The Normativity of the Private Ownership Form

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One of the most acute charges against private property observes that ownership generates a trespassory duty of exclusion that far exceeds the requirements of a commitment to values such as freedom and well-being, and accordingly there exists an analytical mismatch between the form of protecting ownership and the functions that this protection may serve. This article develops a novel account of ownership’s normativity, maintaining that, apart from the functions it may render to external values, the form of ownership is in itself a source of value, in virtue of the society it may engender between free and equal persons. Any gap between the form and the function of ownership need not plague private ownership, because the functions of ownership do not exhaust the explanation of its good. The formal core of private property is a distinctively social one, even in the most isolated case of trespass to property.

SETTING THE STAGE: THE CHARGE OF NORMATIVE ARBITRARINESS

The charge of normative arbitrariness that I shall explore at this stage of the argument arises from the gap between the right to private ownership and its grounds. It will prove helpful to introduce this charge by reference to the familiar analogy between the two kinds of trespass tort – to the person and to the property of another. As it is often observed, the duties against committing trespass upon the person and property of another share an almost identical structure. Both duties may, in principle, extend to capture even a prohibition against making an unauthorised, though harmless contact with the body and property of another, respectively.1

However, the structural similarity between the two torts is, at best, just that – it merely points out the morphology (or characterisation) of trespass torts. It becomes notorious, let alone a form of ‘a serious travesty,’ insofar as it purports to do the normative work of explaining how it is that the tort of trespass to property protects the right-holder with a more or less similar severity and strictness as the tort of trespass to the person of another does.2 Indeed, whereas there is a strong sense that harmlessly using the person of another is, nonetheless, a form of wronging that person by treating her as a means rather than also as an end itself, nothing of this sort of explanation can be extended as a matter of course to make sense of the way in which property is protected by the common law tort, including in particular cases where using the property of another is inconsequential.

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Against this backdrop, one of the most powerful challenges to the right to private property, especially private ownership, has often been cast in terms of the normative arbitrariness that lies at the moral center of the right, especially the form that the right happens to take.\(^3\) As many and diverse observers, including Blackstone and Marx, have noted, the right vests in private persons’ substantial normative powers over other persons with respect to external objects that seemingly extend far beyond its underpinning values, whatever they are.\(^4\) On this observation, a property right-holder can exercise her right even when exercising it cannot be explained by reference to the substantive values that may have grounded this right to begin with (such as realising freedom or promoting well-being through using one’s objects).\(^5\) Thus, the unusual authority possessed by private owners, the authority not just to control an object but more fundamentally to fix the normative standing of others in relation to it,\(^6\) might run out of justification, but, nonetheless, exercise the especially powerful draw characteristic of rights on others, who are non-owners.\(^7\)

More specifically, the charge of normative arbitrariness picks out an analytical mismatch between two ideas of freedom that arise in connection with private ownership. First, within limits, owners enjoy the freedom to deploy their objects as they see fit. Classical liberal champions of equal freedom such as John Locke and Immanuel Kant have begun their respective accounts of property rights in a state of nature by arguing for the necessity of a property right securing the freedom-to-use of right-holders. And second, modern liberal societies sustain freedom-to by protecting property owners’ freedom from the interference of others.\(^8\) The mismatch arises because freedom-from is not – and can never be – an analytic feature of freedom-to. The protection of the latter by the former is over-inclusive, as explained a moment ago, frustrating attempts to explain the duty to defer to

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\(^3\) As will become clear in due course, I do not argue that private ownership’s special authority is, in fact, arbitrary or otherwise illegitimate. Rather, the point of the argument in the first part of the paper is that those who seek to account for the authority in question by resort to functional explanations run into the difficulty I call ‘normative arbitrariness’.

\(^4\) cf 2 Bl Comm 1; Karl Marx, ‘On the Jewish Question’ reprinted in L. H. Simon (ed), Karl Marx: Selected Writings (Indianapolis, Ind: Hackett Publishing Company, 1994) 16–17 (private ownership is ‘the right to enjoy and dispose of one’s possessions as one wills, without regard for other men and independently of society’).

\(^5\) For incisive general discussions concerning the gap between a right and its underlying values, see J. Raz, Ethics in the Public Domain (Oxford: Clarendon Press, 1994) 36–43; F. M. Kamm, Intricate Ethics (Oxford: OUP, 2007) 247. It is an open question, however, whether both of these discussions – that take their paradigm case to be freedom of speech – could be extended to capture private ownership.

\(^6\) I develop this analytical account of ownership in A. Dorfman, ‘Private Ownership’ (2010) 16 Legal Theory 1. The present argument seeks to supplement the analytics of private ownership with its special normativity.

\(^7\) Throughout, I shall use the term non-owners in the broadest sense to capture other property right-holders as well as the propertyless.

\(^8\) This distinction has recently been made by the Supreme Court in Bocardo SA v Star Energy Onshore Ltd and another [2011] AC 1 at [26] (distinguishing between protecting a person against ‘interference with the use of the land’ and protecting her ‘ownership’), per Lord Hope. Lord Walker drives this distinction home by observing that the tortious activity on the part of the trespassers ‘did not . . . interfere one iota with [the right-holder’s] enjoyment of its land . . .’ ibid at [54] (internal citation omitted).
owners’ freedom from by reference to state-of-nature arguments concerning freedom to.\textsuperscript{9}

Another way to put this point, now switching to the familiar language of contemporary property theory, is to observe that while the owner holds the (arguably) legitimate right to use her object, to the exclusion of others, she can also exclude simply for the sake of excluding others with no necessary reference to use, even potential use, at all. Thus, the argument that seeks to ground the legal protection of ownership in the good of setting and pursuing ends using an object – the values associated with use – embarrassingly ends up protecting more than is actually required. To this extent, the form of protecting ownership is not reducible to the functions or purposes served by it. It necessarily gives rise to the overprotection of owners. This deficiency, it important to note, is conceptual, rather than empirical. The worry is not just that there would be too many instances in which exclusion overprotects use (although it surely is a worry also), but rather that there is built into the form of ownership a commitment on behalf of the law to overprotection.

Thus, by enforcing the right of private ownership, the law claims to hold the authority to compel non-owners to defer to owners on what seem to be flatly morally arbitrary grounds. The gaping distortion between the form and the functions of the right to private ownership is much discussed in connection with the scope of the duty to respect ownership, especially the duty against committing trespass against the property of another. There, the form/function gap manifests itself in the puzzling rigidity of this duty. Indeed, it requires deference to the judgment of an owner concerning permission to enter or restriction on entrance, despite the fact that the functions at stake – say, freedom or well-being – do not require the deference. This can be the case where these values are simply not at stake at all, so that a competing use by non-owners is not in fact inconsistent with the owner’s plan to use the object. Alternatively, the demands of these values are, on balance, far less compelling than the competing ones.\textsuperscript{10}

But the charge of normative arbitrariness is not in the first instance a feature of the broad scope of application of the duty to defer to owners. Rather, this charge stands against and is entailed by the very structure of private ownership – the idea that freedom-to-use is sustained by granting owners freedom from non-owners. That the challenge is principally one of the structure, rather than the


\textsuperscript{10} This is exemplified even more so in cases such as the Case of the Tithes YB 21 HenVII 27, pl 5 (1507) (entering the field of another for the purpose of doing her a friendly turn may give rise to liability for trespass). For a more recent acknowledgment of this rule, see Restatement of the Law, Second, Torts § 163 cmt d (St Paul, MN: American Law Institute, 1965).
scope, of ownership’s authority carries an important implication: that overcom-
ing the charge of normative arbitrariness by closing the form/function gap
cannot be made good simply by pointing to a variety of legal doctrines (such as
private necessity, overflying aircrafts, or the right to roam) that effectively limit the
scope of the authority exercised by owners.

Certain modern Lockeans, who are aware of the logical gap between the
Lockean argument for freedom-to and common law’s protection of freedom-
from, proceed by identifying a variety of limitations on the prima facie tort of
trespass that reduce the de facto protection of ownership to a right exclusively to
use an object, rather than a right to exclude as such. To the extent that it
purports to eliminate the gap, this approach is doomed to fail. To begin with,
some of the doctrines invoked by modern Lockeans involve sensational cases of
non-owners facing ‘great jeopardy to more urgent interests in preserving life or
preventing the total destruction of property.’ Others focus on extraordinary
settings (such as aerial trespass). Only few, if any, apply to ordinary cases, by which
I mean everyday situations, such as if I refuse to let you cross through my empty
field (where I once used to grow watermelons) on your way to a nearby friend. For
these reasons, the mismatch between the form and function of private
ownership is too ubiquitous in the lived experience of property to cancel out by
resorting to what is best perceived as exceptional limitations on ownership’s
otherwise unusual authority over non-owners with respect to external objects.

