The Fault of Trespass

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THE FAULT OF TRESPASS†

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The conventional wisdom has it that a property owner assumes virtually no responsibility for guiding others in fulfilling their duties not to trespass on the former's property. In other words, the entire risk of making an unauthorized use of the property in question rests upon the duty-holders. This view is best captured by the Keep-Off picture of property, according to which the content of the duty in question is that of excluding oneself from a thing that is not one’s own. In this article, we argue that this view is mistaken. We advance conceptual, normative, and doctrinal arguments to show that this account runs afoul of the actual workings of the tort in question. A more precise account of trespass to land will reveal that the tort gives rise to a hybrid regime of tort liability: one which combines considerations of fault along with those of strict liability. On the proposed account, therefore, an owner does assume some responsibility for guiding others in fulfilling the duty they owe the former.

I Introduction

The tort of trespass to land has for centuries occupied a highly strategic place in the legal landscape, lying at the respective cores of common law torts and property. From a torts perspective, the development of this body of law as a whole can, to an important extent, be reduced to the past dialectic of trespass and trespass on the case and the present dialectic of trespass and negligence.¹ In property, the tort of trespass to land has shaped the discussions concerning core property concepts such as ownership.² Indeed, much of the current debate between those who view the right to exclude as the single most important characteristic of property and those who seek to belittle this reading in favour of a more progressive view of

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¹ For a contemporary variation, see Arthur Ripstein, ‘Tort Law in a Liberal State’ (2007) 1 Journal of Tort Law 1 at 14–5, noting that tort law features two kinds of wrongdoing: trespassing (to property or person) and harm doing.

property is, in essence, a disagreement about the question of whether or not the tort of trespass to land should be property’s signature feature.³

There seems to be one point over which many tort and property scholars agree. Regardless of how they seek to justify or belittle the place of trespass in tort and property theory, the presumption that it is a tort of strict liability, one which is, at its core, ‘both exceptionally simple and exceptionally rigorous,’⁴ is held in common. This is to say, the tort shuns considerations of reasonableness and, indeed, fault.⁵

In these pages, we shall seek to show that this commonly held view fails adequately to capture a principle of fault that underlies the tort of trespass to land.⁶ We demonstrate this in three different ways. Conceptually, we argue that questions of reasonableness are built into the content of the duty against committing trespass to land, such that any attempt to assess the conduct of duty-holders must draw, in part, on the notion of fault. Normatively, we provide instrumental and non-instrumental reasons in support of the inclusion of fault in the analysis of liability for committing the prima facie tort of trespass. Doctrinally, we show that considerations of fault already figure (in ways that the preceding conceptual and normative claims can foresee) in the doctrines that inform the judicial assessment of liability under the tort of trespass.

Uncovering a principle of fault that underlies the structure of the tort of trespass to land carries significant implications at both theoretical and practical levels. Concerning theory, as we shall show below, rather than merely taking the strict liability of trespass torts for granted in developing their accounts, leading contemporary theories of property can be read as recommending the imposition of strict liability for trespass to land. Indeed, contemporary property theory emphasizes that property is, to an important extent, organized around the notion that the protection of property rights must be ‘exceptionally simple and exceptionally rigorous,’ in order to economize on various institutional and informational costs or to secure autonomy interests.⁷ But the introduction of fault turns the table on these views. We argue that fault does not undermine and, in fact, better promotes the pursuit of efficiency and autonomy.⁸

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⁴ Thomas Atkins Street, The Foundations of Legal Liability, vol 1 (Northport, NY: Edward Thompson, 1906) at 19. See also Thomas W Merrill, ‘Property as Modularity’ (2012) Harv L Rev 125 at 151, 157 [Merrill, ‘Property as Modularity’], noting that ‘strangers are governed by simple rules of trespass and conversion, both matters of strict liability with few defenses’ and that the rule of trespass forms a ‘draconian regime.’
⁶ To forestall misunderstandings, in the present article we focus on the notion of fault’s being part and parcel of the tort of trespass (as can be discerned from the duty against committing trespass). We shall leave to another occasion a different question that arises when potential duty-holders are not (and at times even cannot be) aware of the possibility of having been subjected to a trespassory duty to begin with. On this latter question, see Stewart E Sterk, ‘Strict Liability and Negligence in Property Theory’ (2012) 160 U Pa L Rev 2129; Stewart E Sterk, ‘Property Rules, Liability Rules, and Uncertainty about Property Rights’ (2008) 106 Mich L Rev 1285 at 1295–6.
⁷ To be sure, we do not argue that contemporary property theory calls for strict tort liability for property-right violations across the board. These theories can make some conceptual space for relaxing the liability regime (say, moving from trespass to nuisance or from trespass to negligence). See e.g. Smith, ‘Exclusion,’ supra note 2, at
Concerning practice, giving fault considerations their due place within the structure of the trespass tort makes an important difference in terms both of understanding the current law and of reforming it in desirable ways. We argue that a systematic implementation of a principle of fault in the tort of trespass to land can explain the importance of the notion of owner responsibility in general and in its particular doctrinal manifestations (such as in contemporary premises-liability law). The argument we develop on this front is qualitatively different from certain familiar accounts that call for increasing the responsibility of owners to society. Whereas the latter justify owner responsibility by reference to contingent and coincidental circumstances that supervene on possessing the status of an owner (such as wealth or community), we defend the claim that owners can be held responsible for the well-being of others simply by virtue of being owners. That is, contrary to the conventional wisdom, we shall argue that a property-right-holder assumes some responsibility for guiding others in fulfilling their duties not to trespass on her property. Indeed, we argue that the existence of a fault principle in the tort of trespass to land implies that social responsibility is not foreign to the idea of private ownership but rather is inherent in it.

The argument will run through the following stages. In PART II, we shall set the stage by discussing the conventional view’s emphasis on strict liability and explain the theoretical grounds for such a view. PART III focuses on the deep connection that exists between the tort of trespass to land and fault – we marshal conceptual, normative, and doctrinal arguments in support of this connection. PART IV takes up the objection that the introduction of fault analysis to the prima facie case of trespass to land is somewhat superfluous – we show that this objection is groundless. PART V discusses some of the theoretical and practical implications of the argument from fault for the principle of owner responsibility. We conclude by putting our effort to cast considerations of fault into sharp relief within the context of the path-breaking theoretical and historical discussions of torts in Oliver Wendell Holmes’s *The Common Law*.  

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8 We assume (and hope) that the proposed argument may strike an intuitive chord. Our ambition, however, is to develop a somewhat unarticulated suspicion of the keep-off picture into a mature theoretical account of the protection afforded to property by the common law tort of trespass to land.

9 Oliver Wendell Holmes, Jr, *The Common Law* (Boston: Little, Brown, 1881) [Holmes].
II  Trespass to land: Overview of the conventional wisdom

A. TRESPASS TO LAND: AN ‘EXCEPTIONALLY SIMPLE’ AND ‘EXCEPTIONALLY RIGOROUS’ REQUIREMENT TO KEEP OFF

The tort of trespass to land formally belongs in the class of intentional wrongs. It gives rise to a duty against intentionally entering land in the possession of another person.\(^\text{10}\) However, it is well established that it imposes strict liability on duty-holders for intentionally interfering with the property of another.\(^\text{11}\) At first blush, a requirement of intentional wrongdoing and a strict liability regime pull in different, contradicting directions. Indeed, intentional interference with the property of another seems to undermine the notion of liability without fault, and vice versa.\(^\text{12}\)

That said, the combination of intentional invasion of another’s property with strict tort liability does make sense. This is because the intent requirement is largely devoid of moral content. Indeed, common law tort construes its content narrowly to capture an intentional act only, say, of traversing a particular piece of land. It thus renders immaterial the existence (or inexistence) of intent to commit an unlawful act; for example, an intent to traverse a piece of land in defiance of the owner’s express refusal.\(^\text{13}\) Moreover, the same is true with respect to pro-social behaviour on the part of the would-be trespasser, as when a person enters another’s land for the purpose of making a friendly gesture.\(^\text{14}\) Bluntly put, neither ill nor good will on the part of the potential trespasser has any bearing in finding her liable for trespass – it all comes down to the failure to keep off the boundaries of another’s property. Accordingly, being on Blackacre may be sufficient to ground liability for trespass if a passer-by intends to be there.\(^\text{15}\) As the Restatement (Second) of Torts points out, liability would lie in this situation irrespective of whether the trespasser ‘honestly and reasonably believes that he has the consent of the lawful possessor to enter, or, indeed, that he himself is its possessor.’\(^\text{16}\)

Accordingly, the strict liability aspect of this tort becomes not just the defining feature of trespass to land but also the defining feature of the law’s protection of property.\(^\text{17}\) This is why early jurists cast the tort of trespass to land in the metaphorical term of a fence, and a hermetic

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\(^\text{10}\) See e.g. Restatement (Second) of Torts § 158 (1965) [Restatement].

\(^\text{11}\) See e.g. W Page Keeton et al, Prosser and Keeton on the Law of Torts, 5th ed (St Paul, MN: West Group, 1984) § 13 at 74 [Keeton et al].

\(^\text{12}\) There is another sense in which trespass to land is intentional: there can be no trespass where there is no intentional act of property invasion voluntarily done. For the purpose of our argument, however, this sense of intentionality (or volition) can be set aside.

\(^\text{13}\) See e.g. Meyer v Pacific Employers Inc, Co, 43 Cal Rptr 542 (App Ct 1965).

\(^\text{14}\) The rule dates back to at least the Case of the Tithes (1507), YB Trin 21 Hen VII pl 5, fol 27.

\(^\text{15}\) The sufficiency of being upon Blackacre refers to the prima facie case of trespass. It may not suffice, however, for other purposes such as that of awarding of compensatory damages (including, in particular, punitive damages).

\(^\text{16}\) Restatement, supra note 10 § 164.

one at that. One plausible way to understand this metaphor may be that the duty against committing trespass provides a distinctively powerful protection for possessors of land. The protection provided by this duty is distinctive, and not only in the sense that physical fences built by property-right-holders are likely to prove weaker than a ‘normative fence’ furnished by legal fiat. Rather, it is also distinctive in that the duty against trespassing purports to insure property-right-holders against the invasion of others, regardless of whatever measures – such as physical fences – are taken by these right-holders for self-protection, and irrespective of whatever precautions are taken by duty-holders to avoid crossing the ‘normative fence.’ This is just another way to express the notion that trespass to land gives rise to strict tort liability: by holding duty-holders strictly liable for being upon the property of another, right-holders are thereby subject to a tort regime of no liability. A tort of trespass to land, therefore, crowds out considerations pertaining to fault on both sides of the equation – a duty-holder, as it is often said, acts at her own peril; a property-right holder, conversely, enjoys the liberty of acting at the duty-holder’s peril.

This way of characterizing the conventional view of the strict liability aspect of the tort of trespass to land clearly expresses the ‘exceptionally simple’ structure of the tort. To be sure, this way of presenting trespass to land is not an empty, formal depiction of a requirement to keep off the boundaries of another’s land that, in reality, is hardly felt by duty-holders in their everyday affairs. Indeed, the tort of trespass’s strict liability regime is also ‘exceptionally rigorous’ in the sense that it is rigorously – perhaps even enthusiastically – enforced at common law.

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18 See Star v Rookesby (1711), 91 ER 295 (KB): ‘for the law [of trespass] bounds every man’s property and is his fence’; Ashby v White (1703), 92 ER 126 at 137 (KB); William Blackstone, Commentaries on the Laws of England (Chicago: University of Chicago Press, 1979) vol 3 at 209, observing that ‘every man’s land is in the eye of the law inclosed and set apart from his neighbor’s.’ David Hume invoked a rather similar (metaphorical) idea, according to which ‘[a] man’s property is suppos’d to be fenc’d against every mortal, in every possible case’; David Hume, A Treatise of Human Nature, 2d ed by LA Selby-Bigge (Oxford: Oxford University Press, 1978) at 483.

19 See Jules L Coleman, Risks and Wrongs (Oxford: Oxford University Press, 1992) at 228–30, discussing the interdependence between the injuring’s and the victim’s tort liability.

20 See e.g. Hollins v Fowler (1875), LR 7 HL 757 at 799 (Lord O’Hagan): A right of property is interfered with ‘at the peril of the person interfering with it, and whether his interference be for his own use or that of anybody else.’

21 See Robert Stevens, Torts and Rights (Oxford: Oxford University Press, 2007) at 205–6, arguing that ‘[a]t common law, no defence [of contributory fault] applied, reflecting the view that [chattels’ owners] can be as careless of our own interests as we choose, but those who violate another’s right must pay in full.’ Stevens makes this observation in his discussion of the tort of conversion. But it seems reasonable to suppose that, consistent with his rights-based approach, the logic of this observation would apply to trespass to land as well. As we argue in the present article, however, while there is no explicitly acknowledged defence of ‘contributory fault’ in intentional torts such as trespass to land, there exists an implicit principle of reasonableness akin to contributory fault. This principle often reveals itself in and around various doctrines, such as consent, licence, mistake, proprietary estoppel, abandonment, and certain others. These are surface manifestations of a basic commitment to include considerations of fault in the tort analysis of property protection.

22 William Holdsworth, A History of English Law, 2d ed (London: Sweet and Maxwell, 1937) vol 8 at 467, noting the ‘apparent contradiction,’ according to which ‘liability for trespass to the person and to property rests upon the same principles, yet in practice liability for trespass to property is more severe, and, in many cases, does not differ very materially from medieval principle.’
This observation is best expressed in the otherwise unusual commitment on the part of courts to find trespass and to grant appropriate relief even in cases where boundary crossings are no more than trifling inconveniences or, indeed, harmless. Thus, on top of the strict liability aspect just described, trespass is actionable per se, so that a mere trespass warrants, in the eyes of the law, a legal response to negate the wrong done. This rigorous approach manifests itself, first, in the granting of injunctive relief to forestall a trespass, including a harmless trespass. Second, courts may award punitive damages in response to an invasion of another’s land, irrespective of material or psychological harm done.

This manner of bolstering the strict tort liability for trespass by recourse to rigorous judicial enforcement of property rights has motivated revisionist visions concerning the proper design of the trespassory protection afforded to property-right holders by the law. These visions are numerous and they operate on different levels of analysis – conceptual, normative, and doctrinal accounts of how best to construct the law’s protection of property in land which, by implication, affects, at every turn, the shape and scope of the tort of trespass to land. These accounts differ from each other in many respects, but they are of a piece insofar as they assume, at least implicitly, that the common law tort of trespass comes close to the ‘exceptionally simple and exceptionally rigorous’ depiction of the tort. This is why they develop a more nuanced, and thus less simple and less rigorous, understanding of the appropriate protection of property rights. We shall not discuss these accounts any further, because our ambition is to focus attention on the existing common law tort of trespass to land and the conventionally held view of this tort. As we shall seek to show, this view characterizes the strict liability of the tort in question inadequately, overlooking a principle of fault that is built into it. In other words, we seek the revision of the way trespass is commonly understood, rather than the revision of the tort itself.

