

PROPERTY, TRESPASS, AND THE FORM/FUNCTION GAP

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Introduction

One of the most acute charges against private property begins with the observation that ownership generates a trespassory duty of exclusion that far exceeds what a commitment to values such as freedom and well-being could possibly require. According to this observation, there exists a mismatch—in particular, an analytical gulf—between the form of protecting ownership and the functions that this protection may serve. In these pages, I shall develop a novel account of ownership's normativity, maintaining that, apart from the functions it may render whatever external values are deemed appropriate, the form of ownership is in *itself* a source of value, in virtue of the society it may engender between free and equal persons. Accordingly, the so-called arbitrary gap between the form and the function of ownership need not plague private ownership, because the functions served by ownership do not exhaust the explanation of its good. And while there is no reason to deny that ownership is partly assessed by reference to the functions it promotes, I shall insist that there is a formal core to property, and that it is a distinctively social one even in the most isolated case of trespass to property.

I. Setting the Stage: The Charge of Normative Arbitrariness

One of the most powerful challenges to the right to private property, especially private ownership, has often been cast in terms of the *normative arbitrariness* that lies at the moral center of the right, especially the form that the right happens to take. This right, as many have observed, vests in private persons substantial normative powers over other persons with respect to external objects that seemingly extend far beyond its underpinning values, whatever they are. The charge of arbitrariness that arises from the gap between the right (to private ownership) and its grounds is best captured in the celebrated observations made, separately, by William Blackstone and the young Karl Marx: first, that private ownership features "the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the

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right of any other individual in the universe"¹; and second, that it is "the right to enjoy and dispose of one's possessions as one wills, without regard for other men and independently of society."² Despite, and perhaps because of, the quite melodramatic and exaggerated wordings, both observers render most vivid the following point—that a property right-holder can exercise her right *even when* exercising it cannot be explained by reference to the substantive values that may have grounded this right to begin with (such as realizing freedom or promoting well-being through using one's object). Thus, the unusual authority possessed by private owners, the authority not just to control an object but more fundamentally to fix the normative standing of others in relation to it,³ might run out of justification, but, nonetheless, exercise the especially powerful draw characteristic of rights on others, who are non-owners.

Indeed, the charge of normative arbitrariness picks out an analytical mismatch between two ideas of freedom that arise in connection with private ownership. First, within limits, owners enjoy the *freedom to* deploy their objects as they see fit. Classical liberal champions of equal freedom such as John Locke and Immanuel Kant have begun their respective accounts of property rights in of state of nature by arguing for the necessity of a property right securing the freedom-to of right-holders. And second, modern liberal societies sustain freedom-to by protecting property owners' *freedom from* the interference of others. The mismatch arises because freedom-from is not an analytic feature of freedom-to.⁴ The protection of the latter by the former is over-inclusive as explained a moment ago, frustrating attempts to explain the duty to defer to owners' *freedom from* by reference to state-of-nature arguments concerning *freedom to*.⁵

¹ 2 William Blackstone, Commentaries of the Laws of England, *1 (1779) (1766).

² Karl Marx, On the Jewish Question, reprinted in Karl Marx: Selected Writings 16-17 (Lawrence H. Simon ed., 1994).

³ I develop this analytical account of ownership in Avihay Dorfman, Private Ownership, 16 Legal Theory 1 (2010).

⁴ It once figured prominently in the social, political, and legal conflicts between settlers (whose preferred conception of property resonated with the freedom-to idea) and entrepreneur land-owners (who were naturally drawn to the freedom-from conception of property) in the nineteenth-century American West. See Eduardo Moisés Peñalver & Sonia K. Katyal, Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership 55-63, esp. 56-57 (2010); see also David B. Schorr, Property Rights, Distributive Justice and the Origins of Prior Appropriation ch. 2 (forthcoming, Yale UP).

⁵ Leading modern Lockeans acknowledge the "gap" between Locke's moral theory of property in the state of nature (which grants no more than use-rights) and the contemporary legal protection of ownership (sometimes called "full ownership"). See, e.g., A. John Simmons, The Lockean Theory of Rights 222-306 esp. 230, 282 (1992); Gopal Sreenivasan, The Limits of Lockean Rights in Property 95-119, esp. 97-101 (1995); see also James Tully, A Discourse on Property: John Locke and His Adversaries 61 (1980). For a thorough analysis of Locke's moral theory of property and its legal implications, see Eric R. Claeys, Encroachment, Adverse Possession, and Labor Theory ___ - ___ (unpublished manuscript, on file with author).

The Kantian account of property right reaches a similar structural difficulty in shifting from the state of nature to civil condition. No less an authority on Kant than Christine Korsgaard has acknowledged that Kant's argument for the deference owed persons in connection with their entitlement to control external objects depends on the question of whether they can make "effective use" of the objects under their control. Thus, the argument from ownership on this interpretation of Kant is grounded in securing exclusive control over objects "during the time of use, since, for example, I cannot effectively grow corn in the same field where you are trying, at the same time, to grow barely." Korsgaard is accordingly careful enough to acknowledge that Kant's argument "if it works, does not establish the necessity of "private property" in any

Another way to put this point, now switching to the familiar language of contemporary property theory, is to observe that while the owner holds the (arguably) legitimate right to use her object, to the exclusion of others,⁶ she can *also* exclude simply for the sake of excluding others, that is, with no necessary reference to use, including potential use, at all.⁷ Thus, the argument that seeks to ground the legal protection of ownership in the good of setting and pursuing ends using an object—the values associated with use—embarrassingly ends up protecting *more* than is actually required. To this extent, the *form* of protecting ownership is not reducible to the *functions* or *purposes* served by it. It necessarily gives rise to the overprotection of owners. This deficiency, it important to note, is conceptual, rather than empirical. The worry is not just that there would be too many instances in which exclusion overprotects use (although it surely is this also), but rather that there is *built into* the form of ownership a commitment on behalf of the law to *overprotection*.⁸

Thus, by enforcing the right of private ownership as depicted by Blackstone and Marx, the law *claims to hold the authority* to compel non-owners to defer to owners on what seems to be flatly morally arbitrary grounds. The gapping distortion between the form and the functions of the right to private ownership is much discussed in connection with the *scope* of the duty to respect ownership, especially the duty against committing trespass against the property of another. There, the form/function gap manifests itself in the puzzling rigidity of this duty. Indeed, it requires deference to the judgment of an owner concerning permission to enter or restriction on entrance despite the fact that the functions at stake—say, freedom or well-being—do not require the deference. This can be the case where these values are simply not at stake at all so that a competing use by non-owners is not in fact inconsistent with the owner's plan to use the object.⁹

controversial sense; it establishes only that the means of production and action must be reserved to the exclusive use of certain individuals in certain times and places." Christine M. Korsgaard, *The Constitution of Agency: Essays on Practical Reason and Moral Psychology* 238 n.7 (2008). Ernest Weinrib and Arthur Ripstein have separately sought to offer a more expansive reading of Kant's argument from property in the state of nature. See Ernest J. Weinrib, *Poverty and Property in Kant's System of Rights*, 78 *Notre Dame L. Rev.* 795 (2003); Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* 86-106 (2009). It is an open question, however, how could a compelling interest of agents in *freedom-to* require *freedom-from*, since the latter is not, strictly speaking, entailed by the former. I take stock of Weinrib's and Ripstein's respective accounts of property in Avihay Dorfman, *Trespass Torts: From Grudging Forbearance to True Respect* (unpublished manuscript).

⁶ J. E. Penner, *The Idea of Property in Law* (1997); Henry E. Smith, *Mind the Gap: The Indirect Relations between Means and Ends in American Property Law*, 94 *Cornell L. Rev.* 959 (2009).

⁷ Put differently, the demands of the tort against trespass to land are "exceptionally simple and exceptionally rigorous." 1 Thomas A. Street, *Foundations of Legal Liability* 19 (1906).

⁸ Although my discussion focuses almost entirely on common law property, the problematic of private ownership are not uniquely Anglo-American. See, for example, B.G.B. § 903 (According to the German civil code, "[t]he owner of a thing may, to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion and *exclude others from every influence*." (italics are mine).

⁹ See Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 *J. Legal Stud.* 13, 16 (1985) (discussing the prima-facie case of trespass and observing that "driving on and off A's driveway will be considered actionable trespass, even if these invasions are shown to be only trifling inconveniences that do not interfere with A's use and enjoyment of his property.").

Alternatively, the demands of these values are, on balance, far less compelling than the competing ones.¹⁰

Accordingly, most of the critical analyses of the form/function gap—the normative arbitrariness of private ownership—take stock of the overinclusive *scope* of the duty against trespass. Again, the argument that figures most prominently concerns the counterintuitive notion that non-owners must defer to the property right of owners even when thus deferring is not required in order to sustain, let alone promote, the values that underwrite the right in question. To begin with, critiques of the right as depicted by Blackstone or Marx observe that, in reality, the legal scope of the trespass duty does not extend to exclude non-owners absolutely.¹¹ Public accommodation, private necessity, and the customary (or, in England, statutory) right to ramble are three familiar cases that easily demonstrate this, since they each express a legal retreat from the entitlement of owners to exclude non-owners, and so from the general requirement to defer to the rights of owners. Moreover, these cases of retreat from absolute right of and deference to owners can be further invoked to show that the scope of the right to exclude can be adjusted so as to track more precisely the right’s underlying values, reducing to nothing the normative arbitrariness mentioned above.¹²

To be sure, this is a perfectly sound response to the gapping distortion between ownership’s form and function, a point to which I return more fully below. But this approach does not prove helpful in making sense of a *freestanding* property right that entitles one to exercise, in some cases and in some measure, one’s normative power to exclude others, regardless of whether exclusion is in fact needed to sustain any actual or

¹⁰ See, e.g., Cynthia L. Estlund, Labor, Property, and Sovereignty after Lechmere, 46 Stan. L. Rev. 305, 345 (1994) (“Property owners ordinarily have the right to exclude others from their property even when the exclusion would serve no demonstrable social or private benefit and even when the balance of interests tips in favor of allowing access.”). Moreover, as the old *Case of the Tithes*, Y.B. 21 Hen. VII 27, pl. 5 (1507) points out, entering the field of another for the purpose of doing her a friendly turn may give rise to liability for trespass. For a more recent acknowledgment of this rule, see Restatement (Second) of Torts § 163 cmt. d (1965) (“a harmless entry or remaining, if intentional, is a trespass ... even though the possessor benefits from the trespass, as where the trespasser tears down a worthless building or prepares a field for cultivation.”).

