example, a land owner enjoys a right to exclude unconsented entries onto his land without showing that he was actually using the land,³⁵ but a riparian has no right to exclude unconsented water diversions unless he can show that the diversion constituted an unreasonable use

³¹ *Id.*

³² *Id.*

³³ Parchomovsky & Stein, *supra* note 1, at 1837.

³⁴ See, e.g., Jody S. Kraus, *Legal Determinacy and Moral Justification*, 48 WM. & MARY L. REV. 1773, 1775 (2007) (arguing that theories of corrective justice “are inadequate: they fail to provide justifying reasons that explain why the losing party lost”).

³⁵ See, e.g., *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 157, 161 (Wis. 1997) (holding that an elderly couple had a trespass action to exclude a company from using an empty field to circumvent a snow-blocked public road and to deliver a mobile home on time under a delivery contract). *Accord Longenecker v. Zimmerman*, 267 P.2d 543, 545–46 (Kan. 1954) (holding that a landowner could recover in trespass even if the trespasser caused no injury to her land); *Giddings v. Rogalewski*, 158 N.W. 951, 953 (Mich. 1916); *Dougherty v. Stepp*, 18 N.C. (1 Dev. & Bat.) 371, 371 (1835).

of the river flow and caused harm to his own reasonable use of that flow.³⁶ A car owner's exclusive interest in using his car entitles him to owner value damages if someone steals the car and rents it for a few months, but only to market value damages if someone deprives him of the use of it for the same length of time by crashing into it negligently. And, as Parchomovsky and Stein point out, trespass law limits land owners to market value damages in cases involving good-faith encroachments or the commandeering of property in response to an emergency.³⁷

Some conceptual scholarship can be read not to be sufficiently sensitive to such limitations. For example, Ernest Weinrib distinguishes between the cases of the stolen and rented car and the crashed car on this ground: In the former case, the gravamen of the defendant's wrong is "the defendant's having treated the [car] as if it were his or her own,"³⁸ while in the latter, the wrong lies in "the creation of unreasonable risk" for the plaintiff while driving.³⁹ Although Weinrib recognizes differences like these "compel attention to the plaintiff's entitlement,"⁴⁰ he does not explain why the plaintiff's entitlements vary—why the law endows him with a less protective interest in being free from unconsented car crashes than it does in being free from unconsented misappropriations. A normative interest in encouraging the free use of cars explains these variations, not corrective justice theory—or, at least not the aspects of corrective justice theory that focus on tort's remedial function, which is regarded by prominent theorists as the "point of the core, if not all, of our current tort practice."⁴¹

Weinrib assumes and does not demonstrate why tort presumes and protects different property interests in control over the land, use of the car, and use of riparian rights. Readers not sufficiently aware of the limits of corrective justice theory might then jump to one of two mistaken conclusions: that the remedial parts of corrective justice can explain these differences by themselves, or that legal philosophers *think* that corrective justice can do so. Analytically, conceptual philosophy can describe the general contours that a property right must have to partake of "property" (as Penner explains) or of "right" (as Coleman and Kraus explain). Normatively, corrective justice theory can prescribe that, if an actor invades an interest with the general contours of a property right, the invasion should be rectified. Normatively, however, the details of that interest must be filled in by controlling local

³⁶ See, e.g., JOHN W. JOHNSON, UNITED STATES WATER LAW: AN INTRODUCTION 23–24 (2009); RESTATEMENT (SECOND) OF TORTS, *supra* note 8, § 850.

³⁷ Parchomovsky & Stein, *supra* note 1, at 1849–50.

³⁸ Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQ. L. 1, 13 (2000).

³⁹ *Id.* at 10.

⁴⁰ *Id.* at 6.

⁴¹ COLEMAN, *supra* note 18, at 395.

opinions making practical moral judgments separate from the general remedial structure of tort.⁴²