23 See *Entick v Carrington*, 19 Howell’s State Trials 1029 at 1066 (1765): ‘[E]very invasion of private property, be it ever so minute, is a trespass.’ Another (essentially identical) way to express courts’ commitment to enforce trespass duty in the absence of harm is to say that ‘the law infers some damage [from every trespass onto the land of another]; if nothing more, the treading down grass or herbage, or as here, the shrubbery’; *Doughtry v Stepp*, 18 NC 371 at 371 (1835).

24 Consider the now famous case of *Jacque v Steenberg Homes, Inc*, 563 NW (2d) 154 (Wis 1997) [Jacque], in which the defendant harmlessly crossed through the plaintiffs’ snow-covered land in order to deliver a mobile home to a nearby landowner despite prior ‘adamant protests’ and ‘repeated refusals’ on the part of the plaintiffs; ibid at 156, 157. The crossing took place far enough from the plaintiffs’ sight that they could not even have noticed or felt invaded in any meaningful way and so, without implications of loss of privacy or annoyance. The Supreme Court of Wisconsin awarded one dollar in nominal damages, reflecting the harmlessness of the trespass in question, and an extra $100,000 in punitive damages, reflecting the fact that, though harmless, it was, nonetheless, trespass.


27 See e.g. *State v Shack*, 277 A.2d 369 (NJ 1971).
B. THE THEORY’S EMBRACE OF THE KEEP OFF PICTURE OF TRESPASS TO LAND

The strict liability aspect of the duty to keep off the land of another may prompt the notion that the tort of trespass to land is burdensome in a way that threatens its legitimacy. The English jurist Frederick Pollock, for example, has observed that ‘at first sight, to require a man at his peril to know what land and goods are his neighbour’s’ seems ‘morally unreasonable.’\(^{28}\) However, legal theorists of different stripes have sought to explain why the strictness of the trespassory duty is, in fact, an asset, rather than a liability.\(^{29}\) Pollock himself was acutely aware of this point when he urged that a duty not to trespass on another’s land is simply a demand placed on a duty-holder ‘to know what is his own.’\(^{30}\) To some extent, leading modern accounts of property and its trespassory protection can be seen as sophisticated attempts to elaborate, among other things, a theory of a somewhat similar insight to Pollock’s. Indeed, the theoretical accounts we discuss below emphasize the (instrumental or non-instrumental) value of protecting property by way of imposing a strict tort liability for invading another’s property. Since the main intuitions behind them are straightforward enough, we shall move very quickly to the point they each make with respect to the role of strict tort liability in the trespassory protection of property.

Before we engage these accounts in earnest, it is helpful to note that the unifying theme of these otherwise different accounts is the view of trespass as a crucial means for generating social coordination by separating duty-holders from property-right-holders. This is precisely what is accomplished by Pollock’s shift from saying that trespass places a requirement on the duty-holder ‘to know what land and goods are his neighbour’s’ to saying that trespass places a requirement on the duty-holder ‘to know what is his own.’\(^{31}\) The strict liability aspect of trespass, we may say, orients the duty-holder not so much outward, to the right-holder whose property is thereby vulnerable to invasion, but rather inward, that is, to ‘what is his own’ as a cognitive shorthand for the material means available to him without the peril of being strictly liable for trespassing upon the land of another.

The coordination through separation facilitated by the tort of trespass to land is cast in different ways reflecting the different theoretical approaches of scholars to the subject. We shall present, by way of illustration, one such approach. It introduces an influential conception (or a cluster of conceptions) of the separation between duty-holder and right-holder that a strict liability tort of trespass is supposed to bring about.


\(^{29}\) The accounts we discuss in the main text below do not turn on a familiar historical explanation, according to which the action of trespass served to settle title disputes where no comprehensive system of land registration or recordation existed. Certainly, the availability of systems of registration or recordation nowadays renders the historical explanation inadequate, at least insofar as it applies to the lasting strictness of the modern law of trespass to land.

\(^{30}\) Pollock, supra note 28 at 12.

\(^{31}\) Ibid.
On this approach, developed separately by James Penner and (separately and jointly) by Thomas Merrill and Henry Smith, the duty against committing trespass cuts the duty-holder completely from the right-holder. According to Penner, ‘[t]he general injunction “keep-off” or “leave alone” the property that is not one’s own defines the practice of property.’ Indeed, leading a free and autonomous life in our complex societies depends on a practice like property that coordinates the conflicting courses of action of multiple persons in a highly impersonal fashion, doing away with ‘the specific individuality or particular persons’ who happen to be in the position of property-right-holders. Rather than arduously engaging right-holders in an effort to avoid encroachments on their entitlement to the free use of their objects, the tort of trespass presents a general duty owed to society as a whole. One extreme variation on this theme even asserts that ‘the duty is owed to the res.’

Moreover, and more importantly for the present purpose, the duty must incorporate a strict liability regime in order to achieve its ambition to guide the practical affairs of duty-holders in a general and impersonal fashion. Indeed, strict liability insures that a duty-holder ‘only needs to know that he does not own the asset in order to know that he must keep out.’ After all, incorporating fault into the trespassory duty affects the kind of inquiry (or precautions) that a duty-holder must make (or take) in order to satisfy a fault-based requirement of exercising due care not to interfere with the property of another. A fault-based duty of this sort must hinge upon the attentiveness of the duty-holder to the particular circumstances surrounding any given encounter with external objects not hers – for example, is it reasonable for her to suppose that a large, open wasteland area is privately owned and that the owner does not want anyone on this piece of land? Likewise, it draws the right-holder into the encounter, as considerations of fault apply on both sides of the duty/right-holder relations – for example, is it reasonable for the owner of the wasteland just mentioned to exclude others from this land without giving proper notice to that effect? In this manner, attaching fault liability to the tort of trespass to land exerts pressure toward a property practice which remains impersonal but also far more relational than the existing, strict liability regime.

The value of separating duty-holders from right-holders through assigning strict tort liability for the tort of trespass can be explained in non-instrumental as well as instrumental ways. Penner’s argument, as noted above, is grounded in non-instrumental considerations of

33 Ibid at 29.
34 Ibid at 27.
37 What counts as proper notice may, of course, be controversial. But this is precisely the point of introducing an element of fault to the otherwise strict liability tort of trespass.
sustaining freedom or autonomy in mass societies. According to Merrill and Smith, the complexity of sustaining social coordination is fundamentally a problem of efficiency. Indeed, according to Smith, the costs of large-scale coordination might be prohibitive if the law does not design its rules and practices in ways that economize on the costs of producing and processing information concerning the qualities of rights to particular assets. These costs are particularly relevant for those who seek to avoid trespassing on another’s land, those who want to acquire rights to this land, and others yet (like public officials and judges) who are in charge of the legal enforcement of property rights. We shall focus, however, on the category of avoiders, since the tort of trespass is first and foremost a restriction on their activities.

On the approach developed by Merrill and Smith, the legal practice of property accommodates the challenge posed by the costs of producing and processing information, by resorting to a scheme that minimizes the need for duty-holders to engage in processing idiosyncratic information generated by particular right-holders with respect to their particular piece of land. Thus, in place of a contract-based scheme of Coasean bargaining that aims at settling ex ante conflicting claims to land use, property regulates the activities of duty- and right-holders in ways that keep ‘informational demands on the duty-holder to a minimum.’ The strict liability tort of trespass to land is one key feature in this effort at economizing on information costs. As with Penner’s thesis, the strictness of the tort – the imposition of the entire risk of making a mistaken entrance to another’s land on the duty-holder – reduces significantly the scope of the inquiry that duty-holders would otherwise need to make with respect to each and every asset located along their way. The guidance provided by the trespassory duty is, in

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38 See Penner, Idea, supra note 32 at 181.
39 Smith, ‘Language,’ supra note 36 at 1108.
40 Ibid. Early work on the central place of communication in and around property has emphasized the importance of title earmark – that is, establishing clear signals concerning one’s proprietary claim to a resource. The leading study in this respect is Carol M Rose, ‘Possession as the Origin of Property’ (1985) 52 U Chicago L Rev 73, reprinted in Carol M Rose, Property and Persuasion (Boulder, CO: Westview Press, 1994) at 11–23. Throughout, we shall not discuss this aspect of communication between owners and non-owners; we focus, instead, on a different aspect of ‘property communication,’ concerning the authorization to enter or use another’s land. These two aspects overlap in some measure, but they are, nonetheless, distinct. Only the latter aspect addresses directly the duty against committing trespass to another’s land, whereas the former also raises the preliminary question of whose land is it.
41 See e.g. Merrill, ‘Property as Modularity,’ supra note 4 at 151.
42 The scheme also restrains the power of right-holders to produce idiosyncratic information. A paradigmatic case, according to Merrill and Smith, is the principle of numeros clausus, which is a restriction on the creation of novel forms of property right: Thomas W Merrill & Henry E Smith, ‘Optimal Standardization in the Law of Property: The Numerus Clausus Principle’ (2000) 110 Yale LJ 1 [Merrill & Smith].
44 Merrill, ‘Property as Modularity,’ supra note 4 at 157, observing that Smith’s explanation of the strict liability rule, ‘the ‘draconian regime’ in Merrill’s words, is ‘information costs.’ Moreover, Merrill and Smith have extended their argument to the domain of morality, arguing that the tort of trespass to land incorporates many of the features that form the ‘moral side of property law’; Merrill & Smith, supra note 43 at 1870–1.
45 Smith, ‘Language,’ supra note 36 at 1147.
principle, easy to process because its meaning ‘is invariant under changes of context.’

This invariance is, to an important extent, a feature of relieving the duty-holder from the need to communicate directly with right-holders in order to avoid liability for trespass. The strict liability tort of trespass, once again, requires no more than knowing what one owns in order successfully to discharge the duty to keep off the property of another.

By way of a prelude to the next stage of the argument, it is important to note that the keep-off picture as thus described fails on its own terms for two independent reasons. First, recall that, according to this picture, all that a duty-holder has to know is ‘what is his own’; no more deliberation is called for in order to fulfil the duty against committing trespass to land. However, to the extent that we currently live – and would prefer to continue living – in a society with abundant supply of publicly held property, and insofar as the existence of public property can be extremely valuable, a duty-holder has to know what is his own as well as what is owned by the public. The keep-off injunction would come only after these two stages of deliberation have been completed. But the moment our duty-holder has a reason to extend his deliberation beyond what is his own, a duty to keep-off may fail to achieve strict separation between his practical affairs and those of other private owners. After all, not all publicly held lands are easily distinguishable from privately owned lands, in which case the duty-holder would also need to take into consideration what other private individuals own in order to know whether or not a particular tract of land is public. Hence, if we take seriously the existence and especially the desirability of publicly held property, the keep-off picture cannot sustain the view that the trespassory duty creates a liability regime that separates duty-holders from rights-holders. To be sure, there may be cases (perhaps even many such cases) in which the distinction between publicly and privately held lands is crystal clear. But in these occasions, the duty-holder/right-holder separation that will emerge is a feature of the clear demarcation of the private/public distinction, rather than merely of the duty to keep off.

Second, trespass to land, by virtue of being a tort, gives rise to a duty, the breach of which counts as wrong (or wrongdoing). Thus, like every other tort, the tort in question must state what its underlying wrong is. But since the keep-off picture implies that the trespassory duty prohibits the duty-holder from entering to another’s property, it follows that the underlying wrong of this tort is that of entering another’s land – that is, the very physical act of entry or use. However, as we shall argue presently, entering another’s land as such is not a legal (not to mention moral) wrong. Rather, the wrong that truly underlies the tort of trespass is that of making an unauthorized entry. And if this way of describing the wrong relevant to the tort of trespass is correct, the duty at issue does not separate the duty-holder from the right-holder.

46 Ibid at 1112.
47 Merrill & Smith, supra note 43 at 1862: ‘Property rights break … the symmetry between the holder of the right and neighbors or strangers.’
Quite the contrary, it gives the former a mandatory reason to keep off from another’s property only insofar as the latter does not authorize his entry. And as we shall argue below, this qualified way of fixing the content of the duty opens the door to considerations of fault.

III Trespass to land: Uncovering the fault principle

The object of this stage of the argument is to uncover a fault principle underlying the common law tort of trespass to land. We develop this claim at several, increasingly concrete, levels of analysis. These are conceptual, normative, and doctrinal levels through which we show that fault must, should, and, in fact, does inform liability for trespass to land. This demonstration does not abandon the strict liability aspect of this tort entirely. It rather makes ample conceptual space for assessing tort liability by reference to both strict and fault liability. As we shall argue, the duty against trespassing on another’s land consists of a two-tier structure of tort duty: first, a fault-based requirement to make reasonable inferences concerning the existence (or inexistence) of authorization to use or access another’s land; and second, a strict-liability-based requirement to accommodate this inference to one’s course of action. Trespass, we argue, amounts to the breach of both requirements. The conventional view and its theoretical elaborations focus almost exclusively on the latter requirement, virtually ignoring (or implicitly resisting) the former, and thus missing the fault principle which is built into the tort. The problem with the conventional view, and especially its theoretical foundations, is the denial of the freestanding normative relationship that the trespassory duty directly engenders between the duty- and right-holder. Indeed, at the formal core of the duty lies the authority held by the right-holder against the duty-holder with respect to an object. This authority manifests itself by way of granting or denying a duty-holder authorization to use an object; more precisely, it vests the right-holder with the power to fix the normative standing of another in relation to that object. Against this backdrop, the separation between the property right- and duty-holder, as advocated by leading property scholars, is both analytically untenable, normatively unwarranted, and doctrinally ill supported in the case law. Or so we shall argue.

A. THE CORE CASE OF TRESPASS TO LAND: AN ILLUSTRATION

To set the scene, we commence with a paradigmatic case of trespass: a case of entering into the land of another. Certainly, this is the ‘commonest,’ ‘most obvious,’ perhaps even ‘definitionally essential’ form of trespass to land. Suppose Kate is in the midst of walking

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50 The standard of reasonableness picks out the question of what objectively (or, more precisely, inter-subjectively) appears to have been the decision of the owner.
53 BS Markesinis & SF Deakin, Tort Law, 5th ed (Oxford: Oxford University Press, 2003) at 445
down a road as she encounters Blackacre, a tract of land on her right.\(^{55}\) Kate can either continue with the road and then turn right when she gets to her designated destination; or, she can take a shortcut through the land on her right. All else being equal, Kate prefers the latter course of action. The question is what Kate must (or has most reason to) do in order to meet the duty against trespassing on another’s land.