More dramatically, even assuming for the sake of the argument that the duty
to defer to owners’ authority is viewed through a universe of exceptions,
defenses, privileges, and remedies that successfully eliminate all traces of property
overprotection, the charge of normative arbitrariness may not be put to rest.
Again, the problem is one of structure, rather than of scope; leaving the former
intact perpetuates, and therefore reinforces, the arbitrariness associated with the
form/function gap. Indeed, the form of protecting ownership is the source of
normative arbitrariness – it is this form that makes possible notorious legal
protection of property right-holders who behave, in the words of Scott J, ‘like a
dog in a manger.’ The very existence of this form, rather than its scope of
application, creates an opening for owners to exercise their authority to fix
others’ normative standings without reference to enhancing their own freedom

889, 941 (‘[t]here have always been exceptions to this rule (private necessity), of course, and the law
continues to develop new ones (airplane overflights)’) (internal citations omitted).
13 Another example of an exception to the strict liability tort of trespass is anti-discrimination norms
in public accommodation settings.
14 Unsurprisingly, Claeys, who is a modern Lockean, admits that ‘[i]n trespass, the prima facie case sorts
most cases, and defenses and privileges winnow out only a few false positives.’ E. R. Claeys, ‘Private
Law Theory and Corrective Justice in Trade Secrecy’ 4 J Tort L 1 (no 2, art 2, 2011) 53 at
15 Anchor Brewhouse Development Ltd v Berkley House [1987] 2 EGLR 173, 178. This is not to say that
courts actively encourage owners to become anti-social in their dealings with non-owners. (Indeed,
see the concluding lines of the decision made by Lord Denning MR in McPhail v Persons Unknown
[1973] Ch 447, 460). The point is that the law allows for this undesirable state of affairs to arise and
thus authorises it.
or well-being through the use of objects.\textsuperscript{16} No additional limitation on the scope of ownership’s authority can shut this opening off; by implication, no such limitation can alone – viz, without revising the form itself – prevail over the charge of normative arbitrariness. This is just another way to express the notion mentioned above that there is built into the form of protecting ownership a commitment on the part of the law to overprotection.

Although I shall discuss the revisionist approach below, it should be recalled that my ambition in this paper is to develop an account of private ownership that, due to the unusual authority vested in owners over non-owners, gives rise to the form/function gap. In particular, this account seeks to make sense of an entitlement to exercise, in some cases and in some measure, a normative power to exclude others, regardless of whether exclusion is in fact needed to sustain any actual or potential use (however broadly defined).\textsuperscript{17} Another (informal and less elegant) way to put the point is to observe that ownership is not merely akin to sovereignty, as many have observed,\textsuperscript{18} but rather to one particular, and most troubling, instantiation thereof, which is to say despotic sovereignty. Indeed, it is despotic even when owners almost always (as it happens) exercise their rights to exclude only for the purpose of using their objects. Once again, ownership’s authority carries despotic overtones because of the very possibility that owners \textit{could}, if they so wished, exclude for no such purpose (and for no other good reason). The revisionist approach, after all, does not so much explain this, as it explains it away, by defending a narrower conception of ownership’s authority and so a narrower trespass tort duty on the part of non-owners to defer to owners. Accordingly, I shall now seek to take stock of a prominent explanation of the form/function gap. I shall then develop a novel approach, claiming that the form of ownership, properly conceived, does not give rise to a gaping distortion between the right and the functions it purports to serve.

\textbf{THE INDIRECT THESIS: A POSSIBLE WAY OUT?}

Another approach to the difficulty of normative arbitrariness takes a form reminiscent of rule-consequentialism, which is a principle of evaluating particular acts indirectly by reference to their compliance with a general rule, rather than to the immediate consequences of these acts. The animating idea of this principle is that although it might not be the best thing to do in a particular situation,

\begin{itemize}
  \item \textsuperscript{17} A broad definition of ‘use’ may include any kind of use, including ‘no-use’, as long as itrationally contributes – making a difference, as it were – to the carrying out of a purposeful course of action by the owner (or someone on her behalf). The point of a generous definition of use is that it only rules out ‘usage’ which is nothing more than the exclusion of others. Were mere exclusion to become an instance of use, the normative arbitrariness discussed above would never arise. But thus stretching the notion of use eliminates the form/function gap in a straightforward question-begging fashion.
  \item \textsuperscript{18} The \textit{locus classicus} is M. R. Cohen, ‘Property and Sovereignty’ (1927) 13 Cornell L Q 8.
\end{itemize}
following a certain rule achieves better all-things-considered consequences. Applied to property, rule-consequentialism means that particular acts of owners exercising their right to exclude others should not be assessed at the retail level, that is, one act at a time, with reference to whether exclusion is in fact required to sustain the owner’s ability to deploy her object in legally permissible ways. Instead, the argument emphasises that a general right to exclude non-owners produces the best results in terms of securing use by owners at a wholesale level.\(^{19}\) The motivating force behind this move from retail to wholesale assessment of the right to exclude reflects the need to sustain complex schemes of social coordination in connection with external objects.\(^{20}\) On the rule-consequentialism account, the alternative option of protecting the right to use, rather than to exclude from, an object directly would be ‘difficult in the extreme,’ since it requires the specification of the ‘many different uses one can make of one’s property.’\(^{21}\)

Now, the indirect mode of justifying the right to exclude need not be a version of rule-consequentialism.\(^{22}\) At first blush, the impression one might get from Penner’s explication of the connection between exclusion and use, and thus between the form of ownership and its function, is that there exists no gap between the two sets of distinctions.\(^{23}\) This impression is vividly illustrated by his saying that ‘rights purely to exclude or purely to use interact naturally’\(^{24}\) and that, because the right to use picks out a rather broad definition of “using”\(^{25}\), all rightful exclusions can be broadly characterised as serving the interest or purpose of putting a thing to use.\(^{26}\)

That said, the indirect thesis could escape rule-consequentialism only insofar as it mistakenly assumes a sufficiently tight connection between the interest in using an object and the exclusion of others from that object. To be sure, this is not an empirical mistake (as when some few uninteresting cases are left unaccounted for by the equation of use and exclusion). Rather, it is a conceptual one. As mentioned above, in some cases the ability to use an object requires exclusion, but the tort of trespass goes deeper than demanding from non-owners deference to

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20 Penner, n 1 above, 73 (emphasising the importance of keeping duties in rem, such as a duty to exclude oneself from another’s object, ‘simple’).

21 ibid, 72. See also H. E. Smith, ‘Exclusion versus Governance: Two Strategies for Delineating Property Rights’ (2002) 31 J Legal Stud 453, 469: ‘Because attributes and uses are costly to measure, rights to them are delineated and defended by means of proxies, and it is the use of rougher proxies that leads to more activities being bunched together in a more exclusion-like right.’

22 I shall say more on this point below.

23 See further H. E. Smith, ‘Mind the Gap: The Indirect Relations between Means and Ends in American Property Law’ (2009) 94 Cornell L Rev 959 (Smith, Mind the Gap); Smith, n 19 above, 130, 145 (criticising ‘fine-grained analysis’ of law for hyperrealist and technocratic tendencies and defending a ‘broader-gauged economic analysis’).

24 Penner, n 1 above, 68.

25 ibid, 70 (arguing that ‘ “use” refers to a disposition one can make of something that is purposeful and can be interfered with by others’).

whatever actual or even potential uses may be made by owners of their objects. Accordingly, the justification of the right to exclude in terms of protecting the right to use leaves unaddressed, and so unexplained, the law’s indifference to whether protecting the former is called for in order to protect the latter. The normative powers of owners, especially their authority to fix the standing of others in relation to an object, extend to capture cases in which excluding others has no connection whatsoever with sustaining the right to use.27 This connection figures nowhere in the prima-facie case of trespass;28 nor does it give rise to a defense on the part of the trespasser.29 The only live question for establishing a prima-facie case of trespass is whether the act of entering or using the property of another meets the requirement to display deference to the point of view of the right-holder; that is, to the right-holder’s point of view over the normative standing of the trespasser in relation to the former’s object.30 For this reason it must be the case that the indirect thesis in question should be understood to apply a version of rule-consequentialism in the context of property, seeking to bridge the gap between the functions (associated with using an object) and the form (exclusion) by considering what is best overall.

Thus, the reason for action that rule-consequentialism offers persons in support of respecting the duty against trespassing is not that keeping off the property of another is necessary to protect the right to use (which, in turn, secures freedom or promotes efficiency); rather, it is that deferring to owners is, at least in the long run, necessary to sustain our complex scheme of social coordination in and around external objects (which, ultimately though indirectly, secures the realisation of freedom or efficiency).

This indirect approach, however, suffers from three different inadequacies: first, it is suspiciously incomplete; second, it fails to account for the special character of rights and duties; and third, instead of grounding the right to property in the relational structure of private law norms, it adopts an aggregative stance toward those who are expected to respect this right, namely non-owners. I take each of these weaknesses in turn. In the next stage of the argument, I shall argue that all these shortcomings are surface symptoms of the indirect thesis’s failure to account for the value immanent in the special forms that the right and duty in question take, quite apart from their functions.

To begin with, the indirect thesis moves too quickly from a basic premise, that to sustain the right to use, the user must not be interfered with, to the final conclusion, that the right to use grounds a right to exclude, tout court. It is not that its proponents fail to notice the logical gap between the two elements of the

27 For familiar instances, see Entick v Carrington (1765) 19 St Tr 1029, 1066 (1765) (‘every invasion of private property, be it ever so minute, is a trespass’); Seneca Road Co. v Auburn & R. R. Co. 5 Hill 175 (N.Y. 1843) (the maxim de minimis non curat lex ‘is never applied to the positive and wrongful invasion of another’s property’).
28 eg Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) [1957] 2 All ER 343; Rager v McCloskey 111 N.E.2d 214, 216 (N.Y. 1953) (noting that trespass may consist of ‘making an unauthorised entry upon private property’).
29 See text accompanying notes 11–14 above.
30 W. Page Keeton et al, Prosser and Keeton on the Law of Torts (St Paul, Minn:West Pub Co,5th ed, 1984) 70; 3 Blackstone, n 4 above, 209 (noting that ‘every entry therefore thereon without the owner’s leave, and especially if contrary to his express order, is a trespass’).
thesis (the gap between a duty of non-interference with the owner’s use and a duty of non-interference, regardless of the owner’s use). The failure is to defend an additional (implicit) premise, according to which the costs of circumscribing the right to exclude, so as to track more precisely the need to protect the owner’s use, far exceed the costs of overprotecting use through the tort of trespass. At the very least, this showing must explain why a principle of use- or interference-tracking exclusion would be prohibitively costly. On this alternative, there is no need to specify in advance the different uses to which an owner can put an object. Rather, all that is required is a duty of non-interference, that is, of not pursuing plans involving the object of another which are incompatible with those set by the owner.