¹¹ Blackstone himself, it is worth recalling, was clearly aware of this matter. See Frederick H. Whelan, Property as Artifice: Hume and Blackstone, in Property: Nomos XXII 101 at 114-25 (J. Rowland Pennock & John W. Chapman eds., 1980); Carol M. Rose, Canons of Property Talk, or, Blackstone’s Anxiety, 108 Yale L.J. 601 (1998); David B. Schorr, How Blackstone Became a Blackstonian, 10 Theoretical Inquiries in Law 103 (2009). For a more recent account of the less-than-absolute scope of ownership’s authority, see Joseph William Singer, Entitlement: The Paradoxes of Property 18 (2000) (observing that “[o]wners have obligations; they have always had obligations.”). For an intriguing account of the reasons for compelling private owners to make sacrifices to sustain social structures necessary for the equal human flourishing of all members of society, see Gregory S. Alexander, The Social-Obligation Norm in American Property Law, 94 Cornell L. Rev. 745, 770, 774, 776, 780 (2009).

¹² This is the approach taken, e.g., in Hanoch Dagan, Exclusion and Inclusion in Property (unpublished manuscript, on file with author). Dagan marshals public accommodation, the law of fair housing, and the fair use doctrine in copyright law to explicate the rehabilitation of the right in question in the face of the relevant values (according to his view of what these values are and what relevance requires). I shall discuss another, entirely different attempt to eliminate the gap between the right and its underlying values below, one which advocates the strategy of use-tracking exclusion.

potential use (however broadly defined).¹³ The charge of normative arbitrariness is not primarily directed at the *scope* of the owner's authority; it takes stock of the *character* of this authority, that is, its special power to render judgments concerning the standing of others. Another (informal and less elegant) way to put the point is to observe that ownership is not merely akin to sovereignty, as many have observed,¹⁴ but rather to one particular, and most troubling, instantiation thereof, which is to say *despotic* sovereignty.

Indeed, the force of the observations made by Blackstone and Marx—the normative arbitrariness that lies at the moral center of property—obtains even if the scope of the duty against trespass is in *all* cases far less than absolute.¹⁵ Even then, even if non-owners are not required to defer to owners in respect of every single issue pertaining to the object in question, the normative arbitrariness of property nonetheless manifests itself through the right of owners to exercise their power of exclusion, including exclusion that goes unexplained and unjustified by whatever purposes are served by the entitlement to use an object freely. Accordingly, an effort to adjust the right so that it tracks more precisely its underlying values does not so much explain the form/function gap, as it explains it away by defending a narrower (and therefore a revisionist) conception of the right of ownership than that observed by Blackstone and Marx and so a narrower trespass tort duty on the part of non-owners to defer to owners.

II. The Indirect Thesis: A Possible Way Out?

Another approach to the difficulty of normative arbitrariness takes the form reminiscent of rule-consequentialism, which is a principle of evaluating particular acts indirectly by reference to their compliance with a general rule, rather than to the immediate consequences of these acts. The animating idea of this principle is that although it might not be the best thing to do in a particular situation, following a certain rule achieves better all-things-considered consequences. Applied to property, rule-consequentialism means that particular acts of owners exercising their right to exclude others should not be assessed at the retail level, that is, one act at a time, according to the question of whether exclusion is in fact required to sustain the owner's ability to deploy her object in legally permissible ways. Instead, the argument emphasizes that a general right to exclude non-owners produces best results in terms of securing use by owners at a

¹³ A broad definition of 'use' may include any kind of use, including 'no-use', as long as it rationally contributes—making a difference, as it were—to the carrying out of a purposeful course of action by the owner (or someone on her behalf). The point of a generous definition of use is that it only rules out 'usage' which is nothing more than the exclusion of others. Were mere exclusion to become an instance of use, the normative arbitrariness discussed above would never arise. But thus stretching the notion of use eliminates the form/function gap in a straightforward question-begging fashion.

¹⁴ The *locus classicus* is Morris R. Cohen, Property and Sovereignty, 13 Cornell L.Q. 8 (1927).

¹⁵ Indeed, just because owners cannot exercise their normative powers to require others not to stare at their inspiring objects does not render the normative arbitrariness of the rights of owners any less real.

wholesale level.¹⁶ The motivating force behind this move from retail to wholesale assessment of the right to exclude reflects the need to sustain complex schemes of social coordination in connection with external objects.¹⁷ On the rule-consequentialism account, the alternative option of protecting the right to use, rather than to exclude from, an object directly would be “difficult in the extreme,” since it requires the specification of the “many different uses one can make of one’s property.”¹⁸

Now the indirect mode of justifying the right to exclude need not be a version of rule-consequentialism.¹⁹ At first blush, the impression one might get from Penner’s explication of the connection between exclusion and use, and thus between the form of ownership and its function, is that there exists no gap between the two sets of distinctions.²⁰ This impression is vividly illustrated by his saying that “rights purely to exclude or purely to use interact naturally”²¹ and that, because the right to use picks out a rather broad definition of ‘using’,²² “all rightful exclusions can be broadly characterized as serving the interest or purpose of putting a thing to use.”²³

That said, the indirect thesis could escape rule-consequentialism only insofar as it mistakenly assumes a sufficiently tight connection between the interest of using an object and the exclusion of others from that object.²⁴ To be sure, this is not an empirical mistake (as when some small amount of uninteresting cases is left unaccounted for by the equation of use and exclusion). Rather, it is a *conceptual* one. As mentioned above, in some cases the ability to use an object requires exclusion, but the tort of trespass goes deeper than demanding from non-owners deference to whatever actual or even potential

¹⁶ Henry E. Smith, *Law and Economics: Realism or Democracy?*, 32 *Harv. J.L. & Pub. Pol’y* 127, 130, 145 (2006); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 *Yale L.J.* 357 (2001).

¹⁷ J. E. Penner, *The Idea of Property in Law* 73 (1997) (emphasizing the important of keeping duties *in rem*, such as a duty to exclude oneself from another’s object, “simple”).

¹⁸ J. E. Penner, *The Idea of Property in Law* 72 (1997). See also Smith, *Exclusion versus Governance: Two Strategies for Delineating Property Rights*, 31 *J. Legal Stud.* 453, 469 (2002) (“Because attributes and uses are costly to measure, rights to them are delineated and defended by means of proxies, and it is the use of rougher proxies that leads to more activities being bunched together in a more exclusion-like right.”).

¹⁹ Indeed, the use-tracking right to exclude mentioned above seems to embrace the indirect strategy of justifying the right without also endorsing rule-consequentialism.

²⁰ Another leading proponent of the indirect defense of the right to use in terms of the right to exclude, Henry Smith, has been more explicit on the rule-consequentialist character of the indirect thesis. See Henry E. Smith, *Mind the Gap: The Indirect Relations between Means and Ends in American Property Law*, 94 *Cornell L. Rev.* 959 (2009); Henry E. Smith, *Law and Economics: Realism or Democracy*, 32 *Harv. J. L. & Pub. Pol’y* 127, 130 & 145 (2009) (criticizing “fine-grained analysis” of law for hyperrealist and technocratic tendencies and defending a “broader-gauged economic analysis”); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 *Yale L.J.* 357 (2001).

²¹ J. E. Penner, *The Idea of Property in Law* 68 (1997).

²² J. E. Penner, *The Idea of Property in Law* 70 (1997) (arguing that “‘use’ refers to a disposition one can make of something that is purposeful and can be interfered by others.”).

²³ J. E. Penner, *The Idea of Property in Law* 70 (1997). See also A. M. Honoré, *Rights of Exclusion and Immunities against Divesting*, 34 *Tulane L. Rev.* 453, 463-64 (1960) (same).

²⁴ Or, recall, by settling on a *qualitatively different* notion of use-tracking exclusion. On this view, the owner has no right to exclude, *tout court*, but rather a qualified right to exclude only in the case of inconsistent uses on the parts of the right-holder, on the one hand, and another person, on the other.

uses may be made by owners of their objects.²⁵ Accordingly, the justification of the right to exclude in terms of protecting the right to use leaves unaddressed, and so unexplained, the law's indifference as to whether protecting the former is called for by the good of protecting the latter. The normative powers of owners, especially their authority to fix the standing of others in relation to an object, extend to capture cases in which excluding others has no connection whatsoever with sustaining the right to use.²⁶ This connection figures nowhere in the *prima-facie* case of trespass²⁷; nor does it give rise to a defense on the part of the trespasser.²⁸ The only live question for establishing a *prima-facie* case of trespass is whether the act of entering or using the property of another meets the requirement to display deference to the point of view of the right-holder; that is, to the right-holder's point of view over the normative standing of the trespasser in relation to the former's object.²⁹ For this reason it *must* be the case that the indirect thesis in question should best be understood to apply a version of rule-consequentialism in the context of property, seeking to bridge the gap between the functions (associated with using an object) and the form (exclusion) by recourse to considerations of what is best overall.

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

This indirect approach, however, suffers from four different inadequacies: first, it is suspiciously incomplete; second, it faces the general charge leveled against rule-consequentialism, according to which it is incoherent; third, it fails to account for the special deontic character of rights and duties; and fourth, instead of grounding the right to property in the relational structure of private law norms, it adopts an aggregative stance toward those who are excepted to respect this right, namely non-owners. I take each in

²⁵ Thomas Merrill has noted that "in special circumstances the right to exclude does not entail the right to engage in particular uses." He then observes, however, that "in the ordinary course of events, giving A the right to exclude with respect to Blackacre leads directly to the conclusion that A has the right to use Blackacre." Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730, 741 (1998). This observation makes perfect sense, to be sure, but it is importantly incomplete insofar as it ignores the fact that exclusion does not merely "directly" protect the right to use, but rather overprotect it.

²⁶ See, e.g., Entick v. Carrington, 19 St. Tr. 1029, 1066 (1765) ("every invasion of private property, be it ever so minute, is a trespass."); Doughtry v. Stepp, 18 N.C. 371, 371 (1835) (noting that "the law infers some damage [from every trespass onto the land of another]; if nothing more, the treading down grass or herbage, or as here, the shrubbery."); Seneca Road Co. v. Auburn & R. R. Co., 5 Hill 175 (N.Y. 1843) (the maxim *de minimis non curat lex* "is never applied to the positive and wrongful invasion of another's property."); cf. Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 16 (1985); Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARRY L. REV. 1849, 1871 (2007) (observing that "courts have traditionally granted automatically injunctive relief against continuing or episodic trespasses, without regard to any balancing of the equities.").