On the conventional view, all that Kate must do is to exclude herself from Blackacre as soon as she realizes that she does not own this piece of land. Even when she comes to the reasonable belief that the owner does not object to such acts of shortcutting through Blackacre, the conventional view implies that the entire risk of so acting is on Kate – that is, Kate commits a tort of trespass if it turns out that her reasonable belief about the owner’s permission was mistaken and the owner of Blackacre in fact opposes the entry. Thus, on the conventional view, Kate must exclude herself from Blackacre to avoid liability for trespass.\(^{56}\) Although it is perfectly true that she can do that as well, this view fails adequately to capture what the trespassory duty, in fact, requires Kate to do (or not to do). More precisely, keeping off another’s land may be sufficient for the purpose of meeting the trespassory duty successfully; but so does staying in one’s home all day or moving to Antarctica. The trouble with the keep off account is that doing so – viz, keeping off another’s land – is not necessarily entailed as a matter of duty. Certainly, an account of a duty – any duty – must explain why doing this or that is not merely sufficient, but also necessary to meet the duty. After all, people can conform, say, with the duty not to defame others, by not talking about others at all, and yet no one believes that this duty really requires that form of behaviour. Once again, the underlying wrong of the trespass tort is that of unauthorized entry, rather than mere entry.

Furthermore, the conventional view conceives the duty against committing trespass as a restriction on one’s allowable means. It fails to appreciate that the very existence of a restriction in every given case is the conclusion of a prior process of inferring whether, in what ways and to what extent, the means in question are, in fact, restricted. Whether or not Kate must keep off Blackacre is a question that cannot be decided prior to determining how the owner of this piece of land regards the likes of Kate. Indeed, the law of trespass to land does not impose an absolute duty never to enter another’s land, tout court. If Kate is required to keep off Blackacre, it is not because of a general prohibition on entering another’s land but rather because, and only insofar as, the particular owner of Blackacre has not authorized cutting through his land. This characterization is true even when Kate is expected to know this much by drawing on an established social convention that guides non-owners in their interaction with the likes of Blackacre. For this social convention helps Kate to figure out, not what society at large requires or allows her to do, but rather what the owner of this Blackacre would decide with respect to her (or others’) entry.\(^{57}\)

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\(^{55}\) Whether or not she makes this trip for the first time in her life is unimportant at this stage of the argument.

\(^{56}\) Whether Kate falls within the category of a trespasser or an invitee may partly determine the existence and scope of the duty of care owed to her by the owner of Blackacre once she traverses the former’s land.

\(^{57}\) We develop this claim – that social conventions may serve as proxies for the point of view of the owner – below; see Parts III.B, III.D of the present article.
Proponents of the conventional view may protest at this point, suspecting that our characterization of the duty against trespassing confuses the right order of things. An authorization by an owner, this suspicion might go, is akin to a privilege or a defence; it forms no part of the content of the trespassory duty; namely, the duty to keep off the property of another. This view has some support in the doctrinal division of labour between the general law of trespass and some peripheral doctrines, especially in the area of permission or licence law. It is further supported by the fact that, in some common law jurisdictions, the burden of proving owner authorization (or consent) is cast on the defendant.58

However, we shall argue that this objection is false. A privilege or a defence presupposes the existence of a duty. After all, it takes a duty to do or not to do X in order for a defendant to be able, in the first instance, to invoke a defence (such as that of consent to entry onto land). But what precisely is the trespassory duty on the basis of which a defence of permission to enter is sought? The duty in question is not of the sort ‘do not enter another’s land’ or simply keep off, but rather ‘don’t make an unauthorized entry upon such land.’59 In other words, it specifies a prohibition against ‘wrongful entry,’ rather than entry as such.60 The question of whether a non-owner is, in fact, under a duty not to enter another’s property depends in part upon the prior question of whether or not the latter has authorized the former’s entry. Indeed, the existence or non-existence of authorization is constitutive of the very possibility of describing any act of entrance to land in terms of ‘interference,’ ‘invasion,’ or, indeed, ‘trespass.’ Accordingly, viewing owner authorization as a mere defence makes the mistake of counting authorization twice over: as an element of the prima facie tort of trespass and as defence against liability for this very tort. Hence, even if there may be good historical and functional reasons for analysing questions concerning owner authorization under the doctrinal heading of licence or permission cases, it should be clear by now that these questions are, nonetheless, an ineliminable aspect of the content of the duty itself.61

It may well be (as we think it is) that, in many of her encounters with her neighbours’ lands, Kate would readily know whether she must keep off or may come in.62 Surely, most people nowadays know that it is generally allowed to enter an open restaurant at lunchtime,63 but that it is generally not allowed to do so in the middle of the night. Likewise, it is normally considered a trespass to enter, uninvited, the dwelling home of another, but it is perfectly legal to

58 See e.g. Restatement, supra note 10 § 158 cmt c; Edwards v Ry Executive, [1952] AC 737 (HL).
59 See e.g. Civic Western Corp v Zila Industries, Inc, 135 Cal Rptr 915 at 925 (App Ct 1977), stating that ‘[t]he essence of the cause of action for trespass is an “unauthorized entry” onto the land of another … Where there is a consensual entry, there is no tort, because lack of consent is an element of the wrong.’
60 See De Wurstemberger v Royalite Oil Co, [1935] 2 DLR. 177 (Alta CA) at [12] (the italics are ours). With Blackstone, our approach insists that the trespassory duty only targets cases of ‘unwarrantable entry on another’s soil.’ Blackstone, supra note 18.
61 The existence of authorization (or lack thereof) ‘is not a privilege at all, because lack of it is of the very gist of … trespass to land’; John G. Fleming, The Law of Torts, 8th ed (Sydney, NSW: Lawbook, 1992) at 79 [Fleming].
62 See Bruce A Ackerman, Private Property and the Constitution (New Haven, CT: Yale University Press, 1977) at 116.
63 Not long ago, however, this was not true of blacks in some parts of the United States.
do so when a ‘Tag-Sale’ sign is posted on this house’s partly open door. Nevertheless, our ambition at this stage of the argument is to establish the intimate connection between the tort of trespass and the requirement that duty-holders attend to the owner’s point of view concerning the permissibility or impermissibility of using or accessing this owner’s land. The argument is important because it exposes the conventional view’s failure to appreciate that the tort of trespass to land requires duty-holders to engage the judgments of right-holders concerning permissibility or impermissibility. And as we shall show below, this way of characterizing the tort of trespass to land renders considerations of fault ineliminable. This conclusion, in turn, carries important theoretical and practical implications not only for ‘simple’ cases in which a non-owner seeks to avoid liability for trespass by cutting through another’s land. It becomes especially important in connection with circumstances that depart from the simple examples of restaurants and dwelling homes mentioned a moment ago.

So far we have sought to show that any requirement to keep off necessarily presupposes a prior requirement to draw reasonable inferences concerning one’s legal status in relation to the land in question. This means that the tort of trespass to land directs non-owners to engage the real property of others on the basis of making inferences from the latter’s acts or external objects to their judgments concerning the legal permissibility of using or accessing their property and the terms of thus using or accessing. Thus, part of living together in a society means that, all else being equal, we are required to assume that the act or object of another provides a proxy for his point of view, which, in turn, imposes constraints on our courses of action. Accordingly, the structure of the trespassory duty is twofold: First, a requirement to draw reasonable inferences with respect to the right-holder’s point of view of the matter at hand; and second, a requirement to accommodate one’s own course of action to this view. The supposedly ‘exceptionally simple and exceptionally rigorous’ characterization of the tort of trespass to land may, at best, make sense of the latter requirement. But once the requirement to draw inferences asserts itself, fault becomes an ineliminable feature of the tort in question.

Against this backdrop, we shall introduce the conceptual, normative, and doctrinal claims in support of our contention; namely, that the tort of trespass to land must, should, and does invoke considerations of fault, by virtue of the requirement to draw reasonable inferences concerning use-authorization from the person in authority, which is the property-right-holder.

**B. WHAT DO OWNERS WANT? THE NECESSARY PLACE OF REASONABLENESS WITHIN TRESPASS TO LAND**

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64 Of course, an authorization to enter another’s home during a tag-sale event does not include permission to take a shower there; see *The Calgarth*, [1927] P 93 at 110 (Scrutton LJ) [*The Calgarth*]: ‘When you invite a person into your house to use the staircase you do not invite him to slide down the banisters.’

65 This characterization is subject to modification. We offer a more precise one below.

66 The existence of this second requirement dispels the suspicion that, by introducing fault analysis into the tort of trespass, our account reduces this tort to a harm-based tort such as the torts of negligence and nuisance.
By way of illustration, consider a case in which our Kate approaches the owner of Blackacre, asking his permission to cross his land. Since Kate is unable to peer inside the owner’s mind, she must rely on proxies such as his words (language), gestures, or any other communicative indications that might help bridge the gap between the purely subjective judgment actually made by the owner and its *inter*-subjective (i.e., sharable) meaning.\(^67\) That is, Kate must resort to second-best means of decoding what is truly going on in the owner’s mind in reaction to Kate’s request for permission to cross. It is precisely at this point that considerations of fault come to bear on Kate’s attempt to successfully meet the duty against trespassing. Suppose the owner nods his head in agreement, but actually – deep in his mind – refuses to let Kate in. There may be any number of innocent reasons for this. Perhaps the owner has just recently emigrated from Bulgaria and is thus used to nod his head up-and-down to express ‘no.’\(^68\) Or perhaps the owner is overwhelmed by Kate’s beauty to the point of confusing ‘yes’ for ‘no.’ At any rate, it does not matter why the incongruity between the subjective and inter-subjective judgment of the owner comes about. The important thing to note is that the only means for assessing Kate’s success in drawing reasonable inferences concerning the owner’s permission is by reference to what can be expected from any reasonable person who masters, in some measure, the language, culture, and conventions of the community in which the interaction occurred. No doubt, the precise criteria for reasonableness may turn out to be controversial. But no such controversy arises with respect to the notion that drawing inferences on the basis of proxies such as language can be assessed only by reference to the language we *share*. Hence, the only live question is what can be expected from a person in Kate’s position in terms of ascertaining the (actual) judgment of an owner as *can* be reasonably inferred by those mastering the basics of the relevant language and local conventions.\(^69\)

One might argue that there can be a strict liability for inferring correctly the purely subjective judgment of the owner. This means that the entire risk of drawing a mistaken inference lies with the duty-holder. But the point of the preceding discussion was that there is, in fact, *no* mistake in believing that the owner gave an authorization to cross his land even though a ‘mind detector’ would have revealed otherwise (for example, that he was joking). There is no mistake because there is no available way to access the owner’s mind other than by taking his ‘yes’ at face value. Language (and communication, more broadly) just is the baseline against which it is possible to determine whether or not a particular inference is, in fact, mistaken.

\(^{67}\) The judgments in question can be either the upshot of the specific intentions formed by the owner to address the present case or the policy he or she has with respect to the class of cases to which the present case falls. Policy, that is, is a form of a general intention that replaces the need to engage in a minute-by-minute planning. For more on the notion of personal policies in the philosophy of action and mind, see Michael E Bratman, ‘Intention and Personal Policies’ (1989) 3 Philosophical Perspectives 443.


\(^{69}\) For more on the important role of socialization for participating in the practice of property, see Ackerman, supra note 62 at 97–8. And compare with Robert C Ellickson, ‘The Inevitable Trend Toward Universally Recognizable Signals of Property Claims’ (2011) 19 Wm & Mary Bill Rts J 1015 at 1027–30 [Ellickson].
Language or other face-to-face gestures are not the only proxies through which duty-holders can meet the requirement to draw reasonable inferences concerning the owner’s authorization (or lack thereof). Consider the proxy service furnished by the property itself in the appropriate context. This proxy figures prominently in the practice of property. In modern, complex societies, people often encounter a piece of land without also encountering its owner. Recall that the duty against committing trespass to land calls for deferring to the authorizing judgment of whoever is in authority to give or refuse permissions to enter. Like language, land can serve as a proxy for the intentions of the owner with respect to others’ use of and access to it. To this extent, land mediates between the judgment of the authority and passers-by. It functions as a concrete meeting point, as it were, between the points of view of the owner and all those like Kate whose proximity to the land requires, as a matter of duty, that they incorporate the owner’s judgment into their own course of action. The precise content of this judgment, and therefore the precise contours of the duty to accommodate it, may vary, partly due to the context within which the encounter occurs and the capacities of the participants. The question of what can be reasonably inferred from this context manifests itself once more.

Consider Kate’s case again. Seeing no one standing in front of Blackacre, Kate must draw inferences concerning authorization judgments made by the owner (whoever he is), based on the surroundings and context and informed by conventional know-how. But since judgments (including judgments concerning the status of others in relation to one’s property) defy direct access by others, a resort to contextual, conventional, and customary determinants is inevitable. As mentioned above, and will be demonstrated below, it may matter a lot whether Blackacre is wasteland, a dwelling home, or a restaurant. It matters, not necessarily because of their respective social worth, as legal pluralists believe, but rather because they are embedded with social meanings and conventions that may help non-owners draw reasonable inferences concerning the existence (or non-existence) of owner authorization. In some cases, it will also be important to take into account cultural events such as Hallowe’en or other local traditions that may help in determining what the owner of Blackacre allows (or disallows) with respect to this land.

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70 Both James Penner and David Lametti emphasize that objects mediate between duty- and right-holders, but their respective conceptions of mediation are entirely different from our own. On Penner’s view (upon which Lametti draws), objects are more like screens that block any normative connection between duty- and right-holders; this is precisely why he thinks property gives rise to an indirect structure of obligation (owed to the practice as whole, rather than to the right-holder). See Penner, *Idea*, supra note 32 at 29; David Lametti, ‘The Concept of Property: Relations through Objects of Social Wealth’ (2003) 53 UTLJ 325 at 344–5 [Lametti]. As we argue in the main text, it is a mistake – conceptual as well as normative – to move from the first premise of this view (that objects mediate between duty- and right-holders) to the conclusion that objects allow, and perhaps require, property law to do away with the directional structure of normative relations that generally characterizes private law.