A duty of this kind is no mere analytical conceit, to be sure. It already figures in some jurisdictions, notably in many jurisdictions in the United States, with respect to trespass to chattels. There, a duty-holder is not liable for using another’s chattels as such. Liability depends, rather, on the occurrence of a setback, such as harm or dispossess, to the interest of the owner in enjoying her object uninterrupted. On this trespassory model, there is no need to specify in advance the kind of uses to which an object may be put (and so it does not imply impracticality and excessive bureaucratic regulations). And it is therefore not clear why the indirect thesis cannot settle on a generalised version of this model of trespass to chattels or, more broadly, on any variation on the use-tracking exclusion theme. After all, this version follows naturally from the argument that seeks to ground the right to exclude others indirectly in the right to use an object. Moreover, it compensates for the disproportionate focus of the right-to-exclude account on the freedom of owners by allowing the property-less a broader material context within which to exercise their freedom. And insofar as the costs, including information costs, of running this alternative seem not to be prohibitive,

31 This awareness is empathetically demonstrated in Smith, Mind the Gap, n 23 above.
32 cf A. Bell and G. Parchomovsky, ‘A Theory of Property’ (2005) 90 Cornell L Rev 531, 562 (noting the difficulty of determining ‘what the optimal level of property protection should be’); E. M. Peñalver, ‘Property as Entrance’ (2005) 91 Va L Rev 1889, 1905 (‘While an exceptionless trespass rule minimises information costs at the extreme ends of the private/open-access spectrum, its effect in situations in which owners narrowly carve up their right to exclude is less obvious’).
33 Thus, I deny that the form/function gap is quite understandable and, in fact, even required to avoid transforming the settlement of property disputes into a notorious craft of ad hoc balancing and a-systematic reasoning by courts. To begin with, pragmatic considerations are surely important, but they cannot bear the entire burden of persuasion concerning the justification of the gap, especially when the stakes are so high (in comparison, say, to a rigid requirement of writing in certain land transactions). More importantly, fear of ad hoc-ness is not only insufficient to support a systemic bias in favor of right-holders; it is also groundless, since it gets the issue at stake backwards. Precisely because there are good reasons not to allow duty-holders to refer back to background justifications of the property right they seek to overcome, we ought to construct the legal right in a way that reduces to the minimum the pressure to so refer. The solution is not to embrace the gap unreflectively, simply for the sake of smoothing out the everyday operation of property’s overprotective laws. Rather, it is to find an alternative form of protecting, rather than overprotecting, ownership.
34 Intel Corp v Hamidi 72 P.3d 296, 302–03 (Cal. 2003). The minority position among the States holds, with English common law, that trespass to chattels is actionable per se, See Hawkins v Hawkins 400 S.E.2d 472, 475 (N.C. App. 1991); Leitch & Co Ltd v Leydon [1931] AC 90, 106.
35 Restatement of the Law, Second, Torts § 217.
the indirect thesis can at best show us what, *ex hypothesi*, must be the case in order to move successfully from the right to use to the right to exclude, but without being able to establish that this is actually, or even most plausibly, the case.³⁶

In other words, the resort to rule-consequentialism, to the extent that this form of consequentialism is coherent to begin with, is substantially incomplete.³⁷ It is one thing to defend the form/function gap by reference to rule-consequentialism; quite another to show that the current rule of protecting ownership by creating this gap strikes, or even begins to strike, the right equilibrium between short- and long-term considerations (whatever they are). The indirect thesis, as just explained, is unable to show this.

Second, the next shortcoming of the indirect thesis stems from its very structure, which is at odds with the categorical character of rights (such as the right to property) and duties (such as the duty to defer to the judgment of owners).³⁸ To begin with, rights and duties are not merely placeholders for what we – owners and non-owners – have most reason to do; instead, they figure in our lived experience in the form of freestanding requirements, purporting to guide conduct sometimes in spite of considerations to the contrary. But the indirect thesis grounds the right and duty of exclusion *not* in the necessity of protecting the right to use, for that right (as mentioned above) requires a right and a duty of exclusion akin to the use-tracking account. Instead, they are grounded in considerations of what is best overall for the purpose, say, of sustaining freedom or promoting efficiency in and around the institution of private property. In that, the indirect thesis departs substantially from the core deontic intuition about rights and duties as defining a set of requirements that are irreducible to extrinsic considerations (such as the interests in freedom or efficiency). This departure is particularly troubling since the right and duty of exclusion invite the charge of normative arbitrariness precisely because they do not lend themselves naturally to these considerations, but nevertheless command unusually strong protection, ie, overprotection, in the form of ownership. This conclusion reflects the broader, and familiar, observation that (act- and rule-) consequentialism cannot generally account for the distinctiveness of rights in our moral and legal lived experience.³⁹ And, to be clear, I do not mean to suggest that values such as freedom or autonomy cannot ground some measure of a right to exclude and, in particular, a use-tracking right to exclude.⁴⁰ The point is that these

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³⁶ Of course, it does not follow that the more sensitive regime (as exemplified by the US model of trespass to chattels) proves more efficient than the one defended on grounds of rule-consequentialism. It may well be the case that American courts prefer the former regime for reasons other than economic efficiency. I have mentioned the US cases on trespass to chattels as evidence that the implementation of the more sensitive regime is, at the very least, plausible.


⁴⁰ I remain less confident, however, as to whether economic cost-benefit analysis can do so successfully.
considerations cannot but fall short of grounding no less than a right to exclude, *tout court*.

Finally, the indirect thesis fits uncomfortably with the experience – legal as well as moral – that trespassory duty extends directly, and so relationally, from a non-owner to each and every owner, taken severally.\(^{41}\) This critique will be further elaborated in the second half of this paper, but it is worth emphasising at this point that it has nothing to do with the nature of private law adjudication of disputes over property. Rather, it seeks to raise doubts about the idea of casting the *primary* duty against committing trespass in terms that render the owner, for the purposes of articulating and discharging the duty, ‘dispensable’.\(^{42}\) Indeed, the indirect thesis cannot find the grounds of the duty of exclusion in what any particular duty-holder owes to any particular right-holder; after all, it demands that non-owners defer to owners even where this is not necessary to protect the latter’s right to set and pursue plans using their objects. Accordingly, the articulation of the reasons for action underlying the duty of exclusion must look elsewhere, *to the practice of property as a whole*, rather than to any particular right-holder, in order to explain why a duty-holder ought to keep off the property of another in each and every particular case. The duty of deference, that is, is not owed to and owned by the property right-holder, but rather can only be mediated by a legal practice of property. The indirect thesis, one may say, takes indirectness to heart when – in addition to grounding exclusion indirectly in the right to use – it marshals an indirect structure of property obligation, giving rise to duties running from duty-holders to the legal practice as a whole. On this view, right-holders are being reduced to the position of mere beneficiaries of the duty. This view is reflected in the insistence of proponents of the indirect thesis on the fundamental primacy of the owner-thing relation (the thingness of property, as it were), at the expense of the relational character of property rights as establishing normative relationships between persons with respect to objects.\(^{43}\) More dramatically, this view is best expressed in admissions which state that duties of non-interference are akin to *in-rem* duties, owed to ‘the plurality of property holders’\(^{44}\) or to ‘a large and indefinite class of holders of [property] rights.’\(^{45}\)

Of course, it is perfectly plausible to hold a person under an obligation to act in certain ways regarding the practice of property or society as a whole (as in criminal law duties). However, the indirect structure of property obligation advanced by proponents of the indirect thesis strikes a counterintuitive cord.\(^{46}\) For it runs into direct conflict with the private law form that the tort duty against trespass takes; likewise, and more generally, it runs contrary to the private law form that private ownership takes. Property right-holders are no mere patients of the practice of property, being protected from non-owners by norms of exclusion.


\(^{42}\) Ripstein, n 9 above, 93 n 11.

\(^{43}\) That an account of property can be fundamentally relational as well as formal, see Dorfman, n 6 above, 23–25.

\(^{44}\) Penner, n 1 above, 27.


\(^{46}\) See generally Dorfman, n 6 above, 10–12; Dorfman, n 41 above, 8–10.
laid down for them by the practice’s top officials. They are also, and more dramatically, agents who are distinctively empowered to exercise the authority to determine the standing of others in relation to objects and to vindicate this authority as a matter of (private) law. Their status as agents, as genuine right holders, entails that the trespassory duty (which is a classic private law duty) runs directly to them, being owed to and owned by them, rather than mediated by the social practice of property (or tort, for that matter).