Although space and focus prevent me from treating this issue exhaustively, let me at least sketch roughly the justifications for the variations in property torts just described.⁴³ Under many different theories of morality, property is deemed valuable because the free use of external assets provides a means by which individuals may pursue a wide range of ends. However, different packages of property rights may enlarge the free use of property for those intended ends for different species of property. Thus, many uses of river water can proceed without property protection, and broad rights of exclusion, control, and disposition might actually choke many users' free and concurrent use of the water. By contrast, in most communities with sophisticated commerce, broad rights of exclusion, control, and disposition over land enlarge our power to use land to make life plans. These broad possessory rights guarantee that "the [land] necessary for carrying out our plans can be kept, managed, exchanged (etc.) as the plans require."⁴⁴ Similarly, broad rights of exclusion, control, and disposition enlarge most owners' likely intended uses of their cars. If property rights in cars tracked the usufructuary principles in riparian law, it would be considerably more complicated for owners to use their cars as security for loans, to lease them, to buy homes relying on getting to work by car, and so on. Yet broad possessory rights would cease to enlarge the free use of cars for their likely intended uses if every owner could sue every other for every unconsented harmless bump of his car in a public parking lot. To enlarge all car owners' likely concurrent interests in driving, the law narrows their rights to exclude to avoid covering harmless collisions and collisions where other drivers are not negligent—and it then limits the damages victims may recover in harmful and careless collisions only to market value damages. In each case, the moral justification for a particular package of property rights fills in the

⁴² Legal philosophers debate where to situate the field of practical moral reasoning that declares and specifies the normative interests whose invasions tort rectifies. The dominant view holds that this field belongs to corrective justice. See, e.g., WEINRIB, *supra* note 18, at 70–73. Others maintain that it belongs to distributive justice. See Gregory C. Keating, *Is Tort a Remedial Institution?* (unpublished manuscript, on file with the Northwestern University Law Review Colloquy). I suspect but cannot prove here that the field sounds in a category of justice separate from and lexically prior to the fields of distributive and corrective justice. For the purposes of this Response, readers only need to agree that the remedial aspects of tort cannot explain or justify the differences between different property interests; they may assign the norm-declaring and -specifying functions of tort into whichever of these three alternatives they deem most appropriate.

⁴³ In my own scholarship, I am sympathetic to a theory of natural rights sounding in normative foundations similar to the views advanced by John Locke, William Blackstone, and such early American figures as James Madison and James Kent. See, e.g., Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889, 901–16, 927–34 (2009) (link). Yet many theories of property may start from different foundations and converge on similarly "fairly robust interest[s] in autonomy" in relation to external assets. PENNER, *supra* note 26, at 49. I assume Penner's suggestion as true here.

⁴⁴ A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* 275 (1992).

substance of the conceptual shell described by a domain of exclusive use determination.

The differences in these moral justifications explain many of the variations Parchomovsky and Stein observe in trespass remedies. On one hand, it explains why the “right to exclude” normally includes the lesser “power of the owner to determine the price for the use of her entitlement.”⁴⁵ In corrective justice terms, if a non-owner trespasses on the owner’s property, the law must rectify the harm not only to the owner’s bare physical control over her land but also to her power to determine the price she would have set for admitting an entrant to the land. Injunctions, propertized compensation, and disgorgement all protect that interest in use determination; market value damages do not.

On the other hand, that moral account also explains why trespass law flips to market value damages in necessity cases.⁴⁶ Although different moral theories justify the necessity privilege differently,⁴⁷ at a high level of generality, the following factors seem to make the necessary entry different. The entrant has a moral interest comparable to or more urgent than the landowner’s interest in the free use, control, and disposition of his land—usually her life. Separately, because the entrant is impelled by an emergency (a storm, or a violent third party), it is much less likely than in the ordinary trespass case that the necessity entrant will permanently jeopardize the owner’s plans for her land. Those emergency conditions also make it less likely that a forced entrance in any particular case will delegitimize respect for property rights generally, in non-emergency conditions. That is why necessity law requires the entrant to hold the owner harmless to the extent her entrance damages his land—but not to the extent he claims the entrance jeopardizes his interest in determining the land’s use after the emergency ends.

* * *

My observations thus far can be restated in a way that accentuates the harmony between philosophical and economic analyses of property tort remedies. Recent work in conceptual and moral philosophy corroborate *Re-conceptualizing Trespass’s* economic prescriptions in philosophical terms. The corroboration confirms that philosophical and economic analyses of private law can complement one another. Indeed, Parchomovsky and Stein

⁴⁵ Parchomovsky & Stein, *supra* note 1, at 1825.

⁴⁶ One would need to make the same showings for any other trespasses in which the law limits the plaintiff to market value damages. Parchomovsky and Stein argue that media trespasses and good-faith encroachments should be treated in this manner. See Parchomovsky & Stein, *supra* note 1, at 1852–58. I have reservations about their argument in these cases for reasons too complicated to explore here; I focus on necessity because it provides an uncontroversial example illustrating how corrective justice and conceptual property theory depend on input from normative commitments toward property.