71 See *United States Zinc & Chemical Co v Britt*, 258 US 268 at 275 (1921) (Holmes J) [Britt].


73 That said, we do not call for the unreflective embracing of customs (and other conventional modes of communication, more generally). As with other private law doctrines that rely on conventions (e.g. the standard of
For instance, in a modern society, a duty against unauthorized entry to another’s land will normally exert pressure toward keeping out of the dwelling homes of strangers, though not necessarily of the walkway leading from an owner’s front gate to his front door. The exact same duty, applied to a Bedouin society, will result in an opposite prescription; namely, that by default, duty-holders are granted permission to enter the land of another. Indeed, as mentioned above, the formal core of the trespassory duty is composed of the authority possessed by owners against non-owners. It is formal in the sense that it applies just as much to private owners situated in a Bedouin society or in Beverly Hills, that is, regardless of the context within which they happen to exercise their authority. And this characterization captures the core of the trespassory duty, in the sense that this duty does not require to keep off or to come in, but rather, in the first instance, demands deference to owners’ exercising their power to grant or deny authorization to access their respective objects.

At this point, the conventional view of the tort of trespass to land intrudes into the argument. Proponents of this view may claim that heavy reliance on surrounding circumstances and other conventions suggests that the tort in question in fact separates duty- and right-holders; just like the keep-off picture seeks to block direct engagement between the two, so does reliance on extrinsic circumstances. This is because the reliance on context demonstrates that duty-holders do not interact directly with right-holders. Instead, they appeal to facts about the world that happen to exist apart from any particular owner, including, of course, the owner of Blackacre.

We do not deny the importance of context, custom, and convention, but we reject the conclusion that using these elements supports the notion that the trespass tort separates duty and right-holders. Indeed, it is crucial to understand the precise role of context and convention in the overall structure of the duty against trespassing on another’s land. This role can be cast into sharp relief as soon as one recalls that it is only a proxy for the judgment of the owner, rather than the judgment itself. Like language and gestures, it serves to identify the judgment. Accordingly, the duty-holder is, indeed, preoccupied with the land itself and its surrounding circumstances, but only because, and only insofar as that piece of land, understood in the appropriate context, reflects the actual judgments of the right-holder. Thus, rather than driving a wedge between right- and duty-holder, the proxy service of property, just like the proxies mentioned above, offers another communicative means through which the inherently subjective intentions of the owner can reasonably be shared. As we shall demonstrate below, this understanding of the proxy service of property tracks almost precisely the common law tort of trespass to land.

the reasonable person in negligence law), courts should approach arguments based on customs with care so as not to incorporate oppressive norms into the law.

74 See William C Young, ‘Arab Hospitality as a Rite of Incorporation: The Case of the Rashaayda Bedouin of Eastern Sudan’ (2007) 102 Anthropos 47 at 52.

75 After all, language – our first example of second-best methods of inferring owners’ judgments – is, to an important extent, both heavily contextual and highly conventional. This suggests that the distinction between the two proxies – viz, language and external objects – is at best one of degree.
In conclusion, meeting the first requirement of the duty against trespassing – viz., a requirement to draw inferences with respect to the property-right-holder’s point of view of the matter at stake – has proved to be a task of deploying certain inter-subjective proxies in order to ascertain the subjective intentions of an owner. The critical distance between the owner’s subjective view and what duty-holders can take this view to be gives rise to considerations of reasonableness. As explained above, duty-holders, by definition, cannot enjoy direct access to the owner’s mind; this is why they need to use proxies. The only live question, then, becomes what can be reasonably inferred through means (such as language and custom) that are commonly shared by people occupying the position of duty-holders.

C. THE NORMATIVE CASE FOR FAULT IN TRESPASS TO LAND

1 An instrumental argument for fault in trespass

From a law and economics standpoint, tort law gives rise to two paradigm cases of wrongdoing: the first, intentional; the second, accidental wrong.76 The former calls for a ‘stronger’77 – that is, unaccommodating – legal reaction to right violations. In contrast, the latter typically features a weaker approach, allowing non-owners greater opportunities to use others’ properties without having to secure their consent ex ante. As we shall seek to show, the tort of trespass to land straddles the line between the two paradigms. The argument will proceed by fleshing out the implications of the mainstays of the economic analysis of torts to the case of the tort of trespass to land. Our ambition is twofold: first, presenting the economic case for the place of fault in the trespass tort; second, providing a more precise account of the economic cut-off point between the intentional and accidental paradigms of wrongdoing than has been offered before. Unlike the prevailing economic account’s emphasis on the availability (or unavailability) of markets in determining the cut-off point between the two paradigms, we shall identify another

77 Susan Rose-Ackerman, ‘Dikes, Dams, and Vicious Hogs: Entitlement and Efficiency in Tort Law’ (1989) 28 J Legal Stud 25 at 26. Ackerman criticizes what she calls the ‘proentitlement’ attitude on the part of the common law for failing to make sufficient room for efficiency considerations that support the introduction of contributory or comparative negligence; ibid at 36. The Ackerman thesis differs substantially from ours. First, it focuses solely on the second requirement of the trespassory duty – that duty-holders accommodate, in their courses of action, the judgment made by a right-holder with respect to an object – whereas we take up the requirement to draw reasonable inferences concerning the question of what this judgment is in the first place. Second, unlike our account, Ackerman’s discusses cases that fall outside the core case of trespass, such as cattle trespass, nuisance, and cases that fall in between (of the sort familiar from the classical case of Fletcher v Rylands, (1866) LR 1 Ex 265 and from cases involving ultra-hazardous activities, more generally). In particular, these are cases of accidental infliction of damage on another’s property in situations typically featuring high transaction costs.
such point. In our view, the accidental paradigm has an important role to play in governing market transactions of land-use.\textsuperscript{78}

We commence with the economic analysis’s point of reference – namely, the economic market. All else being equal, transactions between persons concerning scarce resources are best coordinated through economic markets. Thus, if A wants to purchase B’s land, then the socially optimal way to proceed is through reaching an agreement reflecting the terms under which B is actually willing to sell A her piece of land. Another normative assumption that typically holds in the context of our study is that the opportunity to use land can be socially beneficial. This is especially true when so using is consistent with the intentions of the owner as reasonably conceived by non-owners.

The paradigm case of \textit{intentional wrongdoing} picks out instances such as when A deliberately dispossesses B of her land. From a law and economics perspective, the wrong done by A is that of bypassing the market, and intentionally at that.\textsuperscript{79} Setting aside cases featuring bilateral monopoly\textsuperscript{80} or circumstances of necessity, a deliberate trespass is economically illegitimate, since it fails to produce a social gain.\textsuperscript{81} On the contrary, in the vast majority of deliberate trespass cases the benefit to the defendant at best correlates to the loss suffered by the plaintiff (viz, a case of pure transfer), and in addition, the defendant actively invests resources in an effort to inflict it.\textsuperscript{82} Therefore, almost by default, the cheapest way for the defendant to avoid costs is simply to forbear from investing resources in \textit{inflicting} the loss.

On the intentional wrongdoing paradigm, the law’s effort to curb deliberate trespass must not stop at the provision of compensatory damages (or liability rule protection) to the plaintiff/owner.\textsuperscript{83} In the absence of stronger legal measures, an owner would be forced to take

\textsuperscript{78} Of course, there may be other economic arguments (such as the ones developed by Ian Ayres) in support of making more normative space for the accidental paradigm in facilitating market transactions.

\textsuperscript{79} We do not deny that A’s behaviour can also be characterized as morally wrong. Rather, the argument is that the immorality of thus behaving is not the point of the wrong when viewed from an economic perspective.

\textsuperscript{80} A bilateral monopoly describes a situation in which two parties can bargain over access to a resource only with one another, without facing competition from third parties. As a result, each one of the two parties has strong incentives to hold out for a better price. This practice adds many caveats and complications to the typical market analysis.

\textsuperscript{81} Cases such as private necessity, overflight cases, and governmental taking are exceptional in the sense that they reflect circumstances in which deliberate trespass may be welfare-enhancing due to the prohibitive costs of market-based negotiations between the relevant parties. Moreover, these cases are beside the point of the present argument because they pick out the second prong of the trespassory duty; namely, the requirement to accommodate the owner’s judgment with respect to her land in the non-owner’s course of action. The argument from fault, instead, focuses on the first prong of the duty – the requirement to draw reasonable inferences concerning the judgment of the owner.

\textsuperscript{82} The reason we say that the benefit to the defendant \textit{at best} correlates to the loss suffered by the plaintiff is that these so-called benefits may sometimes count as illicit utility, in which case they should be excluded from the benefit side of society’s cost-benefit calculus altogether.

\textsuperscript{83} Liability-rule protection is fixed objectively, typically by courts’ assessment of the relevant market value. See Guido Calabresi & A Douglas Melamed, ‘Property Rules, Liability Rules, and Inalienability: One View of the Cathedral’ (1972) 85 Harv L Rev 1089 at 1105 [Calabresi & Douglas]; Guido Calabresi, ‘A Broader View of the
unnecessary precautions (say, building higher fences) to reflect the difference between the damages she would receive and her true (subjective) reservation price, which is often neither verifiable nor accurately traceable by courts *ex post*.\textsuperscript{84} Matters can get even worse, since the owner’s investment in socially unnecessary precautions might be followed by, and indeed trigger, further investment on the part of the deliberate trespasser in executing his plan (say, getting a higher ladder). Thus, merely rectifying the plaintiff’s loss will not suffice, negatively, to deter the likes of A from engaging in wrongdoing or, affirmatively, to channel the transaction between the likes of A and B to the economic market.\textsuperscript{85} For these reasons, the law deploys a ‘strong’ deterrence package, as it were. This includes the following three aspects: strict defendant liability,\textsuperscript{86} no liability on the part of the plaintiff,\textsuperscript{87} and a set of super-compensatory remedies and sanctions (such as injunctions, punitive damages, and criminal law enforcement).\textsuperscript{88}

The law and economics of torts acknowledges an *additional* paradigm through which to account for cases of wrongdoing – accidental wrongdoing. Whereas the intentional wrongdoing paradigm resolves disputes over conflicting uses of land by placing the entire burden of avoiding such conflicts on non-owners, the accidental paradigm is typically more open to dividing this burden between non-owners and owners of land according to their respective advantages in reducing the social costs of having conflicting plans to use the same land. To give two examples of an accidental tort regime: under negligence liability, non-owners are required to make no more than a reasonable effort not to interfere with the owner’s property. Also, under a scheme of no-fault compensation familiar from workers’ compensation programs, non-owners are not prevented (say, by the issuance of injunctions) from using another’s land, though they are required to pay the market value’s worth of thus using.\textsuperscript{89}

What justifies the move from an intentional to an accidental paradigm of wrongdoing? The most familiar answer, following the seminal works of Coase and of Calabresi and Melamed,\textsuperscript{90} is cast in terms of the feasibility (or infeasibility) of market transaction. That is, the answer hinges upon whether or not the resort to the market can provide a solution to the problem

\textsuperscript{85} Ibid at 142.
\textsuperscript{86} That is, the risk in cases that merit strong deterrence is imposed entirely on the potential trespasser. He is held strictly liable for his acts because, once again, he is the cheapest cost avoider.
\textsuperscript{87} Indeed, the owner is not legally required to take precautions to avert a deliberate trespass, in which case he is not held contributory or comparatively negligent for not doing so. As in ‘alternative care’ cases, it is most desirable that only one party – the trespasser – take precautions, since any precautions taken by the owner amount to a social loss.
\textsuperscript{88} Thus, the law acknowledges the need to supplement compensatory damages with granting injunctions, awarding punitive damages (which are, in essence, injunctions granted *ex post*), and imposing criminal sanctions in cases of deliberate trespass.
of conflicting uses. Thus, when transaction costs are sufficiently prohibitive to preclude market transactions, the optimal solution requires a *retreat* from the intentional paradigm of wrongdoing to the accidental one. Indeed, rather than trading benefits and costs with others on an actively *mutual* basis, the accidental tort paradigm induces owners and non-owners to fix this trade-off on their own through incorporating cost-justified precautions into their preferred course of action. The most famous illustration of this is the duty of due care understood along the lines of the economic interpretation of the Learned Hand formula: an obligation on the part of the risk-creator to take precautions insofar as their costs do not exceed the expected costs of injury to the potential risk bearer.\(^{91}\) Thus, the involuntary duty of care (i.e., a duty imposed by law) *stands in* for a market transaction.

However, the tort of trespass invites the thought that this prevailing characterization is somewhat crude. On our account, the prism of accidental wrongdoing should figure, not only in regulating transactions outside the purview of the economic market, but also in facilitating market transactions. As mentioned above, this is because the question of owner authorization exerts pressure toward conflicting interpretations concerning the existence or absence of authorization to use another’s land. No market transaction between a non-owner and an owner that seeks to solve the problem of conflicting uses can be had without *first* converging on a shared understanding of the owner’s approval (or disapproval) of the non-owner’s use. And this necessity sets the stage for considerations of reasonableness and, indeed, fault. They may be warranted, we shall argue, to prevent over-deterrence on the part of non-owners who are willing to concede authority to owners and, in so doing, forbear from by-passing the market.

To fix ideas, suppose that the non-owner has every reason to believe that he is acting in compliance with the trespassory duty in taking a shortcut through the owner’s land – for instance, as he nears the land, the non-owner overhears the owner telling another person that, for whatever reason, she is happy to see people skipping through the uncultivated part of her land. The non-owner, therefore, takes himself to be participating in a market transaction, understood broadly to capture cases in which non-owners are granted access to a resource of another on this other’s own terms. Now it turns out that the owner does not share this understanding or has a rather idiosyncratically parsimonious view of what parts of her land are in fact uncultivated. Is there an economic reason to decide that no matter what, the entire risk should lie on the non-owner’s shoulders as in the intentional wrongdoing paradigm? That is, is there a justification for enjoining the non-owner activity either *ex ante* (via injunctive relief) or *ex post* (by awarding punitive damages)? We think not – the economic rationale mentioned above for enlisting ‘strong’ legal reaction in cases of deliberate trespass should not apply here.

In particular, employing the intentional paradigm is inefficient in this case because there is no *a priori* reason to suppose that the non-owner is, by definition, the cheapest cost avoider of this conflict – an *accident*, really. To this extent, invoking the accidental wrongdoing paradigm to divide the risks associated with mistakes about the question of owner authorization in an economically efficient way reinforces, rather than supersedes, the market solution to the basic

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\(^{91}\) *United States v Carroll Towing Co*, 159 F (2d) 169 at 173 (2d Cir 1947).
problem of conflicting land use. We should, therefore, expect to see resort to the accidental tort paradigm not only in out-of-market transactions in which transactions costs are strictly prohibitive – as when a bike rider falls onto the land of another as a result of a road accident where he negligently collided with a stranger pedestrian nearby. Rather, this paradigm may also be useful in supporting market transactions that otherwise might be difficult to sustain due to the risk of miscommunication concerning the question of owner authorization.