The inability of the indirect thesis to capture the private law structure of the trespassory duty does not mark a legal-theoretical failure only. The indirect thesis also commits us to abandoning the lived experience of private property by implicitly suggesting that the moral center of the trespass tort departs from our moral intuitions that deference to a person in connection with her claim to control over an object may express a distinctive form of respectful recognition of this person, not just of the practice of property or society, more generally. Whereas the notion of respectful recognition in question figures at the stage of discharging the duty against trespassing (as I shall suggest below), it is most intensely felt at the remedial stage. Indeed, the social and moral significance of respectful recognition exercises the most lively and concrete draw on our minds only after the fact – when the conduct of a duty-holder resulted in the infringement of the owner’s right (or even when an infringement was luckily escaped at the last minute). These circumstances allow us to see most clearly the kind of expectations built into the position of private ownership, expectations to be directly respected and recognised as a person possessing authority to fix the normative standing of others in relation to an object. And while this form of attending to owners makes its first appearance (in tort law) when non-owners are required to comply with the trespassory duty, it often remains so ubiquitous to the way persons interact with one another (by way of deferring to the judgments of owners) that it mostly goes unnoticed, but it is never actually abandoned, as implicitly suggested by the indirect thesis. (It is of course true that many of the encounters duty-holders have with the property of others do not turn on prior acquaintance with the identity – face or name – of the right-holder. But this observation need not count against the view of the trespassory duty as one which runs directly from the duty- to the right-holders. This is because the conception of respect that underwrites the duty concerns respectful recognition of persons as such, rendering the identities of these persons (here, owners) irrelevant. On this view, the duty can be highly impersonal, but still sufficiently relational or directional.)

OUTLINE OF A THEORY OF RESPECTFUL RECOGNITION IN THE PROPERTY CONTEXT

The charge of normative arbitrariness from which I began picks out the critical distance between the right and the values of ownership (and property, more broadly). The charge takes a purely functional stance toward the explanation of the right and its correlative trespassory duty. This approach may be called right-functionalism, because it seeks to explain the grounds of the right and duty involved solely in terms of the functions – extrinsic values and interests – they serve and, indeed, produce. On this view, the special normative power of
ownership— which is most dramatically exemplified by the right to exclude—is cast in terms of, and assessed by, the values and social goals it (indirectly) helps to promote through securing the deployment of objects by owners in pursuit of (collectively acceptable) ends. And although this functional characterisation is helpful as far as it goes, it does not go far enough. In particular, the charge of normative arbitrariness, I shall argue, is a feature of right-functionalism, not necessarily of the right (and duty) itself. This charge accurately identifies the tension between the form of the right and the various functions it (indirectly) serves, but it goes wrong when it supposes that all of ownership’s normativity lies, as it were, on the functional side of the equation. On the account I shall outline presently, the mystery of the special normative power vested in private ownership and the trespassory duty of deference it commends may be solved once a right-formalist approach is sought.

As I shall seek to show, ownership (and trespass) takes a social form. My account, it is important to note, takes a distinctively different approach to the question of the connection between property and society than several influential accounts have so far pursued. Generally, such accounts begin from property arrangements that supervene on thicker forms of social engagement. Familiar examples are the employment setting in Joseph Singer’s article on the reliance interest in property; co-ownership and other social activities in Penner’s writings; and the communal property institutions such as the liberal commons in the writing of Hanoch Dagan and Michael Heller.47 These cases could then be generalised into a broader argument concerning property and social values—that is, that property law helps in sustaining and perhaps even partly producing valuable spheres of social activity. My account takes the opposite approach, purporting to show that property can engender a valuable form of society, irrespective of the preexisting context and the thicker relations to which it happens to apply. This is not to deny that context matters. My argument, however, is that there is a formal core to property, and that it is a distinctively social one (even in the most isolated case of trespass to property).

Thus, I do not claim that ownership right and trespassory duty sustain or produce socially valuable outcomes (although they may occasionally do so) or, for this matter, individually valuable ones.48 Rather, the argument is that they are in themselves social, because of the form they take. For, roughly speaking, this form requires duty-holders to attend to right-holders by embracing, to some extent, the latter’s judgments (concerning use of and access to objects) as guides to their own conduct.

I commence this outline with a brief sketch of the broader legal landscape and the space that the proposed formal account captures therein. I do this mainly for


48 By individual values I especially refer to an influential approach that emphasises the effective hold that some objects may have on the personhood of their owners. See M. J. Radin, ‘Property and Personhood’ (1988) 34 Stan L Rev 957.
the purpose of forestalling misunderstandings about the nature of my argument and its present ambition.

Certainly, any group of persons living in proximity to one another, and thereby seeking to arrange their practical affairs systematically in a peaceful manner, must create a scheme of property coordination. The need for this scheme arises when issues such as the use of, access to, and profit from external objects present themselves, as they are likely to do, given the human condition and other objective circumstances (such as moderate scarcity). To be sure, the need for coordination is not distinctive of property. A parallel story can be told with respect to other, partly overlapping, spheres of interaction such as those pertaining to bodily integrity and to promissory relations (corresponding to the legal practices of tort and contract, respectively).

At any rate, private property is one such scheme that responds to the need for property coordination. By selecting a private property scheme, society vests in private persons some measure of authority to fix the normative standing of others in relation to an object. But apart from this skeletal characterisation of a private property scheme, there remains substantial room to fill in the details, including some of the most fundamental, such as the functions and values served by this scheme and its precise scope of application. It would be wrong to suppose that because private property causally arises in connection with a need for social coordination, this need, whatever it is, also determines the scheme’s shape and point, either in full or even in part. This last normative task requires, among other things, the creation of property right and duty forms – in principle, they can span a broad spectrum of proprietary rights and duties ranging from usufruct to exclusive use and, ultimately, to private ownership (in the robust sense referred to throughout my argument).49 As I shall now seek to show, focusing especially on the form of the trespassory duty which correlates to private ownership, the form under discussion expresses a basic liberal commitment to a society of free and equal persons. This special form does not, of course, rule out the policy and principled goals commonly attributed by functionalists to ownership and trespass. It insists, however, that whatever goals they seek to promote, they do so in a distinctively social way; they demand that duty-holders recognise right-holders as commanding respect for their different points of view, simply because these are their own points of view.

**The characterisation of respectful recognition through trespass to property**

The account of the tort of trespass that I shall develop emphasises the relational character of the impersonal duty against committing trespass.50 To set the stage, it will prove helpful to begin with the alternative account of this tort and of the practice of private property, more generally. On this account, which seems to be the commonly held view among property theorists, the duty against committing

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49 For discussion on the idea of a spectrum (ranging from ‘mere property’ to ‘full-blooded ownership’ and giving rise to respective ‘trespassory rules’), see Harris, n 2 above, 25.  
50 That duties can be highly impersonal and, at the same time, relational is well acknowledged in the law of negligence, for example. See *Palgnaf v Long Island R. Co.* 162 N.E. 99 (N.Y. 1928).
trespass is a general injunction owed to the entire body of owners, taken collectively, to keep off property that is not one’s own.\textsuperscript{51} In other words, it is the very entry upon another’s land that the duty against committing trespass seeks to prevent.\textsuperscript{52} Alongside the law of trespass understood in terms of a general practice of exclusion lies the law of license, dealing with grants of permission to enter another’s land. Thus, the doctrinal division of labor between trespass and license law seems to reflect, according to the commonly held view, the existence of two conceptually different pillars of the institution of property: the rule of exclusion and the exceptional case of license (or permission, more generally).\textsuperscript{53}

However, the commonly held view under discussion fails to account adequately for the relational nature of the tort of trespass and, in particular, for the normative relation that it seeks to establish between a non-owner and an owner, rather than the entire body of owners. Contrary to the commonly held view, the trespass tort is not a tort duty of exclusion pure and simple; that is, a duty against entering or using another’s property. Rather, it is a tort duty against making an unauthorised entry to or use of another’s property. Thus, the legal wrong done by committing a trespass is never merely the wrong of entering land in the possession of another, but rather that of making an unauthorised entry of this kind.\textsuperscript{54}

Accordingly, it is a mistake to suppose that the trespassory duty puts forward a general restriction on using another’s means without appreciating that the existence of a restriction in every given case is the conclusion of a prior process of inferring whether, and in what ways and to what extent, the means in question are in fact restricted. Indeed, the normative power of property right-holders to make such decisions about restrictions (or permissions) and the correlative duty to infer and, then, pursue these decisions have so far been neglected or otherwise mischaracterised due to over-emphasising one particular effect of the power and duty at stake, namely exclusion.

Thus, the familiar characterisation of the duty against trespassing in the negative sense of ‘keeping-off’ the boundaries of others in fact requires duty-holders actively to engage the judgments of right-holders in matters of access to and use of property by incorporating these judgments into their own courses of

\textsuperscript{51} For instance, see Penner, n 1 above, 73 (‘[t]he general injunction “keep-off” or “leave alone” the property that is not one’s own defines the practice of property’); H. E. Smith, ‘The Language of Property: Form, Context, and Audience’ (2003) 55 Stan L Rev 1105, 1147 (observing that a duty-holder ‘only needs to know that he does not own the asset in order to know that he must keep out’).

\textsuperscript{52} For example, this perception of the content of the trespassory duty figures in F. Pollock, \textit{The Law of Torts} (London: Stevens and Sons, 11th ed, 1920) 350 (‘Trespass may be committed by various kinds of acts, of which the most obvious are entry on another’s land (trespass \textit{quaere clausum fregit}) and taking another’s goods (trespass \textit{de bonis asportatis}) and arguably already in 3 Bl. Comm. 209. It seems to dominate leading modern theoretical analyses of trespass. See eg Penner, n 1 above, 73; Merrill and Smith, n 19 above, 359 (observing that the basic injunction generated by the practice of property in respect to an owned object reads: ‘not to enter upon it, not to use it, not to take it, etc.’).