²⁷ E.g., Rager v. McCloskey, 111 N.E.2d 214, 216 (N.Y. 1953) (noting that trespass may consist "in making an unauthorized entry upon private property.").

²⁸ GET CITE – LIST DEFENCES

²⁹ CITE TO FN 26 & MORE

turn. In the next stage of the argument, I shall argue that all these shortcomings are surface symptoms of the indirect thesis's failure to account for the value immanent in the special *forms* that the right and duty in question take, quite apart from their functions.

To begin with, the indirect thesis moves too quickly from a basic premise—viz., that to sustain the right to use, the user must not be interfered with—to the final conclusion—viz., that the right to use grounds a right to exclude, *tout court*. It is not that its proponents fail to notice the logical gap between the two elements of the thesis (the gap between a duty of non-interference *with the owner's use* and a duty of non-interference, regardless of the owner's use).³⁰ The failure is to defend an additional (implicit) premise, according to which the *costs* of circumscribing the right to exclude so as to track more precisely the need to protect the owner's use far exceed the costs of overprotecting use through the tort of trespass.³¹ At the very least, this showing must explain why a principle of use- or interference-tracking exclusion would be prohibitively costly. On this alternative, there is no need to specify in advance the different uses to which an owner can put an object. Rather, all that is required is a duty of non-interference, that is, of not pursuing plans involving the object of another which are incompatible with those set by the owner.

A duty of this kind is no mere analytical conceit, to be sure. It already figures in some jurisdictions, notably the United States, in respect of trespass to chattels.³² There, a duty-holder is not liable for using another's chattels *as such*. Liability depends, rather, on the occurrence of setback, such as harm or dispossession, to the interest of the owner in enjoying her object uninterrupted.³³ On this trespassory model, there is no need to specify in advance the kind of uses to which an object may be put to use (and so does not imply impracticality and excessive bureaucratic regulations).³⁴ And it is therefore not clear why the indirect thesis cannot settle on a generalized version of this model of trespass to chattels or, more broadly, on any variation on the use-tracking exclusion theme. After all, this version follows naturally from the argument that seeks to ground the right to exclude others indirectly, in the right to use an object. Moreover, it compensates for the disproportionate focus of the right-to-exclude account on the freedom of owners by allowing the propertyless a broader material context within which to exercise their freedom. And insofar as the costs, including information costs, of

³⁰ This awareness is empathetically demonstrated in Smith, *Mind the Gap*_____

³¹ Cf. Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 *Cornell L. Rev.* 531, 562 (2005) (noting the difficulty of determining "what the optimal level of property protection should be."); Eduardo M. Peñalver, *Property as Entrance*, 91 *Va. L. Rev.* 1889, 1905 (2005) ("While an exceptionless trespass rule minimizes information costs at the extreme ends of the private/open-access spectrum, its effect in situations in which owners narrowly carve up their right to exclude is less obvious.").

³² GET CITE; see, generally, Shyamkrishna Balganesh, *Property Along the Tort Spectrum: Trespass to Chattels and the Anglo-American Doctrinal Divergence*, 35 *Common L. World Rev.* 135 (2006).

³³ GET CITE

³⁴ Another way to put the same point is to say that trespass to chattels is not a system of property protection akin either to nuisance (especially as interpreted in *Boomer*_____) or to what Guido Calabresi and Douglas Melamed call liability rule. Trespass to chattels lays down a *duty* (not to interfere with another's property), which is therefore enforceable not only through compensatory or nominal damages, but also through punitive ones. For more on the role of punitive damages in tort remedies, see Avihay Dorfman, *What is the Point of the Tort Remedy?*, 55 *Am. J. Juris.* 105 (2010).

running this alternative seem not to be prohibitive, the indirect thesis can at best show us what, *ex hypothesi*, must be the case in order to move successfully from the right to use to the right to exclude, but without being able to establish that this is actually, or even most plausibly, the case.

Moreover, and secondly, rule-consequentialism has been powerfully criticized for being incoherent.³⁵ The indirect thesis in property is susceptible to this charge insofar as it purports to defend the law's overprotection of the right to exclude by a strict trespassory duty of non-interference.³⁶ On the one hand, rule-consequentialism requires that the conduct of non-owners be assessed by reference to its compliance with the rule of deferring to the judgment of the owner in each particular case *even when* this is not required to promote or even sustain the freedom or efficiency generated by owners' deploying their objects, in which case the *consequential* argument for promoting freedom or efficiency through property does not ground a right to exclude, but rather imposes unnecessary restrictions in the form of trespassory duties on the (equally valuable) freedom of non-owners. By implication, it condemns violators of the rule by rendering them liable, sometimes including in punitive damages,³⁷ even where their conduct does not impinge upon the right of owners to use their objects. On the other hand, the same rule can incorporate enough exceptions to the right to exclude that it comports more satisfactorily with the demands of freedom and efficiency (including the demands of freedom on the part of non-owners), in which case the indirect thesis is abandoned entirely and in its stead arises an account of use-tracking exclusion.

Third, the next shortcoming of the indirect thesis stems from its very structure which is at odds with the *deontic character* of rights (such as the right to property) and duties (such as the duty to defer to the judgment of owners).³⁸ To begin with, rights and duties are not merely placeholders for what we—owners and non-owners—have *most reason* to do; instead, they figure in our lived experience in the form of freestanding *requirements*.³⁹ But the indirect thesis grounds the right and duty of exclusion *not* in the necessity of protecting the right to use, for the latter right (as mentioned above) requires a

³⁵ David Lyons, *Forms and Limits of Utilitarianism* (1965). This critique has been employed against rule-consequentialist arguments in the legal arenas of contract and torts. See, on the torts side, Jules L. Coleman, *The Practice of Principle* ____ (2001). On the contract side, see Charles Fried, *Contract as Promise* 16 (1981).

³⁶ Thus, the argument is not that rule-consequentialism is incoherent, tout court, but rather that applying this justificatory approach to the case of the right and duty of exclusion in their current forms may result in incoherence.

³⁷ See *infra* text accompanying notes ____.

³⁸ For more on the deontic character of rights and duties and, more generally, on the distinction between right- and value-jurisprudence, see Jürgen Habermas, *Between Facts and Norms* 253-266 (William Rehg trans., 1996). Note that it is not necessary for my argument to claim that *all* rights, by virtue of being rights, must have a deontic character; some rights may (arguably) protect the right-holder's welfare or interest, in which case paying compensatory damages is sufficient to right the violation of such rights. On this last point, see Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 *Yale L.J.* 1335 (1986). The gap between the form and the function of ownership, however, can arise only insofar the right (of ownership or property, more generally) does not merely protect welfare or interest.

³⁹ Requirements need not be absolute, to be sure, but they are nonetheless distinctive in the sense that they do not figure as considerations that count in favor of or against acting in certain ways. Indeed, requirements purport to guide conduct in spite of such considerations.

right and a duty of exclusion akin to the use-tracking account. Indeed, they are grounded instead in considerations of what is best overall for the purpose, say, of sustaining freedom or promoting efficiency in and around the institution of private property. In that, the indirect thesis departs substantially from the core deontic intuition about rights and duties as defining a set of requirements that are irreducible to extrinsic considerations (such as the interests in freedom or efficiency). This departure is particularly troubling since the right and duty of exclusion invite the charge of normative arbitrariness precisely because they do not lend themselves naturally to these considerations, but nevertheless command an unusually strong protection, i.e., overprotection, of them in the form of ownership. This conclusion reflects the broader, and familiar, observation that (act- and rule-) consequentialism cannot generally account for the distinctiveness of rights in our moral and legal lived experience.⁴⁰ And, to be clear, I do not mean to suggest that values such as freedom or autonomy cannot ground some measure of a right to exclude and, in particular, a use-tracking right to exclude.⁴¹ The point is that these considerations cannot but fall short of grounding no less than a right to exclude, *tout court*.

Finally, the indirect thesis fits uncomfortably with the experience—legal as well as moral—that trespassory duty extends directly, and so relationally, from a non-owner to each and every owner, taken severally. Indeed, this thesis cannot find the grounds of the duty of exclusion in what any particular duty-holder owes to any particular right-holder; after all, it demands that non-owners defer to owners even where this is not necessary to protect the latter’s right to set and pursue plans using their objects. Accordingly, the articulation of the reasons for action underlying the duty of exclusion must look elsewhere, *to the practice of property as a whole*, rather than to any particular right-holder, in order to explain why a duty-holder ought to keep off the property of another in each and every particular case. The duty of deference, that is, is not owed to and owned by the property right-holder, but rather can only be mediated by a legal practice of property.⁴² The indirect thesis, one may say, takes indirectness to heart when—in addition to grounding exclusion indirectly in the right to use—it marshals an indirect structure of property obligation, giving rise to duties running from duty-holders to the legal practice as a whole. On this view, right-holders are being reduced to the position of mere beneficiaries of the duty. This view is reflected in the insistence of proponents of the indirect thesis on the fundamental primacy of the owner-thing relation (the thingness

⁴⁰ See, e.g., Robert Nozick, *Anarchy, State, and Utopia* 28-33 (1974); Ronald Dworkin, *Taking Rights Seriously* ___ (1978). Joseph Raz has sought to explain the special force of a right (what he calls the “mismatch between the importance of right and its contribution to the rightholder’s well-being”) by reference to its being a common good. Some rights, on this account, serve as preconditions for the flourishing of persons generally, not just of any right-holder in particular. Joseph Raz, *Ethics in the Public Domain* 55 (1994). See, e.g., Joseph Raz, *The Morality of Freedom* 251 (1986) (freedom of religion). The right to private property, however, does not seem to fall naturally within this account of rights as common goods—the charge of normative arbitrariness picks out the worry that *over*protecting ownership necessarily comes at the expense of society.

⁴¹ I remain less confident, however, as to whether economic cost-benefit analysis can do so successfully.

