The Society of Property

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I Introduction
Property rights and duties, as it is often said, are good against the world, whereas contract rights and obligations apply more narrowly against specific others. The most basic question that arises in connection with this distinction is what accounts for the general scope that property rights and duties, unlike their contractual counterparts, share? Almost all the theories that have so far sought to address this question have emphasized the extrinsic circumstances—such as transaction costs or the normative priority of protecting property over contract rights. In that, these theories might be able to explain the general scope of application characteristic of property rights and duties, on the one hand, and the particular reach of contract rights and duties, on the other.

This starting point, however, implies the conclusion that property and contract rights and duties are, at best, quantitatively different, reflecting differences of degree, not of quality. More precisely, the source of the difference (whatever it is) does not originate in either property or contract, but rather lies outside both (for instance, in the costs of making and carrying out transactions concerning external objects).

Although this approach is perfectly sound as far as it goes, it does not go far enough. In particular, it fails to consider whether the general scope of property rights and duties is, in fact, a side effect of the special structure of property (vis-à-vis contract). Indeed, this possibility can be found once it is sought in the distinctive form of social coordination that property takes. On the account I shall develop, property is a framework of coordination in which participants approach the resolution of their competing claims (such as for use of and access to an object) together. In this way, property turns coordination itself into a form of respectful recognition among persons, quite apart from the functions it serves (such as promoting efficiency or sustaining freedom). This is, I argue, because the duties that arise in connection with a system of property take a categorically social form—that is, they can engender interactions of respect and recognition between persons simply in virtue of their being persons. Duties originating in a contractual interaction, by contrast, may (at best) take a hypothetically social form—that is, they may (arguably) establish relations of respect and recognition in which being a person as such is never sufficient for these relations to get going. This formal way of distinguishing between property and contract obligations lies at the center of the characterization of the duties in question that I shall pursue in these pages. Moreover,

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and perhaps more dramatically, this characterization provides the necessary normative resources to elaborate on their normativity—I shall argue that property, unlike contract, expresses the *categorical value* of regarding others as free and equal persons (at least in the sphere of action onto which property maps).

The argument will run through the following stages. Part II draws on the Hohfeldian tradition of explaining the source (or sources) of the difference that may set property apart from contractual rights.¹ I shall seek to show that this tradition is substantially incomplete. It identifies certain contingent features about property rights, but fails to establish their connection to the structure or nature of property. In part III, I discuss and reject an account of property rights that seeks to make good on the failure just mentioned. On this account, property rights, unlike contract rights, give rise to duties nonowners owe to the legal practice of property as a whole. As I argue in this part, this characterization of property duties inadequately depends on extrinsic circumstances (such as transaction costs) that lie outside the nature of property rights and duties (whatever this nature may be).

Parts IV and V, taken together, represent the centerpiece of my argument. In part IV, I develop a characterization of property’s distinctive structure (*vis-à-vis* the structure of contract), focusing on the social form of coordination that property rights and duties underwrite. I demonstrate this claim by investigating the distinction between property- and contract-based coordination against the backdrop of a fairly simple world featuring trivial transaction, information, and search costs. This investigation helps to render vivid the notion that property and contract are *qualitatively* different even when they are, due to these special circumstances, functionally the same. Finally, part V further reinforces the preceding analysis. It emphasizes that the social form of coordination that arises in and around property features an *un*conditional commitment to the respectful recognition of persons as such. Contract-based coordination, by contrast, remains parochial, rendering the commitment to an ideal of respectful recognition conditional and in this sense contingent upon preexisting predilections on the part of the participants. I shall then apply my account of the qualitative difference between contract and property by to four doctrinal areas where the law’s insistence on the contract/property divide is plain and, yet, somewhat mysterious (at least insofar as the distinction between contract and property is quantitative only). The distinction between contract and property that I develop here, I shall argue, fits naturally with this insistence. Accordingly, the distinction between contract and property that lies at the center of my argument goes beyond theory; indeed, as part V seeks to show, it permeates important doctrinal areas of contract and of property, including, in particular, doctrines that come between the respective laws of contract and property.

¹ Throughout, the discussion of the Hohfeldian tradition does not seek to provide an exegesis of Hohfeld’s own views, but rather to draw more loosely on the intellectual legacy associated (especially by legal realists) with his work.
II The Conventional Wisdom

Hohfeld is well known for seeking to demystify the prevailing discourse of his time about legal rights, exposing its artificial and irrational ideas to the bright light of analytical precision. Chief on his agenda was that of debunking the distinction between rights in personam and in rem. The strategy can be summarized into two stylized arguments. First, rights are characteristically relational in the sense that they necessarily pick out normative relations between persons inter se. This means that the defining feature of a right in rem cannot be cashed out in terms of a normative connection between a right-holder and a thing. On Hohfeld's view, a thing may figure as the object of the relations that rights and duties purport to form among persons. And second, since a right in rem is not a right to a thing simpliciter, but rather a right held directly against another person with respect to a thing, the difference between in rem and in personam rights must lie in circumstances that are external to either one. In particular, rights in rem just are rights that establish normative relations between right-holders and a class of large and indefinite persons who are thereby called duty-holders. And since this way of driving a wedge between rights in personam and in rem turn on contingencies (such as duty-holders' numerosity), the Hohfeldian approach yields the conclusion that these two types of right are conceptually indistinct. A more precise way to put the matter is to note that, on the Hohfeldian approach, rights in personam and in rem are extensionally distinct—viz., because they differ in the scope of their respective applications—but intensionally equivalent—viz., because they pick out an identical relational structure of interpersonal right and duty. Thus, rights in personam and in rem are not so different from each other,
but happen to figure in different contexts—on the one hand typically small-scale, and on the other typically large-scale contexts.  

The Hohfeldian approach has turned out to be extremely influential. It lies at the heart of the conventional wisdom according to which rights in rem and in personam are qualitatively indistinct. This wisdom has ever since grown in sophistication and elaborateness. For instance, lawyer economists have further demystified the distinction in question by reducing the inquiry to functional concerns about transaction costs so that in rem rights are mere adaptations of in personam rights to a world of high transaction costs. Another development of the Hohfeldian approach explains the general applicability of rights in rem in terms of the normative importance of protecting property interests over the more "narrowly binding" force of rights in personam such as contractual rights. Finally, the Hohfeldian emphasis on the numerosity of duty-holders as the key feature of rights in rem has been extended and deepened to capture the temporal dimension of these rights: the number of in rem duty-holders is not merely large and indefinite, but rather determined solely by reference to the number of persons subject to the law in the relevant jurisdiction. Thus, the number of in rem duty-holders is a feature of membership in a legal jurisdiction in any given time and it can, therefore,

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7 See, e.g., Yoram Barzel, Economic Analysis of Property Rights, 2 ed (New York: Cambridge University Press, 1997) at 33 (“At the heart of the study of property rights lies the study of contracts.”) [Barzel]; Abraham Bell & Gideon Parchomovsky, ‘A Theory of Property’ (2005) 90 Cornell L Rev 531 at 565 (noting that “modern economic analysis presumes that property is the left-over category when contract is exhausted.”).

8 See Pavlos Eleftheriadis, ‘The Analysis of Property Rights’ (1996) 16 Oxford J Legal Stud 31 at 53-54, reprinted with modifications in Pavlos Eleftheriadis, Legal Rights (Oxford: Oxford University Press, 2008) 129 at 137-38. In an earlier essay, Honoré seems to be making a somewhat similar point. See Honoré, ‘Rights,’ supra note 5 at 461 (observing that rights in rem, “primarily general rights of exclusion, ... are so vital that the law ought not to leave [them] to the initiative of the individual interested to secure them.” In addition, these rights “can be so easily damaged or destroyed by persons generally in the absence of legal regulation that a general rule of exclusion is desirable.”). But unlike Eleftheriadis, Honoré acknowledges that the criterion of normative importance is embarrassingly over-inclusive, since there exist rights in personam (“contractual rights of wage and salary earners” or parent-child rights and obligations) as well as other non-in rem rights (such as “statutory rights of members of national or state insurance schemes”) that are just as normatively important as rights in rem. Ibid at 461. Furthermore, normative importance may also be under-inclusive, since there could exist rights in rem that are far less vital than rights in personam. For more see infra Part V.c. below.

increase and decrease as changes in population numbers occur. And although this explanation rejects at first blush the Hohfeldian emphasis on the class of duty-holders being large and indefinite, it actually reinforces this point by applying the time dimension to the indefiniteness of duty-holders.

As mentioned at the outset, it is striking to note that the Hohfeldian approach to the distinction between rights in rem and in personam focuses exclusively on certain extrinsic circumstances that, on this approach, lie at the center of the (quantitative) distinction between the two types of right. This is of course a plausible working hypothesis. However, it is not at all clear why these circumstances would exhaust the theoretical elaboration of the distinction in question. More specifically, it is not clear why the finding of these circumstances should imply, let alone entail, the conclusion that rights in rem and in personam are extensionally distinct and intensionally equivalent. Perhaps, as I shall argue in due course, some of the external circumstances that Hohfeldians are right to point out are but surface manifestations of the distinctive structure of rights in rem. But before I take up this view, I shall consider an ambitious recent attempt to do away with the Hohfeldian approach to the distinction between rights in personam and in rem.

III The Rise (and Fall) of a Practice-Based Account of Duties

In rem

The broadly-speaking Hohfeldian approach to the distinction between norms in personam and in rem—viz., that they are intensionally equivalent, but (at best) extensionally distinct—is certainly more appealing than its most obvious competitor, the right-to-a-thing approach. Indeed, an approach that emphasizes that a right in rem runs directly from the right-holder to a thing, rather than to a duty-holder (or even to a plurality of duty-holders), seems to be making a categorical mistake—that of confusing the object of the right with the right itself. And since a thing can never attain the status of a duty-holder, any plausible account of the distinction between norms in personam and in rem must begin from the notion that rights and duties hold as between persons.

The only live question, therefore, is whether there exists a qualitative difference between the ways in which rights in personam and in rem establish their respective normative connections among the persons concerned. Recently, James Penner has sought to break with the Hohfeldian approach by developing a sophisticated and powerful account of the distinction between norms in personam and in rem, with particular emphasis on the duty aspect of the distinction in question. In that, Penner picks up an argument made before by Honoré, according to which there exists a crucial distinction between “the right itself” and the “particular claims by which it may happen to be protected [from others].” Rights, Honoré argues, should not be understood merely as relational claims availing against duty-holders, because these claims are derivative legal

10 Honoré, ‘Rights,’ supra note 5 at 464. See also J. W. Harris, Property and Justice (Oxford: Clarendon Press 1996) at 129 (arguing that "claim-rights are not intrinsic to ownership interests.").
mechanisms through which the law guards against violations of rights. Penner begins from this view in his own effort to develop an account that, contrary to Hohfeld and his disciples, could reclaim for property law the qualitative distinction between rights in personam and in rem.

Penner develops his account in two stages. First, he begins by articulating a novel theory of the distinction between norms in personam and norms in rem; and second, he then expands on that theory and integrates it into a normative account of the value of autonomy as embodied in the legal practice of property. I shall for the most part take stock of the former, since it is at this stage of Penner's account that the fundamental distinction between in personam and in rem norms is established. The basic shortcomings of the Penner account that I shall seek to identify below are all features of this stage of his analysis.

According to Penner, duties in rem, unlike their in personam counterparts, are not owed directly to any right-holder in particular. This account 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 reduced to the position of mere beneficiaries of the duty. This view is reflected in the insistence 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. Duty-holders do not, therefore, owe separate duties to right-holders, taken severally. Rather, they "are under one duty to the plurality of property holders however their property is distributed amongst themselves."

Accordingly, Honoré criticizes Hohfeld for predicating his account of rights upon the various "particular claims" which hold against other persons without addressing, let alone explaining, the "right itself," that is, the right that runs directly from a right-holder to that which is protected by it—say, her piece of land or bodily security. Honoré, ‘Rights,’ supra note 5 at 456. According to Honoré, the distinction between the right itself and the particular claims for protection it underlies is traced back to “[o]rdinary legal usage.” Ibid at 456.