\textsuperscript{53} By exceptional case of license I do not mean to suggest that there are few cases involving permission to enter another’s land. Rather, the case is exceptional in the sense that it governs incidents that fall outside the core of the practice of property, which is the rule of exclusion.

\textsuperscript{54} For the purpose of the present argument I focus on one (highly important) type of authorisation – that which is granted by the property right-holder (as opposed to other types such as the one granted by the law to the police force in connection with search warrants).
action.\textsuperscript{55} It also follows that the doctrinal division of labor between trespass and license law does not reflect the existence of two analytically separate bodies of law, according to which the trespassory duty exists independently of the question of whether or not entry has been authorised by the property right-holder. Questions pertaining to the owner's authorisation may well be analysed under the doctrinal heading of license or permission cases, but they are, nonetheless, an ineliminable aspect of the structure of the trespassory duty itself.\textsuperscript{56}

Against this backdrop, a better approach to the characterisation of the trespassory duty must account for the relational form that an impersonal duty such as this takes. As I shall argue, underlying the tort of trespass is a generic reason for action, indeed a duty, that people should engage the property of others on the basis of making reasonable inferences from the latter's acts\textsuperscript{57} or external objects to their points of view of the matter at hand – that is, the judgments of property right-holders concerning the legal permissibility of using or accessing their property and, therefore, the terms of thus using or accessing. Therefore, part of living together in a society with others is that, all else being equal, we are required to assume that the act or object of another provides a proxy for her point of view, which in turn imposes constraints on our courses of action.

Thus, the normative structure of the generic trespass duty is (conceptually) twofold: first, a requirement to draw reasonable inferences with respect to the right-holder's point of view; and second, a requirement to accommodate, in some measure, one's own course of action in accordance with the inferred point of view.

To this extent, I shall argue that recognising another person as constituting a point of view is not merely a grudging forbearance reducible to a restriction on the duty-holder's allowable means. It is also a demand to take at face value the judgment of another as an end in itself, including in the weak sense of not interfering with it because she so judges.

Indeed, in many cases owners have given absolutely no thought whatsoever to why they would not want others to use their objects. Likewise, the trespassory duty expresses no interest at all in what ends owners seek to pursue by using their objects – within limits, it protects owners whatever their ends happen to be and even if they have none. In this way, the duty requires non-owners to take owners’ judgments as an unmediated guide to their own conduct and hence to attend to owners on their (the owners’) own terms. Now, I do not mean to suggest that in this way the trespassory duty commands a personal form of interaction between non-owners and owners, that is, an engagement akin to bespoke contracting. Indeed, we normally do not need to know any detail about the person who happens to own an object in order to respect this person’s control over the object. It is enough to know (or even reasonably to suppose) that, for any given object which can be reasonably identified as being owned by another, there is someone,

\textsuperscript{55} As I shall explain in the main text below, it is no objection to the preceding observation to claim that judgments by property right-holders can be easily inferred in most ordinary cases.

\textsuperscript{56} As John Fleming has correctly observed, the authorisation in question ‘is not a privilege at all, because lack of it is of the very gist of . . . trespass to land or goods.’ G. Fleming, \textit{The Law of Torts} (Sidney: Law Book Company, 8th ed, 1992) 79. See also \textit{Leitch v Leydon} [1930] AC 90, 108–109 per Lord Blanesburgh.

\textsuperscript{57} Language is included.
whoever she is; that she is a person; and that she possesses the authority to fix the
normative standing of others in relation to that object.\textsuperscript{58}

The purpose of the following analysis is to unpack these observations by
drawing (mainly) on the established doctrines and principles of trespass torts. I
begin by elaborating the first element of the trespassory duty; namely, the
requirement to draw reasonable inferences with respect to the right-holder’s
point of view concerning access to and use of her object; I shall then take up the
second element, which is the requirement to adjust one’s own course of action
in accordance with the inferred point of view; finally, I shall briefly discuss the
grounds of these two requirements in connection with the social form that they
jointly engender.

Deference and inference: the trespassory requirement to draw reasonable
inferences with respect to the right-holder’s point of view

To begin with, discharging a duty to regard the judgments made from the points
of view of right-holders as freestanding constraints on duty-holders’ own
conduct might in fact prove impossible. For these judgments are mental states that
are, strictly speaking, never transparent. This epistemic difficulty is not a feature of
tort law, to be sure. Bluntly put, judgments (including judgments concerning the
normative standing of others in relation to one’s property) defy direct access by
others; hence the need to employ proxies – such as language and other forms of
communicative action – through which to draw inferences about the judgments
issued from the points of view of right-holders.

Consider the proxy service furnished by external objects. In the typical
property case, persons may often encounter an external object without also
encountering the owner of this object. A pedestrian, for instance, may pass near
a building without encountering an owner (or another right-holder) standing
either beside or inside it. Recall that the duty against committing trespass to land
calls for accepting the judgment of whichever person is in authority to fix her
normative standing to the building. This becomes (or purports to become) the
guide to conduct. The building, the mere object, \textit{mediates} between the judgment
of the authority and the attitude (of considerateness) on the part of the passerby.
In other words, the object is a concrete meeting point, as it were, between the
points of view of the owner and all those whose proximity to the building
requires them, as a matter of duty, to incorporate the owner’s determination of
their normative standing into their own course of action. The precise content of
this determination, and therefore the precise contours of the duty to defer to it,
may vary depending on contextual features. Thus, in certain contexts (such as
when the building is a family’s house), the pedestrian is expected to infer that,
unless indicated otherwise (eg, a clear ‘tag-sale’ sign is placed near the front door),

\textsuperscript{58} In other words, I deny that the irrelevance of the owner’s identity for the purpose of discharging
the trespassory duty entails that duty-holders cannot owe the duty to this owner and that, instead,
duty-holders can only owe a similar duty to the entire body of owners. As I argue in the main text,
it is not clear why it is that without knowing who the owner is one cannot have the owner figuring
in one’s deliberation over action.
the owner intends to exclude strangers from the building. In other contexts (such as when the building is a restaurant), the owner may fix the normative standing of the pedestrian in relation to the building as an invitee, rendering it permissible to enter the place (but not to sleep there, for example). 59 (Both Penner and David Lametti also emphasise that objects mediate between duty- and right-holders, to be sure, but their respective conceptions of mediation are entirely different to my own. On Penner’s view (on 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). 60 As I argue above and elsewhere, 61 it is a mistake – conceptual as well as normative – to move from the 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 characterise private law).

Certainly, correctly discharging the duty to infer the relevant judgments from an action or object relies heavily on mastering local conventions concerning the relevant signals, as it were, that words, actions and inactions, and objects communicate. Some cases may prove more difficult for duty-holders than others. These will likely involve words, acts, and objects communicating mixed signals. Consider a passerby seeking to use the toilet in a nearby bookstore. He has a reason (indeed, a duty) to figure out the owner’s judgment with respect to his normative standing to the store and, in particular, to using the toilet; in short, the owner’s decision concerning the invitation and, if granted, its scope. 62 However this person proceeds, the point of this humdrum illustration is that by using the proxy service of the object, his deliberation toward action takes the decisional authority of the owner as a freestanding constraint on his own course of action. In this sense, the object mediates between his point of view and that of the owner.

To be sure, mediation through objects (or words or acts) does not only provide a cognitive short-hand with which duty-holders can better negotiate the world. Indeed, the accuracy of the proxy service is not just a statistical characterisation of the natural connection between points of view and their various proxies; rather, attending to others by means of drawing inferences about their points of view expresses a special normative connection – that is, a relationship founded on the recognition of the point of view of the right-holder by another as standing-providing for the latter. 63 Thus, as part of living together respectfully, we are committed through the tort system to regard one another as free and equal

59 eg The Calgarth [1927] 93, 110 (‘When you invite a person into your house to use the staircase you do not invite him to slide down the banisters’) per Scrutton LJ. See also Restatement of the Law, Second, Torts § 892A cmt. g (‘a landowner’s permission for a picnic on his land will normally not be taken to give consent to a picnic at three o’clock in the morning or to a drunken bawl’).
61 Dorfman, n 41 above.
62 See The Calgarth n 59 above.
63 By standing-providing I mean the determination of the normative standing of one with relation to the object of another.

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precisely by assuming that, all else being equal, activity and external objects are proxies for the points of view of others. Note that, as I argue presently, the proxy service of activity or object has normative, rather than just causal, foundations (i.e., respect for persons as persons).

**Deference and accommodation: the trespassory requirement of accommodation**

Up to this point, my brief analysis focused on the first element of the trespass duty of deference – that is, a requirement to draw reasonable inferences with respect to the (relevant) judgments made from the point of view of the right-holder. Much less attention has so far been paid to the second element, a requirement to accommodate, in some measure, one’s own course of action in accordance with the inferred judgments, which lies at the core of trespass’s social form of deference. It is therefore necessary to provide a more precise characterisation of its place within the architecture of the trespassory duty.

There are any number of ways to introduce adjustments to one’s own course of action in the face of the judgments of another. One familiar way features the duty-holder who is required impartially to evaluate (necessarily from his point of view, including his view concerning what impartiality requires) the extent to which these judgments reflect or otherwise embody the interest or right of the right-holder in order for them to be accommodated into the duty-holder’s activity.