⁴² Thus, I do not argue that duty-holders cannot owe an obligation to society or to the practice of property. Of course they can. My argument, rather, is that an indirect form of obligation does not, and cannot, rule out the existence of a direct form of obligation, namely an obligation that runs directly from duty-holders to right-holders. Moreover, as I explain in the main text below, the latter obligation captures the legal and moral centers of the trespassory duty.

of property, as it were), at the expense of the relational character of property rights as establishing normative relationships between persons with respect to objects.⁴³ More dramatically, this view is best expressed in admissions, saying that duties of non-interference are akin to *in-rem* duties, owed to "the plurality of property holders"⁴⁴ or to "a large and indefinite class of holders of [property] rights."⁴⁵

Of course, it is perfectly plausible to hold a person under an obligation to act in certain ways regarding the practice of property or society as a whole (as in criminal law duties). However, the indirect structure of property obligation advanced by proponents of the indirect thesis strikes a counterintuitive cord.⁴⁶ For it runs into direct conflict with the *private law form* that the tort duty against trespass takes; likewise, and more generally, it runs contrary to the private law form that private ownership takes. Property right-holders are no mere patients of the practice of property, being protected from non-owners by norms of exclusion laid down *for them* by the practice's top officials. They are also, and more dramatically, *agents* who are distinctively empowered to exercise the authority to determine the standing of others in relation to objects and to vindicate this authority as a matter of (private) law. Their status as agents, as genuine right *holders*, entails that the trespassory duty (which is a classic private law duty) runs directly to them, being *owed to and owned by* them, rather than mediated by the social practice of property (or tort for that matter).

The inability of the indirect thesis to capture the private law structure of the trespassory duty does not mark a *legal-theoretical* failure only. The indirect thesis also commits us to abandoning the lived experience of private property by implicitly suggesting that the moral center of the trespass tort departs from our moral intuitions that deference to a person in connection with her claim to control over an object may express a distinctive form of respectful recognition for *this* person, not just for the practice of property or society, more generally. Whereas the notion of respectful recognition in question figures at the stage of discharging the duty against trespassing (as I shall suggest below), it is most intensively felt at the remedial stage. Indeed, the social and moral significance of respectful recognition exercise their most lively and concrete draw on our minds only after the fact—when the conduct of a duty-holder resulted in the infringement of the owner's right (or even when an infringement was luckily escaped at the last minute). These circumstances allow us to see most clearly the kind of expectations built into the position of private ownership, expectations to be *directly* respected and recognized as a person possessing authority to fix the normative standing of others in relation to an object. And while this form of attending to owners makes its first appearance (in tort law) when non-owners are required to comply with the trespassory

⁴³ As I explain elsewhere, there exists a mistaken tendency to cast the distinction between thing-based and relational accounts of property in terms of the distinction between legal formalism and realism, respectively. This is because the latter distinction cuts across the former one. On my account, property is fundamentally relational, but equally formal. See Dorfman, *Private Ownership*, 16 *Legal Theory* 1, ____ (2010).

⁴⁴ J. E. Penner, *The Idea of Property in Law* 27 (1997).

⁴⁵ Thomas Merrill and Henry E. Smith, *The Property/Contract Interface*, 101 *Colum. L. Rev.* 773, 789 (2001).

⁴⁶ See generally Avihay Dorfman, *Private Ownership*, 16 *Legal Theory* 1 (2010).

duty, it often remains so ubiquitous to the way persons interact with one another (by way of deferring to the judgments of owners) that it mostly goes unnoticed, but it is never actually abandoned as implicitly suggested by the indirect thesis.⁴⁷

III. Outline of a Theory of Respectful Recognition in the Property Context

The charge of normative arbitrariness from which I began picks out the critical distance between the right and the values of ownership (and property, more broadly). The charge takes a purely functional stance toward the explanation of the right and its correlative trespassory duty. This approach may be called *right-functionalism*, because it seeks to explain the grounds of the right and duty involved solely in terms of the functions—extrinsic values and interests—they serve and, indeed, produce. On this view, the special normative power of ownership—which is most dramatically exemplified by the right to exclude—is cast in terms of, and assessed by, the values and social goals it (indirectly) helps to promote through securing the deployment of objects by owners in pursuit of (collectively acceptable) ends. And although this functional characterization is helpful as far as it goes, it does not go far enough. In particular, the charge of normative arbitrariness, I shall argue, is a feature of right-functionalism, not necessarily of the right (and duty) itself. This charge accurately identifies the tension between the form of the right and the various functions it (indirectly) serves, but it goes wrong when it supposes that *all* of ownership's normativity lies, as it were, on the functional side of the equation.⁴⁸ On the account I shall outline presently, the mystery of the special normative power vested in private ownership and the trespassory duty of deference it commends may be solved once a *right-formalist* approach is sought.

As I shall seek to show, ownership (and trespass) takes a *social form*. My account, it is important to note, takes a distinctively different approach to the question of the connection between property and society than several influential accounts have so far

⁴⁷ It is of course true that many of the encounters duty-holders have with the property of others do not turn on prior acquaintance with the identity—face or name—of the right-holder. But this observation need not count against the view of the trespassory duty as one which runs directly from the duty- to the right-holders. This is because the conception of respect that underwrites the duty concerns respectful recognition of persons as such, rendering the identities of these persons (here, owners) irrelevant. It seems to me that Penner, who is especially skeptical about the reality of direct duties of non-interference, has good reasons to allow for this possibility. At one point, he notes that trespass to property shares a similar structure with trespass to person (such as assault and battery). See J. E. Penner, *The Idea of Property in Law* 74 (1997). The duty against assaulting or battering the person of another can most plausibly express an idea of respectful recognition for persons as such even though it certainly does not turn on the identity of the would-be victim. And although the grounds for the right to property and the right to personal integrity (or otherwise) need not be the same (as property is not merely an extension of self-ownership to the external domain), the analogy to person allows us to see that duties can be highly impersonal, but still sufficiently relational or directional. For more on the impersonally relational duties in torts, see Avihay Dorfman, *Can Tort Law be Moral?*, 23 *Ratio Juris* 205, ____ (2010).

⁴⁸ Frances Kamm has suggested that, for “some rights,” “the strength of the right is not a mark of the strength of the interest it directly or indirectly protects, but a mark of the fact that the right is a response to basic, morally crucial characteristics of persons.” F. M. Kamm, *Intricate Ethics* 247 (2007). Kamm’s stock example is free speech; it is far from clear, however, whether an argument of this sort could be extended to capture private property.

pursued. Generally, such accounts begin from property arrangements that supervene on thicker forms of social engagement.⁴⁹ Familiar examples are the employment setting in Joseph Singer's article on the reliance interest in property; co-ownership and other social activities in Penner's writings; psychological and social attachments to land in Eduardo M. Peñalver's work on land's memory; and the communal property institutions such as the liberal commons in the writing of Hanoch Dagan and Michael Heller.⁵⁰ These cases could then be generalized into a broader argument concerning property and social values—that is, that property law helps in sustaining and perhaps even partly producing valuable spheres of social activity.⁵¹ My account takes the opposite approach, purporting to show that property can engender a valuable form of society, irrespective of the preexisting context and the thicker relations to which it happens to apply.⁵² Thus, I do not claim that ownership right and trespassory duty sustain or produce socially valuable outcomes (although they may occasionally do so).⁵³ Rather, the argument is that *they are in themselves social*, because of the form they take. For, roughly speaking, this form requires duty-holders to attend to right-holders by embracing, to some extent, the latter's ends as guides to their (the former's) own conduct.

I commence this outline with a brief sketch of the broader legal landscape and the space that the proposed formal account captures therein. I do this mainly for the purpose of forestalling misunderstandings about the nature of my argument and its present ambition.

⁴⁹ I say *generally* in recognition of (functional) accounts that emphasize that property may serve as a possible (though presumably not necessary) prerequisite to engaging in social relations and, at a more fundamental level, supporting the social and political structures that constitute human flourishing. See Daphna Lewinson-Zamir, *The objectivity of Well-Being and the Objectives of Property*, 78 N.Y.U. L. Rev. 1669, 1716 (2003) (noting that property "is conducive (although certainly not crucial) to the attainment of *deep and meaningful social relationships*.") and Alexander, *supra* note ____, respectively.

⁵⁰ See, respectively, Joseph Singer, *The Reliance Interest* ____, J.E. Penner [CITE TO HIS FIRST BOOK, THE CO-OWNERSHIP PIECE, AND THE NEW M-S]; Eduardo M. Peñalver, *Land Virtues*, 94 Cornell L. Rev. 821, 830-31 (2009); Hanoch Dagan & Michael Heller, *The Liberal Commons*, 110 Yale L.J. __ (2001). See also Eduardo M. Peñalver, *Property as Entrance*, 91 Va. L. Rev. 1889, 1965 (2005); Hanoch Dagan & Caroline J. Frantz, *The Properties of Marriage*, 104 Colum. L. Rev. 75 (2004); David Lametti, *The Concept of Property: Relations through Objects of Social Wealth*, __ U.T.L.J. __ (2003); Lisa M. Austin, *Person, Place, or Thing? Property and the Structuring of Social Relations*, __ U.T.L.J. __ (2010).

⁵¹ This may be true for the approaches developed, separately, by Penner and Lewinson-Zamir, but is less so for Singer and certainly much less so for Dagan's pluralistic account of property as a range of different property institutions, some of which are (on his view) asocial and *should* remain so. See Dagan [ch.2, forthcoming book].

⁵² This is not to deny that property is partly constitutive of the social arrangements onto which it maps. On the contrary, I argue that property can establish a valuable society of free and equal persons. Moreover, I do not deny that context matters. My argument, however, is that there is a formal core to property, and that it is a distinctively social one (even in the most isolated case of trespass to property). For the democratic legitimation underpinning of this approach, see Dorfman, *Private Ownership*, 16 Legal Theory 1, __ (2010).

⁵³ This functionalist claim concerning the connection between the exclusion and society is advanced in James Penner, *Ownership, Co-Ownership, and the Justification of Property Rights*, in *Properties of Law* 166 (Timothy Benedict ed., 2006); J.E. Penner, *The Property Fetish* [ASK J.P. FOR PERMISSION TO CITE; OTHERWISE, OMIT]. See also Lisa M. Austin, *Person, Place, or Thing? Property and the Structuring of Social Relations*, __ U.T.L.J. __ (2010).

Certainly, any group of persons living in proximity to one another, and thereby seeking to arrange their practical affairs systematically in (at least) a peaceful manner, must create a scheme of property coordination. The need for this scheme arises when issues such as the use of, access to, and profit from external objects present themselves, as they are likely to do given the human condition and other objective circumstances (such as moderate scarcity).