At this point of his argument, Honoré seems far less confident of the success of his approach in explaining the distinction between rights in personam and in rem (which is why Penner goes on to develop his own account of the distinction in question). See ibid at 453-461.

There are, of course, other elements in Penner's book which go beyond my two-stage characterization of his work. The two stages mentioned in the main text above refer to that part of the book whose basic ambition is to develop a theory of the distinction between in personam and in rem norms.


There exists a mistaken tendency to cast the distinction between thing-based and relational accounts of property in terms of the distinction between legal formalist and realist approaches to property, respectively. This is because the latter distinction cuts across the former one. On my account, property is fundamentally relational, but just as well formal. See Avihay Dorfman, Private Ownership (2010) 16 Legal Theory 1 at 24-25 [Dorfman, ‘Private’].

Penner, supra note 14 at 27.
Penner emphasizes that, contrary to *in rem* rights, it is crucial for *in personam* rights and duties that the people involved (the right- and duty-holder) would know the one standing on the other side of the norm. Indeed, Penner begins his argument by observing that *in personam* norms can arise in the context of property, but only to the extent that they involve duties that establish direct and personal relations between their holders and property owners: "If A owns Blackacre then he may grant any number of rights *in personam* to specific or specifiable people to make use of it, walk across it, and so on."\(^{17}\) And he insists, in order to show why these rights and their counterpart duties are distinctively *in personam* and, so, cannot have the impersonal and indirect character of norms *in rem*, that "it matters to A who they [the right-holders] are, and it matters to them who A is. It matters to A who they are because he must grant to them the licence to use his land."\(^{18}\) This direct normative structure is then distinguished from norms *in rem* under which an owner A may "deal with [others] through his property, like any passer-by who can only have an effect on A by somehow engaging Blackacre itself, by stealing some apples or throwing himself into the hedge."\(^{19}\)

By emphasizing the direct engagement between *in personam* right- and duty-holder, Penner purports to connect the distinction between *in personam* and *in rem* norms to the normative guidance of norms; in particular, the ability of duty-holders to comply with their duties given what they know about the world. In the context of property, for example, duty-holders are required to discharge a duty against trespass even when they lack sufficient knowledge concerning "what owners held what property."\(^{20}\) On Penner's view, a duty *in rem* compensates for this epistemic shortfall by fixing the content of the norm against trespassing impersonally and indirectly. The right-holder literally disappears from the trespass duty and, instead, a generic requirement to keep-off property which does not belong to the duty-holder arises.\(^{21}\)

But this otherwise illuminating way of explaining the difference between norms *in personam* and *in rem* confuses impersonal norms with general ones. The need to impersonalize the duty against committing trespass on the property of another seems to imply, on Penner's analysis, that this duty cannot take a relational form, which is to say it cannot be a duty which is owed to particular others. That norms can be impersonal and, at the same time, relational is an idea that figures prominently in the law of negligence, for example. The duty of due care specifies a demand to exercise a reasonable amount of

\(^{17}\) Ibid at 26.
\(^{18}\) Ibid.
\(^{19}\) Ibid.
\(^{20}\) Penner emphasizes the importance of normative guidance on several occasions. See ibid at 8-13, 26.
\(^{21}\) Ibid at 27.
\(^{22}\) Arthur Ripstein goes even further to argue that the view under discussion relates “nonowners to objects,” in which case the property owner becomes “dispensable.” Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Theory* (Cambridge, MA: Harvard University Press, 2009) at 93 n. 11 [Ripstein, *Force*].
care. To this extent, it is highly impersonal, guiding the conduct of risk-creators without relying on their prior acquaintance with potential victims. At the same time the duty, at least since Cardozo’s landmark decision in Palsgraf v. Long Island R.Co.,\(^{23}\) takes a relational form.\(^{24}\) Rather than being owed generally to the world at large, it runs directly from each and every duty-holder to each and every right-holder with respect to each and every protected interest in the person or property of the right-holder.\(^{25}\)

This is not to say that relational norms can always be cast in impersonal terms. A conception of relationality that picks out intimate or otherwise thick relations between duty-holders and right-holders may not be articulated impersonally. However, the conception of relationality appropriate for the context of property does not turn on intimacy or preexisting relations. Nor does it depend on knowing the identity—face and name—of owners, taken severally, and the location of their distinct pieces of property. All that a relational duty against trespassing requires is to acknowledge that, for any given object which can be reasonably identified as being owned by another, there is someone, whoever she is; that she is a person (this includes the class of artificial person in the case of organizations); and that she possesses the authority to fix the normative standing of others in relation to that object.\(^{26}\) This duty is perfectly relational—because it is owed to and owned by a particular owner—and highly impersonal—since it does away with the biographical and historical details about right-holders and their objects. Normally, we do not need to know any detail about the person who happens to own an object in order to respect this person’s ownership over the object. The mistake is to suppose that the irrelevance of the owner’s identity entails that we cannot owe this owner  

\(^{23}\) 162 N.E. 99 (N.Y. 1928). In this landmark decision, Cardozo C.J. announced that the duty of care takes a relational form.  

\(^{24}\) Penner is well aware of this challenge. See Penner, supra note 14 at 29 n. 38. His attempted rejoinder, however, may not be successful since it turns on the proposition that the relational form of the duty of care (or, as Penner would prefer, the doctrine of foreseeable plaintiff) is, actually, a feature of the proximate or legal cause element of the prima facie case of negligence. The duty of care, on this view, is a general duty, perhaps on the model suggested in Judge Andrews's dissent in Palsgraf (supra at 103), to the effect that everyone owes a duty of care to the world at large (which is clearly not the kind of duty recognized by most common law jurisdictions). But although the relational duty effectively imposes a limitation on the scope of liability, it does much more than that. In particular, the relational duty of care is not just a question of the scope of liability (or proximate cause), but rather a question of the conditions upon which liability (of whatever scope) can arise in the first place. The difference between the duty and the proximate cause elements is thus the difference between the grounds of and limitations on liability, respectively.  


\(^{26}\) By authority to fix the normative standing of others in relation to an object I mean the legal power (in Hohfeldian terms) vested in ownership right-holders to decide the rights and duties which non-owners have toward owners with respect to an object. I develop this account of the character of ownership in Dorfman, ‘Private,’ supra note 14. The scope, rather than the character, of this power is further discussed in Part V.e. below.
the duty against trespass and that, in its stead, we can only owe a similar duty to society (or the plurality of owners) at large. The missing element in the argument—viz., that without knowing who the owner is one cannot have the owner figuring in one’s deliberation toward action—is not entirely convincing.\textsuperscript{27} It is enough to know (or even reasonably to suppose) that there is a person out there who owns this object and that we ought to respect her, not just society at large, by not using her object. Nothing in this act of displaying respect turns on the name, face, or any other contingent fact about the identity of the owner. Respect for persons \textit{as such}, which is the relevant conception of respect in the property context, renders these facts redundant.\textsuperscript{28}

Another way to put the point is this. To insist, as Penner does, that a duty \textit{in rem} cannot take a relational form \textit{because} such duty cannot "express[] a personal relationship; there isn't one"\textsuperscript{29} is to beg the basic question by assuming that for a legal norm to be relational in the first place, the norm must turn on preexisting familiarity with the identity of the person to whom one owes a (relational) duty. And as I seek to show at this stage of my argument, this assumption is groundless, at least with respect to the property context.

Now, the conflation of impersonality with non-relationality 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. I take the legal experience first; the moral one second.

First, the indirect structure of the trespass duty on Penner's account runs into conflict with the \textit{private law form} that the tort duty against trespass takes. Property right-holders are no mere patients of the practice of property, being protected from non-owners by norms of exclusion laid down \textit{for them} by the practice’s top officials. They are also, and more dramatically, \textit{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 \textit{holders}, entails that the trespassory duty (which is a classic private law duty) runs directly to them, being \textit{owed to and owned by} them, rather then mediated by the social practice of property (or tort for that matter).

\textsuperscript{27} Penner might protest that his insistence on the centrality of right-holders’ identities accords with the psychological realities of duty-holders keeping off the objects of others. See Penner, supra note 14 at 26-27, 31. I do not deny that these realities may sometimes be crucial for respectful interactions to arise—consider the family nest or other cases of intimacy or fiduciary among the parties involved. As I argue in the main text below, however, norms of respect for and recognition of persons \textit{qua} persons do not turn on preexisting familiarity between right- and duty-holders. Respect for my fellow creature as such can never depend on contingencies such as prior acquaintance or shared cultural background.

\textsuperscript{28} I develop this conception of respect—the recognition conception of respect for persons—below.

\textsuperscript{29} The entire sentence reads: "The reason that we conceive of duties \textit{in rem} is that it is wrong to conceive of a duty whose content is exhausted by the way one deals with a thing as a duty expressing a personal relationship; there isn't one." Penner, supra note 14 at 27. I would like to thank an anonymous \textit{UTLJ} referee for pressing me on this point.
This relational form of the duty is not merely an aspect of the enforcement of the duty—that is, the exclusive entitlement on the part of the right-holder to vindicate her right in a court of (private) law. Rather, the judgment of the particular owner (in respect to others' normative standing) lies at the conceptual center of the duty against trespass. Indeed, contrary to Penner's view, the content of the trespassory duty is not that of 'keeping off'. The duty in question is not a mere restriction on using another's means, tout court. Instead, the duty would more accurately be described as prohibiting the unauthorized use of another's means. And, therefore, 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—it all comes down to the (relational) question of authorization as given by the right-holder.

Indeed, the giving of permission to enter one's property—the authority to fix the normative standings of others in relations to an object—does not merely serve to excuse duty-holders from liability for trespass, for it is more accurately constitutive of whether there is a duty not to commit trespass to begin with. Against this backdrop, it is conceptually impossible for a duty against unauthorized use of another's object to be owed to the entire practice (as Penner conceives), while at the same time to hold, as the law of trespass actually does, that the very existence of the duty depends on the judgment of each and every right-holder with respect to the normative standing of each and every duty-holder in relation to each and every piece of owned property. The relational form of the trespass duty in law demonstrates (once again) not only that relationality and impersonality are not mutually inconsistent; it also suggests that accepting Penner's explanation of the distinction between in personam and in rem duties commits one to hold that, because they take a relational form, all the trespassory duties which figure in tort law necessarily feature an in personam structure.

30 We normally do not say that an invitee who steps into the designated area of the invitation (say, a bookstore) is thereby committing a trespass, but that her normative standing—her being an invitee—excuses her from tort liability. In fact, it is more accurate to say that she is not under a duty precisely because her entrance has been authorized by the right-holder. More generally, the authorization in question "is not a privilege at all, because lack of it is of the very gist of assault and battery, false imprisonment, and trespass to land or goods." John G. Fleming, The Law of Torts, 8th ed (Sydney: Law Book Company, 1992) at 79.
31 Another (very different) way to render more vivid the conceptual problem of conflating impersonal with indirect duties is to consider Penner's extension of his analysis to the area of trespass against the person (as exemplified in the torts of assault and battery). Penner rightly notes that trespass to property shares a similar structure with trespass to person. See Penner, supra note 14 at 27-8, 74. But in order to get to his view concerning the impersonal and indirect character of trespass duties, he wrongly supposes that assault and battery protect bodily security. A human body, on this view, is somewhat like a res, lying out there, mediating between the duty-holder and the right-holder (whose body is protected by the duty against committing assault or battery). Accordingly, the res-like body invites the thought that torts such as assault and battery, like their trespass to property counterpart, involve impersonal and indirect duties (owed to the plurality of body 'owners'). But assault and battery do not merely protect bodily security (and, strictly speaking, not even bodily integrity); they do not feature a harm(requirement (and in some cases, such as
To be sure, Penner does not deny that some aspects of private law protection of property rights involve in personam duties. To this extent, Penner allows for relational duties to supplement the in rem duties that lie, on his view, at the center of the practice of property. That said, these in personam duties are, with Penner, "secondary" or "remedial" only. Indeed, "When the [in rem] duty is breached, and the individual owner sues the individual trespasser, only then do we have a claim which is properly in personam, against a specific individual." The critique I have been leveling against Penner's conflation of the impersonal with the non-relational (or general) has nothing to do with this aspect of the practice of property, which merely aims at the integration of in rem property rights with tort liability.