The recognition conception that on my account underlies trespass, by contrast, presents a distinctive interpretation of the demand to make accommodation. Indeed, it requires that duty-holders defer to the judgments of right-holders by incorporating them into their own practical affairs. The judgments are to be taken at face value, that is, unmediated by the substantive judgments of the duty-holders. Thus, deferring to the judgment made by the landowner concerning the normative standing of the duty-holder in relation to a piece of land involves seeing this judgment as determining the ways in which this land can figure in the plan of action pursued by the duty-holder.

Accordingly, duty-holders defer to the judgments of right-holders when they take these judgments as a guide to their own conduct by incorporating them into their respective courses of action. Depending on the course of action in question, incorporating the judgment of another may amount to abandoning the planned course altogether. This is the case where the initial plan of the duty-holder was to enter the house of another, but as it happens no permission has been granted. Conversely, the incorporation of another’s judgment may figure less robustly in the practical life of the duty-holder, as when he is on the way to the beach and must decide whether to take the public road or to shortcut through the privately-owned land of another. On this view, the demand to incorporate the judgment of another need not result in abandoning one’s own plan, but rather in adjusting it partially. More generally, therefore, the incorporation characteristic of deference in trespass torts admits of different degrees, all of which share the same form of deference – that of attending to another person by treating her judgment as a guide to one’s own conduct.
That said, since this form of deference requires a duty-holder to concede practical authority to the judgment of a right-holder, there arises the worry that the deferring person is being asked to undermine his own integrity as a free and equal person. More concretely, deference that takes the form characteristic of trespass implicates the duty-holder in endorsing judgments rendered by right-holders that he may strongly oppose, because he judges them (from his point of view) to be grounded in unreasonable and even mistaken reasons. (Of course, there are external limitations on what one can be legally required to endorse. But these would be exceptions that prove the rule, as I explain below.)

Consider *Jacque v. Steenberg Homes, Inc*<sup>64</sup> (*Jacque*) for illustration. There, 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’ by and ‘repeated refusals’ from the plaintiffs.<sup>65</sup> 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.<sup>66</sup> It turned out, as both the Court of Appeals and the Supreme Court of Wisconsin indicated, that the reason the plaintiffs refused to grant the defendant permission to cross harmlessly on any terms – including in return for a consideration<sup>67</sup> – was their fear of losing legal control over parts of their land by prescription.<sup>68</sup> And this reason is not just unreasonable, but rather clearly mistaken in every possible sense, factually and legally speaking. Nevertheless, the duty against trespassing demands, on pain of punitive damages, that duty-holders defer to the judgment of the right-holder, and so pursue it as their unmediated guide to conduct.<sup>69</sup> And although the facts of this case render it more dramatic than usual trespass cases, it reflects the traditional view of the common law tort of trespass to property to the effect that liability would lie whenever one fails to take the unmediated judgment of the right-holder as standing–providing for oneself. There are, of course, exceptional circumstances (such as private necessity) in which this rule is partly or wholly abandoned, but

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<sup>64</sup> 563 N.W.2d 154 (Wis. 1997).

<sup>65</sup> ibid at 156 and 157, respectively.

<sup>66</sup> *Jacque v. Steenberg Homes, Inc* 201 Wis.2d 22, 26, 548 N.W.2d 80 (Wis.App. 1996) (noting that ‘[s]ince the movers had proceeded far enough down the road to be out of the Jacques’ sight, they used their “cat” to cut a path through the snow-covered field and left the mobile home at the site’). For this reason, property scholars who seek to defend *Jacque* on autonomy, privacy, or personhood–constituting grounds miss the point that this is not a case of home invasion.

<sup>67</sup> *Jacque* n 64 above at 157 (‘the assistant manager [of the defendant] asked Mr. Jacque how much money it would take to get permission. Mr. Jacque responded that it was not a question of money’).

<sup>68</sup> ibid (‘The Jacques were sensitive about allowing others on their land because they had lost property valued at over $10,000 to other neighbors in an adverse possession action in the mid–1980’s’); *Jacque* n 66 above, 25–26 (‘In the early 1980s, the Jacques allowed some other neighbors located along the lake to park cars on their land. After several years, one neighbor claimed that he now owned this land under adverse possession. [The Jacques] . . . lost roughly $10,000 worth of property in default. Also, the Jacques believed that the DNR had taken advantage of them during negotiations to acquire a conservation easement along the lake. As a result, the Jacques had become very sensitive about outsiders entering onto their property and were unwilling to help Steenberg Homes’).

<sup>69</sup> The *Jacque* court awarded $100,000 in punitive damages on top of a one-dollar-award in nominal damages. To this extent, punitive damages, as opposed to compensatory damages, are set sufficiently high to preclude efficient trespass.
these aside, the *prima facie* case of trespass to property gives rise to the permission-to-enter question only. (The preceding analysis also brings home my earlier observation that trespass and license law are not analytically distinct – for the question of whether the non-owner is in fact under a trespassory duty not to enter the owners’ land turns in part on the prior question of whether or not the latter has authorised the former’s entry.)

Can deference grounded in a conception of respect deny duty-holders their self-respect by demanding that they endorse judgments they would otherwise never accept for themselves (and rightly so)? This question, I shall argue, is misplaced, as it mistakenly presupposes that deference requires endorsement, pure and simple. To begin with, deference to the point of view of another involves a willingness to open up oneself to the other’s judgment, but it falls short of ascribing value to this judgment as such, that is, apart from its being that of the person who calls the judgment into being. It is one thing to respect the judgment of another; quite another to suppose this judgment is in itself valuable. The recognition conception of respect captures this difference when it distinguishes between recognition of the right-holder with respect to her judgment and recognition of the judgment itself. The duty-holder recognises the right-holder in striving to infer the judgment of the right-holder with respect to his (the duty-holder’s) normative standing and, then, upholds this judgment by taking care not to disregard it. At no point during this effort at discharging the duty against trespass need the duty-holder endorse the judgment of the right-holder on its merits. Deference and, indeed, respect for the point of view of another operate precisely in the gap between the good of attending to the judgment of another and the value of the judgment, *tout court*. Thus, deference does not presuppose endorsement of (false) substantive judgments; the only endorsement it presupposes pertains to the value of engaging another person on this person’s own (valuable or otherwise) terms.

**The grounds of deference and respectful recognition**

The peculiar form of deference in the sense of accommodating the judgment of another person into one’s own practical affairs does not require that persons be motivated to act out of their benevolence or any other form of goodwill. Motivation might provide an explanation of why, among other reasons, they defer (or fail to defer) to the judgment of another. By saying that the object of the deference is the judgment made from the point of view of the right-holder, my argument thus far explains what deference consists of, regardless of the motives that may have initially disposed people to act in accordance with it. Indeed, a non-owner can take the judgment of an owner as a guide to conduct for any number of reasons, including reasons that do not cast the importance of deference in terms of respect, let alone the recognition conception of respect for another. These could be either purely instrumental (such as fear of liability) or non-instrumental (such as respect for the rule of law) or both.

But even given the conceptual separation between the act of and motivation for deference, displaying deference implicates the deferring person in acquiring a pro-social attitude. That is, an implicit or explicit willingness to recognise the point of view of another as meriting accommodation simply by virtue of its
being her distinctive point of view. This is just another way to express the notion that the duty against trespassing takes a social form. For this reason, the morphology of trespass torts does not yet establish the connection between deference and respect for others, but it nonetheless exhibits the necessary backdrop – its social form – against which this connection can be made good. Indeed, the recognition conception of respect, because its aspiration is normative and not merely interpretive, seeks to make this showing by grounding deference in a liberal ideal of respecting persons as free and equal. The proposed grounds cannot, of course, produce the necessary motivation for respectful recognition to arise; instead, the recognition conception of respect purports to give us reasons for acting as respecting persons ought to do. Or so I shall argue.

Indeed, the recognition conception of respect seeks to make this showing and in this sense to interweave the morphology of deference into the special normativity of respect for persons on their own terms. I shall elaborate on the respect-based grounds for the social form of deference in and around trespass torts. The centerpiece of this stage of the argument is establishing that respect for persons may arise only insofar as people enter into distinctively social relations of recognition with one another. On this account, respect and society are not merely related in some loose sense, but rather mutually presuppose one another.

True respect

Respect for persons as being free and equal, I shall argue, cannot get off the ground so long as the respecting person determines individualistically, from his point of view, the terms of the respect he owes other persons. Indeed, there is a strong intuitive sense according to which true respect for persons as such can be had only insofar as the respecting person defers, in some measure, to the respected person on her own terms. Anything short of this requirement seems to cast respect for persons in counterintuitive terms – that of holding fast to our own conception of what respect for another requires us to do. Thus, it is not only that persons figure as causal or moral constraints on the practical affairs of others, but also that these persons get to determine, to some extent, what the terms of the constraints actually are. As mentioned above, this is precisely what is meant by saying that deference grounded in respect for other persons involves suppressing one’s own judgment and opening up to the unmediated judgment of another person, thus ‘see[ing] the world . . . from that person’s point of view.’