Private property is one such scheme that *responds* to this need.⁵⁴ By selecting a private property scheme, society vests in private persons some measure of authority to fix the normative standing of others in relation to an object. But apart from this skeletal characterization of a private property scheme, there remains substantial room to fill in the details of this scheme, including some of the most fundamental of them (including, of course, the functions and values served by this scheme). It would be wrong to suppose that because private property *causally* arises in connection with a need for social coordination, this need, whatever it is, also determines the scheme's shape and point, either in full or even in part. This last normative task requires, among other things, the creation of property right and duty forms.⁵⁵ As I shall now seek to show, focusing especially on the form of the trespassory duty, the form under discussion expresses a basic liberal commitment to a *society* of free and equal persons. This special form does not, of course, rule out the policy and principled goals commonly attributed by functionalists to ownership and trespass. It insists, however, that whatever goals they seek to promote, they do so in a distinctively social way: they demand that duty-holders recognize right-holders as commending respect for their different ends, simply because these are their own ends. To this extent, the form in question can be seen as a limiting condition on the pursuit of human purposes through the institution of private property.

A. *The Characterization of Respectful Recognition through Trespass to Property*

Underlying the tort of trespass is a *generic* reason for action, indeed a duty, that people should engage the property of others on the basis of making reasonable inferences from the latter's acts⁵⁶ or external objects to their points of view of the matter at hand—that is, their *judgments* concerning the legal permissibility of using or accessing their property and, therefore, the terms of thus using or accessing.⁵⁷ Thus, part of living

⁵⁴ For instance, the story of the emergence of private ownership in the Labrador Peninsula as told by Harold Demsetz fits this pattern. Harold Demsetz, *Toward a Theory of Property Rights*, 57 *Am. Econ. Rev.* 347 (1967). According to Demsetz, the source of the need mentioned in the main text above is high transaction costs.

⁵⁵ There is a separate question concerning the authority to create novel property right and duty forms (such as easement, mortgage, and so on) *after* the get-go stage, which is the question picked out by the principle of *numerus clausus*. On this question, see Avihay Dorfman, *Property and Collective Undertaking: The Principle of Numerus Clausus*, available at <http://ssrn.com/abstract=1661068>

⁵⁶ Of course, language is included.

⁵⁷ Evidence for this interpretation can be discerned from the fact that the particular torts of trespass (to land, chattels, and also to person) involve the unauthorized deployment of the person or property of another. As a prominent tort scholar has observed, 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* 79 (8th ed. 1992). See also Prosser and Keeton on the Law of

together in society with others is that, all else being equal, we are required to assume that the act or object of another provide a proxy for her point of view, which in turn imposes constraints on our courses of action. That is, the normative structure of the generic trespass duty is (conceptually) twofold: first, a requirement to draw reasonable inferences with respect to the right-holder's point of view; and second, a requirement to accommodate, in some measure, one's own course of action in accordance with the inferred point of view.

This way of engaging with other persons through adopting, in some measure, their points of view as a guide to our own conduct may not only render vivid the true object of deference through the trespass tort—the point of view of another—but also emphasize the important but, nonetheless, widely neglected extent to which trespass to land may leave us up to our necks in the practical affairs of others.⁵⁸ This neglect is characteristic of the commonly held view of the duty against committing trespass as a mere restriction on using another's means without appreciating that the existence of a restriction in every given case is the *conclusion* of a prior process of inferring whether, and in what ways and to what extent, the means in question are in fact restricted.

Indeed, the normative power to make such decisions about restrictions (or permissions) and the correlative duty to infer and, then, pursue these decisions have so far been neglected or otherwise mischaracterized due to over-emphasizing one particular *effect* of the power and duty at stake, namely exclusion. Thus, the familiar characterization of the duty against trespassing in the negative terms of ‘keeping-off’ the boundaries of others whose unwelcome hold on us may give a libertarian impression of separateness and retreat from society in fact requires duty-holders *actively* to engage the judgments of right-holders by incorporating these judgments into their own courses of action. On the account I shall develop, therefore, recognizing another person as constituting a point of view is not merely a grudging forbearance reducible to a restriction on the duty-holder’s allowable means. It is also a demand to take *at face value* the judgment of another to execute her plan (whatever it is) *as an end in itself*, including in the weak sense of not interfering with it because *she* so judges. As I mentioned a moment ago, the former demand may not be specified in advance, let alone fulfilled, without presupposing some version of the latter. The purpose of the following analysis is to unpack these observations by drawing (mainly) on the established doctrines and principles of trespass torts.

Torts 113 (5th ed. 1984) (observing that “[c]onsent avoids recovery simply because it destroys the wrongfulness of the conduct as between the consenting parties, however harmful it might be to the interest of others, and even though it is perhaps both immoral and criminal.”).

⁵⁸ For this reason (among others), the strains of deference to the point of view of the right-holder must be kept 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 legal practice of trespass torts. 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 these in Avihay Dorfman & Assaf Jacob, Copyright as Tort, 12 Theoretical Inquiries in Law 59 (2011).

A.1. Deference and Inference

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

Consider the proxy service furnished by external objects. In the typical property case, persons may often encounter an external object without also encountering the owner of this object. A pedestrian, for instance, may pass near a building without encountering an owner (or another right-holder) standing either beside or inside it. The duty against committing trespass to land, recall, calls for taking the judgment of whichever person is in authority to fix her normative standing to the building. This becomes (or purports to become) the guide to his conduct. The building, the mere object, *mediates* between the judgment of the authority and the attitude (of considerateness) on the part of the passerby.⁵⁹ In other words, the object is a concrete meeting point, as it were, between the points of view of the owner and all those whose proximity to the building requires them, as a matter of duty, to incorporate the owner's determination of their normative standing into their own course of action. The precise content of this determination, and therefore the precise contours of the duty to defer to it, may vary depending on contextual features. Thus, in certain contexts (such as when the building is a family's house), the pedestrian is expected to infer that, unless indicated otherwise (e.g., a clear 'tag-sale' sign is placed near the front door), the owner intends to exclude strangers from the building. In other contexts (such as when this building is a restaurant), the owner may fix the normative standing of the pedestrian in relation to the building as an invitee, rendering it permissible to enter the place (but not to sleep there, for example).⁶⁰

Certainly, correctly discharging the duty to infer the relevant judgments from an action or object relies heavily on mastering local conventions concerning the relevant signals, as it were, that words, actions and inactions, and objects communicate.⁶¹ Some cases may prove more difficult for duty-holders than others. These will likely involve words, acts, and objects communicating mixed signals. Consider a passerby seeking to

⁵⁹ CITE TO David Lametti, *The Concept of Property: Relations through Objects of Social Wealth*, __ U.T.L.J. __ (2003).

⁶⁰ See, e.g., *The Calgarth* [1927] p. 93, 110 ("When you invite a person into your house to use the staircase you do not invite him to slide down the banisters.") (*per* Scrutton L.J.) See also Restatement (Second) of Torts § 892A cmt. g (____) ("a landowner's permission for a picnic on his land will normally not be taken to give consent to a picnic at three o'clock in the morning or to a drunken brawl.").

⁶¹ CITE to Restatement (Second) of Torts § 892 cmt. d (____) and the cases cited in its support. "In determining whether conduct would be understood by a reasonable person as indicating consent, the customs of the community are to be taken into account." (cmt. d).

use the toilet in a nearby bookstore. He has a reason (indeed, a duty) to figure out the owner's judgment with respect to his normative standing to the store and, in particular, to using the toilet; in short, the owner's decision concerning the scope of the invitation.⁶² However this person proceeds, the point of this humdrum illustration is that by using the proxy service of the object, his deliberation toward action takes the decisional authority of the owner as a freestanding constraint on his own course of action. In this sense, the object mediates between his point of view and that of the owner.

To be sure, mediation through objects (or words or acts) provides not only a cognitive short-hand with which duty-holders can better negotiate the world. Indeed, the accuracy of the proxy service is not just a statistical characterization of the natural connection between points of view and their various proxies; rather, attending to others by means of drawing inferences about their points of view expresses a special normative connection—that is, a relationship founded on the recognition of the point of view of the right-holder by another as *standing-providing* for the latter.⁶³ Thus, as part of living together respectfully we are *committed* through the tort system to regard one another as free and equal precisely by *assuming* that, all else being equal, activity and external object are proxies for the points of view of others.⁶⁴

A.2. Deference and Accommodation

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

There are any number of ways to introduce adjustments to one's own course of action in the face of the judgments of another. One familiar such way features the duty-holder who is required impartially to *evaluate* (necessarily from his point of view⁶⁵) the extent to which these judgments reflect or otherwise embody the interest or right of the right-holder in order for them to be accommodated into the duty-holder's activity.

⁶² CITE TO CASES

⁶³ By *standing-providing* I mean the determination of the normative standing of one with relation to the object of another.

⁶⁴ This abstract observation about the nature of the connection between points of view and activity or object is not yet an argument concerning the moral grounds of the duty to take the activity or object of right-holders as a proxy for the object of deference. I elaborate on the grounds of such a duty below. The purpose of this observation, instead, is to make clear from the outset that the proxy service of activity or object has *normative*, rather than just causal, foundations (i.e., respect for persons as persons).

⁶⁵ The evaluation must proceed from the duty-holder's point of view, because even an attempt to decide on these matters impartially implies a value judgment (by the duty-holder) concerning what impartiality requires.

The recognition conception that on my account underlies trespass, by contrast, presents a distinctive interpretation of the demand to make accommodation. Indeed, it requires that duty-holders defer to the judgments of right-holders by incorporating them into their own practical affairs. The judgments are to be taken at face value, that is, *unmediated* by the substantive judgments of the duty-holders.⁶⁶ Thus, deferring to the judgment made by the landowner concerning the normative standing of the duty-holder in relation to a piece of land involves seeing this judgment as determining the ways in which this land can figure in the plan of action pursued by the duty-holder.

Accordingly, duty-holders defer to the judgments of right-holders when they take these judgments as a guide to their own conduct by incorporating them into their respective courses of action. Depending on the course of action in question, incorporating the judgment of another may amount to abandoning the planned course altogether.⁶⁷ This is the case where the initial plan of the duty-holder was to enter the house of another, but as it happens no permission has been granted. Conversely, the incorporation of another's judgment may figure less robustly in the practical life of the duty-holder, as when he is on the way to the beach and must decide whether to take the public road or to shortcut through the privately-owned land of another. On this view, the demand to incorporate the judgment of another need not result in abandoning one's own plan, but rather to adjust it *partly*. More generally, therefore, the incorporation characteristic of deference in trespass torts admits of different degrees, all of which share the same *form* of deference—that of attending to another person by treating her judgment as a guide to one's own conduct.