⁴⁷ For a sampling of different justifications for necessity, see, e.g., JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 130–39 (2006) (Scholastic Thomistic natural law theory); WEINRIB, *supra* note 18, at 196–203 (neo-Kantian theory).

deserve thanks from private law philosophers for flagging an issue they have not sufficiently considered. Weinrib has made a case in corrective justice for restitution damages in property torts, but he assumed that the only main alternative to such damages are market value compensatory damages.⁴⁸ Similarly, although Coleman, Kraus, and Penner all have highlighted important conceptual problems with *Cathedral* liability rules, they have not considered propertized compensation rules, such as the Roman rules and *Armory v. Delamirie* (both discussed in Part I). Parchomovsky and Stein have therefore uncovered important evidence corroborating Coleman and Kraus's and Penner's criticisms.⁴⁹

III. EXCLUSION IN ECONOMIC ANALYSIS OF PROPERTY REMEDIES

A. Legal Concepts in Economic Analysis

We scholars interested in legal and moral philosophy should be forgiven, however, if we do not leave the relationship between legal philosophy and economics in perfect harmony. Law and economics' proponents have argued for a generation that the economic analysis of law is more scientific than practical legal reasoning⁵⁰ and more determinate than legal philosophy.⁵¹ Those arguments have left an impression, especially among legal scholars not particularly interested in legal philosophy studying the norms and concepts embedded in legal practice. The propertized compensation rules studied in *Reconceptualizing Trespass* follow fairly straightforwardly from private law philosophy. Existing philosophical scholarship has not taken notice of such rules, but common-denominator prescriptions in that scholarship can explain them. It would be harder to say that propertized compensation follows straightforwardly from post-*Cathedral* law and economics scholarship. Indeed, *Reconceptualizing Trespass* makes an important contribution to that scholarship by pushing back against tendencies in that scholarship strongly favoring liability rules. Why are propertized compensation rules harder for many law and economics scholars to explain—especially seeing as law and economics is supposed to be more determinate than legal philosophy?

⁴⁸ See Weinrib, *supra* note 38, at 9-12.

⁴⁹ For example, Coleman and Kraus insist that a damage award for trespass is different from a damage award paid to justify a trespass in an emergency even if the damages are identical. See, e.g., Coleman, *supra* note 20, at 420. Parchomovsky and Stein, however, provide compelling reasons why the damages will normally be different in the two cases. The garden-variety trespass deserves propertized compensation, and the emergency trespass deserves only market value compensation. See Parchomovsky & Stein, *supra* note 1, at 1842-47, 1851-54.

⁵⁰ See COOTER & ULEN, *supra* note 16, at 3.

⁵¹ See Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 357-59 (2007) (link).

Before proceeding to answer this question, let me clarify *how* I will answer it. The criticisms of the property/liability rule scheme discussed in the last Part are principled conceptual criticisms of the economic analysis of legal remedies. At bottom, as Coleman puts it, the property/liability rule scheme “look[s] at the law . . . from the point of view of behavior [and] not . . . the law at all.”⁵² Although I share Coleman’s reservations, I recognize that this law review is published for a general audience of legal scholars. The *Cathedral* has been cited too many times⁵³ for general readers to be convinced by Coleman that they should ignore the property/liability rule scheme as if the *Cathedral* had never been written. Those readers may reasonably ask for examples illustrating, in doctrinal or economic terms, how conceptual confusion distorts economic analyses of remedies in property torts. I hope to offer a few such illustrations to close this Response.

Before doing so, let me recapitulate briefly the terms in which property/liability rule choices are often framed. In economic parlance, the main advantage of a property rule is to protect an owner’s own valuation of his property. The main disadvantage of a property rule is to encourage owners to expropriate from prospective buyers by holding out in situations in which they enjoy monopolistic bargaining position over a scarce asset.⁵⁴ The main advantage of a liability rule is to break up that monopoly hold-out power; the main disadvantage is to allow non-owners to use the legal process to acquire an asset without the owner’s consent. When non-owners can acquire assets coercively, they may expropriate the difference between the owner’s subjective valuation of the asset and its market value. When liability rules are widespread, they can also create cascading secondary social costs, by encouraging parties to bypass markets and dissipate rent in property disputes.⁵⁵ Although many treatments of property and liability rules are quite theoretical, the trade-offs between the two types of rules are “implicitly empirical but not capable of precise justification.”⁵⁶

B. *Liability Rules in the Shadow of the Cathedral*

When the issues are framed in this manner, law and economic analysis can interact with the *Cathedral*’s conceptual confusion in various ways. One is fairly obvious: law and economic analysis can veer off track if it

⁵² Coleman, *supra* note 20, at 422.