Respecting persons on their own terms and being respected in this way by others is deeply embedded in the lived experience of becoming a person. Indeed, this process features the gradual shift from respect for the interest of the developing child, to his or her point of view. It commences with a strong sense of parents and educators being in control of, and thus being obligated to respect, the child by setting for her the terms of the respect. That said, respect for interest

71 As Tamar Schapiro has observed, ‘children . . . make direct moral claims . . . to have their interests protected and their needs met.’ T. Schapiro, ‘Childhood and Personhood’ (2003) 45 Ariz L Rev 575.
comes constantly under the growing pressure of attending to the child more like an adult, up to the point where pursuing her best interest at the expense of respecting her on her own terms seems inappropriate, paternalistic, and, indeed, disrespectful.

To be sure, unlike the parent–child relationship, respect for persons, including for strangers in connection with their properties, is generally far less intense and demanding in the case of strangers, which is the paradigmatic case for trespass torts. Nevertheless, the notion of developing into a person renders more natural the commitment to respect persons as such by regarding their judgments as independent constraints on the conduct of the respecting person. After all, despite the differences in scope, intensity, and affection, the respect which the parent assiduously aspires to display toward her child takes precisely the same form — that of regarding others as free and equal persons by accommodating their unmediated judgments into our own practical lives.

The social form of respecting person as such

Although the idea of true respect strikes a familiar cord, much less attention has so far been paid to what seems to be its most significant, and perhaps surprising, achievement. Far from being a moral ideal of separation and retreat from society, a grudging forbearance so to speak, respecting other persons on their own terms expresses a commitment to accommodation which is profoundly social; namely, to identify with the distinctive points of view of others merely by virtue of their being persons. On this view, respect and society are not merely incidentally connected (as when people respect those with whom they previously formed social relations); nor are they merely normatively connected (as when the good of respect and the good of society contribute jointly to human flourishing); and nor are they simply causally connected (in the sense that Robinson Crusoe cannot respect others and be respected by them where there are no ‘others’ in his world). Rather, the connection is conceptual, since true respect and society of persons mutually presuppose one another. Respect presupposes a distinctively social way of being with others in the world; and society of persons as such arises through acquiring the practical attitude associated with the recognition conception of respect.

Begin with the social underpinnings of respect for persons. Persons are reasoning creatures, negotiating the world by forming their own judgments about what to do and what to believe. This is not merely a reflection about human minds and actions, but also a basic modern ideal of critical rationality often expressed in terms of self-sufficiency — ‘the maxim of always thinking for oneself.’ The judgments made by individuals reflect distinct points of view


from which self-sufficient people come, separately, to appreciate and, indeed, experience others (among other things). But although they literally make possible our experience of one another, these points of view might also isolate us (socially speaking) from those captured by their lens. For they are our own, personal points of view, mediating what actually lies out there according to our judgment of what is there. Thus, attending to others’ claims using our own points of view does not, after all, amount to appreciating them as such – that is, as persons constituting their own independent judgments about the world of action and thought. Rather, in insisting on pursuing them exclusively through our own points of view, what we come to appreciate is those judgments of ours (about what others’ demands require of us) that are made by reference to, rather than by, others. And this is precisely why our points of view, although allowing rational creatures such as ourselves to negotiate the world, might isolate us from others.

However, by attending to the judgments of others, a person can overcome the separateness involved in experiencing the social world exclusively from his own point of view. Indeed, by taking the judgments of others as guides to conduct, one can identify with the points of view of others, even if only in the weak sense of acknowledging them as freestanding constraints, and not just with one’s own peculiar conception of these judgments and the demands they may place on oneself. Isolation, therefore, can be replaced by society once persons are disposed, in some measure, to accord the point of view of their fellow creatures unmediated recognition. This form of being with others is therefore irreducibly social, since (to repeat) it involves suppressing one’s own judgment and opening up to the judgment of another simply because she is a person and it is her judgment.

This tight connection between respect and society is readily apparent when the respecting person suppresses his judgment and incorporates the judgment of another even though the former judgment is correct and the latter is, on his view, flatly mistaken. The Jacque case mentioned above serves to illustrate this point. This and many other quite ordinary cases render more vivid the thought that the negative description of respect – deference to the point of view of another – comes with a positive component as well – the deferring person accommodates, in some measure, the judgment of another and in this way pursues it. To this extent, pursuing the judgment of another is truly social and, for the same reason, truly respectful. Indeed, deference to the point of view of another person is not merely instrumentally valuable (as when the other person professes better practical or theoretical expertise on the matter at hand);74 within limits the recognition conception of respect picks out the accommodation of another’s judgment, regardless of the extrinsic value it might produce.

74 See J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) 53 (noting that an authority is normally justified and in this way can garner its legitimacy insofar as a person ‘is likely better to comply with the reasons which apply to him (other than the alleged authoritative directive) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly’).
ELABORATION: THE NECESSITY OF THE FORM/FUNCTION GAP

The indirect thesis seeks (to no avail, as I argued above) to close the gap between form and function by highlighting the intimate (functional) connection between the two aspects of the right (and duty) – that is, showing the important extent to which the form is called for by the various functions of ownership (and trespass). By contrast, the proposed account seeks to take the opposite approach: to show that this gap is a defining feature of the social form of ownership (and trespass). On the right-formalism approach I developed above, the charge of normative arbitrariness is fully addressed by emphasising the value immanent in the form that ownership (and trespass) takes. The gap between form and function, as I sought to show, need not be a source of trouble for the normativity of ownership (and trespass), because the functions served by ownership (including by ownership’s form) do not exhaust the explanation of the ownership’s good.

This, however, may only go so far as explaining why the peculiar form of ownership (and trespass) is compatible with the recognition conception of respect and the basic intuition concerning respect that lies beneath it. As I shall now seek to argue, this form is also required by the recognition conception of respect; which is to say, the gap between form and function is a defining feature of ownership whose moral center reflects respectful recognition of persons as such. Accordingly, it is impossible to eliminate the gap without abandoning the commitment to true respect for persons in the sphere of action picked out by a system of private property.

The necessity of the gap can be made precise by investigating the opposite approach; namely, one which seeks to eliminate this gap by casting ownership in terms of use-tracking exclusion.75 On this approach, ownership commands a duty on the part of non-owners to ‘fall in line’ with the agenda set by the owner for an object, which is to say an obligation not to put the object to uses that are inconsistent with the owner’s desired use.76 The concept of use, to be sure, need not include actual use only, but can also involve potential use, defined by reference to the kind of actual uses it would be reasonable to expect owners to put the object in question to in the foreseeable future,77 as well as background use.78

The most straightforward implication of moving from ownership’s form being the authority to fix the normative standings of others, to the authority being the ability to put an object to use, pertains to the object of the deference on the part

75 This approach is reflected in Nozick’s observation that ‘The central core of the notion of a property right in X . . . is the right to determine what shall be done with X; the right to choose which of the constrained set of options concerning X shall be realized or attempted.’ Nozick, n 39 above, 171. It also appears in A. Alchian and H. Demsetz, ‘The Property Right Paradigm’ (1973) 33 J Econ Hist 16, 17 (noting that ‘[t]he strength with which rights are owned can be defined by the extent to which an owner’s decision about how a resource will be used actually determined the use’). I shall mostly draw on L. Katz, ‘Exclusion and Exclusivity in Property Law’ (2008) 58 U Toronto L J 275 to reconstruct an up-to-date approach of use-tracking exclusion.
76 Katz, ibid, 297.
77 ibid, 300–301.
78 ibid, 300. That said, Katz’s attempt to extend this intuition to the case of Jaque is less convincing for the reason I mentioned above. See text accompanying notes 64–69 above.
of non-owners. The object of deference, I shall argue in due course, is partly constitutive of the conception of respect that underwrites the forms of ownership and trespass. To begin with, on the use-tracking approach, the trespassory duty of deference would not require the accommodation of the judgment of the owner (about non-owners’ standings) into the duty-holders’ own courses of action. Were deference to another’s use (or agenda) to require respect for this other’s judgment instead, the use-tracking approach would essentially reproduce the form/function gap. It would collapse, in other words, into the right to exclude, abandoning the ambition to defend a genuine use-tracking approach. Of course, non-owners may sometimes need to defer to the owner’s own judgment, but only coincidentally – that is, to the extent that this judgment overlaps precisely with the (actual, potential, or background) use to which the owner put the object.

The critical distance between deference to use and to judgment can be cast into sharp relief by considering a dispute between owners and non-owners over the question of inconsistent uses. This case (of what counts as an inconsistent use) is crucial to the use-tracking approach, because inconsistent uses determine the contours of ownership and the trespassory duty it prescribes. Suppose an owner-farmer refuses permission to a neighbor who wishes to train horses on her empty field during the summer (e.g., she grows watermelons from September until May only). This is because horses squash and compress the soil over which they run, permanently damaging the soil, or so the owner worries (perhaps unreasonably, but sincerely and therefore not maliciously). The ultimate question here for the use-tracking approach concerns the relevant conception of use-inconsistency with which to adjudicate between the competing claims made by the owner and by the non-owner.

Suppose the owner’s worry is groundless. A duty to defer to the (mistaken) judgment of the owner would betray the notion of use-tracking exclusion and, once again, be tantamount to capitulating to the right-to-exclude account of ownership. Indeed, there is in fact no inconsistency between the owner’s agenda and horse training. Thus, pursuing the activity of training a horse may fall perfectly in line with the actual, potential, and background uses to which the owner has put the field, even though it amounts to disregarding her point of view, in violation of the recognition conception of respect. The duty of deference, on the use-tracking approach, takes its object to be the use made by the owner, objectively characterised. And what objectivity requires, in general and in particular, is a question that does not turn on the point of view of the owner.