That said, since this form of deference requires a duty-holder to concede practical authority to the judgment of a right-holder, there arises the worry that the deferring person is being asked to undermine his own integrity as a free and equal person. More concretely, deference that takes the form characteristic of trespass implicates the duty-holder in endorsing judgments rendered by right-holders that he may strongly oppose, because he judges them (from his point of view) to be grounded in unreasonable and even mistaken reasons.⁶⁸

Consider *Jacque v. Steenberg Homes, Inc.*⁶⁹ by illustration. There, the defendant harmlessly crossed through the plaintiffs' snow-covered land in order to deliver a mobile

⁶⁶ Of course, one would still have to make judgments about the judgments of others but these would amount to making 'second-order judgments'—that is, inferring the judgments made by others. This deliberative procedure of identification, however, differs qualitatively from experiencing others exclusively from one's own point of view. The former, second-order judgment mainly operates on an epistemological level (of inferring the precise judgment *made by* others) whereas the latter is normative through and through, involving value-judgments as to what is in others' best interests, including what these others *would* or even *could* take to be their best interests.

⁶⁷ But recall the caveat made in supra note ____ [CITE TO FN ON STRAINS OF DEFERENCE]

⁶⁸ Of course, there are external limitations on what one can be legally required to endorse. For example, consider racial discrimination in public accommodation settings or the exercise of free speech on private property (such as shopping malls). But these and other important external limitations are exceptions that prove the rule, as I explain in the main text below.

⁶⁹ 563 N.W.2d 154 (Wis. 1997).

home to a nearby landowner despite prior “adamant protests” by and “repeated refusals” from the plaintiffs.⁷⁰ The crossing took place far enough from the plaintiffs’ sight that they could not even have noticed or felt invaded in any meaningful way and, so, without implications of loss of privacy or annoyance.⁷¹ It turned out, as both the Court of Appeals and the Supreme Court of Wisconsin indicated, that the reason the plaintiffs refused to grant the defendant permission to cross harmlessly on any terms—including in return for a consideration⁷²—was their fear of losing legal control over parts of their land by prescription.⁷³ And this reason is not just unreasonable, but rather clearly mistaken in every possible sense, factually and legally speaking.⁷⁴ Nevertheless, the duty against trespassing demands, on pain of punitive damages, that duty-holders defer to the judgment of the right-holder, and so pursue it as their unmediated guide to conduct.⁷⁵ And although the facts of this case render it more dramatic than usual trespass cases, it reflects the traditional view of the common law tort of trespass to property to the effect that liability would lie whenever one fails to take the unmediated judgment of the right-holder as standing-providing for him.⁷⁶ There are, of course, exceptional circumstances (such as private necessity) in which this rule is partly or wholly abandoned, but these

⁷⁰ Jacque at 156 & 157, respectively.

⁷¹ Jacque v. Steenberg Homes, Inc., 201 Wis.2d 22, 26, 548 N.W.2d 80 (Wis. App. 1996) (noting that “[o]nce the movers had proceeded far enough down the road to be out of the Jacques’ sight, they used their ‘cat’ to cut a path through the snow-covered field and left the mobile home at the site.”).

⁷² Jacque at 157 (“the assistant manager [of the defendant] asked Mr. Jacque how much money it would take to get permission. Mr. Jacque responded that it was not a question of money”).

⁷³ Jacque (S.C.) at 157 (“The Jacques were sensitive about allowing others on their land because they had lost property valued at over \$10,000 to other neighbors in an adverse possession action in the mid-1980’s.”); Jacque (Ct.App.) at 25-26 (“In the early 1980s, the Jacques allowed some other neighbors located along the lake to park cars on their land. After several years, one neighbor claimed that he now owned this land under adverse possession. [The Jacques] ... lost roughly \$10,000 worth of property in default. Also, the Jacques believed that the DNR had taken advantage of them during negotiations to acquire a conservation easement along the lake. As a result, the Jacques had become very sensitive about outsiders entering onto their property and were unwilling to help Steenberg Homes.”)

⁷⁴ Adverse possession or easement by prescription simply cannot arise out of the one-time grant of a license to cross one’s land. Moreover, the nature of the transaction at stake—involving permission to cross one’s land—represents the antithesis of the *unilateral* acquisition of property rights characteristic of adverse possession and easement by prescription.

⁷⁵ Punitive damages, as opposed to compensatory damages, are set sufficiently high to preclude efficient trespass. GET CITE TO Dorfman, What is the Point of the Tort Remedy?, 55 Am. J. Juris. ____ (2010); Lee A. Fennell, Efficient Trespass: The Case for “Bad Faith” Adverse Possession, 100 Nw. U. L. Rev. 1037 (2006); Gideon Parchomovsky & Alex Stein, Reconceptualizing Trespass, 103 Nw. U. L. Rev. ____ (2009). The Jacque court awarded \$100,000 in punitive damages on top of a one-dollar-award in nominal damages.

⁷⁶ There are, of course, exceptions to this rule. One familiar exception is *State v. Shack*, (N.J. 1971) (finding no-liability for entry by *government service workers* into migrant labor camps situated on privately owned land; the purpose of the entry was to provide the workers with medical and legal assistance pursuant to a federally funded program). This exception, however, must be read against the backdrop of its special public overtones. See *Bellemead Dev. Corp. v. Schneider*, 483 A.2d 830 (N.J. Super. 1984) (denying access to private sidewalks in front of private office buildings on the ground that plaintiffs have not devoted their property to any public use), *cert. denied*, 301 A.2d 894 (N.J. 1985); see also *State v. Schmid*, 423 A.2d 615, 629 (N.J. 1980) (noting that “the more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property.”).

aside, the *prima facie* case of trespass to property gives rise to the permission-to-enter question only.⁷⁷

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

B. *The Grounds of Deference and Respectful Recognition*

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

⁷⁷ For a comprehensive treatment of the traditional rule, see W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* ___ (5th ed. 1984). See also Frederick Pollock, *The Law of Torts* 353-54 (11th ed. 1920). In most U.S. jurisdictions, the tort of trespass to chattels has departed from the traditional common law rule (which is still in practice in England and Australia, for example). That said, except for novelties such as cyberspace trespass claims, the importance of trespass to chattels, in comparison to trespass to land, has declined substantially, becoming, as Prosser puts it, the "little brother of conversion." Prosser ___ at 86.

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

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

B.1. True Respect

Respect for persons as free and equal, I shall argue, cannot get off the ground so long as the respecting person determines individualistically—viz., from his point of view—the terms of the respect he owes other persons.⁷⁸ To begin with, to respect another is to regard her as placing *some sort* of a constraint on the moral permissibility of actions connected (in the appropriate sense) with her. Persons can figure as constraints on others in many different ways, to be sure, reflecting various ideas of what it means to respect another. For instance, persons can figure as *causal* constraints, as when, and to the extent that, deference to them serves to promote efficient allocation of resources among *all* members of society. On this view, personal costs to potential victims of rights violations often, *but not necessarily*, stand in for the *social* cost of (socially) inefficient pursuit of activities.⁷⁹ But even when there exists a perfect overlap between the social

⁷⁸ I insist on respect for *persons* in recognition of cases in which persons are respected not merely as such but rather by virtue of idiosyncratic facts about them. Parental respect, fiduciary respect, and pedagogical respect, for example, are familiar illustrations of respect for specific others, not for persons as such.

⁷⁹ The problem from which theories of efficiency begin is one of *social* costs. This is reflected in the respective titles of two of the most influential writings on the subject: R. H. Coase, *The Problem of Social Costs*, 3 *J. L. & Econ.* 1 (1960); Guido Calabresi, *The Costs of Accidents* (1970). One familiar example of the infliction of personal without accompanying social costs is the category of cases that often goes by the name of pure economic loss—viz., financial loss without an accompanying loss to the person or property of

and the personal costs in a particular case, these costs must be balanced against the benefits of the action at stake. The respecting person, because he is the one who chooses according to his preferences what activity to pursue, fixes these benefits and, for that reason, determines *unilaterally* how much respect is owed to the right-holder.⁸⁰

Furthermore, persons can figure as *moral* constraints on the practical lives of others. This is most familiar in the basic moral requirement that all persons display impartial concern for the interests of others. This seems to be the most common view of respect in contemporary philosophy.⁸¹ Of course, it is by no means modern, as different variations on the impartiality theme (such as the golden rule) have long figured prominently in moral reflection about respect for others. For example, one of Kant's formulations of the Categorical Imperative, the Universal Law formulation, reads: "act only in accordance with that maxim through which you can at the same time will that it become a universal law."⁸² This Kantian version of impartial concern for others suffers from exactly the same structural deficiency that plagues impartiality more generally—it remains fundamentally individualistic, because impartial regard for others operates on a prior judgment (made from the point of view of the respecting person) of what impartiality requires in general and, more crucially, in the particular case at hand.⁸³ The Universal Law formulation of the Categorical Imperative, as Jürgen Habermas observes, fails on its own individualistic terms, as it were, because "as long as we apply this ... test [of impartiality] in a monological fashion, each of us still considers privately what all could will from individually isolated perspectives."⁸⁴

another. See, e.g., Richard Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 *Ariz. L. Rev.* 735 (2006).

⁸⁰ Cf. Weinrib, *The Idea of Private Law* ____ (1995); Coleman, ____ (CITE TO Postema's ed. Book 2001).

⁸¹ E.g., Harry Frankfurt, *Equality and Respect*, in *Necessity, Volition and Love* 150 (1999) ("Respect, therefore, entails impartiality and the avoidance of arbitrariness."). See, most recently, Leslie Green, *Two Worries about Respect for Persons*, 120 *Ethics* 212, 213 (2010) (observing that "respect [for] persons ... is an impartial moral principle of universal application.").

⁸² Immanuel Kant, *Groundwork of the Metaphysics of Morals* 4: 421 (trans. Mary Gregor, 1998).

⁸³ And it will not do to insist that the respecting person employs his subjective evaluation so as to make a *bona-fide* determination of how the respected person *could have* fixed the respect requirement had she actually decided herself; put differently, it will not do to settle for a given person moderating his activity in a way that *could have* been accepted (or could not be reasonably rejected) by the other person. These alternatives still give rise to the same suspicion; namely, the respecting person subjectively sets the terms by which he displays concern and, hence, respect toward another person. But the former cannot respect another on the latter's own terms (as our moral intuitions insist) while at the same time setting the content of these terms by himself.