The conflation of impersonality with relationality does not mark a legal-theoretical difficulty only. It may also commit us to abandon the lived experience of private property by implicitly suggesting that the moral center of the tort of trespass to property departs from our moral intuitions that deference to a person in connection with her claim to control an object may express a distinctive form of respectful recognition for this person, not just for the practice of property or society more generally. Worse yet, many of our encounters with the properties of others are not as impersonal as the Pennerian account might suggest. Most people nowadays are no nomads. Most of their—our—encounters with the properties of others (at least in respect to encounters that come under the purview of tort liability for trespass) are deeply ingrained in everyday routine so that radical impersonality sounds just as unrealistic as its extreme opposite; namely, the nostalgic close-knit society of the Middle Ages. Thus, it is not just that duties whose content is construed impersonally can be perfectly relational in their forms as explained above. The point, rather, is that impersonality itself is a matter of degree and so need not

medical battery cases, these torts even impose liability on tort-feasors pursuing procedures that in fact contribute to the victims' bodily security and well-being). Indeed, the torts of assault and battery (as well as false imprisonment) protect the dignity of the person—that others will not employ one's body in ways that are not authorized by oneself, that is, contrary to one's judgment concerning the normative standings of others in relation to one's body. Whereas these torts surely impose impersonal duties, it is hard to see how their focus on dignity, rather than bodily security, could not take a relational form. Accordingly, to the extent that Penner takes these relational duties to form an essential part of the idea of property in law (which I doubt), it may be more accurate to say that Penner does develop an understanding of property which is partially relational, but, as I argue in the main text, that this understanding is of the wrong kind.

Penner, supra note 14 at 24.

Ibid.

To fix ideas, it seems more plausible to believe that parents explain to their children why they ought not to cross through the property of another (say, on their way to the beach) in terms of respecting this other, whoever she is. It is less likely, I think, that their explanation is cast in terms of a single duty children and adults alike owe the practice of property in general. The difference between the two kinds of explanation manifests itself in the difference between expressions like 'your conduct is being disrespectful of the land's owner' and 'you are being disrespectful of the practice of property or the plurality of property owners that, say, live in England or Connecticut'.
obtain, at least not as vigorously as would have been required to substantiate the argument from the practical *necessity* of indirect duties *in rem*, which is to say duties people owed to the practice as a whole *instead of* to particular right-holders.

In fact, there are good reasons to believe that Penner is well aware of this difficulty. His awareness is striking, I shall argue, because it suggests that his proposed account of norms *in rem* may fail to defend adequately a qualitative difference between these norms and their *in personam* counterparts.

To see this, recall that a duty (in *rem*) mediated by and so owed to the entire practice as a whole suspiciously departs from the lived experience of property, both legally and morally. Consider a trespass case in which a duty-holder and the right-holder are familiar with one another. This could be because they live in a very small village or for any other reason that means that the duty-holder deliberates as to whether he should cross through this right-holder’s land (say, to deliver a heavy package to a third person who lives across from the right-holder’s premises). Suppose, further, that the duty-holder seeks, to no avail, the permission of the right-holder to cross through the latter’s land. In this case there is no plausible way out of the observation that the duty-holder understands himself to be owing the duty to the right-holder directly, and that the resort to the mediating service of a general practice is superficial. Now suppose that many human interactions in and around property were of this sort. How could the duty against trespassing be adequately cast, with Penner, in terms of an indirect and impersonal principle of action?

At this point Penner concedes that when there is “just one owner of everything,” the trespass duty will necessarily be identified with a “single right-holder,” in which case the “duty naturally takes on the character of a duty *in personam*.” While Penner focuses on a world consisting of a single right-holder, the logic of this concession extends more broadly to capture *every* case involving some measure of preexisting relations or familiarity between duty-holders and right-holders. How substantial must this measure be in order for trespassory duties to lose their *in rem* nature—viz., indirect and impersonal characters—is of course a question of transactions costs, which is to say a matter of degree, not of quality. It is, in other words, a matter that turns on the *external circumstances* within which the duty happens to apply. And wherever the line between prohibitive and bearable costs is drawn, it should be clear by now that the explanation of the distinction between norms *in personam* and *in rem* as offered by Penner relies heavily upon these circumstances. Or so I shall now seek to show.

The most plausible way to cash out the implications of this conclusion—viz., that external circumstances or costs lie at the center of the distinction between norms *in personam* and *in rem*—is as follows. Norms *in rem*, because they are by definition indirect and impersonal, can *exist* only insofar as the world is such that transaction costs (search and information costs included) render the identification of right-holders

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36 Penner, supra note 14 at 27.
37 Penner notes that “the idea of rights *in rem* to property depends upon there being many owners.” Ibid.
infeasible. The point is not that norms in rem are not necessary, normatively speaking, to regulate the affairs of persons occupying a simple world (say, a close-knit-society), but rather that, as a conceptual matter, there are no norms in rem under these conditions. I find this conceptual claim perplexing and as I shall show in the examples I discuss in the next stage of my argument, norms in rem can and do figure in a simple world (however ‘simple’ is defined).

But even assuming that the conceptual claim obtains, it is not clear whether Penner’s account provides an adequate explanation of the difference between norms in personam and in rem, that is, of elaborating their qualitative difference based on the contingency of transaction costs. Indeed, while on Penner’s account, a duty could have the exact same content—not to trespass against the property of another—determining whether it is a norm in personam or in rem would be a matter of circumstances extrinsic to this duty. In particular, the classification of the duty as in rem (or in personam) is in the end a feature of the transaction-costs-question of whether the right-holder—the ‘other’ to which the duty directly or indirectly refers—“can be easily identified.”

A and B, for example, owe the same (content of) duty against trespassing on C’s land. But because A lives in C’s small village, and B is a stranger who merely comes across the village on her way elsewhere, A may owe C a trespass duty whose character is in personam, while the duty incurred by B would be characterized as in rem. The real world is of course neither perfectly an A-world nor a B-world. It features, for every single right-holder, a mix of As and Bs. And although the difference between the duty on the part of As and on the part of Bs is purportedly cast in the qualitative terms of directness and personality, it supervenes on the purely contingent nature of transaction costs. Thus, whether person D owes an in rem duty with respect to C’s property is determined by reference to the question of how similar (in the appropriate sense) is D’s situation is to either A or B, which is a matter of degree only.

Accordingly, and more generally, the distinction between norms in personam and in rem turns, on Penner’s account, on a prior question which lies outside the nature of these

38 The normative claim is made by Merrill & Smith, ‘Interface,’ supra note 5.
39 Indeed, Penner notes that in personam and in rem duties against trespass “would have the same content, i.e., not to trespass on property,” and he then goes on to conclude that “the idea of rights in rem to property depends upon there being many owners.” Penner, supra note 14 at 27.
40 Ibid.
41 The law of trespass (at least in this case) does not acknowledge the biographical details that distinguish A from B with respect to C.
42 There may well be pragmatic reasons to consolidate the law of trespass such that A and B will owe the same duty to C, not just in content but also in character (either in rem or in personam character), but these reasons cannot be derived from the account developed by Penner.
43 More precisely, A and B stand at the opposite extremes of an axis featuring many different degrees of familiarity with the right-holder.
What renders a norm indirect and impersonal in its application are the external circumstances onto which it maps—transaction costs are the ultimate source of the (necessarily quantitative) difference between in personam and in rem norms.

Whereas the Hohfeldian approach takes extrinsic circumstances (such as large and indefinite duty-holders) to be a condition for telling the difference between norms in rem and in personam, the account developed by Penner takes extrinsic circumstances to be prerequisite for the existence of norms in rem (and the non-existence of norms in personam). In spite of their otherwise important differences, both approaches are of a piece insofar as they (explicitly or implicitly) presuppose that it is impossible to explain the distinctiveness of norms in rem without drawing on the crucial role of transaction costs. A better approach, as I shall seek to outline below, must show that norms in rem are different in nature from in personam ones, including most importantly in cases where transaction costs are not an issue. Were norms in rem truly distinctive, their distinctiveness would manifest itself even then, that is, even when external circumstances are set to one side.

IV Property as Common Framework: A Characterization

I commence my account with the functional observation that both contract and property represent normative systems of coordinating access to, use of, and profit from external objects. Both systems, in other words, order the interactions between persons with respect to external objects. To this extent, contract and property are functionally similar, striving to bring about the same objective—that of property coordination in terms of persons' practical affairs in relation to external objects. Faced with the complexity of modern society, contract may often do so less effectively than property. Nevertheless, the functional superiority of property arrangements reflects the view—the conventional view—that the difference between contract and property is a matter of degree. In principle, as I shall explain below, contract-based regulation of persons' practical affairs (in and around external objects) can achieve, often at a higher cost, property-like effects.

But although the functional elaboration of the necessarily quantitative difference between contract and property reinforces the Hohfeldian approach (that norms in personam and in rem are intensionally indistinct), there remains ample logical space to

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44 It will not do to answer, instead, that the difference between norms in personam and in rem is a feature of the indirect and impersonal character of the latter. In order not to beg the relevant question (of saying that the indirect and impersonal character of the latter explains why A owes a duty in personam to C, whereas B owes a duty in rem), one must explain why a norm gets its in rem character in the first place. Penner provides this explanation, as I suggest in the main text, by reference to the costs of identifying the right-holder at stake.

45 To be sure, I do not claim that contract’s framework of coordination can operate on external objects only. Surely there can be contractual engagements that do not turn on external objects. In this paper, however, I focus on contract relations that are formed exclusively in and around external objects.

46 See e.g. Merrill & Smith, ‘Interface,’ supra note 5 at 793.
show that contract and property are, nonetheless, of a different quality. Against the backdrop of this space, many of the quantitative differences attributed to the property norms—e.g., general applicability, powerful protection of interests, economizing on transaction costs, etc.—are but surface manifestations of property’s distinctive character. As I shall argue, property is a genuinely common framework of coordination in which participants approach the resolution of their competing claims (such as for use of and access to an object) together. Property, on my account, turns coordination itself into a form of respectful recognition, quite apart from the functions it serves (such as promoting efficiency or sustaining freedom). This is, I argue, because duties in rem take a categorically social form—that is, they can engender human interaction of respect and recognition of persons simply by virtue of their being persons. Duties in personam, by contrast, may at best, take a hypothetically social form—that is, they may (arguably) establish relations of respect and recognition in which being a person as such is never sufficient for these relations to get going. This formal way of distinguishing between duties in personam and in rem is not only part of the morphology of the duties in question. Rather, it provides the necessary normative resources to elaborate on their

47 Thus, I do not argue, as Honoré seems to be arguing, that a duty in rem typically applies to persons generally (subject to particular exceptions). Honoré, ‘Rights,’ supra note 5 at 458. This may be true (or false), to be sure. My argument, however, is that the form that this duty takes is social (in the sense I explain in the main text below) and unconditionally so.

Another point which is worth clarifying at this stage of my argument concerns the distinction between the form that an act may take and its underlying motivation. By saying that property coordination takes a social form, I do not argue that participants in this scheme of coordination in fact orient themselves toward one another out of good will—it is possible that some are disposed to defer to the point of view of the property right-holder out of a purely instrumental motivation (such as fear of liability) or non-instrumental motivation (such as respect for the rule of law) or both. But even given the conceptual separation between the act of and motivation for deference to others, displaying it implicates the deferring person in acquiring a pro-social attitude. That is, an implicit or explicit willingness to recognize the point of view of another as meriting accommodation simply by virtue of its being her distinctive point of view. The good of respectful recognition of others cannot, of course, produce the needed motivation for respectful recognition to arise; instead, this good purports to give us a reason for acting as respecting persons ought to do.

48 This way of distinguishing between contract and property does not mean that the latter is absolutely ‘more important’ than the former. To start with, it seems fair to say that both are necessary to human flourishing. Furthermore, their respective importance plays out differently, rendering the question of whether property is absolutely ‘more important’ than contract obscure and, indeed, unhelpful. On the one hand, contracts may establish normative relations that, in many cases, are socially thicker than those that can arise through property (consider marriage or employment contract). On the other hand, however, contract allows—viz., it creates the opening for—one to create these thicker relations parochially. Sending one’s children to a private school or living in a gated community in the suburbs are two familiar contemporary manifestations of parochialism sustained by contract. Of course, contracts can establish relations across castes or clans. However, the point is that that is not a necessary aspect thereof. Making a contract is an act of picking your friends—this is just another way to say that it takes a hypothetically social form. Property, by contrast, is a form of coordination in which the so-called friends are predetermined on a categorical basis: they consist of each and every person.
normativity—property, unlike contract, expresses the *categorical value* of regarding others as free and equal persons. Or so I argue.  