2 The non-instrumental argument for fault in trespass: Non-owners and self-disrespect

As one of us argues elsewhere, the requirements to infer the owner’s judgment (in matters of authorization to enter her land) and have this judgment accommodated in the non-owner’s course of action express an ideal of respectful recognition of persons as free and equal agents.\(^\text{92}\) That is, attending to others by means of drawing inferences about their judgments expresses a special normative connection – a relationship founded on the recognition of the point of view of the right-holder by another as standing providing for the latter.\(^\text{93}\) Thus, as part of living together respectfully, we are committed, through the tort system, to regard one another as free and equal precisely by assuming that, all else being equal, activity and external objects are proxies for the points of view of others qua owners. This ideal of respectful recognition is readily apparent when complying with the duty which requires the non-owner to suppress his own judgment about what to do and how to proceed and, in its stead, incorporate the judgment of the owner even though the former judgment is correct and the latter is, on his (non-owner) view, flatly mistaken.\(^\text{94}\)

But although deference to the point of view of another can involve a willingness to open oneself up to the other’s judgment, there arises a worry of implicating oneself in self-disrespect.\(^\text{95}\) Indeed, since this form of deference requires a duty-holder to concede practical authority to the judgment of a right-holder, it might be the case that the deferring person is being asked to undermine his own integrity as a free and equal person. Certainly, the strains of deference to the point of view of the right-holder must be kept under appropriate control, as it were, so as not to force duty-holders into self-disrespect. This concern clearly, even if not perfectly, manifests itself in and around the principles and doctrines informing the tort of trespass. This is illustrated by tort and property law’s insistence (with the exception of


\(^{93}\) By standing-providing we mean the determination of the normative standing of one with relation to the object of another. Avihay Dorfman, ‘Private Ownership and the Standing to Say So’ (2014) 64 UTLJ 402 [Dorfman, ‘Private’].

\(^{94}\) This proposition is best captured by the familiar case of Jacque, supra note 24. The crossing took place far enough from the plaintiffs’ sight that they could not even have noticed or felt invaded in any meaningful way and, so, without implications of loss of autonomy, privacy, or even the causation of annoyance. See Jacque v Steenberg Homes, Inc, 201 Wis 2d 22, 22, 548 NW (2d) 80 (App Ct 1996).

\(^{95}\) Of course, there may be other cases in which the institution of private ownership can implicate non-owners in self-disrespect.
affirmative covenants) on negative duties of forbearance; simply processed and performed duties; and various doctrines of no-duty in cases where deference to right-holders is exceptionally burdensome for duty-holders (consider the doctrine of private necessity as an example).

For the purpose of the present argument, we shall identify another important source of self-disrespect: deference can become excessive, and hence self-undermining, insofar as the judgment of the owner (concerning authorization) is deeply confused to the point of misleading every reasonable person to believe that permission to enter the land has been granted while, in fact, it has been denied. Suppose that Kate and virtually all other members of society take the ‘garage sale’ sign to express authorization by the owner to enter her garage. In fact, however, the true (subjective) intention of the owner was to begin the sale event a couple of hours later. Under such circumstances, compelling the likes of Kate to comply with the requirement to defer to the latent wish of an owner becomes a form of illegitimate subordination of the former by the latter. To this extent, the power to grant (or deny) authorization to enter must be construed with an eye to the intelligibility of thus granting (or denying). Accordingly, considerations pertaining to the intelligibility of owner authorization give rise to constraints laid down by the public nature of language (or communication) upon which compliance with the tort of trespass is partly dependent. On this view, the fault of failing to conform to these constraints should be attributed to the owner, lest the trespassory duty subjugate non-owners to a radically inaccessible form of authority held by property owners.

Finally, it will be apt to observe that a principle of fault makes better normative sense when considering the freedom of the owner, too. Holding him responsible for a standard of reasonableness, as opposed to absolving him of all responsibility, expresses the law’s respect for the owner qua agent. Indeed, recognizing an owner as a free agent seems to be inconsistent with ignoring the consequences of his failure to provide a reasonably clear representation of his true intentions (in matters of granting or denying authorization to use his land). By contrast, holding him responsible for the way he exercises his say-so authority is a form of treating the owner as an agent, rather than a patient. In this respect, whereas others have argued that the keep-off picture fails conceptually by overlooking the special position that private owners occupy, the present argument implies that the keep-off picture also fails normatively by downplaying the owner’s agency.96

D. TRESPASS TO LAND AND FAULT: THE DOCTRINE’S PERSPECTIVE

At this stage of the argument, we seek to elaborate on the principle of fault that underlies the common law tort of trespass to land. Whereas considerations of fault take centre stage in the tort of negligence, they may be less apparent, though no less real, in trespass to land. Unlike in

96 The conceptual failure has been developed, in different ways and for different purposes, in Katz, ‘Exclusion,’ supra note 25; Ripstein, Force, supra note 49 at 93 n. 11; Christopher Essert, ‘The Office of Ownership’ (2013) 63 UTLJ 418 [Essert]; Dorfman, ‘Private,’ supra note 93.
the former tort, these considerations are ordinarily treated as constituting peripheral doctrinal areas of the latter tort, such as that of privileges or mistake as well as some property law doctrines such as proprietary estoppel. This may make ample historical sense, as the current trespass tort has emerged from the old action for trespass, which is commonly believed to have given rise to absolute liability based on a rigid principle of factual causation. Nevertheless, the substantive principle of fault bleeds through these doctrinal areas, so that it permeates the prima facie case of trespass to land. Duty-holders, we shall argue, are required to draw reasonable inferences concerning right-holders’ permission or prohibition to make use of their respective resources. Likewise, right-holders are required to exercise their special authority (to fix the standing of others in relation to their land) in ways that could be made reasonably available to duty-holders.

As we explained above, whether a person discharges her duty against trespassing on another’s land depends on her meeting the two requirements of drawing reasonable inferences and accommodating her course of action to those inferences. Consistent with this argument, courts assess whether the duty-holder meets the first requirement successfully by recourse to ‘evidence of willingness in fact’ on the part of the right-holder to allow or deny entry and by reference to the ‘particular conduct’ on the part of the duty-holder who seeks to avoid liability for trespass on this right-holder’s land. And since ‘willingness in fact’ as to the ‘particular’ issue at stake has no social existence in the absence of its representation through inter-subjective proxies such as actions and the circumstances surrounding the property, considerations of fault become (at least implicitly) paramount.

Thus, resorting to a standard of reasonableness spans the entire range of interactions between duty- and right-holders in connection with drawing reasonable inferences concerning the latter’s intentions – their ‘willingness in fact’ – with respect to the use of and access to their premises by the former. The standard, as succinctly put by one court, suggests that authorization by the owner ‘may be implied from custom, or when the owner’s conduct is such as would warrant a reasonable person having knowledge thereof to believe that the owner had

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97 As John Fleming observes, ‘Similar considerations [that apply in the area of privileges against liability for trespass torts] are given weight in negligence cases in determining whether the defendant’s conduct was reasonable … In that context, however, the conclusion that the act is likely to do more good than harm is not expressed by saying that it is ‘privileged,’ but by holding that it is not negligent. The difference in approach is due to the fact that the law of intentional wrongs developed principally within the frame of the old action for trespass, with its notion of prima facie causal liability, while the law of negligence emerged through the action on the case where fault was from the start a necessary element of liability’; Fleming, supra note 61 at 83.

98 See Hager v Tire Recyclers, Inc, 901 P25 948 at 951 (Or App 1995) [Hager] (internal quotation to the Restatement, supra note 10 §§ 892, 892A omitted).

99 We define actions broadly to capture language and inaction as well.


101 Hager, supra note 98 at 948.
given consent to come upon the premises.’ And its range of application, as has just been said, is wide enough to capture both very thick and very thin forms of engagements between duty- and right-holders. By discussing this wide spectrum of thick-to-thin interactions, we also seek to emphasize that the principle of fault cuts across different degrees of contextualization – that is, courts resort to fault analysis in cases where the relationship between right- and duty-holder is personal as well as in cases involving highly impersonal relationship. And as will become clear, this wide spectrum also refutes the suspicion that our insistence on fault considerations is limited to cases of licence. We show that the doctrinal area of licence is but one surface manifestation of the basic structure of the property interaction between duty- and right-holder cast, in part, in terms of reasonableness.

1 Fault in trespass: The doctrinal treatment of interactions between intimates

Begin with a case of thick, pre-existing relationship between the duty- and right-holder. Face-to-face engagements seem typically to leave little indeterminacy as to the precise intentions of the right-holder with respect to permission or denial of authorization to enter upon the land. This is especially true for parties familiar with one another, who share a history of special relationship in and around their properties (say, neighbours). But even in this case of rich common background, duty-holders are entitled to act on the basis of inferences that it would be reasonable to draw with respect to the true intentions of right-holders. Whether these inferences actually reflect the true intentions of right-holders is, therefore, immaterial for the purpose of meeting the duty against committing trespass.

This is best illustrated in one extreme case where a fantastic gap seems to lie between the actual and reasonably inferred intentions of a right-holder. There, the defendant took the reins of a horse owned by the plaintiff, leaving the latter’s clerk without means to ride the horse back to the owner’s premises. The defendant ignored subsequent requests made by the plaintiff to have his reins back. At first blush, the facts as just told support the imposition of liability for trespass to chattels or conversion – after all, the taking and withholding of the reins seem to disregard the authority of the owner to fix the standing of others in relation to the reins.

\footnote{102 Verdoljak v Mosinee Paper Corp, 192 Wis (2d) 235 at 243 (App Ct 1995) [Verdoljak]; see also Keeton et al, supra note 11 at 113: ‘The defendant is entitled to rely upon what any reasonable man would understand from the plaintiff’s conduct.’}

\footnote{103 In other words, fault analysis applies even when the right/duty relationship that the tort of trespass structures is depersonalized (as when the right- and duty-holder are mere strangers).}

\footnote{104 Wartman v Swindell, 25 A 356 (NJ 1892).}

\footnote{105 Ibid at 357.}

\footnote{106 To be sure, the tort of conversion is (arguably) qualitatively different from the tort of trespass to chattels, insofar as the former, but not the latter, is about usurping the position of the owner. However, for the purpose of the present argument, it is less important to insist on the differences between the two torts or, for that matter, between any of them and the tort of trespass to land. At any rate, it is telling that, although the case may plausibly be one of conversion, the court draws on the tort of trespass to land in the course of analysing the issue at stake, which is ‘wrongful invasion of another’s property’; ibid.}
However, it turned out that the alleged tortious conduct of the defendant was part of a ‘joke.’\textsuperscript{107} In particular, the court suspected that the defendant and plaintiff were ‘perpetrating practical jokes upon each other.’\textsuperscript{108} If this were true, the defendant might escape liability for trespass or conversion, since dispossessing the plaintiff of the reins was not in violation of the duty against committing trespass. The reason, as the court notes, is that ‘defendant had a right to believe that the plaintiff would accept this act [of dispossessing] as a joke.’\textsuperscript{109} Which is to say that, since there is no straightforward access to the actual intentions of the owner/plaintiff, the crucial question for the juries\textsuperscript{110} seems to be what could be reasonably inferred – by reasonable persons occupying the position of the defendant – from the conduct of the owner.

2 Fault in trespass: The doctrinal treatment of interactions between strangers

Recourse to reasonableness as the standard by which to assess whether the duty-holder has met the requirement to draw reasonable inferences is equally apparent where the duty- and right-holder are mere strangers. Indeed, at the other end of the spectrum of thick to thin engagements between duty- and right-holder lies the case of strangers whose interaction is guided through the requirement to draw reasonable inferences concerning authorization to enter land of another. Consider, in this vein, the role of local custom in determining whether a door-to-door salesperson committed an unauthorized entry upon the land of another by knocking on the latter’s door.\textsuperscript{111} This is clearly a case where prior, verbal communication between the entrant and the owner of the relevant property is unlikely to exist. Resorting to the proxy service of the property in question, salespersons must rely on the circumstances surrounding this property in order \textit{reasonably} to infer the true intentions of the owner with respect to the permissibility of their entrance. The test, once again, is whether the circumstances are ‘such as would warrant a reasonable person … to believe that the owner had given consent to come upon the premises.’\textsuperscript{112} Many jurisdictions in the United States have found that there exists a long-standing, local custom according to which private owners allow door-to-door salespersons to enter their premises and knock on their doors.\textsuperscript{113}

This finding, it is crucial to note, is not a mere legal construction based upon public policy, including a policy informed by the notion of property as a system of coordination-

\textsuperscript{107} Ibid.
\textsuperscript{108} Ibid.
\textsuperscript{109} Ibid.
\textsuperscript{110} Ibid.
\textsuperscript{111} We discuss the case of the salesperson because, unlike religious solicitation, the law in some common law jurisdictions recognizes no special reason to grant this person privilege to enter apart from the owner’s (customarily implied) authorization to do so.
\textsuperscript{112} Verdoljak, supra note 102 at 243.
\textsuperscript{113} See e.g. \textit{Prior v White}, 180 So 347 (Fla 1938); \textit{Jewel Tea Co v City of Geneva}, 291 NW 664 (Neb 1940); \textit{City of Osceola v Blair}, 2 NW (2d) 83 (Iowa 1942); \textit{Commonwealth v Ousley}, 393 SW (3d) 15 (Ky 2013). The custom at stake dates back to at least late nineteenth century. See Thomas M Cooley, \textit{A Treatise on the Law of Torts, or, Wrongs that Arise Independent of Contract} (Chicago: Callaghan, 1880) at 303 [Cooley].
through-separation. In particular, it is not fixed by considerations unrelated to the effort of discerning the judgment of the particular owner concerning permission to enter his land. Rather, it is a purely factual one; the point is to determine, based on the lived experience of the community, whether the owner in this case has authorized entry of this kind by implication. This approach, it is important to note, is followed in contexts other than that of salespersons and beyond the jurisdictional boundaries of the United States.\textsuperscript{114}