⁸⁴ Jürgen Habermas, *The Inclusion of the Other* 57 (Ciaran Cronin & Pablo De Greif eds., 1998). Habermas, who is a self-defined *republican* Kantian, seeks to overcome the "ethnocentric" difficulty of Kant's individualistic conception of reason by introducing the communicative turn to practical philosophy. Impartiality is then replaced by an intersubjective procedure for establishing what impartiality requires, but this procedure is shot through with idealizations concerning communication through language—its *telos* (as Habermas says) and its success conditions. See, e.g., 1 Jürgen Habermas, *The Theory of Communicative Action* ____ (____1982); Jürgen Habermas, *Discourse Ethics: Notes on a Program of Philosophical Justification*, in *Moral Consciousness and Communicative Action* ____ (____). I do not follow Habermas, since it is not clear to me how a *hypothetical* procedure could establish a genuine intersubjective point of view, a point of view that we share together, rather than one we *could* have shared if we could have satisfied the demands of Habermasian communication.

By contrast, there is a strong intuitive sense according to which true respect for persons *as such* can be had *only insofar* as the respecting person defers, in some measure, to the respected person *on her own terms*. Anything short of this requirement seems to cast respect for persons in counterintuitive terms—that of holding fast to our own conception of what respect for another requires us to do. Thus, it is not only that persons figure as causal or moral constraints on the practical affairs of others, but also that these persons get to determine, to some extent, what the terms of the constraints actually are.⁸⁵ As mentioned above, this is precisely what is meant by saying that deference grounded in respect for other persons involves suppressing one's own judgment and opening up to the unmediated judgment of another person, thus “see[ing] the world ... from that person's point of view.”⁸⁶

Respecting persons on their own terms and being respected in this way by others is deeply embedded in the lived experience of *becoming a person*—that is, the moral development of human beings from infancy to the stage of full personhood seems to track our moral intuition concerning respectful recognition of persons. Indeed, this process features the gradual shift from respect for the interest to the point of view of the developing child. It commences with a strong sense of parents and educators being in control of, and thus being obligated to respect, the child by setting *for her* the terms of the respect. As Tamar Schapiro has observed, “children ... make direct moral claims ... to have their interests protected and their needs met.”⁸⁷ On this view, children are owed special respect (for interest) *because* they are not fully persons yet and cannot, therefore, command the respect (for point of view) that persons do.⁸⁸

That said, respect for interest comes constantly under the growing pressure of attending to the child more like an adult, up to the point where pursuing her best interest at the expense of respecting her on her own terms seems inappropriate, paternalistic, and, indeed, *disrespectful*. Throughout this process, the parent gradually, and quite steadily, distances herself from the child by way of imposing less vigorously her conception of what respect for the child requires. This distance, in turn, provides the necessary space for the parent to regard the child as constituting her own “voice,” negotiating the world from her own peculiar point of view.⁸⁹

To be sure, unlike the parent-child relationship, respect for persons, including for persons in connection with their properties, is generally far less intense and demanding in the case of strangers, which is the paradigmatic case for trespass torts. Nevertheless, the notion of developing into a person renders more *natural* the commitment to respect

⁸⁵ As I noted in *supra* notes 55??? & 65??? [strains of deference & external limitations such as racial discrimination], there are limitations on true respect. Some of these limitations, it is worth mentioning, are not external to the recognition conception of respect, but rather internal to it—that is, they reflect concerns for forcing duty-holders into *self*-disrespect.

⁸⁶ Bernard Williams ____ 103.

⁸⁷ Tamar Schapiro, ____, *Ariz. L. Rev.* at 575.

⁸⁸ Tamar Schapiro p. 715 (*Ethics* 1999): “To treat someone like a child is, roughly, to treat her as if her life is not quite her own to lead and as if her choices are not quite her own to make.” See, more generally, Peter F. Strawson, *Freedom and Resentment* 9-____ (1974).

⁸⁹ Schapiro P. 729 (*Ethics*).

persons as such by regarding their judgments as independent constraints on the conduct of the respecting person. After all, despite the differences in scope, intensity, and affection, the respect which the parent assiduously aspires to display toward her child takes precisely the same form—that of regarding others as free and equal persons by accommodating *their* unmediated judgments in our own practical lives.⁹⁰

B.2. *The Social Form of Respecting Persons as Such*

Although the idea of true respect strikes a familiar cord,⁹¹ much less attention has so far been paid to what seems to be its most significant, and perhaps surprising, achievement. Far from being a moral ideal of separation and retreat from society, a grudging forbearance so to speak, respecting other persons on their own terms expresses a commitment to accommodation which is profoundly social; namely, to identify with the distinctive points of view of others merely by virtue of their being persons. On this view, respect and society are not merely incidentally connected (as when people respect those with whom they previously formed social relations); nor are they merely normatively connected (as when the good of respect and the good of society contribute jointly to human flourishing); and nor are they simply causally connected (in the sense that Robinson Crusoe cannot respect others and be respected by them where there are no ‘others’ in his world). Rather, the connection is conceptual, since true respect and society of persons mutually presuppose one another. Respect presupposes a distinctively social way of being with others in the world; and society of persons as such arises through acquiring the practical attitude associated with the recognition conception of respect.

Begin with the social underpinnings of respect for persons. Persons are reasoning creatures, negotiating the world by forming their own *judgments* about what to do and what to believe. This is not merely a reflection about human minds and actions, but also a basic modern ideal of *critical rationality* often cashed out in terms of self-sufficiency—“the maxim of always thinking for oneself.”⁹² The judgments made by individuals reflect distinct points of view from which self-sufficient people come, separately, to appreciate and, indeed, experience others (among other things). But although they literally make possible our experience of one another, these points of view might also isolate us (socially speaking) from those captured by their lens. For they are our own, personal points of view, mediating what actually lies out there according to our judgment of what

⁹⁰ Democracy, too, reflects a similar form of respect. More precisely, the principle of one-person-one-vote that lies at the very root of democracy takes precisely this form, and participation in the democratic process of collective decision-making may therefore express the respect which participants owe one another's point of view. My view is equally counted in the democratic process, not necessarily because the merits of the view deserve respectful recognition at all, but rather because it is mine and I am a person. There is, of course, the question of citizenship that might not extend democratic respect to all persons. My claim assumes that there may be compelling reasons to believe that the exclusive nature of citizenship is not arbitrary or otherwise in conflict with our moral intuitions about true respect. I shall leave my defense of this claim for another occasion.

⁹¹ See, e.g., by Bernard Williams, ____ 103; John Rawls, TJ 337; Jürgen Habermas, *The Inclusion of the Other* 100; Stephen Darwall, *The Second-Person Standpoint* 127 (2006).

⁹² Immanuel Kant, *What Does it Mean to Orient Oneself in Thought?*, ____ [8:146].

is there. Thus, attending to others' claims using our own points of view does not, after all, amount to appreciating them as such—that is, as persons constituting their own independent judgments about the world of action and thought. Rather, in insisting on pursuing them exclusively through our own points of view, what we come to appreciate is those judgments of ours (about what others' demands require of us) that are made *by reference to*, rather than *by*, others. And this is precisely why our points of view, although allowing rational creatures such as we are to negotiate the world, might isolate us from others.⁹³

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

This tight connection between respect and society is readily apparent when the respecting person suppresses his judgment and incorporates the judgment of another *even though* the former judgment is correct and the latter is, on his view, flatly mistaken. The *Jacque* case mentioned above served to illustrate this point. This and many other quite ordinary cases render more vivid the thought that the negative description of respect—deference to the point of view of another—comes with a positive component as well—the deferring person accommodates, in some measure, the judgment of another and in this way *pursues* it. To this extent, pursuing the judgment of another is truly social and, *for the same reason*, truly respectful. Indeed, deference to the point of view of another person is not merely instrumentally valuable (as when the other person professes better practical or theoretical expertise on the matter at hand)⁹⁴; within limits, the recognition conception of respect picks out the accommodation of another's judgment, regardless of the extrinsic value it might produce.⁹⁵

⁹³ It is not possible to undo this form of isolation by practicing altruism, if altruism consists of executing a plan that calls for the success of the interests of the respected person. (Here see Thomas Nagel, *The Possibility of Altruism* 16 n.1 (1970).) The reason is that the altruist engages in activities according to his conception of the relevant interests and their proper rank and weight in the life of altruism's beneficiary. This is not to say that altruism is necessarily unduly paternalistic, unwarranted, or even incompatible with respect for others' points of view. Rather, the point is that altruism represents a form of attending to others (and especially to their interests) that remains individualistic, because it does not require deference to the judgment of another. The individualistic bent of altruism is best *exemplified* in cases of benevolent, but unjustified paternalism. GET EXAMPLE

⁹⁴ See Joseph Raz, *The Morality of Freedom* ____ (____) CITE TO THE NORMAL JUSTICIATION THESIS

⁹⁵ For a sketch of the limits of respect, see *supra* note ____.

IV. Elaboration: The Necessity of the Form/Function Gap

The indirect thesis seeks (to no avail, as I argued above) to close the gap between form and function by highlighting the intimate (functional) connection between the two aspects of the right (and duty)—that is, showing the important extent to which the form is called for by the various functions of ownership (and trespass). By contrast, the proposed account seeks to go the other way around: to show that this gap is a defining feature of the social form of ownership (and trespass). On the right-formalism approach I developed above, the charge of normative arbitrariness is fully addressed by emphasizing the value immanent in the form that ownership (and trespass) takes. The gap between form and function, as I sought to show, need not be a source of trouble for the normativity of ownership (and trespass), because the functions served by ownership (including by ownership's form⁹⁶) do not exhaust the explanation of the ownership's good.

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

The necessity of the gap can be made precise by investigating the opposite approach; namely, one which seeks to eliminate this gap by casting ownership in terms of use-tracking exclusion.⁹⁷ On this approach, ownership commands a duty on the part of non-owners to “fall in line” with the agenda set by the owner for an object, which is to say an

⁹⁶ I say including by ownership's form in recognition of functionally motivated account of ownership (and trespass) form. On this account, the form serve some external goals or values (such as efficiency or freedom, respectively). On my account of right-formalism, by contrast, ownership (and trespass) is itself a source of value, in virtue of the social form that it takes.