To make good on these claims, I open my argument with a familiar example from the early history of property—a lease for a term of years. Against the backdrop of this example, I shall seek to tease out the distinctively common framework of object-related coordination that property makes possible. The example is a particularly helpful proving ground, since it involves a truly simple world, allowing for a more precise investigation of the practical difference that social coordination based on property makes even where coordination through contract becomes, to an important extent, functionally indistinct.

A CONTRACT-CUM-PROPERTY: THE CASE OF THE LEASE FOR A TERM OF YEARS

During the early days of common law, the right held by a tenant for years, a termor, was no more than an *in personam* one, arising from the contract he would make with the lessor. There are several different hypotheses as to why it is that a lease for a term of years could not furnish the termor with a right *in rem*, one which runs with the land and, therefore, holds good against persons outside the privity of contract. One such hypothesis emphasizes blind, and indeed arbitrary, imitation of Roman law, especially the traditional resistance of Roman law to vesting the lessee with a property right to the possession of the leased land. Another seeks to generalize an observation that might (at best) obtain in the case of some termors—namely, their being moneylenders practicing usury—to the entire termor class. This move is then deployed in the service of explaining why all termors, moneylenders and otherwise, had no more than contract-based protection of the land they possessed *qua* lessees. Others focus on the departure of the lease in question from the ordinary economic and social structure of feudalism—the termor, it has been observed, “had no tenure, no freehold, no tenement even.”  

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49 I do not deny, however, that some legal institutions (such as bailment) may feature a property-contract integrated scheme of coordination. My ambition is to explain the qualitative difference between property *as such* and contract *as such*.

50 While I draw on historical cases, my argument, it is important to note, is not causal or historical, but rather conceptual and normative.


same event (say, trespass on the leased land). A right in personam on the part of the lessee is just another way to say, on this account, that the lessor has the unique standing to sue third parties (for trespassing on the leased land).  

No matter which hypothesis makes better sense of the legal situation, it is clear that (on either account) common law self-consciously denied lessees the formal status of property right-holders. At the same time, however, the law did afford lessees a property-like protection by way of contract-making. I shall begin by outlining the ways in which contract served to sustain the in personam right of lessees against those who stand outside the privity of contract. To this extent, I argue, the schemes of land-use coordination provided respectively by contract and property are functionally similar, merely differing in the degree of protection against third parties. Rather than looking for functional differences, I shall seek to show that contract and property are, nonetheless, fundamentally different in virtue of the distinctive forms of coordination they, separately, take. The lease for years, as I shall explain, renders this point vivid. Moreover, since I focus on one particular property right (one stick of the bundle of sticks, as it were), the ambition of the argument is to present the case for the distinctive nature of property at a retail level—that is, in respect to a concrete property right. The next stage of the argument takes this showing to its wholesale level of ownership (which is at once a stick and a bundle of the remaining sticks).

There exist two imminent threats to any termor, both of which extend beyond privity of contract: First, third parties ejectors; and second, a subsequent owner of the leased land, which is to say the lessor’s grantee. A property right for a term of years, because it is good against the world, would put the lessee in the position to seek legal redress (whatever it is) immediately against both classes of ejectors. Indeed, the very act of ejection is a freestanding wrong to the lessee, because it involves disregarding the lessee’s right in rem to the exclusive possession of the land. In its absence, however, the lessee could only resort to her contractual arrangement with the lessor to seek an alternative mode of protection. In this case, a third party trespasser does not wrong the lessee merely by disregarding her claim to a right to the exclusive possession of the land, since her claim runs directly and exclusively to the lessor. The trespasser may, of course, wrong the lessee’s person, by literally pushing her off the land, in which case liability for battery would lie. But the commission of this tort, or any other tort for this matter, is purely coincidental upon any successful attempt to oust

McGovern, supra note 52 at 505-506.

I make this widely acknowledged distinction between mere strangers and purchasers from the lessors for purpose of exposition only.

Likewise, the trespasser would be liable for procuring a breach of contract between the lessee and the lessor in case ousting the lessee would prevent her from fulfilling her promise to the lessor to pay for the lease. But it is not clear that liability for the inducement of a breach of contract could lie in this case, since there is no breach of the leased contract after the ousted lessee no longer possesses, let alone enjoys, the land. For more on the connection between property and the inducement tort, see Part V.c. below.
the lessee off the leased land. In other words, it is not necessary for the purpose of seizing physical control over the land in question—for example, an ejector may simply switch the locks in the gates surrounding the land while the lessee is away, say, for work.

In spite of its vulnerability, a contractual transaction could, to an important extent, mimic the effects of holding a property right for a term of years. Begin with looking at third parties ejectors. These are strangers not only with respect to the lessee, but also to the lessor. In this case, the lessee may invoke an express or implied warranty of quiet possession against the promisor-lessee. During the early days of the common law, the warranty grounded a remedy in contract on the writ of covenant, in which case specific performance of the contract was awarded to the benefit of the lessee.\textsuperscript{58} Compelling the lessor to perform his promise—to provide the lessee with the equivalent of an undisturbed possession—amounts to an obligation to restore the lessee to her position as occupier of the land. And unlike the lessee, the property right held by the lessor renders him eligible to retrieve the land bringing the assize of novel disseisin against the third party trespasser.\textsuperscript{59} Indeed, ousting the lessee, to repeat, is not in and of itself a legal wrong; the wrong, rather, is that of disseising or dispossessing the lessor.\textsuperscript{60} Thus, at bottom, the lessee was protected against third party ejectors by way of a contract for a term of years as though she held no less than a property right for a similar term.

The second class of potential ejectors—the purchaser of title from the original lessor—represents a greater challenge to the deployment of contract in the service of compensating for the absence of a formal property right for a term of years. This is obvious, as the lessor, who grants his title to the purchaser, can no longer bring real action against the grantee to recover the land (such as the assize of novel disseisin).\textsuperscript{61} Even given this defect, however, contract can prove helpful in giving the lessee protection that, effectively, is characteristic of property, not merely of contract.

Indeed, the contractual right for a term of years obligates the promisor-lessee to see to it that the lessee enjoys the land. By alienating his title to a third person, the lessor fails to make good on this obligation. After all, the absence of property right on the part of the lessee renders her eviction by the subsequent owner legally innocent. But the lessee can insist that the lessor rectify him for the loss of the right to use the land. Now, damages \textit{in lieu} of the lease itself may certainly reveal a shortcoming in a contract-based protection of a right for a term of years. However, it does not rob the contract arrangement of its property-like protection. For this protection—damages for the full value of the term of years—is akin to the predominant protection of property right-holders with respect to

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\textsuperscript{58} On the remedy of specific performance for the breach of warrant in connection with the lease, see Pollock & Maitland, supra note 51 at 106 and references cited therein.

\textsuperscript{59} The assize of novel disseisin was an action to recover land.

\textsuperscript{60} Milsom, supra note 54 at 153; Plucknett supra note 53 at 571 n.1.

\textsuperscript{61} Nor would it be logical for the (ex) lessor to contradict himself by alienating his title, on the one hand, and seeking to retrieve it, on the other.
their chattels. The tort of conversion and its “little brother,” trespass to chattels, offer owners of chattels damages; in the case of conversion, this remedy provides for the full value of the chattel converted. And since common law, unlike Roman law, provides very little space, as it were, for actions for the vindication of ownership, a remedy of damages for conversion is, in many cases, as far as property right-holders can get with respect to disregarding their entitlements for chattels.

Against this backdrop, it is not surprising that early common law lawyers called the right held by the lessee formally under a contract with the lessor a “chattel interest” and, more importantly, a “chattel real,” reflecting the de-facto mixture of characteristics: that “of real property and [that] of chattels” underlying the property-like legal protection of the lessee’s formally contract right. Accordingly, the unavailability of an in kind remedy—the impossibility of compelling the original lessor to restore the lessee to her ex-ante position—does not make the contract-based protection of the right for a term of years any less like property in its effect. As mentioned a moment ago, it insures the lessee not merely against the original lessor, as contractual rights normally do, but also against the adverse consequences of being ousted by subsequent owners who owe no prior duty in personam to the lessee. Contract, therefore, can have an in rem draw on third parties—mere strangers as well as subsequent owners—seeking to interfere with the lessee’s enjoyment of the land. And while this form of (indirect) protection does not always give rise to the recovery of the term in specie, it nonetheless provides the lessee with a monetized equivalent for the term lost at the hands of persons standing outside the privity of contract.

I say the predominant, rather than the only, protection in recognition of traditional common law actions such as replevin and especially detinue. It is beyond the scope of my argument to delve into the history of the forms of action in order to show that, for a variety of different reasons (such as the susceptibility of this action to wager of law), detinue had failed to compete with trover (or conversion). I do not deny that conversion and detinue reflect different causes of action (on this point, see General and Finance Facilities Ltd. v. Cook Cars (Romford) Ltd., [1963] 1 W.L.R. 644, 648 (per Diplock L.J.)). Rather, the argument is that specific restitution (through detinue) is everything but a defining feature of the law’s protection of chattels. See, generally, John W. Salmond, ‘Observations on Trover and Conversion’ (1905) 21 LQR 43. This is also the case with respect to replevin, which is a remedy for goods taken by ways of distress. Cf. Mellor v. Leather (1853) 1 E. & B. 619, 629 (replevin is “an unusual form of action” for goods unlawfully taken).


The comparison between the contractual protection of the termor and the tort of conversion is conceptual, not historical. The tort of conversion did not exist (certainly not in its current form) during the early days of the common law.

See supra note 62.

Punitive damages can also be had on top of compensatory damages, but they, too, fall short of the Roman law action of vindicatio.

Simpson, supra note 54 at 71.

Ibid at 71.

Ibid.
B MORPHOLOGY OF PROPERTY: THE LEASE FOR A TERM OF YEARS

The case of the contractual right for a term of years, I shall argue, allows us to see why the conventional wisdom concerning the (quantitative) difference between property and contract is inadequately incomplete. To be sure, the case under consideration clearly demonstrates that, viewed from a purely functional approach, property is likely (though not certain) to present a technological improvement over contract.\(^{70}\) In rem effects, that is, can be had either way so that the crucial question becomes that of which technology proves more appropriate given certain considerations (such as the complexity of mass society) that are external to the distinction between property and contract.\(^{71}\)

That said, the preceding discussion of the lease for a term of years is especially helpful insofar as it helps reveal why the functional approach underlying the conventional wisdom cannot capture the distinctiveness of property. This is because this discussion does not turn on external considerations that (on the conventional wisdom) are constitutive of the selection between property and contract forms of land use coordination. Instead, it picks out a fairly simple world, including even a world occupied by a lessor, lessee, and third party ejector; that and no more. As I shall now seek to show, the explanation of the distinction between property and contract in the term of years context can be elaborated with no reference to any of the external circumstances such as a large and indefinite number of duty-holders or many owners as suggested by Hohfeld and Penner, respectively. The difference between property and contract is qualitative and, for this reason, it manifests itself at every turn, including in connection with the simplified world mentioned above.

Unlike the contract-based coordination exemplified by the case of the term of years, property puts forward a distinctively common framework of social coordination in which participants—regardless of privity of contract—approach their conflicting claims together, that is, from a shared point of view of the matter at stake. A framework such as property, I shall argue, is common not just in the sense that it makes possible claims and remedies running directly between the participants in this coordinating framework, but rather in the deeper sense that it expresses a collective commitment that participants share, a commitment to approach the resolution of competing claims by respectfully recognizing one another as constituting independent points of view. To begin with,

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\(^{70}\) The technological improvement brought about by property, as one lawyer economist has argued, is less than certain. In some circumstances, such as when political opportunism and corruption prevail, considerations of welfare and utility count against property (even when property, as already observed, economizes on transaction costs associated with a contract-based coordination). See Benitto Arruñada, ‘Property Enforcement as Organized Consent’ (2003) 19 JL Econ & Org 401 at 410-411.