That property-related custom is no more than an imperfect proxy for the point of view of the actual owner is straightforwardly apparent. Indeed, courts routinely emphasize that local custom takes the back seat whenever the owner’s determination concerning permission is reasonably discernible from the facts of the case.\textsuperscript{115} For instance, posting a ‘No Soliciting’ placard is considered in most US jurisdictions to express the owner’s judgment that door-to-door salespersons lack the necessary authorization to enter.\textsuperscript{116} It has the immediate effect of rendering recourse to local custom redundant. More generally, it affects the kind of inferences that a reasonable person should have drawn with respect to the existence or inexistence of authorization to enter onto the land in question. Another way to make this point is to say that the owner who fails to make his judgment concerning solicitation on his premises reasonably clear acts at his own peril.\textsuperscript{117}

A similar doctrinal pattern can be traced in connection with the customary rule pertaining to non-owners’ entitlement to hunt and fish on the ‘large expanses of unenclosed and uncultivated land’ of another.\textsuperscript{118} The common law tort in some jurisdictions employs this rule in concert with posting laws in a way reminiscent of the preceding discussion concerning the proxy service of certain customary norms of property.\textsuperscript{119} Thus, in the absence of posting to the contrary, the customary rule sets out a presumption that authorization (to certain recreational activities) has been granted by the owner. A resort to posting, by contrast, destroys this presumption, signalling that authorization to enter has been denied.

\begin{itemize}
\item \textsuperscript{114}See e.g. Maritime Coal Railway & Coal Co v Herdman, [1919] SCR 127, 140–1.
\item \textsuperscript{115}See McKee v Gratz, 260 US 127 at 136 (1922) [McKee]; Kent R Middleton, ‘Journalists, Trespass, and Officials: Closing the Door on Florida Publishing Co. v. Fletcher’ (1989) 16 Pepp L Rev 259 at 269, observing that ‘[o]nly if property owners fenced or posted their land could they exclude trespassers who otherwise had a privilege in custom and usage to enter.’
\item \textsuperscript{116}Watchtower Bible & Tract Soc’y of NY, Inc v Vill of Stratton, 536 US 150 (2002): If the resident files a ‘No Solicitation Registration Form’ with the mayor, and also posts a ‘No Solicitation’ sign on his property, no uninvited canvassers may enter his property, unless they are specifically authorized to do so in the ‘No Solicitation Registration Form’ itself; see also Commonwealth v Ousley, 393 SW (3d) 15 (Ky 2013).
\item \textsuperscript{117}The peril is not unlimited, of course, as it pertains to the practice of door-to-door solicitation only.
\item \textsuperscript{118}McKee, supra note 115 (Holmes J). Commenting on the McKee case, Justice Thurgood Marshall notes that ‘[i]f a person has not marked the boundaries of his fields or woods in a way that informs passersby that they are not welcome, he cannot object if members of the public enter onto the property’; Oliver v United States, 466 US 170 (1984) (Marshall J, dissenting). While dissenting, this observation is part of his decision agreeing with the majority.
\item \textsuperscript{119}Robert C Ellickson, ‘Property in Land’ (1993) 102 Yale Law Journal 1315 at 1383.
\end{itemize}
3 Fault in trespass: The doctrinal treatment of ‘middle-range’ interactions

So far we have focused on two opposite extremes along the spectrum of interaction between duty- and right-holders. However, the resort to reasonableness, as we have asserted above, spans the full spectrum of interactions between duty- and right-holders. To demonstrate this, consider a case which lies in between the two poles, so that neither verbal communication nor local custom could serve as a baseline against which to assess the conduct of the persons concerned in connection with the trespassory duty. In one typical case of this genre, *Hendle v Stevens*,¹²⁰ a group of minors found currency on property owned by the Stevenses. One of the questions raised by this case was whether the minors were trespassers, in which case they might not be entitled to possess the lost property.¹²¹ The court did not search for a generally accepted local custom or for explicit understanding between the minors and the Stevenses with respect to use of and access to the latter’s land. In their stead, the court considered what can be inferred from the action and inaction of the Stevenses with respect to the existence of authorization to access their land.

Thus, the court began with a description of the land – a wooded area – being ‘in an abandoned state, wooded, overrun with weeds, and with piles of junk on the property.’¹²² Furthermore, the court found that it is ‘unlikely … that the property owners never noticed children traversing their property or playing on it [including by riding] all-terrain vehicles throughout the wooded area.’¹²³ Against this backdrop, the court noted, using language that carried clear overtones of fault, that the Stevenses ‘knew, or should have known’¹²⁴ that others were occasionally entering their land and yet they did not take any measures to prevent this habit, including by posting ‘no trespassing,’ or ‘keep out,’ signs or anything of that nature.¹²⁵ The court thus concluded that, based on these factual findings, the Stevenses acquiesced in the minors’ repeated entries, so that these entries remain just that, falling short of being acts of trespass.¹²⁶

In discussing the preceding three types of interaction (strangers, intimates, and a category of middle-range) we have sought to illustrate different doctrinal means through which courts approach the first requirement of the trespassory duty; that is, the demand to make reasonable inferences concerning the judgments made by right-holders in respect of permission to use and access their premises. These doctrinal means express different interpretive ways to find the

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¹²⁰ 586 NE (2d) 826 (Ill App 1992) [*Hendle*]. To be sure, neither the fact situation nor the decision in the case about to be discussed is exceptional or otherwise unsupported by courts’ resorting to the doctrine of implied consent to and acquiesce in entering land of another (or using another’s property). See e.g. CPR v The King, [1931] 2 DLR 386 (PC); *Habib Bank Ltd v Habib Bank AG Zurich*, [1981] 2 All ER 650, CA.
¹²¹ Ultimately, the *Hendle* court found that trespassers may nonetheless have rights of possession of lost property; *Hendle*, ibid at 832.
¹²² Ibid (internal quotation marks omitted).
¹²³ Ibid at 833.
¹²⁴ Ibid.
¹²⁵ Ibid at 828.
¹²⁶ Ibid at 833.
‘willingness in fact’ on the part of the right-holder to allow or deny the ‘particular conduct’ of the duty-holder who seeks to avoid liability for trespass to land. They hold in common, however, that the notion of reasonableness is a regulative principle for assessing the conduct of both duty-holders and right-holders.

In addition to the proxy service of custom, courts often employ the scope-of-invitation doctrine, and a number of related rules, in order to decide whether the requirement to draw reasonable inferences concerning right-holders’ permission to make use of their resources has been successfully met. As we shall argue, considerations of reasonableness and, indeed, fault loom large.

Begin with the old case of Townsend v Wathen.127 There, the defendant/owner left a stock of meat on his premises, as a result of which the plaintiff’s dogs entered the premises and were trapped to death by baits set in advance by the defendant. The question of whether the entering dogs implicated their owner/plaintiff in trespass was essential for determining whether the defendant, qua occupier of land, was liable in negligence (or, more accurately, trespass on the case) for the dogs’ loss.128 On this point it seems, as Francis Burdick once observed, that the ‘wish or thought’ of the defendant was that of keeping out uninvited visitors, especially those accompanied by dogs.129 Recall, however, that the trespassory duty requires drawing reasonable inferences only; it does not impose strict liability for failing to decipher the owner’s ‘wish or thought’ as such. Indeed, it is not unreasonable for someone standing outside the premises and observing the piles of meat thereon to infer, that ‘dogs may be impliedly invited upon lands by exposing meat which is apparently abandoned.’130 As this case exemplifies, considerations of reasonableness figure in determining the prima facie case of the trespass tort, and they become especially vivid when duty-holders are presented with murkier signals as to whether they (or their pets) are allowed in.131 These considerations are important, not merely at the bottom line – viz, whose liability it is, the plaintiff’s or defendant’s – but also with respect to the sort of considerations that are pertinent to the resolution of the dispute; that is, considerations that invoke the question of fault.

The same point is further reinforced by reference to a set of more recent cases involving the scope of invitation to the right-holder’s premises that can be reasonably inferred by duty-holders. Here, too, the fault principle underlying the tort of trespass resurfaces. Thus, for example, an open bookstore provides a clear invitation to the public, especially to potential buyers of books. Once they are in the store, the invitation extends to the ‘area of invitation,’132

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127 9 East 277 (1808).
128 The traditional common law had sharply distinguished between trespasser, invitee, and licensee creating a different regime of liability to each one of them. The duty of the land occupier towards an individual entering his premises was contingent upon his status.
130 Cooley, supra note 113 at 303.
131 C.f. Britt, supra note 71 at 275.
132 Restatement, supra note 10 § 332. See also Dobbs, supra note 54 at 602: ‘scope of invitation.’
and no more.\textsuperscript{133} On many occasions, patrons grasp the designated area quite naturally, which means that spaces and objects that lie beyond this area are private and thus protected by the tort of trespass. However, in case the signals conveyed by an object (or space) are equivocal, the question of reasonableness and, indeed, fault is crucial (both for the sake of liability for trespass and, by implication, for the sake of determining whether the owner owes a duty of care to persons injured while on the former’s premises). A patron remains an invitee, as opposed to a trespasser, insofar as she is (intentionally or unintentionally) led by the owner’s representations to the ‘reasonable belief’\textsuperscript{134} that entering a particular space (say, a stock room) or using an object (say, a water cooler for employees only located at the far end of the store) is allowed.

* * *

The argument so far has achieved the result of uncovering a principle of fault in the law of trespass to land. We have developed this argument in three, increasingly concrete, levels of analysis: conceptual, normative, and doctrinal analysis of a duty against committing an unauthorized entry on another’s land. On the basis of these analyses, we have shown that considerations of reasonableness are inherent in, rather than contingent upon, a tort that imposes liability for unauthorized entries on the land of another. In the next couple of stages of the argument, we shall seek to explain the implications of this conclusion.

IV \textit{Addressing three potential objections}

A. WHAT’S THE DIFFERENCE BETWEEN FAULT AND STRICT LIABILITY ANALYSIS OF THE TRESPASS TORT ANYWAY?

Our account shows that the dominant characterization of the tort of trespass neglects the notion that this tort embodies a principle of fault. This principle precedes the imposition of strict tort liability for failing to meet the accommodation requirement: non-owners must first infer whether entry to another’s land has been denied before they can proceed with the demand to accommodate this judgment of denial onto their course of action. Furthermore, as we have established above, this conclusion has ample conceptual, normative, and doctrinal support. It is therefore natural to wonder how the conventional wisdom has survived for so long, turning the impression of trespass as strict liability into a basic theme of property theory and practice?

Certainly, there are any number of explanations that may be relevant. However, we shall limit our attention to one of them, since it appears to be the most fundamental. This explanation

\textsuperscript{133} The Calgarth, supra note 64.

\textsuperscript{134} Restatement, supra note 10 § 332 cmt l.
begins with the observation that, in some cases – and it is an open question whether ‘some’ means many or few cases – the difference between fault and strict liability for violating the tort duty’s first requirement of drawing reasonable inferences is fairly trivial. This thought is not distinctive of trespass to land, to be sure. Leading torts scholars take this position to be generally true with respect to some areas within tort law in which the distinction between fault and strict liability is explored.\(^{135}\)

Indeed, when a property-right-holder says ‘no’ or shuts her gate in response to someone’s request to cross through her land, it seems that the choice between assigning fault and strict liability is insignificant. A duty-holder can make the (reasonably) correct inference from this response, at no cost or effort whatsoever. Indeed, it is safe to assert that under these circumstances resort to a standard of reasonableness, rather than strict liability, makes virtually no difference in terms of the effort and time invested by non-owners to meet the trespassory duty. More generally, as long as the costs of drawing reasonable inferences is sufficiently low, the difference between the person who acts at her own peril, on the one hand, and the reasonable person, on the other, is blurred to the point of triviality. And this is precisely why the persistence of the conventional view is possible despite its mistaken characterization of the tort of trespass to land. But note that this state of affairs only proves that strict tort liability is not a necessary condition for the tort of trespass to succeed in setting out a fairly simple and effective scheme of property protection.

Nevertheless, even given that some cases involving trespass to land (arguably) render the difference between fault and strict liability trivial, the inadequate characterization of trespass to land in terms of strict tort liability is not, after all, harmless. In fact, the costs which are associated with ignoring the importance of the fault principle in the tort of trespass are significant in both theory and practice. We shall discuss some of these costs in PART V below. For the meantime, we shall focus on the theoretical difficulty of disregarding the existence of the fault principle in the trespass tort.

We argue that the convergence between the application of a principle of fault and the application of one of strict liability to assessing liability for trespass depends on features that lie outside the duty against trespassing on another’s land.\(^{136}\) For this reason, taking this convergence seriously leads us astray, insofar as it confuses effects for causes. Indeed, this convergence is one possible effect of a world whereby certain circumstances exist – say, communicating and processing a clear message such as ‘keep out’ or ‘welcome’ are typically effortless; customary rules are applied effectively and consistently as proxies of owners’ judgments concerning use of and access to their respective resources as mentioned above; and other doctrines, such as the scope-of-invitation doctrine, which arise in and around cases of licence and permission more generally, are satisfactorily known and employed. But once these and other circumstances – the


\(^{136}\) For an early elaboration of these features, see Avihay Dorfman & Assaf Jacob, ‘Copyright as Tort’ (2011) 12 Theor Inq L 59 at 72–8.
causes of the blurred distinction – are set aside, it becomes crystal clear that the difference between fault and strict liability could carry important implications and that the insistence on strict liability obscures them from scrutiny.\footnote{137}

It is important to note that we do not argue that insisting on the place of fault within the tort of trespass may pay off in deciding exceptional cases only, but far less so in connection with ordinary cases. Rather, our argument is that the neglect of the fault principle is consequential even in cases where the choice between the application of strict and fault tort liability appears to make no difference with respect to the outcome. Indeed, the seeming overlap between the two liability regimes occurs not because fault and strict liability are \textit{de facto} equivalent or otherwise co-extensive. Rather, it arises \textit{despite} their conflicting philosophies. Indeed, the overlap in question is the result of certain circumstances mentioned above that fix the answer to the question of who is responsible for the accident of drawing a mistaken inference concerning owner authorization. At any rate, it is fault analysis of owner authorization, therefore, which lies at the centre of the first of the two requirements of the trespassory duty. We may now say, in a rather informal manner, that fault analysis goes all the way down to the theoretical foundations of the tort and all the way up to its doctrinal elaboration. The next stage of the argument (\textsc{part v}) further shows the normative and practical significance of insisting on the fault principle in the trespass tort.

\textbf{B. HOW BURDENSOME CAN THE TRESPASSORY DUTY BE? ON THE SCOPE OF OWNER’S AUTHORITY}

In rejecting the keep-off picture of property, we have advanced an account that takes more seriously the relational character of the property relationship. In particular, we have argued that the content of the trespassory duty is partially determined by the owner’s authority to fix the normative situation of non-owners. Much of the discussion has focused on whether or not an authorization to enter the owner’s land has been granted. Can the same analysis apply to cases where the owner exercises his authority in ways that create greater duties for others not to interfere? The worry is that our proposed account would allow owners to impose burdensome obligations on non-owners in violation of their equal freedom and in disregard of the social utility of rendering land more available for use by non-owners.