⁵³ See, e.g., James E. Krier & Stewart J. Schwab, *The Cathedral at Twenty-Five: Citations and Impressions*, 106 YALE L.J. 2121, 2123–28 (1997).

⁵⁴ Different law and economics scholars disagree about how “scarce” an asset needs to be to trigger the hold-out exception, but they all agree in principle that, if scarcity exists, it creates a risk of hold-out expropriation.

⁵⁵ See Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2092–95 (1997); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 72–93 (1986). Accord Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1743 (2004) (“[T]he responsiveness of different kinds of behavior is an empirical matter.”).

⁵⁶ Epstein, *supra* note 55, at 2095.

does not take sufficient account of the concepts that focus the law under analysis. For example, Parchomovsky and Stein cite the “option” line of post-*Cathedral* scholarship.⁵⁷ Option scholarship favors liability rules because they provide parties with “call options,” or legal entitlements that empower non-owners to assert control over assets owned by others if they pay some collectively determined price.⁵⁸ Alternatively, option scholarship justifies liability rules because they create conditions for interparty “auctions,” in which parties use the legal process effectively to bid on assets in dispute.⁵⁹

Option scholarship illustrates how economic analysis can abstract from foundational legal concepts. Analytically, option scholarship does not explain why trespass law strongly prefers injunctions when they can be enforced and property-damages or disgorgement when they cannot. Normatively, option authorities seem overly optimistic about the possibility that legal processes will determine liability-rule damage awards accurately and cheaply, and insufficiently concerned that “calls” or “auctions” may encourage non-owners to use the legal system to expropriate the difference between owner and market value. As Parchomovsky and Stein put it, such authorities make normative claims inconsistent with the “well-accepted concept of ownership” that owners need “the power to set the price for the use of [their] property.”⁶⁰

C. *Property Rules in the Shadow of the Cathedral*

Of course, not all law and economic analysis abstracts so significantly from the conception of rights that inform tort and property law. At the other end of the *Cathedral*, some scholars maintain that property rules do and should dominate in most cases. For example, Henry Smith argues that option scholarship fails to consider sufficiently how property rules reduce and liability rules increase third-party information costs exponentially over a long run of disputes.⁶¹ Richard Epstein reads property-tort law to encourage courts to “use the calculation of damages to reinstitute a de facto property

⁵⁷ See Parchomovsky & Stein, *supra* note 1, at 1824 & n.5 (citing Ian Ayres, *Protecting Property with Puts*, 32 VAL. U. L. REV. 793 (1998)).

⁵⁸ See Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703 (1996) (link).

⁵⁹ See Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1031 (1995).

⁶⁰ Parchomovsky & Stein, *supra* note 1, at 1832. There is another way to explain the discrepancy between option scholarship and the law. A scholar who had prior reasons to find government-set price determinations normatively attractive might prefer the term “liability rule” because it makes property transfers seem less coercive than they seem in the common law vocabulary of rights. I have no reason for thinking that this explanation applies to any scholar under consideration here. If any scholar *were* to use liability rules in this manner, however, he would be using the property/liability rule scheme as a tool not for economic analysis but apologetics.

⁶¹ Smith, *supra* note 55.

rule”); he suggests they do so by giving aggrieved owners discretion to inflate their damages, and he traces this preference back to the Roman sources mentioned in Part I.⁶² *Reconceptualizing Trespass* also falls on this side of the *Cathedral*.

As *Reconceptualizing Trespass* and these other authorities confirm, law and economic analysis can stay fairly close to the substantive and conceptual commitments in law, even though it does so using a methodology external to the law.⁶³ Even so, scholars interested in legal philosophy may reasonably wonder whether such analysis is parasitic—either on parallel philosophical analysis, or on practical moral reasoning already latent in the law.

For example, recall that the economic pros and cons of property and liability rules raise empirical issues for which little specific factual data exists. In these conditions of limited information, law and economics scholars must resort to a variety of second-best alternatives to verify or falsify their hypotheses. One of the less-worse alternatives is to ask whether those hypotheses accord with existing legal practices. If the law has a “strong set of practices” favoring property rules, the strength of those practices “suggests that [a] judgment has been made, perhaps unconsciously, by large numbers of persons who have been forced to confront just these choices.”⁶⁴ Yet what if those practices can be explained by concepts and normative arguments, internal to the doctrine, and embraced—consciously—by judges relying on moral opinions in the course of their practical legal reasoning? Then, pro-property rule authorities have what economists call a confounding-factor problem. Philosophers can already explain, with concepts and moral arguments internal to doctrine, the “well-accepted concept of ownership” that owners need “the power to set the price for the use of [their] property.”⁶⁵ If that concept gives pro-property rule law and economics a trump over pro-liability rule economic analysis, it also gives conceptual and moral philosophy a trump over economic analysis generally.