\(^{71}\) I do not say, however, that these considerations (whatever they are) must be sufficient in order for the selection between property and contract to be made.
contract-based coordination quite literally severs the lessee from third parties.\textsuperscript{72} Indeed, it conceives of the lessee as the lessor's patient, enjoying some measure of property-like protection against third parties indirectly and, thus, consequentially by way of forming a contractual bond with the lessor, essentially as having a guardian in the lessor. Third parties, after all, owe no obligation to respect the lessee in connection with her claim to control the land under lease, in which case such a claim amounts to no more than a brute claim.

Property, by contrast, gives rise to coordination in which third-parties regard not only the lessor, but also the lessee as an agent, since her claims demand freestanding recognition by them.\textsuperscript{73} Third parties are no longer required to moderate their claims and adjust their activities solely by reference to the lessor. They also incur an independent obligation to defer to the judgment of the lessee concerning their normative standings in relation to the land—to accommodate this judgment in their thoughts and actions going forward. In other words, third parties are required to take the point of view of the lessee as their guide to conduct in respect to using, accessing to, and profiting from that land.\textsuperscript{74} In this regard, they approach the question of what constraints are placed on them with respect to the land in question by adopting a single point of view—that of the lessee. Thus, rather than insisting on their or the lessor's conception of 'permissible use' of the leased land, third parties suppress their judgments in deference to the lessee's and, thus, share in the judgment made by the lessee. Third parties, on this view, do not merely display impartial concern for the well-being of the lessee; they respect the lessee for being a person as such, that is, as constituting her own point of view and, indeed, distinctive subjectivity.

Moreover, the lessee (or the property right-holder, more generally) does not just enable third parties to share her point of view of the matter at stake and, therefore, to

\textsuperscript{72} To be sure, the severance in question pertains to the (dis)connection between the lessee and the third party as established by legal fiat (rather than, say, by preexisting friendship).

\textsuperscript{73} It is certainly true that, under a property regime, the duty against trespassing on the leased land is primarily (and sometimes even exclusively) owed to the lessee, rather than to the lessor. See also infra note 74 for more. Does this mean that the move from contract to property coordination amounts to nothing other than a change of the person to whom the third-party ejector must defer as a result? I think not. To begin with, the lessor may (at most) fall out of the normative relation engendered by the trespassory duty between the ejector and possessor. However, she does not disappear from the property coordination itself. This is not only the case when the lease ends and the lessor regains exclusive possession of the land in question. Indeed, any transaction between the ejector and the possessor that happens to exceed the terms of the lease may require deference on the part of both to the authority of the lessor. At any rate, the main purpose of the lease example is to flesh out the practical difference that property coordination introduces into the world as seen from the point of view of the lessee who, by virtue of the emergence of property-based coordination, can be recognized by others as an agent, rather than merely as a patient (of the lessor).

\textsuperscript{74} In many cases, the lessor does not possess the authority held by the lessee to determine the normative standing of others in relation to the land. See e.g. W.V.H. Rogers, ed, Winfield and Jolowicz on Tort, 16th ed (London: Sweet & Maxwell, 2002) at 489 (noting that "a lessor of land gives up possession to his tenant so that the tenant alone can bring trespass during the currency of the lease").
approach the problem of coordination together. Rather, by exercising her authority (to fix others' normative standing), the lessee also commits herself to recognizing third parties in ways she would not have been required to do had her right for a term of years been purely contractual.

Indeed, the move from contract to property transforms the brute claims placed by the lessee on third parties into pronouncements of right, which depend on the lessee's recognition of these third parties as duty-holders and, therefore, as free and equal persons. Accordingly, a violation of the duty to defer to the judgment of the lessee (say, ejecting the lessee) normally entitles the lessee not only to resent the tort-feasor, but also to hold him—rather than just the lessor—legally accountable. This form of attending to others is distinctively a feature of human relationship and it can operate only insofar as participants presuppose (or have most reason to presuppose) the importance of respecting one another as free and equal persons. It is certainly odd to resent trespassing cattle (rather than the owner of the cattle) and to hold them responsible as though they violated a duty owed to the lessee. More generally, it is a transcendental condition of the possibility of holding someone legally accountable that one is acknowledged (by the lessee-victim) as a being with equal standing to make and receive claims from the legal point of view.

To be sure, coordination in connection with external objects that takes the form of contract does not of course render third parties inferiors or otherwise nonhumans, tout court. The ambition of the argument, recall, is to explain the distinctive form of property against the backdrop of contract. Thus, by falling short of constituting a common framework for the coordination of activities, contract coordinates the respective claims of the lessee and the third party without necessarily reorienting these participants toward one another and, in the lessee's case, toward according the third party the recognition that the status of a property duty-holder entails.

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75 Cf. Peter F. Strawson, Freedom and Resentment (London: Methuen, 1974) at 9 (noting that “to adopt the objective attitude to another human being [sic] to see him, perhaps, as an object of social policy; as a subject for ... treatment”).

76 Slaves, after all, were often denied this form of recognition precisely when they were denied the status of duty-holders by being treated as though they were their masters' cattle.

77 The highly abstract elucidation of the recognition immanent in establishing property's common framework of coordination has several concrete doctrinal expressions which, but for a brief sketch, I shall leave for another occasion. To begin with, there exists a requirement, mostly implicit but no less real, on the part of property right-holders to render their judgments (concerning the normative standings of others) reasonably accessible in order for duty-holders to accommodate these judgments to begin with. Moreover, property right-holders incur many different general obligations to third parties. See e.g. A. M. Honoré, ‘Ownership’ in A. G. Guest, ed, Oxford Essays in Jurisprudence (Oxford: Oxford University Press, 1961) 107 at 123-24. Finally, recent progressive property theorists urge that property right-holders should assume obligations or responsibility toward society that reflect the need to promote human flourishing and distributive justice through private law and property law, in particular. See e.g. Eduardo Moisés Peñalver & Sonia K. Katyal, Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of
On my account, therefore, property is essential to rendering a common endeavor the coordination of competing claims of distinct persons over an object. The form of coordination based on contract alone exerts no such rational pressure toward establishing a shared perception (by the participants) of how and in what ways the competing activities are to be coordinated. Indeed, contract leaves the participants to coordinate their activities with others selectively, depending on the prior decision about the making of agreements. It features the coordination of some with some (say, lessor with lessee, but not necessarily lessee with third parties), rather than of each with each (which will necessarily include lessee with third parties, taken severally).

Now, it may be thought that property is not as essential to connecting participants through a common framework of coordinating competing claims as argued above. This is because in a world with trivial transaction costs, the argument goes, a lessee and a third party would negotiate their competing claims together by striking an agreement that best reflects their respective preferences concerning the matter at stake.

But this argument mischaracterizes the practical (qualitative) difference between property and the absence thereof. The mistake in the argument under consideration is that it assumes that property has no freestanding value (including even a purely economic value), though in fact it does. The necessary connection I have established above between property and a common framework of coordination grounded in respectful recognition does not break down in the face of zero transaction costs. Indeed, the qualitative difference that property makes to social coordination, as just explained, is not a feature of the costs of buying the lessee’s permission to use the leased land. For in the absence of property, the lessee’s permission is costless, since no permission on her behalf is required. If anything, the property form, because it creates a common framework of coordination, sets the necessary baseline against which a third party may seek the permission of the lessee. Likewise, the lessee has no pressing need to contract a quiet


While the focus of my argument in the main text is private property, it can equally be extended to other systems of property coordination such as common property. The need to render collective decisions about use of and access to common property necessitates a framework of decision-making (which appears to be either extremely costly or dangerously totalitarian).

An argument along this line is found in Barzel, supra note 7. This is not, however, the argument made by Coase in his celebrated Ronald H. Coase, ‘The Problem of Social Cost’ (1960) 3 JL Econ 1. As I explain in the main text below, Coase did acknowledge the importance of property, because it fixes the preliminary question of who contracts with whom (or, in the language of Guido Calabresi, who bribes whom). For a critique of Barzel's neglect of the role of property (including its role in the economic analysis of property law), see Thomas W. Merrill & Henry E. Smith, ‘What Happened to Property in Law and Economics?’ (2000) 111 Yale LJ 357 at 377-378.

There may of course be prudential reasons that contingently support an effort on the part of third parties to secure the lessee’s permission (as when the lessee is unusually strong and dangerously resentful).
possession agreement with the third party—as explained above, the lessor already provides her with a contract-based assurance to that effect. In either case, a world featuring zero transaction costs does not in and of itself give rise to a common framework of coordination. It is property, instead, that establishes this framework, in virtue of the special form of coordination that it takes.81

C CONTRACT-CUM-PROPERTY AT A WHOLES ALE: THE CASE OF OWNERSHIP

The preceding discussion focuses on property in retail—the case of a particular right, a term of years, that takes the form of property. In what follows I shall seek to develop a similar argument concerning the distinctiveness of property in terms of wholesale, which is to say ownership. The interest in using a piece of land called a term of years represents a stick in the bundle of different other sticks that, metaphorically speaking, jointly form property as a whole. If anything, ownership captures this level of wholeness, since it is at once a stick and a bundle of the remaining sticks. Accordingly, the argument going forward does not attempt to establish once again, from scratch, the argument from the distinctiveness of property. Rather, my ambition is to show the conceptual possibility of extending this argument from the particular case of the lease to the general case of ownership.

Suppose a dozen individuals who happen to live in close proximity to one another are the sole inhabitants of the world (or so they believe). Considerations pertaining to a large and indefinite class of person have no moment in this world. On the conventional wisdom, recall, it must be true that there is no fundamental distinction between property and contractual obligations or rights. But if, however, the distinction is qualitative and thus goes to the nature of these two sets of obligation or right, as I shall seek to show, it will appear even in this hypothetical.

Now, it turns out that this class of individuals has no practice of property regulation with respect to both tangible and intangible things. There may be any number of reasons for this, none of which need imply that these people, separately and jointly, self-consciously reject property as such. Perhaps, most plausibly, the need for property has not arisen yet or perhaps the people involved have never come up with an idea, let alone an articulated conception, of property. This is not surprising given the size of the society under consideration. Against this backdrop, it becomes less important to figure out why property has not emerged yet than it is to see what can be done under these circumstances by resorting to contract or other means of producing property-like effects. For I can now investigate the practical difference that property makes (against the base-line of contract-

81 What, then, would be the case if only two persons—the lessee and the lessor—occupy the world? In particular, could this world imply that the lessee’s right is both an in personam and an in rem right, in which case the argument from the qualitative difference between contract and property immediately fails? I think not. The crucial question to which this special case gives rise is whether the right of the lessee establishes a truly common framework of coordination—one which, in principle, obligates future comers.
based coordination) without pre-judging the law’s or positive morality’s actual stance toward property; in particular, a stance taken toward the question of whether persons ought to respect one another not just in connection with the normative power to bind themselves to each other by making promises, but rather in connection with their respective claims to possess an authority to fix the normative standing of others in relation to certain objects.

Suppose A finds or produces a beautiful necklace. In the absence of a system of private property, she can quite effectively secure her unique control over the object by any number of ways of keeping others off it. These could at best provide her with quiet possession. For instance, A can quite effectively secure her unique control over the object by any number of ways of keeping others off it. For instance, A could shield, cover, or hide any trace of the necklace. In this way she could literally secure her unique control without relying on others displaying respect for her in connection with her claim to control the necklace. Recourse to physical protection of external objects, as Hobbes famously observed, figures prominently even in the lived experience of private property—many people lock their car despite having a legally secured title to it. Alternatively, A could wear the necklace and thus secure her control over this object indirectly, that is, by recourse to the moral and/or legal duty on the part of others to respect her in connection with her person. One who attempts to tear the necklace off her does not disregard her claim to control over the object—after all, there is no system of private property that turns her brute demand (for control) to an assertion of right (to control). However, tearing the necklace off her may sometimes involve an unauthorized touching of A’s body, in which case the aggressor commits the moral or legal wrong of disrespecting A in relation to her entitlement to have control over her person. Since this somewhat primitive way of securing actual control falls short of a property-based coordination not just formally, but also functionally, it will prove helpful to consider a more sophisticated method—a contract-based coordination—of mimicking property-based coordination in function (though not, of course, in form).