This worry is misplaced. To begin with, the authority of owners is not limitless. The \textit{numerus clausus} principle defines this limit (along, of course, with extra-property limitations such as those picked out by the doctrine of abuse of rights and other tort and criminal legal norms). On this principle, the authority of an owner is not self-authorizing in the sense that he or she lacks the normative power to create novel forms of property rights\footnote{138} – say, a right that non-

\footnote{137} Elsewhere, we have elaborated some of these implications, focusing on property’s neighbouring field of copyright law; ibid at 80–96.
\footnote{138} For a detailed analysis of this principle along these lines, see Avihay Dorfman, ‘Property and Collective Undertaking: The Principle of \textit{Numerus Clausus}’ (2011) 61 UTLJ 467 at 470–6.
owners refrain from looking onto his or her land or, in another legal domain, a copyright that extends its in rem protection beyond the terms defined by the relevant statute.\textsuperscript{139}

The resort to the principle of \textit{numerus clausus}, it might be protested, does not dissolve the worry entirely. This is because owners could still manipulate the existing forms of property right in ways that prove too onerous. However, this worry rests on a mistake. A move from a duty to keep off to a duty not to make unauthorized use of another’s property need not result in a demand to exercise more care or to invest more time and energy in attempting to avoid tort liability for trespass. Such a move does not rule out the possibility of conforming with the latter duty by keeping off the property of others. After all, we do not argue that every time Kate is out and about she thereby incurs a duty to seek information about the intentions (or the identities) of the owners whose properties lie next to the sidewalk on which she walks. To this extent, proponents of the keep-off picture create a straw man when they say that the trespassory duty does not require duty-holders to know the actual identity – face and name – of property owners as they walk next to their property.\textsuperscript{140} Nothing we have argued in these pages requires any of this. And as far as we know, \textit{no one} holding a relational approach to the property relationship has ever said, implicitly or explicitly, that discharging the trespassory duty turns on knowing the identity of the individual person to whom the (relational) duty is owed.

\section*{C. FROM TRESPASS TO LAND TO TRESPASS AGAINST THE PERSON?}

Does our account apply to trespass against the person so that considerations of fault would inform the content of the duties against committing battery, assault, and false imprisonment? The ultimate worry here is that our account will resurrect (or, rather, reinforce) the infamous rape jurisprudence, according to which victims of rape are deemed partly or even fully responsible if they happen to convey confusing signals concerning the permissibility of sexual relations.\textsuperscript{141} Once again, this worry is misplaced.

To begin with, despite their structural similarities, the two trespassory torts (to land and to person) are qualitatively different. The difference is normative: The right to private property is not on a moral par with the rights protected by trespass against the person; namely, bodily integrity and dignity.\textsuperscript{142} Hence, a theory of trespass to land cannot be \textit{automatically} applied to the normatively different context of trespass against the person. Thus, nothing we have said so

\begin{itemize}
\item \textsuperscript{139}‘The former example draws, very loosely, on the nuisance case of \textit{Victoria Park Racing & Recreation Grounds Co Ltd v Taylor}, [1937] HCA 45.
\item \textsuperscript{140}See the car park example discussed in Penner, \textit{Idea}, supra note 32 at 75; see also JE Penner, ‘The Transmissibility of Rights: A Final Nail in the Coffin for the Hohfeldian Analysis of Property Rights?’ [unpublished, June 2014, on file with authors] at 27, noting that ‘I can interfere with someone’s possession of an airliner without realising the fusilage is owned by British Airways whilst the engines are owned by Rolls-Royce.’
\item \textsuperscript{141}For more on the ‘no means yes’ approach, see Susan Ostrich, ‘Rape’ (1986) 95 Yale LJ 1087 at 1127–9.
\end{itemize}
far can be extended as a matter of course to make sense of tort law’s protection of dignity and bodily integrity.

Furthermore, even if extending our account to trespass against the person happens to be desirable, it does not follow that the incorporation of fault considerations is the source of the notorious approach taken by courts in favour of the defendants.\textsuperscript{143} If anything, this approach is the upshot of taking a sexist stance toward the question of what counts as a reasonably clear authorization to engage in sexual or other intimate interaction with another person. This would be the case, to give a fairly easy example, were courts to decide that a certain form of dressing can be ‘reasonably’ understood as giving an authorization to touch this person’s body.\textsuperscript{144}

\section*{V \quad Some practical and theoretical implications: Owner responsibility redux}

The ambition of the argument going forward is to flesh out one important implication of our argument: the responsibility that property-right-holders assume toward others by virtue of occupying the position of property-right-holders. Contrary to the conventional wisdom, a property-right-holder assumes some responsibility for guiding others in fulfilling their duties not to trespass on her property. It is important to note, however, that our ambition is to identify, rather than pursue or fully develop, this implication.\textsuperscript{145}

The existence of a fault principle in the tort of trespass to land that we have identified in these pages suggests that social responsibility is not foreign to the idea of private ownership, but rather it is inherent to it. We shall seek to explain this notion against the backdrop of current trends in the theory and the practice of property. Whereas recent progressive property theorists appeal to general notions of justice, fairness, community, and well-being in order to generate obligations and responsibilities to be applied to the special case of private property, our account makes possible the elucidation of a conception of social responsibility that is \textit{inherent} in property at common law. We shall further connect this conception with the modern trend in common law tort toward increasing the responsibility of property-right-holders for the safety of non-owners.

Any plausible account of private ownership must account for the unusual authority possessed by owners; that is, the power not just to control an object but more fundamentally to determine the standing of other persons in relation to it. Thus, ownership is no mere negative freedom from the interference of others but rather (to repeat) a form of status authority over these

\textsuperscript{143} Arguably, there may be good reasons to incorporate a principle of fault to battery cases in contexts other than sexual interactions; see, e.g., \textit{O’Brien v Cunard SS. Co}, 28 NE 266 (1891).

\textsuperscript{144} Moreover, even in a hypothetical case in which the established social convention (shared by both men and women) is such that a certain style of dressing implies permission to touch a person who dresses in this way, it is not clear that the law ought to authorize such a convention by exempting defendants from liability for battery. As noted in note 73, a custom or social convention is used in the context of trespass to land as a mere proxy – i.e., a cognitive short-hand – to the point of view of the property owner. Its normativity necessarily depends on its consistency with the demands of legitimacy, fairness, and so on. The same point holds in the case of trespass against the person.

\textsuperscript{145} We shall leave other important implications, such as the one pertaining to the legal protection of copyright infringements, to other occasions.
others. At the same time, however, the existence of such power or authority gives rise to the question of its limits, especially the existence and contours of owners’ social responsibility; that is, the burdens and duties that private owners *qua* owners incur for the purpose of accommodating, in some measure, others’ interests (whatever they are).¹⁴⁶ Whereas the question concerning the state’s responsibility toward these others has been explored quite extensively in political philosophy, the question of owner responsibility has received far less attention.

It is important to note that we shall focus on the social responsibility of owners *qua* owners. We shall not invoke a stewardship conception of property, according to which private ownership involves the delegation of fundamentally public powers.¹⁴⁷ Nor do we focus on owners’ social responsibility *qua* individual persons (as exemplified in occupiers’ duty of common humanity), citizens of an egalitarian state, or members of a close-knit community who also happen to hold property rights. Since it addresses owners *qua* owners only, the question of owner responsibility need not turn on whether owners (or judges or law makers) have compelling reasons to subscribe to the dictates of a libertarian, egalitarian, or communitarian philosophy. Indeed, our argument is that the notion of owner responsibility follows from the idea of private ownership. Anyone who accepts the idea of ownership as giving rise to the authority to determine the standing of others in relation to an object *must* also accept, on our account, the responsibility to make such determinations reasonably accessible to others.

This way of deriving a principle of social responsibility from the idea of private ownership itself must be appreciated against the backdrop of some leading accounts of social responsibility in and around property. Indeed, a recurring theme in the modern theory of property is the failure to pin down the intuitive notion that being a private owner entails some measure of social responsibility *by virtue of* the idea of ownership itself.

To begin with, almost every one, the die-hard libertarian included, would agree that owners cannot exercise their rights in ways that violate core obligations that persons owe one another *qua* human beings. It is the fact of being humans, rather than property owners, that generate such obligations. For instance, an owner is not allowed to hit another with her baseball bat merely because she owns the bat. Moreover, some jurisdictions place constraints on the scope of ownership authority based on the notion that the exercise of legal rights – of ownership or otherwise – must be tempered in ways that prevent abuse of such rights¹⁴⁸ or render the law more

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¹⁴⁶ A commitment to social responsibility is an important but not the only consideration supporting some measure of limitation on owner’s authority. For instance, the principle of *numerus clausus* introduces another kind of restriction on this authority.

¹⁴⁷ There are many different variations on the stewardship theme, ranging from economic analysis of law to legal realism to progressive legal theory. These variations differ from one another in many ways but they are of a piece insofar as they dismiss, on principled and pragmatic grounds, the public/private distinction. By contrast, our argument in the main text does not presuppose this dismissive approach – it argues that some measure of social responsibility is already embedded in the idea of *private* ownership.

conscionable. But this form of legal intervention purports to address owners as right-holders or citizens, not necessarily as property-right-holders.149

Furthermore, liberal pluralist property scholars justify the imposition of constraints on the authority of private owners by reference to the plurality of values (other than negative liberty) that certain property institutions and resources may plausibly embody.150 Once again, these constraints are grounded not so much in the fact of ownership, tout court. Rather, the true basis is located elsewhere; that is, in the fact of participation in a special social practice (such as a marital relationship) whose purpose plausibly calls for greater interference with freedom of contract and negative liberty, more generally. For instance, the introduction of egalitarian norms to the resolution of property disputes between a divorcing couple is grounded in the participation of the (ex-)couple in the institution of marriage, properly conceived.151 Thus, it is the fact of membership in a marital union, rather than that of being an owner or co-owner of property, that warrants the legal intervention in the proprietary aspects of the union’s dissolution.

Finally, the most ambitious attempt to derive substantive norms of social responsibility in the context of private ownership begins from an ontological view about the necessary place of community in sustaining the human flourishing of the individual. Very briefly, the basic thought is that human flourishing depends on acquiring certain capabilities (such as freedom and critical judgment152) and that these capabilities can be acquired only insofar as we acknowledge our ‘inherent embeddedness in and dependence upon communities.’153 While not necessarily a capability on its own, an adequate access to material resources is certainly a prerequisite to develop the capabilities necessary for human flourishing. Hence, this account seeks to establish a moral obligation to support the opportunity of all members of society to acquire material resources. In part, this obligation demands that the well-off give up on their right to exclusive

149 It has been suggested that owners are office holders; Essert, supra note 96. To this extent, it could be the case that owners assume certain responsibilities by virtue of holding an office just as most other office holders do. However, the normative implications of this conceptual argument have not been fully developed yet. At any rate, there are reasons to suspect the supposed conceptual relationship between the idea of office and that of ownership and, especially, private ownership; see Avihay Dorfman, ‘On Trust and Transubstantiation: Mitigating the Excesses of Private Ownership’ in Andrew S Gold & Paul B Miller, eds, The Philosophical Foundations of Fiduciary Law (Oxford: Oxford University Press 2014) 339 at 354.

150 Hanoch Dagan, ‘Pluralism and Perfectionism in Private Law’ (2012) 112 Colum L Rev 1409 at 1416, noting the plurality of property institutions that cannot be properly understood by exclusive reference to the value of negative liberty. On the notion that some resources can ground an owner’s responsibility toward society, see Lametti, supra note 70 at 353.

151 Sharing in the property of one another may certainly be an important aspect of the marriage institution, but it is not its purpose. People who marry each other for the sake of managing their total assets better do not serve as a successful exemplar of the institution of marriage as we know it. They merely take advantage of the legal institution of marriage.


153 Ibid at 143.
access to their material resources. 154 Be that as it may, the only point worth emphasizing here is that this communitarian ideal of human flourishing does not ground the social responsibility of owners in the fact of being owners. 155 Rather, it engages well-off owners by demanding their sacrifice on the basis of their membership in a community whose existence is constitutive of each and every member’s human flourishing. 156

Why should we care about locating the source of owner responsibility in ownership itself or elsewhere? Our answer consists of two, increasingly concrete, stages. First, the notion of owner responsibility that we have developed helps in refuting the libertarian view. According to this view, the idea of social responsibility of private owners is an oxymoron because the point of private ownership is to allow owners to shun completely the demands of society, or so we are told. 157 The liberal and communitarian approaches sketched above do not show why the libertarian view is wrong, including, in particular, by challenging the libertarian’s approach on its own terms. They merely show that private ownership may supervene on pre-existing social practices and other thick forms of community, so that these practices and communities may generate demands that private owners that participate in them behave in a socially responsible manner; that is, to take into their considerations the interest of others, rather than to pursue their narrow self-interests only. Certainly, not all the interactions between property and duty-holders occur in the face of special social practices or thick communities. 158 The libertarian can, therefore, defend her resistance to the notion of owner’s responsibility without being forced to deny the legal limits imposed on owners qua members of a thick community (such as a marital union). By contrast, our approach allows one to see that private owners must take into consideration the interests of others even in the most isolated case; that is, irrespective of the social practices surrounding the interactions between property- and duty-holders. Moreover, owners assume this responsibility, regardless of their economic status; it is merely their status as owners rather than their economic well- or ill-being that triggers the commitment to be attentive, in some measure, to non-owners. Thus, many progressive and liberal approaches share the

154 Alexander, ‘Social,’ supra note 26 at 805; Alexander & Peñalver, supra note 152 at 143, defending a ‘standard of obligation [that] will frequently and justifiably demand disproportionate sacrifice from those who have more … for the (disproportionate) benefit of those who have less,’ Alexander makes a similar claim in a recent essay; see Gregory S Alexander, ‘Ownership and Obligations: The Human Flourishing Theory of Property’ (2013) 43 Hong Kong LJ 451 <http://ssrn.com/abstract=2348202>, especially his remarks in ibid at 7 (ssrn version).

155 At best, only rich owners or those who hold property in strategic places (such as private beaches) may be called on to sacrifice part of their wealth to accommodate the interests of others in leading the good life.

156 Alexander & Peñalver, supra note 152 at 148, noting that ‘the state should be empowered and may even be obligated to step in to compel the wealthy to share their surplus with the poor so that the latter can develop the necessary capabilities.’