A non-owner, on this view, does not need to adjust, let alone pursue, the judgment of an owner in order to deploy the latter’s object lawfully. Instead of attending to an owner on the owner’s own terms, it is sufficient for the non-owner to convince the court that, the judgment of the owner notwithstanding, his purported use does not exert substantial pressure toward conflict with the (actual, potential, or background) uses made by the owner. This is an appeal, in other words, for the court to take the point of view of the non-owner, rather than that of the owner, with respect to the correct characterisation of the owner’s use and to the possibility of inconsistent uses. This form of deference remains firmly individualistic and, therefore, falls short of the demands of true...
respect – it allows non-owners to determine the terms on which they may come to respect others. It is therefore also at odds with the respect immanent in property law’s self-understanding of deference to owners, which is to say the view that the normative standing of the non-owner is fixed by the owner, rather than the non-owner, regardless of the use or function to which an object is or can be put.79

Thus, the charge of normative arbitrariness may be fully addressed by the use-tracking approach. But this concession comes at the cost of abandoning the special forms of ownership and trespass that figure in common law and that, most importantly, distinctively establish a way of being with others in a society of free and equal persons.

Perhaps, however, one may protest the preceding illustration because, it might be argued, most cases are not like that: Owners, unlike the farmer just mentioned, are mostly rational and reasonable persons whose respective conceptions of inconsistent uses overlap with most (rational and reasonable) non-owners’, in which case deference to use and to judgment becomes extensionally, though not intensionally, equivalent. I set to one side the suspiciously speculative empirical assumption made in this protest, as well as the normatively problematic view of the special force of rights (of property and otherwise) as protections limited to actions that are rational and reasonable, and so less likely to be as vulnerable as heterodoxy almost always is.

I focus, instead, on the claim that seems to be at the heart of the protest under consideration – the nature of the connection between deference to use and to judgment. Although the object of deference is the use to which an object is put by the owner, the judgment of the owner (about what the use is and what counts as an inconsistent use) is, nonetheless, a very reliable proxy thereof. But this gambit is not helpful, because it concedes that the object of deference is not, after all, point of view or judgment, but rather use itself; it further entails that non-owners may be required to take seriously, at face value, the point of view of owners but only because, and only insofar as, that point of view reflects the owner’s actual, potential, or background use of an object.

Moreover, submerging deference to another’s judgment in deference to another’s rational and reasonable use of an object renders redundant the possibility of pursuing the recognition conception of respect through the forms of ownership and trespass that the use-tracking approach advocates. This is because it would become impossible to explain why deference to the judgment of (rational and reasonable) owners is not merely sufficient, but rather necessary, at least in some cases. It is one thing to give an account of deference characteristic of trespass which is equally compatible with any number of different other accounts of the same phenomenon; quite another to show that any account of common law’s ownership and trespass cannot but invoke the special social forms they both take.

This conclusion – that on the use-tracking approach, the social forms of trespass and ownership make no difference to the explanation and justification of

79 See The Mediana [1900] AC 113, 117 (‘What right has a wrongdoer to consider what use you are going to make of your vessel?’). See further R. Stevens, Torts and Rights (Oxford: OUP, 2007) 73–74.
these forms – returns me to the account from which I began. For, by implication, the gap between form and function is necessarily required in order for deference to be grounded in the recognition conception of respect. The judgment of the owner is not merely a proxy for some other objects of deference (such as use). Instead, it represents a freestanding claim, that is, to be respected on the respected person’s own terms, and thus be recognised as a free and equal person. Non-owners are required to defer to owners not just because the judgments of the latter provide good evidence for the potential of incompatible uses, in which case there would be no form/function gap. Rather, the deference requirement runs directly to the unmediated judgments of owners because these are their judgments.

This means that the demand to suppress one’s own judgment and open up to the owner’s can be genuinely social (in the sense explained above) only to the extent that it cannot be reduced to the qualitatively different demand placed on non-owners by the use-tracking approach – that is, to refrain from deploying the property of another in ways that, in an impartial assessment of the allegedly competing uses, are in fact inconsistent with the course of action pursued by the owner. Indeed, the forms of ownership and trespass can be irreducibly social if, and only if, non-owners are required to defer to the judgment of owners even where this cannot be squared with a functionalist account that emphasises the external values associated with a secured privilege to use one’s object. The form/function gap, in short, is not just compatible with the recognition conception; it makes possible the establishment of a society of persons among participants of the practice of private property, which is all of us.

THE NECESSITY OF THE GAP AND ITS PRACTICAL IMPLICATION FOR EQUALITY

The account developed in these pages carries important practical implications for society’s pursuit of equality. Indeed, although my account has so far cast private ownership in terms of a thin ideal of social solidarity, it also opens the door for a thicker, liberal egalitarian commitment to solidarity and non-subordination. My present ambition is merely to identify, rather than pursue, this conception – the latter task deserves a paper of its own. Its centerpiece will be that the necessity of the form/function gap entails that, for the purpose of alleviating inequality, private ownership is not only a problem, but (in part) also the solution. On my account, there can be no alternative but for a society of free and equal persons to provide private ownership rights (in the robust sense explored in these pages) to all persons.80

80 cf J. Waldron, The Right to Private Property (Oxford: Clarendon Press, 1988) 115–117. With Waldron, my account supports a ‘radical’ redistributive program, governed by ‘a requirement that private property, under some conception, is something all men must have.’ ibid, 444. However, my account departs substantially from, and to this extent takes a more ‘radical’ turn than, Waldron’s. On my account, to play on Waldron, ‘all men must have’ the right to private ownership in the robust sense explained throughout these pages, rather than Waldron’s preference for ‘some conception’ of private property.
The argument for the necessity of the form/function gap I developed in these pages establishes an intimate connection between the private ownership form and an ideal of all persons standing in relations of freedom and equality to one another. However, persons cannot stand in these relations to others when they lack some (non-trivial) measure of external objects to command the respectful recognition of their own points of view by others. This worry arises when some participants in the practice of private property constantly find themselves on the bestowing side of respectful recognition, but not on the receiving side. It would not be merely empty formalism, but simply a mistake, to recommend the form/function gap in a society where a few own everything and the rest nothing. Accordingly, the moral center of private ownership featuring the form/function gap exerts normative pressure on private ownership being exercised by all. Otherwise, the ability of participants in the practice of private property to stand in relations of freedom and equality to each other is strained. For this reason, state (or private law-based) provision of public access, however broadly defined and implemented, may complement but not substitute private ownership for all. Indeed, the account of the form/function gap I have developed suggests that social solidarity and non-subordination among persons call for what John Rawls has termed a ‘property-owning democracy,’ rather than merely a welfare state.

This way of identifying in very general terms the implications of my account for society’s pursuit of social solidarity leaves open important questions that lie beyond the scope of the present argument. The point of the preceding discussion was not to settle any of these (or other) questions, but rather to render more vivid the notion that theoretical elaborations of the forms that ownership and trespass take have normative and, indeed, political consequences all the way up, that is, to the basic commitment of society as a whole to sustain the legitimacy of its own coercive order.

81 For this reason, my account supports a qualitatively different approach to the problem of inequality from both progressivists and modern Kantians working in the area of property theory. These last two hold in common a similar assumption—that inequality can be tackled by allowing non-owners to extend their practical affairs to involve the resources of others, in the case of property progressivism, or, on the Kantian approach, resources formerly held by others and now by the state (in the form of public space, education, health, and housing). More specifically, they share the view that responding to inequality is not necessarily about turning non-owners into private owners themselves. I do not mean to suggest that this transformation of status from non-owners to owners cannot be a possible side effect of the progressive and Kantian responses; my claim is that it is not the point of their respective responses. For the property progressivists’ view, see Peñalver and Katyal, n 16 above, 153–154; G. Alexander, ‘The Social-Obligation Norm in American Property Law’ (2009) 94 Cornell L Rev 745. For the Kantian position, see Weinrib, n 9 above; Ripstein, n 9 above, chs 8–9. For an elaborated critical discussion of these two approaches, see H. Dagan, Property: Values and Institutions (Oxford: OUP, 2011) 62–69.


83 For example, how many rights and what kind of objects would meet the bar to ensure the meaningful participation of each person in the legal practice of private property (as an owner, rather than merely as a non-owner); or how to account for persons’ responsibility for the effects of choice and chance on their demand to be included in (or excluded from) participation in this practice.
CONCLUSION

In these pages I have explored the notion that the form of protecting ownership is not reducible to the functions served by it. I have argued that this seemingly arbitrary mismatch between ownership’s form and its function can be solved by elaborating the distinctively social form of ownership and the trespassory duty it underwrites. Ownership (and, for that matter, trespass) is in itself social, because of the form it takes. Indeed, this form requires duty-holders to attend to right-holders by embracing, in some measure, the ends set by the latter as a guide to the former’s own conduct. On this account, the so-called mismatch between form and function is not only non-arbitrary, but also necessary insofar as a system of private property seeks to sustain a sphere of action (in connection with external objects) in which participants respect each other by recognising one another as free and equal persons. For the most part, the argument has proceeded in the mode of making sense of the traditional common law forms of ownership and trespass. But as I indicated toward the end, my philosophical reconstruction of these forms may have practical consequences for any society whose constituents are committed to regarding one another as free and equal persons in practice. These consequences include placing a substantially demanding obligation on the state to secure private ownership rights to all.