Thus, suppose that A is not merely interested in a quiet possession of the necklace. After all, the unusual authority characteristic of private ownership extends not just to being in control of an object, but more fundamentally to fix the normative standing of

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82 According to Hobbes, the state of nature can never be eliminated altogether. See Thomas Hobbes, Leviathan, edited by Richard Tuck (Cambridge: Cambridge University Press, 1991) at 89 ("Let him therefore consider with himself … when going to sleep, he locks his dores; when even in his house he locks his chests; and this when he knows there bee Lawes, and Publike Officers, armed, to revenge all injuries shall bee done him").

83 See Restatement (Second) of Torts § 18 cmt. C (1965) ("some things such as clothing or a cane … which are so intimately connected with one’s body as to be universally regarded as part of the person."). A similar view is expressed in Immanuel Kant, The Metaphysics of Morals, translated by Mary Gregor (New York: Cambridge University Press, 1996) at 39.
others in relation to it.\textsuperscript{84} Accordingly, being a prototype of the capitalist entrepreneur, \textit{A} seeks to make a profit out of the necklace (or, for that matter, her novel work of art, invention, or valuable information).\textsuperscript{85} In the absence of property coordination she could employ a scheme of contract coordination as a substitute. \textit{A} may thus generate a chain of contracts with a complex set of assignment clauses, the purpose of which is to obligate each and every \textit{future} promisor to his or her \textit{future} promisee to abide by the terms fixed by the initial contract between \textit{A} and \textit{B}.\textsuperscript{86} These terms might concern whatever \textit{A} deems necessary to secure her ultimate control over the necklace and to insure against losing profits (due to unilateral appropriation of the thing by others).\textsuperscript{87} Thus, when \textit{B} seeks to let the thing to \textit{C}, he would owe \textit{A} an obligation to introduce into his contract with \textit{C} the terms of his contract with \textit{A}; \textit{C} would owe \textit{B} an obligation to the same effect when negotiating an agreement with \textit{D}; the same is true for \textit{D}'s contract with \textit{E}, and so forth. Any contractual breach along this chain (say, \textit{D} defaults on her obligation to \textit{C}) can, in principle, be enforced by \textit{A}, indirectly, by requiring \textit{B} to enforce her contractual right against \textit{C} to compel \textit{D} to make good on his promise (to \textit{C}). This roundabout method functionally mimics a private property regime—rather than merely a weaker proprietary regime of restrictive covenants—through \textit{in personam} rights and obligations sounding in contract.\textsuperscript{88} From a purely functional standpoint, property rights economize on the transaction costs involved in generating a chain of contracts. This is just another way to restate the conventional view mentioned above.

\begin{flushleft}
\textsuperscript{84} As I demonstrate elsewhere, accounts that cast private ownership in terms of the right to exclusive use (or exclusivity of use) fall short of explaining the freestanding idea of private ownership. Exclusive use is a feature of possession (including mere possession, that is, unauthorized possession), not of ownership. This is true even when one insists that ownership is a special case of possession—ultimate possession—for this strategy, once again, cannot but articulate an account of ownership solely in terms of possession. See Dorfman, ‘Private,’ supra note 15 at 9-10.

\textsuperscript{85} Economic analysis of the three alternatives mentioned in the bracketed discussion—corresponding to copyright, patent, and trade secret, respectively—acknowledges that contract-based coordination (and, in some cases, a chain of contracts in particular) functions as a (primitive) substitute for a framework of property (or property-like) coordination. See e.g. Henry Hansmann & Reinier Kraakman, ‘Property, Contract, and Veriﬁcation: The Numerus Clausus Problem and the Divisibility of Rights’ (2003) 31 J Legal Stud 373 [Hansmann & Kraakman]; Mark A. Lemley, ‘The Surprising Virtues of Treating Trade Secrets as IP Rights’ (2008) 61 Stan L Rev 311 at 334-337.

\textsuperscript{86} In this way, \textit{A} could secure her profit against those who \textit{at present} see no point in wearing the necklace, but due to a \textit{future} change in their aesthetic tastes will be more inclined to do so.

\textsuperscript{87} For example, the permissible way(s) and extent of using the thing in question, the allocation of risk of malfunctioning, remedies for breach, and so on.

\textsuperscript{88} There exists an important difference between a chain-of-contract and a contractual arrangement that seeks to produce a property-like regime of restrictive covenants. Unlike restrictive covenants, the necklace case exemplifies an ambitious effort to generate, through a chain of contracts only, a legal entitlement akin to private ownership (on the part of \textit{A}). This chain does not merely pose some use-constraints on preexisting entitlements (as restrictive covenants normally purport to do); rather, it is constitutive of these entitlements.
\end{flushleft}
On my proposed account, by contrast, property gives rise to social coordination, whose distinctive nature resides in its form, rather than merely in the values or goals it may help produce—property, on this view, turns coordination *itself* into a form of respectful recognition. Property is therefore distinctive, because it can engender normative relationships of respect and recognition that contract coordination need not.

Indeed, under the chain of contracts, $A$ and $E$, for example, may in effect assert competing claims with respect to the same object but, nonetheless, share no common interactional framework against which to approach the subject of their competition *together*. After all, by setting in motion several, partly overlapping zones of contractual privity, $A$ can only count morally or legally on $B$, her guardian so to speak, in order to secure her claims *vis-à-vis* $E$. $A$ and $E$ remain complete strangers from beginning to end. The promissory obligation that extends directly and exclusively from $B$ to $A$ stands in, as it were, for the absence of a commitment, held in common by $E$ and $A$, to regulate practical affairs by respectfully regarding one another as constituting independent points of view. $A$ and $E$ may affect one another’s wealth, to be sure, but they can only do so indirectly and thus without being required to accord one another the recognition that, as explained above, the property form of coordination requires, in virtue of establishing a common framework of action independently of prior contractual engagements, including even of a historical social contract that allegedly marks the foundation of civil society and, indeed, private property.\(^{89}\)

In fact, the ownership-like effect of the chain of contracts replicates the theme explored in connection with the lease for a term of years. As with the latter case, and unlike property, coordination based on contract exerts no necessary pressure on actors (such as third parties in the lease case or $E$ in the ownership case) toward treating persons (such as the lessee or $A$, respectively) as agents whose independent points of view command unmediated respect and recognition.\(^{90}\) It instead requires the former to address the latter indirectly through the service of guardians, without ever needing to recognize the latter as persons as such and, therefore, without approaching the resolution of their competing claims together by sharing a point of view of the matter at hand. In short,

\(^{89}\) The last part of the sentence emphasizes that property's distinctive character does not turn on the prior existence of an actual (explicit or implicit) social contract which purpose is to create a system of private property. I do not deny that a scheme of property coordination can arise out of an actual social contract, though it is very unlikely. Surely, there can be different plausible causal explanations of the evolution of property, and none of them need invoke a contractual engagement of the sort described in these pages (i.e., a mode of coordination operating on reciprocal promises which take the bargain form). Familiar examples of such explanations include David Hume, *A Treatise of Human Nature*, edited by L. A. Selby-Bigge (Oxford: Oxford University Press, 1978) at 490 [Hume]; Jean-Jacques Rousseau, *Discourse on the Origin and the Foundations of Inequality among Men*, edited & translated by Victor Gourevitch (Cambridge: Cambridge University Press 1997) at 161.

\(^{90}\) Recall that the argument is not that no respect and recognition can be had among the persons concerned. Rather, it is that no such form of respect is possible in the context of social coordination pertaining to external objects.
property makes a practical difference not just functionally, and thus quantitatively; rather, it turns the practice of property itself into a form of respectful recognition among persons as such.

V  Property and the Categorical Value of Respectful Recognition: Theory and Doctrine
My attempt to explain the distinctive form of coordination that property takes has so far achieved the substantial result of getting past the functional analysis of the necessary quantitative difference between property and contract. However, this showing may only go so far as explaining why the difference between property and contract cannot be assessed exclusively by reference to functional analysis. It still remains to be seen whether the difference between the two forms of coordination, of property and of contract, is not in itself quantitative. The suspicion is that contract, too, establishes a common framework of coordination (or even cooperation) grounded in respectful recognition, in which case contract just is property on a small scale, and the transition from contract- to property-based coordination marks a shift from typically small to typically larger frameworks of regulating competing claims over use of, access to, and profit from objects.91

However, although contract may arguably take a form of coordination in which participants establish relations of mutual respect and recognition among themselves,92 it falls critically short of property. For there is, built into the contract form of coordination, a contingent commitment to respectful recognition, since it is always up to a person to determine according to her inclinations, economic or otherwise, whether to make a contract to begin with. A contract may arguably bring persons together in a respectful manner of mutual regard and recognition only insofar as these persons are already and independently inclined to make a contract and thus to respect one another as persons in this particular sphere of action. To this extent, the voluntariness of contract-making and the mutuality of economic interests that motivate it—both are jointly necessary features of the contract practice—give the contractual relation a fundamentally limited reach. Again, this holds not necessarily in terms of its scope of application, as a contract can be had between multiple persons, but rather in its underlying contingent commitment to the


92 Moreover, contractual relations can sometimes generate thicker interactions than property’s in that they require the parties to engage one another’s points of view affirmatively and literally to establish an ongoing joint venture.
ideal of being with (many or few) others by respectfully recognizing them as persons as such.

Property, by contrast, gives the ideal of respectful recognition an ambitiously deeper traction, not just—and not necessarily—in the scope of the ideal’s application (to capture a large and indefinite class of person), but rather by rendering the application of this ideal unconditional. Indeed, property rights’ correlative duties give persons unconditional, mandatory reasons for deferring to the judgments of right-holders with regard to fixing their normative standing in relation to objects. This form of attending to others—by recognizing them as possessing distinctive points of view through which they render their judgments concerning others’ normative standings—gives rise to relations of respectful recognition in their purest sense. That is, the demand to participate in them applies to persons whatever else their interests, ends, or values happen to be. The universal reach of property, once again, is not in the first instance a description of its broad scope of application (as the discussions of the term of years and ownership demonstrated). It is, rather, a feature of the character of the relations of respect and recognition established by property—that is, their unconditional character.

Two qualifications are in order. First, the very idea of respect for others as free and equal persons exerts pressure in favor of keeping the strains of deference to the point of view of the right-holder under reasonable control, as it were, so as not to force duty-holders into self-disrespect. This concern clearly, even if not perfectly, manifests itself in and around the principles and doctrines informing the trespassory duty. This is illustrated by property law’s insistence (with the exception of affirmative covenants) on negative duties; simply processed and performed duties (as the information cost account of Henry Smith observes); and various doctrines of no-duties in cases where deference to right-holders is exceptionally burdensome for duty-holders (consider the doctrine of private necessity as an example). I say more on some of these issues in Avihay Dorfman & Assaf Jacob, ‘Copyright as Tort’ (2011) 12 Theoretical Inquires L 59.

Second, the argument I developed in these pages establishes an intimate connection between private ownership and an ideal of all persons—right- and duty-holders alike—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. Accordingly, the ideal respectful recognition that underwrites property’s distinctive nature recommends the inclusion of all in the exercise of property rights. Otherwise, the ability of participants in the practice of private property to stand in relations of freedom and equality to each other is substantially strained. I discuss the egalitarian implications of my account of property in Avihay Dorfman, The Property Gap online: http://ssrn.com/abstract=1806440.