⁹⁷ I shall mostly draw on Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U.T.L.J. 275 (2008) to reconstruct the most plausible, up-to-date approach of use-tracking exclusion. Katz articulates a sophisticated account of ownership in terms of a superior position to set an agenda for an object. (Id. at 290). Katz is an acute observer of the charge of normative arbitrariness, purporting to address this charge by arguing for a form of ownership that is “much more closely allied to its purpose than proponents of the [right to exclude account] acknowledge.” (Id. at 289). On this view of right-instrumentalism, defining the right in question more narrowly so that it will only protect, rather than overprotect, an owner's privilege to use an object can eliminate the gap between the form and function of ownership. Katz's implicit commitment to the use-tracking agenda seems to be reflected in the observation that a non-owner “defies the owner's agenda-setting authority and asserts his own” insofar as he is “acting in a manner inconsistent with the owner's intended use of the land.” (Id. at 292-93). See also Larissa Katz, *Ownership, Exclusion and Social Obligation: Kantian Contributions to Property Theory* 26-27 (August 10, 2010) (unpublished manuscript, on file with author) (arguing that “a system of property can discharge its function to safeguard owners' positions just by guarding against interferences with owners' actual exercises of authority and by guarding against attempts ... to oust the owner from the position itself.”).

obligation not to put the object to uses that are inconsistent with the owner's.⁹⁸ The concept of use, to be sure, need not include actual use only, but can also involve potential use, defined by reference to the kind of actual uses of the object in question it would be reasonable to expect owners to put it to in the foreseeable future,⁹⁹ as well as background use.¹⁰⁰

The most straightforward implication of moving from ownership's form being the authority to fix the normative standings of others to the authority to put an object to use pertains to the *object of the deference* on the part of non-owners. The object of deference, I shall argue in due course, is partly constitutive of the conception of respect that underwrites the forms of ownership and trespass. To begin with, on the use-tracking approach, the trespassory duty of deference would not require the accommodation of the judgment of the owner (about non-owners' standings) into the duty-holders' own courses of action. Were deference to another's use (or agenda) to require respect for this other's judgment instead, the use-tracking approach would essentially reproduce the form/function gap. It would collapse, in other words, into the right to exclude, abandoning the ambition to defend a genuine use-tracking approach.¹⁰¹

The critical distance between deference to use and to judgment can be cast into sharp relief by considering a dispute between owners and non-owners over the question of inconsistent uses. This case (of what counts as inconsistent uses) is crucial to the use-tracking approach, because inconsistent uses determine the contours of ownership and the trespassory duty it prescribes. Suppose an owner-farmer refuses permission to a neighbor who wishes to train horses on her empty field during the summer (viz., she grows watermelons from September until May only). This is because horses squash and

⁹⁸ Katz, ____297. Katz prefers agenda-setting for use-selection, but I find the concept of agenda a little obscure. In particular, it is not immediately clear whether 'agenda' is a synonym for the 'use' or 'purpose' to which an object is put *or* whether it picks out the judgment of the owner with respect to the standing of others in relation to an object. For the reasons mentioned in *supra* note ____ and in the main text below (text accompanying notes ____), the former is the most plausible reading of Katz's account.

⁹⁹ Evidence for this can be discerned from Katz's discussion of aerial trespass, saying (with reference to *Didow v. Alberta Power Ltd.* (1988), 60 Alta. L. R. (2d) 212 (C.A.)) that "an encroachment was a trespass to the extent that it protruded into the airspace that was reasonably necessary for ordinary actual or potential uses of the land." Katz __ 300-01.

¹⁰⁰ This is the kind of use that courts may "impute" to owners given the sort of the object in question and against the backdrop of the appropriate context—for example, it is natural to impute privacy-preserving use to the owner's dwelling home on top of the various actual and potential uses characteristic of the object. Katz ____ 300. While the observation in this example strikes an intuitive cord, Katz's attempt to extend this intuition to the case of *Jacque* is less convincing for the reason I mentioned above. See text accompanying notes ____.

¹⁰¹ Of course, non-owners may sometimes need to defer to the owner's own judgment, but only coincidentally—that is, to the extent that this judgment overlaps precisely with the (actual, potential, or background) *use* to which the owner put the object. For example, if the owner of Blackacre grows watermelons, others cannot simply decide to grow melons in the same field and at the same time. But even then, the object of non-owners' duty of deference is not, strictly speaking, the judgment of the owner, but rather the fact that growing melons is inconsistent with the current use of Blackacre. Moreover, the judgment of the owner may (again, sometimes) be a useful piece of evidence for the kind of (actual, potential, background) use to which an object is put. Contingencies aside, however, the critical distance between deference to agenda (or use) and to judgment is significant. It reflects, as I argue in the main text, a qualitative difference between them, that is, between their underlying conceptions of respect for others.

compress the soil under which they run, permanently damaging the soil. Or so the owner worries (perhaps unreasonably, but sincerely and, therefore, not maliciously).¹⁰² And the ultimate question here for the use-tracking approach concerns the relevant conception of use-inconsistency against which to adjudicate between the competing claims made by the owner and by the non-owner.

Suppose the owner's worry is groundless. A duty to defer to the (mistaken) judgment of the owner would betray the notion of use-tracking exclusion and, once again, be tantamount to capitulating to the right-to-exclude account of ownership. Indeed, there is *in fact* no inconsistency between the owner's agenda and horse training. Thus, pursuing an activity of training a horse may fall perfectly in line with the actual, potential, and background uses to which the owner has put the field, *even though* it amounts to disregarding her point of view, in violation of the recognition conception of respect. The duty of deference, on the use-tracking approach, takes its object to be the use made by the owner, objectively characterized. And what objectivity requires, in general and in particular, is a question that does not turn on the point of view of the owner.¹⁰³

A non-owner, on this view, does not need to adjust, let alone pursue, the judgment of an owner in order to deploy the latter's object lawfully. Instead of attending to an owner on the owner's own terms, it is sufficient for the non-owner to convince the court that, the judgment of an owner notwithstanding, his purported use does not exert substantial pressure toward conflict with the (actual, potential, or background) uses made by the owner. This is an appeal, in other words, for the court to take *the point of view of the non-owner*, rather than that of the owner, with respect to the correct characterization of the owner's use and to the possibility of inconsistent uses.¹⁰⁴ This form of deference remains firmly individualistic and, therefore, falls short of the demands of true respect—it allows for non-owners to determine the terms on which they may come to respect others.

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

¹⁰² CITE TO KATZ on abuse of rights.

¹⁰³ To further clarify the argument, consider the copyright practice of 'space shifting' by analogy. There, one who purchases a CD seeks to upload it onto her personal computer. There exist at least two different grounds as to why it is lawful to do so. First, it is lawful because the copyright-holder permits this sort of space shifting, in which case uploading the CD onto one's computer amounts to an authorized use. And second, it is lawful because it falls within the ambit of the fair-use doctrine. The difference between the two grounds is that the former turns on the authority of the right-holder to fix others' normative standing, whereas the latter operates *independently* of the right-holder's authority, since the criteria that constitute fair use are determined by operation of law. The difference between use-authorization and fair-use doctrine tracks, very roughly, the distinction developed in the main text, that is, between deference to the owner's judgment and to her use, respectively.

¹⁰⁴ Of course, the court can reject this appeal. But it is important to recall that, because the object of deference is use rather than the judgment of an owner, the point of view of the owner has no normative priority in these matters (although, as noted above, it may have an evidential worth in the resolution of the dispute).

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

I focus, instead, on the claim that seems to be at the heart of the protest under consideration—the nature of the connection between deference to use and to judgment. Although the object of deference is the use to which an object is put by the owner, the judgment of the owner (about what the use is and what counts as an inconsistent use) is, nonetheless, a very reliable proxy thereof. But this gambit is not helpful, because it concedes that the object of deference is not, after all, point of view or judgment, but rather use itself; it further entails that non-owners may be required to take seriously—viz., at face value—the point of view of owners *but only because, and only insofar as*, that point of view reflects the owner's actual, potential, or background use of an object.¹⁰⁵

Moreover, submerging deference to another's judgment in deference to another's rational and reasonable use of an object renders redundant the possibility of pursuing the recognition conception of respect through the forms of ownership and trespass that the use-tracking approach advocates. This is because it would become impossible to explain why deference to the judgment of (rational and reasonable) owners is not merely sufficient, but rather *necessary*, at least in some cases.¹⁰⁶ It is one thing to give an account of deference characteristic of trespass which is *equally compatible* with any number of different other accounts of the same phenomenon; quite another to show that any account of the common law's ownership and trespass *cannot but invoke* the special *social* forms they both take.

This conclusion—that on the use-tracking approach, the social forms of trespass and ownership make no difference to the explanation and justification of these forms—returns me to the account from which I began. For, by implication, the gap between form and function is necessarily required in order for deference to be grounded in the recognition conception of respect. The judgment of the owner is not merely a proxy for some other objects of deference (such as use). Instead, it represents a *freestanding* claim, that is, to be respected on the respected person's own terms, and thus be recognized as a

¹⁰⁵ And since, to return to the empirical assumption about widespread agreement on rationality and reasonability, the proxy service of judgment is surely far from a perfect one, a duty to defer to the actual or potential uses made by an owner runs afoul of the recognition conception of respect.

¹⁰⁶ Recall that, on my account, the charge of normative arbitrariness (and the theory I have developed in response) is in the first instance one which concerns the *character* of ownership, rather than the *scope* of application of ownership's authority. See the discussion in text accompanying supra notes ____.

free and equal person. Non-owners are required to defer to owners not just because the judgments of the latter provide good evidence for the potential of incompatible uses, in which case there will be no form/function gap. Rather, the deference requirement runs directly to the unmediated judgments of owners *because* these are *their* judgments.

This means that the demand to suppress one's own judgment and open up to the owner's can be genuinely social (in the sense explained above) only to the extent it cannot be reduced to the qualitatively different demand placed on non-owners by the use-tracking approach—that is, to refrain from deploying the property of another in ways that, on an impartial assessment of the allegedly competing uses, are in fact inconsistent with the course of action pursued by the owner. Indeed, the forms of ownership and trespass can be irreducibly social if, and only if, non-owners are required to defer to the judgment of owners even where this cannot be squared with a functionalist account that emphasizes the external values associated with a secured privilege to use one's object.¹⁰⁷ The form/function gap, in short, is not just compatible with the recognition conception; it makes possible the establishment of a society of persons among participants of the practice of private property, which is all of us.

Conclusion

[...]

¹⁰⁷ Once again, my account is perfectly compatible with a wide range of exceptions to the deference requirement, the effect of which is to narrow the scope of ownership's authority to fix others' normative standings in relation to an object (such as in the case of the fair use doctrine in copyright law). For the proposed account emphasizes the *character* of the deference requirement (in particular, the social form that it takes), but not the scope of its application (in particular, the classes of cases in which there exist reasons, external to property, to deviate from ownership's social form).