D. *Property’s Exclusivity in the Shadow of the Cathedral*

The last two sections illustrated why law and economics scholars need to pay closer attention to Coleman and Kraus’s dissection of property rules and liability rules, recounted in section II.A. Law and economists should also pay closer attention to Penner’s dissection in section II.B, because it highlights some important ambiguities in how economists understand “exclusion.”⁶⁶ When law and economics scholars assume that property refers

⁶² Epstein, *supra* note 55, at 2096 (citing NICHOLAS, *supra* note 15, at 102).

⁶³ On the difference between internal and external justifications for law, see H.L.A. HART, *THE CONCEPT OF LAW* 97–107 (1961).

⁶⁴ Epstein, *supra* note 55, at 2095.

⁶⁵ Parchomovsky & Stein, *supra* note 1, at 1832.

⁶⁶ For example, Parchomovsky and Stein cite Larissa Katz’s scholarship as corroboration for the right to exclude. See *id.* at 1828 n.16. Actually, Katz is a *critic* of right-to-exclude theory: she defines

to a right to exclude from a thing, as they often do, they complicate analysis under the *Cathedral* even further.

When property refers only to a “right to exclude,” without further specification, it becomes merely a right to blockade. The term “property” does not give any clue as to when the blockade right kicks in, or with what consequence. The right to exclude *can* be coterminous with a broad domain of autonomy, in which an owner enjoys great discretion to conserve her subjective value in it. Evidently, Parchomovsky and Stein assume as much. Eminent domain is a counter-example against the broad view of the right to exclude. The condemnation power is usually assumed to vest in the government the power to pay the owner not owner value but “‘just compensation’ (= market value).”⁶⁷ Parchomovsky and Stein quote Nicole Garnett to show that eminent domain is an exception, that it “deprives an owner of her ‘most essential right’ to exclude others—including, especially, the government—from her property.”⁶⁸ Evidently, they assume that the right to exclude means the same thing as a right to determine exclusively the use of the asset: the right to exclude vests in an owner broad power to “*determine* the price for the *use* of her entitlement.”⁶⁹

However, the right to exclude can be construed much more narrowly. Adam Mossoff⁷⁰ and I⁷¹ have both recovered an alternate view, which severs the right to exclude others from the physical manifestation of an asset from the right to exclude them from interfering with the price at which that asset is used or sold. In the early twentieth century, prominent Legal Realist property theorists reconceived of property understood as being a right of exclusive use determination into a right to exclude. When their conception stuck, a landlord had a right to exclude strangers from entering or interfering with the management of his apartments, but he did not enjoy an exclusive entitlement to set the tenants’ rent. By severing commercialization potential from physical control and possession, Realist theorists made it conceptually easier for courts to uphold rate regulations. As long as owners were left with physical control of their property, they could not complain if

property as an exclusive domain of freedom in which owners are left “in a special position to set the agenda for a resource.” Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 278 (2008) (link).

⁶⁷ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.7, at 56 (7th ed. 2007) (quoting U.S. CONST. amend. V (link)). For a more dubious view toward market value compensation, see RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 182–86 (1985).

⁶⁸ Parchomovsky & Stein, *supra* note 1, at 1831 n.22 (quoting Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 109 (2006) (internal quotations omitted) (link)).

⁶⁹ Parchomovsky & Stein, *supra* note 1, at 1825 (emphases added).

⁷⁰ See Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 HARV. J.L. & TECH. 321, 361–70 (2009) (link); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 395–97 (2003).