My account of the qualitative difference between contract and property does not deny that some human interactions would—indeed, will likely—combine the two. A passerby incurs a trespassory duty against making an unauthorized entry to another’s land, but she may then want to seek the permission of the owner to access that land, in which case the interaction between the two appears to come very close to that of two parties in a pre-contractual negotiation. Certainly, the unconditional value of respect that underlies the trespassory duty in this example allows for the persons involved to engage each other less impersonally, including in ways that take a thicker (and, thus, a conditional) form of respect such as that which is
A DOCTRINAL FOOTPRINTS
Property’s distinctively unconditional common framework of interaction is deeply
enmeshed in the law and so carries important doctrinal implications, as I shall now seek
to illustrate briefly. In particular, I shall discuss four doctrinal areas in which the
qualitative difference between the frameworks of coordination based on contract and
property, respectively, clearly manifests itself: the rule against recovery for pure
economic loss; the difference between the tort of inducement of breach of contract and
the tort of trespass; the place of criminal liability in protecting property, rather than
contract, rights; and the legal restriction on the creation of new forms of property right.
The emphasis on property being a genuinely common framework of unconditional
respect and recognition, I shall argue, captures accurately the sharp distinction between
property and contract that each of these doctrinal areas vividly expresses, and that the
conventional wisdom—viz., that property and contract are intensionally indistinct—can
hardly make sense of. For the four doctrinal areas that will be explored herein do not
lend themselves to the conventional view, according to which property and contract differ
in degree.

B PURE ECONOMIC LOSS
Begin with the established common law rule against recovery for negligently inflicted
pure economic loss, that is, financial loss without antecedent harm to the person or
property of the plaintiff. On a typical factual setting, the defendant negligently harms
the person or property of another, thereby carelessly causing this other to breach a
contract with a third person; say, the defendant’s dry dock negligently damaged the
propeller of a ship while it was being refurbished, inflicting financial loss on its
charterer. Keeping with the rule against recovery for pure economic loss, the defendant
is not liable for the economic loss befallen the plaintiff -charterer. In sharp
contradistinction, negligently damaging the property of another is, generally speaking,
recoverable. Thus, the same financial loss could have been fully recovered, together

characteristic of contract (or of friendship or love). On my account, the trespassory duty applies regardless
of whether the passerby and the owner would ever find it mutually desirable to cooperate or form personal
relations of some sort.
95 There are, of course, other factual settings that give rise to the rule against recovery for pure economic
loss which, therefore, remain outside the purview of my argument.
97 Ibid at 309 (per Holmes J.).
98 As one commentator observes, “[s]omeone who owns outright a chattel (such as a ship) may recover
damages for the period it cannot be used because of the negligence of another, but one who charters the
ship has no claim, though certainly it is foreseeable that ships will be chartered.” Richard L. Abel, ‘Should
with the injury to the ship, had the ship owner sought to operate it by herself, rather than through a charterer.

There are any number of explanations of this doctrine. I cannot discuss all of them at present. A fully-fleshed account of pure economic loss must await future elaboration. The ambition of the current argument, instead, is to show that the contract/property distinction may illuminate a doctrine that is otherwise under-explained. Certainly, it seems especially suspicious to explain the difference between the one rule—viz., the rule against recovery for negligent infliction of pure economic loss—and the other one—viz., the rule for recovery for negligent infliction of property loss—simply through the importance the law attaches to "tangible property" but not to "intangible wealth." This is even more strongly the case given that the remedy for a negligent infliction of property damage just is a payment of a sum of money, a quintessential intangible wealth. The key

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99 It is important to mention very briefly the most familiar such explanation—that which emphasizes the threat of open-ended and indeterminate liability as the animating force behind the rule against recovery for pure economic loss. But as Fleming James powerfully observed, this threat does not arise in the dry dock scenario mentioned in the main text above. See Fleming James, Jr., 'Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal' (1972) 25 Vand. L. Rev. 43 at 55-57.

100 The proposed analysis overlaps to an important extent with Peter Benson’s excellent analysis of pure economic loss in the category of cases exemplified by the Robins Dry Dock decision (supra note 96). The main theme in Benson's argument is that the “absence of a legal relation of right[]” between the plaintiff and the defendant rules out recovery for pure economic loss (as well as in all other cases of negligence, more generally). Peter Benson, ‘The Problem with Pure Economic Loss’ (2009) 60 S Cal L Rev 823, 842. According to this argument, negligent infliction of property damage satisfies the “relation of right” condition, because the plaintiff’s right to property is held against the world at large, the defendant included. Whereas, negligent infliction of financial loss fails to meet this bar, because the plaintiff holds no more than a contract right, availing against the plaintiff’s party to a contract, rather than the defendant. Benson criticizes the prevailing accounts of the pure economic loss doctrine for failing to notice this right-base explanation and for favoring, in its stead, a purely pragmatic set of considerations.

While I share Benson’s conclusion (that the doctrine in question can be made coherent and can be explained in a principled fashion), I find the argument importantly incomplete. To begin with, Benson’s rejection of the prevailing pragmatic accounts of pure economic loss does not fully engage the pragmatists. These jurists draw on pragmatic explanations not because they fail to notice the distinction between protecting a property right, on the one hand, and protecting a contract right, on the other. On the contrary, they may find recourse to pragmatic explanations attractive, I suppose, because they are not convinced that the contract/property distinction is defensible. The otherwise illuminating doctrinal analysis provided by Benson may not overcome this worry, because it proceeds in the mode of restating the non-recovery rule in terms of “the absence of a legal relation of right.” Merely identifying the existence (or absence) of a relation of right is conclusory—that is, the right is a conclusion of, rather than a premise in, an argument concerning the nature of the difference between rights in personam and in rem and their relative importance in the relevant context in which they apply. The ideal of respectful recognition that underlies, on my preferred account, the distinction between contract and property purports to make good on this difficulty (and, in this sense, may provide the missing elements in the right-base account of Benson). Due to space limitation, I shall leave for another occasion discussion of other points of disagreement (and agreement) with Benson’s argument.

to understanding the difference between the two rules, by contrast, lies in the normative framework of coordination that defines the substantive rights of the victim and duties of the injurer. Indeed, a negligent infliction of pure economic loss is an upshot of interfering with rights arising out of contract-based coordination. More importantly, the rule against recovery for such loss reflects the notion that the framework of coordination in question takes the form of contract. Indeed, the lost profits on the part of the charterer from the example just mentioned represent a right to so profit which is held against the charteree (the ship's owner) as part of a contractual transaction. There is, however, no common interactional framework that orients the charterer and the defendant’s dry dock toward one another in connection with coordinating their respective activities concerning the ship, which is just another way to say that the charterer does not hold a property right in the ship. Property, on the proposed account, establishes the missing framework through which persons with competing claims could engage one another directly, and respectfully at that. Property, in other words, renders recovery for the negligent infliction of property loss possible even without contract, because it engenders unconditional normative relations of respect and recognition, the violation of which gives rise to a second-order duty on the part of the injurer to make good on this failure.

C INDUCEMENT OF BREACH OF CONTRACT

Second, there exists a related doctrinal area in which property's distinctively unconditional form of coordination figures prominently. It, too, pertains to the legal protection of rights against third parties, but, unlike negligent infliction of economic loss, it takes up intentional interference with rights, contractual or otherwise, by third parties. Whereas contractual rights are protected through the tort of inducement of breach of contract, property rights are protected through trespass tort (and conversion in the case of chattels). Strikingly, the former tort limits liability to deliberate acts of procuring a breach of contract, whereas the tort of trespass against property (land or chattels) renders fault wholly immaterial for liability purposes.

Certainly, and contrary to the hierarchy between the torts of trespass and inducement, some contractual interests are no less important to us, and to society as a whole, than property interests (say, some employment contracts are normally more valuable than securing control over one's bicycle). What, then, can make sense of the strict separation between the two torts?

As I shall argue, focusing on the different forms of coordination, of contract and of property, helps set out the necessary analytical structure in which to resolve the question. To begin with, the inducement tort does not require that third parties abide by the contractual rights and obligations that run directly and exclusively between the parties to a contract. Third parties cannot be put under a contractual obligation merely because other persons, parties to a contract, so announce in their contract. Instead, the duty not to induce a breach of contract is meant to shield parties in a contract from the intentionally
wrongful pressure to breach exerted on them by someone standing outside the framework of coordination established by the contract. Thus, the stringent approach to liability imposition characteristic of the inducement tort expresses the point that third parties do not participate in contract-based coordination or cooperation, for otherwise they would have been facing the strict liability regime that parties to a contract normally incur. By standing outside the common framework made and shared by the parties to a contract, third parties are not required to share in the point of view of the promisee; unlike the promisor, they are not expected to respect and recognize the promise made as a guide to their own conduct. Their duty, rather, is not to interfere with the promisor's requirement to respect and recognize the point of view of the promisee, which is the requirement to carry out the promise (unless the promisee releases him). The inducement tort, rather than implicating them in the normative relations between promisor and promisee, seeks to keep third parties off the contractual engagement and, thus, away from the exclusive framework of joint action that contract underwrites among its participants.

The tort of trespass, unlike the inducement tort, rests on no such distinction between participants and non-participants, doing without a division of liability between participants’ no-fault and non-participant’s deliberate misfeasance. In fact, a division of this sort does not arise in the case of protecting property, since third parties never stand outside property’s effort to coordinate activity in and around external objects. Instead of the inducement tort’s requirement not to disturb the relation that contract may create between right- and duty-holder, property turns these third parties themselves into participants in direct relations of respect and recognition between property right- and duty-holder.

This shift can explain why liability for trespass against property cannot be predicated, along with the inducement tort, on deliberate wrongdoing. Indeed, restricting liability for instances of deliberate interference with property rights is inconsistent with the demand to respect and recognize the point of view of a right-holder placed on third parties by virtue of being participants in property’s form of coordination. A subjective standard of fault, one which is based on the question of whether one intends to wrong another, runs afoul of the most basic tenant of respectful recognition—it allows the respecting person to respect the respected person on the former’s own terms. But, if anything, to respect another person and to recognize him as constituting an independent point of view is not possible without giving the respected person some measure of authority to determine herself, from her own distinctive point of view, the terms of the respect. The authority of property right-holders to fix the normative standing of others in relation to an object just is the view that duty-holders are required to attend to right-holders on their own respective terms. The prohibition against deliberate inducement of a breach of contract, once again, reflects an opposite approach to the notion of respecting others, because it
allows the potential inducer, the duty-holder, to fix the terms of his respect for the contractual promisee.\textsuperscript{102}

D  ABSENCE OF CRIMINAL LIABILITY FOR DISREGARDING CONTRACT RIGHTS

Thirdly, property and contract exhibit opposing criminal implications of right violations.\textsuperscript{103} Indeed, a deliberate act of wronging another by breaking a promissory obligation to return a $100 loan is not in and of itself criminal, whereas a deliberate act of trespass against or conversion of the ($100 worth of) property of another surely could be.\textsuperscript{104} To be sure, the nonperformance of a promise may also involve fraud or other forms of wrongful conduct, in which case the promisor may be subject to criminal liability. But this would be the case only insofar as this conduct amounts to an independent tort or crime, including even against a complete stranger.\textsuperscript{105} The mere breach of contract, however, remains fundamentally the private business of the parties in a contract, not of the public, and thus outside the purview of criminal law.\textsuperscript{106}

As the example just mentioned demonstrates, the absence of criminal liability in the former case need neither be a feature of the wrongfulness nor of the harmful consequences of the act.\textsuperscript{107} Nor, moreover, is it a feature of a general disfavor on behalf of common law of the principle of promise-keeping, since the same approach of no criminal liability applies broadly to jurisdictions that prefer specific performance, rather

\textsuperscript{102} For a general critique of using a subjective measure of fault (and of the costs of one's activity), see Jules Coleman & Arthur Ripstein, ‘Mischief and Misfortune’ (1995) 41 McGill LJ 91 at 96.

\textsuperscript{103} Benno C. Schmidt Jr., ‘Principle and Prejudice: The Supreme Court and the Race in the Progressive Era. Part 2: The Peonage Case’ (1982) 82 Colum L Rev 646 at 705 (“The long-accepted position of the Anglo-American criminal law is that an individual breaching a contract should not be subject to criminal penalties.”).

\textsuperscript{104} E.g. \textit{Commonwealth v. Bixler}, 79 Pa.Super. 295, 295 (1922) (observing that “[t]he law does not make the breaking of a contract a crime... The act, under which this defendant was indicted, both in its title and text, refers only to the conversion of property or the proceeds thereof where such property belongs to another.”).

\textsuperscript{105} See e.g. Mail Fraud Act, 18 U.S.C. § 1341 (1994) (criminalizing the construction of a scheme to extract money or property by means of false promises).

\textsuperscript{106} Even the private law remedy of punitive damages is not generally available for a mere breach of contract. A familiar case in point is \textit{Addis v. Gramophone Co.}, [1909] A.C. 488.