157 This version of property libertarianism is best exemplified by Karl Marx’s critical observation, according to which private property is ‘the right to enjoy and dispose of one’s possessions as one wills, without regard for other men and independently of society’; Karl Marx, ‘On the Jewish Question’ in Lawrence H Simon, ed, Karl Marx: Selected Writings (Indianapolis: Hackett, 1994) 1 at 16–7.

158 Dagan, Property Values, supra note 3 at 41, noting that ‘some parts of the property drama do indeed consist in governing the productive struggle between autonomous excluders.’
libertarian view that responsibility may be imposed on private owners *despite* their ownership; we shall argue, by contrast, that such imposition is sometimes appropriate *because* of their ownership.

Second, addressing the question of owner responsibility is no mere theoretical challenge. It manifests itself in several doctrinal areas, especially in tort and property law. We shall focus on one such area – premises liability law. But before we discuss this case, it will be apt to mention (very briefly) another area (on which we intend to elaborate in the future): the equitable doctrine of proprietary estoppel (and, possibly, other related forms of estoppel as well). In a typical case, a non-owner is being accused of trespassing on another’s land, but it turns out that she was acting under the reasonable impression of having the owner’s permission to use the land in question. Estopping the owners from asserting their rights under such circumstances reflects the view that owners may sometimes bear the onus of ‘speak[ing], protest[ing] or interfer[e]ing’. This view exerts pressure toward conflict with the conventional view that owners assume no responsibility to guide others in fulfilling their trespassory duty. The historical fact that the estoppel doctrine ‘belongs’ in equity only reinforces this alleged conflict (as if the historical emergence of the Anglo-American law out of common-land/equity divide is preordained). Indeed, both proponents and opponents of this piece of doctrine suppose that proprietary estoppel forms an exception to the logic of the common law of property (and perhaps even to the rule of law, more generally). Property, it is sometimes argued, makes no normative space for imposing such a burden on private owners. To this extent, proprietary estoppel (and, possibly, related forms of estoppel too) *intrudes* into the legal practice of property in the service of mitigating the excesses of owners’ uninhibited freedom. Although we do not have sufficient space to engage this view at the moment, the argument we have developed so far provides preliminary reasons to doubt this commonly held view. That is, the common law/equity historical divide should not mislead one into believing that proprietary estoppel cannot be understood as a doctrinal *outgrowth* of the traditional common law duty against committing trespass on another’s land. Indeed, the argument from fault that we have established in these pages makes it the case that owners are responsible for making sure that their intentions or policies (concerning the permissibility of using their lands) are publicly manifested and that this manifestation is made reasonably clear.

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159 One related set of doctrines we have in mind is estoppel in cases of misrepresentation made in contexts such as court proceedings and legal documents.

160 See *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982], 1 QB 133 at 147 HC [*Taylors Fashions*].

161 For a discussion of the doctrine’s critique and an attempt to defend the doctrine (on moral and consequential grounds) as a justifiable exception to the keep-off picture, see Irit Samet, ‘Proprietary Estoppel and Responsibility for Omissions’ MLR [unpublished, on file with the authors].

162 It is important to note that, by saying that owners may be responsible to guide others in fulfilling their trespassory duties, we do *not* argue that owners are *duty-bound* to so guide. Courts sometimes speak as though owners have such a duty (see *Moorgate Mercantile v Twitchings*, [1977] AC 890 at 903 (Lord Wilberforce); *Taylors Fashions*, supra note 160 at 147. But talk of duty obscures an important normative distinction between a duty and a burden (or onus). Insofar as ‘duty’ is best understood as a mandatory reason for action, the notion of owner responsibility under discussion does not provide such reason. This is best exemplified by the fact that a non-owner cannot ask the court...
Now, consider premises liability law. We shall limit the analysis to the US experience.\textsuperscript{163} There exists an ongoing debate regarding the question of whether or not landowners are privileged to discharge a lower standard of care toward entrants upon their lands. Normally, all people are under a tort duty to take care not to create unreasonable risk of physical harm to others; the duty applies to the risks that flow either from their activities or from external objects under their control. Should this obligation apply to them when acting as landowners?\textsuperscript{163}

Traditionally, the common law divided entrants upon land into three classes: invitee, licensee, and trespasser.\textsuperscript{164} The membership conditions of each class are crucial, since the tripartite division determines the existence and the scope of the protection that members of each class receive at negligence law. An invitee, who is typically a business visitor, is protected by a duty to take reasonable care that the premises are safe.\textsuperscript{165} A licensee, who is typically a social guest or anyone who holds the occupier’s permission to enter the land, is owed a limited duty of care: that of protecting the licensee against concealed danger known, or can reasonably be known, to the occupier.\textsuperscript{166} A trespasser is owed no protection (except for being protected from wilful or wanton injury).\textsuperscript{167}

Apart from historical and other contingent considerations,\textsuperscript{168} the prevailing approach among courts has been to adjudicate between two allegedly competing interests: The ‘human safety’ of entrants upon land, on the one hand, and the ‘unrestricted freedom’ of landowners, on the other.\textsuperscript{169} Courts are split on this question, especially with respect to whether the safety of invitee, licensee, or trespasser should outweigh the interest of owners in the exclusive use of their respective lands.\textsuperscript{170} A ‘near majority’ of state courts in the United States holds fast to the historical classification, asserting that respect for ownership demands that all visitors, except for

to grant an injunction, ordering the owner to make his permission decisions reasonably clear. A real duty (such as the trespassory duty and even the duty of due care) entitles its beneficiary the standing to demand such an injunction. In other words, the argument from owner responsibility that we develop in the main text is akin to contributory or comparative fault in the law of negligence, where a plaintiff does not owe a duty of care to others. It is just a burden to display reasonable care toward herself – that is, she is absolutely free to choose between bearing the burden and receiving a smaller (or no) amount of compensatory damages. An injurer, by contrast, must exercise due care toward others (even though, in many but not all cases, enjoining him from creating unreasonable risk is impractical).

\textsuperscript{163} A parallel development in English law (especially the \textit{Occupiers' Liability Acts} of 1957 and 1984) shares some rough similarities, but we shall not discuss these in the main text below.

\textsuperscript{164} See \textit{Robert Addie & Sons (Collieries), Ltd v Dumbreck}, [1929] AC 358 at 364 HL (Scot).

\textsuperscript{165} Ibid at 364–5.

\textsuperscript{166} Ibid.

\textsuperscript{167} Ibid.

\textsuperscript{168} See \textit{Rowland v Christian}, 443 P (2d) 561 at 567 (Cal 1968) [\textit{Rowland}].

\textsuperscript{169} \textit{O’Leary v Coenen}, 251 NW (2d) 746 at 749 (ND 1977) [\textit{O’Leary}]; see also \textit{Smith v Arbaugh’s Restaurant Inc}, 469 F (2d) 97 at 101 (App Ct DC 1972); \textit{Rowland}, ibid at 568. See Keeton et al, supra note 11 at 395.

business visitors, must take the premises as they find them.¹⁷¹ The ‘modern consensus’ trend, by contrast, is to eliminate the categories of invitees and licensees, but usually not that of trespassers.¹⁷³ In this respect, this trend prefers the safety of anyone lawfully entering the land over the so-called uninhibited freedom of owners.¹⁷⁴ We shall assess the case of invitees and licensees first, and then move to that of trespassers.

1 The abolition of the invitee/licensee distinction: The leveling-up of the standard of care owed by landowners toward lawful entrants

Courts in the modern camp justify this trend mainly by reference to the perceived need to break with the feudal overtones of privileging landownership over the personal safety of people.¹⁷⁵ Indeed, commentators have observed that this privilege expresses none other than an aristocratic embrace of the ‘sanctity of land ownership.’¹⁷⁶

The account of owner responsibility that we have developed in these pages provides a potentially powerful support for this modern trend. It is especially powerful because, unlike the prevailing arguments in support of the modern trend, it manages to defeat libertarian resistance to the modern trend on its own (libertarian) terms, as it were. Indeed, we are in a position to challenge the terms of the debate between traditional and modern views of the premises liability of landowners. The debate, as it now stands, takes the form of a competition between owners’ freedom and entrants’ safety. Our account shows that ownership, however sacrosanct, need not be inconsistent with the interest of entrants in their personal safety. Rather than being a right to an ‘unrestricted freedom’ of use, ownership includes some measure of social responsibility. In that, we are able to place a foot at the door, as it were, creating the opening for deeming an owner responsible for the safety of those who act in and around the physical boundaries of the land under this owner’s legal authority.

It will be apt to recall that this prescription does not, and cannot, depend upon whether landowners participate in special social practices or engage in thick forms of social relations; nor does it depend on the socio-economic status of the owners in question. This is crucial, as the modern trend in premises liability law makes no explicit or implicit reference to these contingencies. If anything, its successful development and expansion can be made more compelling insofar as the duty of care toward foreseeable entrants can be grounded in the idea of private ownership itself. Establishing these grounds could render obsolete the most powerful argument against the modern trend; namely, that an owner enjoys an ‘unrestricted freedom.’ In

¹⁷³ Mallet v Pickens, 522 SE (2d) 436 at 444–5 (W Va 1999). See also Comment, supra note 171 at 889–90.
¹⁷⁴ See Nelson v Freeland, 507 SE (2d) 882, 892 (NC 1998).
¹⁷⁵ See e.g. Kermarec v Compagnie Generale Transatlantique, 358 US 625 at 631 (1959) (admiralty law).
¹⁷⁶ Harper et al, supra note 171 at 132.
¹⁷⁷ O’Leary, supra note 169 at 749.
our view, the requirement to take others into account and make your intentions regarding the permissibility of their access to your land reasonably clear is inherent in being a landowner. Indeed, the very fact of ownership entails at least this much social responsibility.

2 The class of trespasser: The no-duty rule

Recall that there exists a wide consensus that landowners need not engage in taking precautions to insure the safety of trespassers. The stated rationale behind this rule is that trespassing is a form of wrongdoing: As such, it cannot generate a duty on the part an owner who is the victim actively to discharge reasonable care to protect the safety of the wrongdoer.\footnote{See e.g. \textit{Sweeny v Old Colony & Newport Railroad Co}, 92 Mass (10 Allen) 368 at 372 (1865).} The proposed account shows that this rationale is \textit{incompletely} wrong, since it obscures the important extent to which landowners, in fact, do assume responsibility for the safety of trespassers. The key to realizing this point begins with the proposed two-part definition of the duty against committing trespass: first, a requirement to make reasonable inferences concerning the existence (or inexistence) of authorization to use or access another’s land; and second, a requirement to accommodate this inference to one’s course of action. The common view that landowners assume no responsibility to take precautions to insure the safety of trespassers reflects the latter requirement. But, since the trespass duty gives rise to both requirements, it is a mistake to draw definite conclusions as to the responsibility of landowners toward trespassers from focusing on the second requirement only. Indeed, the first requirement, recall, deploys a standard of reasonableness to divide the risk of mistaking lack of authorization for authorization between owners and non-owners.

The immediate implication of thus understanding the requirement in question is that landowners do assume responsibility toward trespassers. Their responsibility \textit{qua} owners can take either one of the following forms, \textit{none} of which allows owners to remain indifferent to the safety of potential trespassers. First, landowners are expected to communicate with reasonable clarity their actual judgments concerning the absence of permission to enter upon their respective premises. Second, in case they deliberately or accidently fail to render their no-permission judgments reasonably clear, landowners owe visitors acting under the impression of making a lawful entrance a duty to exercise reasonable care toward these entrants’ safety. By this account, there is still no duty owed to \textit{trespassers}, but the class of trespassers encompasses a narrower group of people, as those who enter under a reasonable, if objectively mistaken, interpretation of the owner’s permission are no longer included in this class and are, therefore, to be considered licensees. According to the modern trend mentioned above, the duty would be just as demanding as the duty landowners owe \textit{all} other lawful visitors. By choosing between these two forms of taking precautions, landowners bear the potentially non-trivial burden of treating would-be trespassers as human beings whose physical vulnerability cannot fade away in the face of ownership rights.
We began this article with a critique of the keep off view of the trespass tort. We have emphasized the conceptual, normative, and doctrinal shortcomings of this view. Non-owners, we have argued, face a duty not to keep off property that is not theirs but rather to defer to the judgment of the owner concerning permission to enter. The argument we have advanced in this part of the article, concerning owner responsibility, allows us to see the mirror view of the preceding argument – that owners do not enjoy the liberty to disregard the personal safety of entrants, lawful or otherwise. Ownership commands (1) the deference of others and, at the same time, (2) at the very least, the attentiveness of owners to the safety of others (in ways discussed a moment ago). The tort of trespass to land expresses the former, while the tort of negligence (in respect of premises liability) the latter.

VI Conclusion

In his path-breaking study of the common law torts, Oliver Wendell Holmes sought to defend the special morality of tort law. In the course of doing so, Holmes argued that a sympathetic reconstruction of the case law reveals that the common law repudiates the notion of ‘absolute responsibility,’ by which he meant the maxim that a person unqualifiedly acts at his or her own peril. This is true, Holmes argued, not only in the case of negligence, but also with respect to strict tort liability: considerations of foreseeability and avoidability constrain the imposition of strict liability, including in the case of trespass to land. In that, Holmes sought to demonstrate the existence of a single ‘general principle of civil liability at common law,’ which is the ‘common ground at the bottom of all liability in tort.’ There still exists a lively debate between tort scholars as to whether the ability to foresee and avoid a potential risk to the person or property of another can reconcile negligence and strict tort liability with a defensible theory of responsibility for private wrongs.

Be that as it may, in these pages we have sought to develop a more ambitious claim; namely, that rules of negligence and strict liability can share a far more robust principle of responsibility than the one founded on foreseeability and avoidability. We have argued that, at least in respect to the tort of trespass to land, considerations of fault are not entirely excluded. This argument clearly contradicts the standard account of trespass to land, according to which the tort imposes the entire risk for making a mistake concerning the permissibility of using another’s land on the duty-holder. We have advanced conceptual, normative, and doctrinal arguments to show that the latter view runs afoul of the actual workings, and the immanent logic, of the tort in question. At the same time, however, we have insisted that considerations of fault do not supplant strict liability; instead, the former supplement the latter in a way that takes seriously the right of the owner, the duty of the non-owner, and the interest of society as a whole.

179 Holmes, supra note 9 at 89.
180 Ibid at 112.
181 For the precondition of avoidability, see ibid at 95. For reasonable foreseeability, see ibid at 96.
182 Ibid at 77.