⁷¹ Claeys, *supra* note 27, at 634–38.

a government socialized the rights associated with making profitable commercial use of it.⁷²

Law and economics scholars do not appreciate as well as they should that the “right to exclude” can be construed to refer to these two extreme packages of property rights and many intermediate packages between them. The resulting confusion may cause different judges or scholars to talk past one another. The passage Parchomovsky and Stein quote from Garnett illustrates the confusion. To help prove that private eminent domain *violates* the right to exclude, Garnett cites eminent domain cases in which the U.S. Supreme Court claims to *vindicate* the right to exclude.⁷³ Garnett assumes that, when the Court refers to a right to exclude, it means a property rule package of substantive rights. The cases she cites have nothing to do with property rules or liability rules. They are regulatory-takings cases, which specify not what kind of remedy an owner will get for a taking but whether she can claim she has suffered a taking at all. *Kelo v. City of New London*,⁷⁴ the Court’s most recent public use case, denies owners property rule protection in situations in which the government transfers to a private buyer property condemned by eminent domain. When one harmonizes the Court’s regulatory takings cases with *Kelo*, it is clear that the Court assumes that the “right to exclude” refers to a *liability rule* package of substantive rights.⁷⁵

If the right to exclude can be construed to refer to both property and liability rule protections, it is for all intents and purposes indeterminate as it applies to the problems that arise under the *Cathedral*. Most post-*Cathedral* articles do not specify as clearly as *Reconceptualizing Trespass* does what they mean by the “right to exclude.” Even so, I strongly suspect conceptual confusion about exclusion amplifies the disagreements recounted in the last two sections. My suspicions run much further than *Reconceptualizing Trespass*’s argument,⁷⁶ but the essay definitely confirms them. It claims to be pushing back against law and economics authorities that would limit ex post damage remedies to liability rules. Those authorities implicitly assume, like pro-exclusion Legal Realists and the current Su-

⁷² See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927). This conception of exclusion was certainly not the only and probably not the most popular conception of property among Legal Realists. Many and probably more Realists preferred a “bundle of rights” conception in which property consists of different “aggregates of rights, privileges, powers and immunities” as determined by different legal communities’ balances of relevant policies. RESTATEMENT OF PROPERTY § 5 (1936). See Claeys, *supra* note 27, at 618–24, 635–36.

⁷³ See Garnett, *supra* note 68, at 109 n.43 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (“[T]he landowner’s right to exclude [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))); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987)).

⁷⁴ *Kelo v. City of New London*, 545 U.S. 469 (2005) (link).

⁷⁵ See Claeys, *supra* note 27, at 646–47.

⁷⁶ I have suggested how the right to exclude creates indeterminacies in Thomas Merrill and Henry Smith’s scholarship in *id.* at 639–49.

preme Court, that property endows owners only with a narrow right to exclude. Conceived so narrowly, property guarantees dispossessed owners a right to complain in court if their land is trespassed on and a right to demand market value damages, but it does not guarantee property rule remedies protecting owner value. *Reconceptualizing Trespass* uses a more robust conception of exclusion, implicitly tied to owner value, to criticize that liability rule approach. Using a theoretically-revealing doctrinal example, Parchomovsky and Stein explain to law and economists, in economic terms, why it is usually more important to protect owners' powers to determine their subjective values than it is to break up owner hold-out power. This lesson stands as an important contribution to law and economics scholarship. But the lesson might never need to have been taught if more law and economists understood that property normally refers to an owner's right exclusively to determine the use of an external asset.

CONCLUSION

Reconceptualizing Trespass performs useful services for three separate audiences. For doctrinalists and judges, the essay teaches that the *Restatements of Torts* and *Restitution* advocate market value damages in some situations in which foundational property principles require owner value damages. These *Restatement* provisions are outliers, and *Reconceptualizing Trespass* deserves credit for identifying them as such. For legal philosophers, the essay uncovers a legal rule previously hidden in plain view—the propertized-compensation principle in *Armory*—that corroborates prominent conceptual critiques of the *Cathedral's* property/liability rule scheme.

Reconceptualizing Trespass's greatest contribution is to law and economics, though here I am certain to disagree with Parchomovsky and Stein about the precise extent of the contribution. On one hand, the essay corrects the questionable tendency in a substantial segment of post-*Cathedral* scholarship to favor liability rules over property rules. On the other hand, the same problem may be critiqued philosophically, and I think Parchomovsky and Stein's economic critique is parasitic on the philosophical critique. More generally, much of this critique's value lies in removing from law and economists conceptual blinders they would not be wearing if they took conceptual philosophy more seriously.

Of course, even if my assessment is correct, *Reconceptualizing Trespass* still counts as a valuable contribution to law and economics scholarship. Because conceptualists have not really succeeded in explaining their complaints to law and economists in conceptual terms, Parchomovsky and Stein deserve credit if they can convince law and economists in economic terms. Either way, readers should take care not to repeat the conceptual confusions encouraged under the *Cathedral*.