\textsuperscript{107} See also S. E. Marshall & R. A. Duff, ‘Criminalization and Sharing Wrongs’ (1998) 11 Can JL & Juris 7 at 8 (observing that “a breach of contract could be far more serious in both its wrongfulness and its harmful consequences than a minor act of vandalism; but the former remains a matter of civil law, whilst the latter is a case of criminal damage.”). Some have suggested that a crime differs from private wrongdoing in that it involves trading, rather than merely disregarding, the rights of another. See Arthur Ripstein, \textit{Equality, Responsibility, and the Law} (Cambridge: Cambridge University Press, 1999) at 148; but see Ripstein, \textit{Force}, supra note 22 at 312-314. While I agree that treating another's rights as tradable resources may occasionally ground punishment, including punitive damages, it cannot explain the distinction between private and public wrongs, including the distinction between contract and crime. This shortfall is clearly exemplified in the primacy of the expectation damages remedy in contract law.
than merely expectation damages, as a primary remedy for a breach of contract.\textsuperscript{108} Lastly, nor is it a feature of the capitalist economic structure onto which modern legal practice of contract maps—many anti-capitalist societies, such as communist states, denied criminal liability for breach of contract.\textsuperscript{109}

Instead, the absence of criminal liability for breach of contractual obligation must have something to do with the familiar, but somewhat elusive, distinction between private and public wrongdoing; namely, the thought that the wrong of breaching a contract is private in nature, whereas that of violating property rights can give rise to private and public wrongs. My emphasis on the qualitative distinction between contract and property forms of coordinating actions in and around external objects can illuminate the difference between private and public wrongs in a non question-begging way.

Indeed, the absence of criminal liability for breach of contract is a surface manifestation of the conditional commitment to respectful recognition in the contract framework of social coordination.\textsuperscript{110} The failure to perform a contractual promise reflects the disregarding of the rights and obligations that govern the interaction between those who voluntarily seek to pursue a joint venture by entering into this particular contract—this is a failure to share in the point of view of the promisee. It violates the possibility of coordination between those who have opted into the contractual framework of interaction, but it is not in itself a failure to respect and recognize those standing outside the privity of contract. Indeed, it cannot express disrespect for the distinctive points of view of others in virtue of their being persons, tout court.\textsuperscript{111}

\textsuperscript{108} Israel is a good case in point.


\textsuperscript{110} Compare with a familiar Kantian account developed in B. Sharon Byrd, ‘Kant’s Theory of Punishment: Deterrence in its Threat, Retribution in its Execution’ (1989) 8 Law & Phil 151 at 181-183, according to which fraud is a “private crime whereas larceny is “public,” because in the former case “the victim chooses his own business partner [and so], he has a reason to be alert to the actions of the other individual and can enforce his rights in a court of law.” It seems that on Byrd’s view, the private character of fraudulent misrepresentation is explained by reference to a theory reminiscent of comparative or contributory negligence (“he has a reason to be alert to the actions of the other individuals”). I find this view incoherent. A criterion of comparative fault (however it is defined) cuts across the private/public wrong distinction. On the one hand, many public crimes arise in the context of prior acquaintance between the victim and offender, in which case it is not implausible to consider whether the victim had a reason to be alert to the offender’s criminal scheme. On the other hand, many instances of private wrongdoing—torts—occur in a context where tort-victims cannot be reasonably alert to the intentional or unintentional threats posed by others.

\textsuperscript{111} Once again, this observation obtains even in the extreme case of a contract engagement that includes the entire population—a legally-binding social contract, as it were. For the requirement to respect and recognize persons would be owed to them in virtue of the contractual bond they happen to share, not metaphorically or hypothetically, but actually.
Accordingly, breaching a contract (at best)\textsuperscript{112} reflects a private wrong not necessarily in the sense of taking a less serious form of wrongdoing (in comparison to public wrongdoing), but rather in the sense of wronging only those with whom one has already established a contractual bond. And since this bond exerts no rational pressure toward the inclusion of persons with whom one does not happen to share an immediate economic interest, the wrong in question is private in the sense just explained. Crimes such as larceny and deliberate trespass, too, are private wrongs of disregarding the particular rights held by specific others. But, unlike breach of contract, they are at the same time wrongs of a \textit{public} quality.

This is because these acts of violating the property right of another are inconsistent with a commitment on the part of society to coordinate activities in a distinctively respectful manner which is \textit{un}conditionally binding upon all persons by virtue of being persons. Thus, wrongs such as larceny and deliberate trespass express intentional disregard for the point of view of the owner, which is why these acts constitute private wrongs; and since property-based coordination is a \textit{common} framework of interaction, these wrongs express intentional disregard for a point of view (the owner's) to which \textit{all} members of society are committed to defer, which is why these acts can also amount to \textit{public} wrongs. In other words, the wrongs in question acquire their public quality because they occur within an unconditionally shared community of commitment (to regulate interactions with regard to external objects in the respectful manner discussed above). They express the blatant rejection of, rather than merely the failure to acknowledge, this community and in this way undermine the very possibility of respectful recognition in the property context to be truly unconditional.\textsuperscript{113}

\textbf{E \ THE NUMERUS CLAUSUS PRINCIPLE}

Property rights in both common and civil law jurisdictions are subject to the principle of \textit{numerus clausus}, which is a restriction that means that it cannot be up to the contracting parties—or private persons, more generally—to create new forms of property right, but only to trade rights that take existing forms.\textsuperscript{114} It is sometimes suggested that the \textit{numerus clausus} principle does not apply to the contract context in the sense that parties in a contract enjoy the nearly absolute freedom to devise contractual rights and

\begin{footnotesize}
\begin{enumerate}
\item I say \textit{at best} in recognition of accounts of contract that emphasize the disjunctive content of promissory obligation (an obligation to perform \textit{or} pay).
\item For this reason, Nestor Davidson is right to observe that property is a "public institution in its basic constitution." Nestor M Davidson, ‘Standardization and Pluralism in Property Law’ (2008) 61 Vand L Rev 1597 at 1602.
\end{enumerate}
\end{footnotesize}
obligations as they see fit. But this is wrong, because comparing property right \textit{forms} with contract rights, rather than their \textit{forms}, is akin to comparing apples and oranges. The right comparison is between property right forms and the contractual obligation (or right) \textit{forms}. Contract law (arguably) recognizes several such forms—for example, the generic contract originating in reciprocal promises that take the bargain form, contract of adhesion, and certain "special" forms such as a contract for the sale of goods or a construction contract. Accordingly, a more precise way to cast the property/contract distinction in connection with the \textit{numerus clausus} principle is this. There exists a restriction on the creation of novel forms of property right, but no such equivalent restriction on the creation of new forms of contract right and obligation.

Part of the difficulty in explaining this contradistinction has to do with a seeming mismatch between the law’s approach to the property/contract distinction as reflected in the \textit{numerus clausus} principle, on the one hand, and the conventional view of the property/contract distinction, on the other. Recall that, on the conventional view, property merely represents a technological improvement over contract—functionally speaking, property presents a more effective means of coordination when transaction costs are sufficiently high. As property theorists of different stripes have observed, this quantitative difference can hardly support, let alone justify, the law’s \textit{strict divide} between property (to which the \textit{numerus clausus} applies vigorously) and contract (with which no such principle is ever at work).\textsuperscript{115}

As I argue elsewhere, the best way to understand the need for a \textit{numerus clausus} principle in the property context is by reference to a concern for (il)legitimate legislation.\textsuperscript{116} Thus, private persons attempting to create a new form of property right (say, a mortgage form where none exists) engage in the democratically illegitimate activity of usurping the political authority ordinarily vested in the legislature (and, exceptionally, also in courts).\textsuperscript{117} This authority involves the power to put third parties under an obligation that takes a novel form, and thus to determine—by way of making a contract—the basic features of this obligation (such as its \textit{in rem} force, the kind of tort liability that attaches to it, and other elements necessary to filling out the content of the obligation that takes this new form).\textsuperscript{118}

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\bibitem{117} For the purpose of the present argument, however, it does not even matter whether or not courts can legitimately create new forms of property right.
\bibitem{118} To fix ideas, consider a case where parties in a contract create \textit{for the first time} in the history of their jurisdiction a property right that takes the form of what we nowadays call easement. This act of private
\end{thebibliography}
Unlike property, the creation of new forms of contract right or obligation implicates private persons in legislation which is, nonetheless, politically legitimate. To be sure, private legislation through contract has given rise to suspicions concerning the possibility of creating even particular obligations (to carry out the promise) that take existing forms. As David Hume famously observed, the creation of new obligations by promise is "one of the most mysterious and incomprehensible operations that can possibly be imagin’d, and may be even compar’d to transubstantiation." However, in contrast to property rights, which purport to obligate third parties, Hume’s skepticism is directed at the possibility of promisors obligating themselves. Accordingly, contract theorists have ever since emphasized the important values (such as autonomy) that ground the obligation to keep promises. Crucially, these attempts seek to bear the burden of explaining the obligatory character of the promise for the promisor only, but they do not, nor could they, establish the grounds for extending this character to the rest of society. This is just another way to express the idea that contract-based coordination features a conditional commitment to being with others in relations of respect and recognition—that is, the voluntariness and mutuality of economic interests that make the contractual engagement possible in the first instance are also the elements which insure third parties against being bound by the private legislation made by parties in a contract. Whereas in sharp contradistinction, private legislation of property right forms necessarily results in placing third parties under a new in rem obligation, simply in virtue of property’s unconditional commitment to being with others in relations of respectful recognition. For this reason, a principle of numeros clausus restricts private legislation in the arena of property but, at the same time, appears nowhere in the arena of contract.

VI Conclusion
The distinction between contract and property rights figures prominently in private law doctrine and theory; perhaps it is as fundamental as the idea of private law itself. The most prevailing explanations of this distinction have so far been more successful at specifying the extrinsic circumstances that may affect property’s general scope of application, on the one hand, and contract’s typically narrow reach, on the other. They have failed, however, in explaining the most basic aspect that any adequate explanation legislation would have to make all the necessary determinations to render the "easement" sufficiently intelligible and practical in just about the way that we find the easement form today. For elaboration, see Dorfman, ‘Property,’ supra note 116.

119 Hume, supra note 89 at 524.

120 Even practice-based explanations of promise-keeping do not purport to turn promisory obligations into in rem rights. It may be the case, though, that these explanations create such rights, since the obligation to keep a promise on these accounts is owed to the practice of promising, rather than to the promisee in particular. But this unintended consequence—viz., that the promise is not owed to the promisee but rather to the practice—is precisely what renders these explanations counterintuitive. See, e.g. the discussions in Markovits, supra note 91 at 1443-4; T.M. Scanlon, What We Owe to Each Other (Cambridge, MA: Belknap Press of Harvard University Press,1998) at 295-311.
of the distinction in question must provide: whether property and contract rights and duties are at their respective cores genetically different.

In these pages I have sought to show that, indeed, property and contract are not merely extensionally divergent, but rather also intensionally so; bluntly put, they are of a different *quality*. Moreover, I have argued that the (extensional) differences in their respective scopes of application are surface manifestations of their (intensional) divergence. On the account I have developed, contract and property rights give rise to different frameworks of interpersonal coordination. The contractual framework takes a hypothetically or conditionally social form, establishing normative relations of respect and recognition between *interested* parties. By contrast, property takes an unconditionally social form of coordination, according to which participants approach the resolution of their competing claims together by regarding one another as constituting distinctive points of view. Although the proposed distinction emphasizes form, rather than function, it provides the moral building blocks with which to elaborate the normative foundation of property’s distinctive normativity—that the social coordination established by property rights and duties expresses the categorical value of taking persons *seriously*, i.e. as free and equal agents, simply in virtue of their being persons. Moreover, and finally, I have shown that the conceptual and normative analyses of the property/contract distinction illuminate the crystal-clear divide between property and contract as manifested in several important doctrinal areas: pure economic loss, inducement tort, criminal enforcement of private law rights, and the *numerus clausus* principle. These doctrines presuppose that contract and property are *qualitatively* different—the account I have developed in these pages cast this presupposition into sharp relief.