ON THE “PROPERTY” AND THE “TORT” IN TRESPASS

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INTRODUCTION

Over the last two decades, philosophical scholars have argued whether tort law’s most important priority is to rectify wrongs to citizens’ substantive moral rights, or to prevent those rights from being wronged in the first place.1 Recently, however, disputants have suggested that this debate is framed badly. Wrong-correction and rights-protection supply answers to different theoretical questions. If the question is, “What supplies the most basic foundation for having tort law?”, the answer is “Rights-protection.” If the question is, “What seems best to explain tort’s structure in practice?”, the answer is “Wrong-correction.”2


2 See Jules Coleman, “Epilogue to Risks and Wrongs,” manuscript at 24-26, available at http://ssrn.com/abstract=1679554 (downloaded February 14, 2013). This paper qualifies and supersedes observations I have made in previous scholarship about the relationship...
I think this general settlement is good enough for government work and assume as much here.\(^3\) The settlement points to an important field for follow-on scholarship: to clarify how tort manages to protect substantive rights within a corrective structure. This inquiry may seem unambitious, for it does not stake out a distinctive grand unifying theory of tort. Yet recall the parable in which six blind men argued whether elephants are walls, tree trunks, snakes, fans, snakes, or ropes. Each grand unifying theory of the elephant overgeneralized from a valid insight about one part of elephants to an absurd conclusion about the whole. In tort, durable conceptual inquiry should make tort’s protective and corrective functions intelligible, and also explain how each complements the other to make tort operate as a whole.

Two torts are better candidates than all others to make concrete the interplay in tort between rights-protection and wrong-correction—battery and trespass to land. Although many tort scholars assume that negligence is the paradigmatic tort, trespass and battery focus on wrongs simpler and more paradigmatic than negligence.\(^4\) In this Chapter, I focus on trespass. Lawyers and scholars appreciate that “property” and “tort” are largely autonomous yet partly complementary. They intuit that property justifies the normative interests protected by property rights (viz., the exclusive control over and use of land). They also intuit that tort supplies the legal infrastructure for enforcing those rights (viz.,

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trespass to land). Although battery presumes a similar separation, there is no field of “liberty law” or “bodily-safety law” autonomous from tort. A full account of tort would need to explain how the field presumes and declares interests like these. To understand how tort reconciles rights and wrongs, however, it is better to abstract from that problem—as trespass helps to do.

In this Chapter, then, I explain how trespass to land and related doctrines implement normative goals associated with the law and policy of property—in the hope that such an explanation will shed light on how tort law generally assumes as true and is informed by background common moral opinions about substantive rights. I use the term “explanation” intentionally; my focus is descriptive and conceptual. Conceptually, the ultimate priority of the land-related property torts is to protect land-related property rights. But because tort law has a corrective structure, it discharges this priority indirectly and backhandedly. Tort doctrines will seem indirect to property scholars. The normative interests in exclusive control over and use of land are defined not by any one tort doctrine but by the coordination of all the relevant ones in the right land-use disputes. The same doctrines will seem backhanded to tort scholars. The fact that tort simultaneously discharges two functions complicates how it discharges each. When trespass and other doctrines protect substantive property rights, they do so not by declaring the rights but by remedying wrongs to those rights. These wrong-focused actions manage to stay protective because the wrongs are parasitic on logically-prior accounts of the underlying rights.

Here, some readers may wonder: Why have such a convoluted structure? I have no single answer to this question, but I assume here that readers will find at least one of three

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possible answers satisfying. First, hardcore positivists may answer: Who cares? There is
scholarly value in “begin[ning] not at the top, but in the middle, by asking what principles if
any, are embodied in the legal practices we are presently engaged in.”6 Second, natural
lawyers may answer: Because “[t]he backbone of tort is a set of moral—natural law—
principles identifying as wrongful all choices precisely to harm or to deceive.”7 That
assertion may be somewhat overdrawn. The moral “backbone” for any particular scheme
of tort law is not automatically “natural” simply because legal decision makers who apply it
believe that it is. Nevertheless, it confirms natural law that decision makers assume that
particular judgments they make must fit intelligibly onto to some backbone. So too that
decision makers take such backbones for granted while settling particular disputes.

My last possible answer is a pragmatic conceptualist one:8 “It’s the worst system
available except for all the others.” A wrong-based approach trades on people’s selfishness.
Citizens may reliably be expected to assert their claimed rights to their fullest—and to
accuse anyone who stands in the way of committing a wrong. In addition, civil judicial
proceedings are the likeliest venues for clarifying the scope of rights—and they are almost
certain to be more efficient if they are focused on the wrongs. Criminal law can and
sometimes does declare property rights.9 But substantively, criminal law focuses more

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6 Coleman, The Practice of Principle, 5.
9 See, e.g., People v. Emmert, 597 P.2d 1025 (Colo. 1979) (holding that recreational boaters are not entitled to boat on rivers not navigable under traditional tests of navigability without the consent of the owners of the beds beneath the rivers); State v. Shack, 277 A.2d 369, 370 (N.J. 1971) (holding that a land owner’s possessory interest in control does not entitle him to exclude government caseworkers or publicly-funded legal advocates from meeting migrant farmworkers residing on his land).
often on punishing clear aggression than it does on determining the precise limits on rights allegedly aggressed-on. And institutionally, criminal lawsuits are initiated and resolved by public prosecutors, not owners. The latter have strong incentives to clarify the scope of their property rights in litigation; the former hardly ever do. Property rights could also be declared in *in rem* actions—as claims to title are in quiet-title proceedings. But it is far easier, less tedious, and less threatening to non-parties’ due process interests for a court to pronounce that D is more culpable than P than it is for the court to enumerate all of P’s rights in relation to his *res* and everyone else in the world.10

Yet even if the tort system generally avoids making sweeping pronouncements about property rights, it does operate as if such pronouncements exist. I hope to demonstrate as much by showing how trespass to land and four other salient doctrines implement a single property-related political morality. I cover here: one paradigm “property” tort (trespass to land); one “tort” defense to trespass (necessity); another “property” defense to trespass (adverse possession); the tort that gets pride of place among torts (negligence); and one orphan action usually overlooked in both property and tort (trespass to chattels).

I. PROPERTY IN A LOCKEAN THEORY OF LABOR

Throughout most of this Chapter, I will interpret the tort doctrines I have selected assuming that a labor-based morality justifies the property rights being secured by trespass and the other doctrines selected. Readers need not find labor-based morality normatively persuasive to follow my conceptual use of it here. Although such a morality is not in vogue today, many if not most of the seminal English and American trespass,

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nuisance, and other related cases relied on some such morality. Conceptual interplays are easier to follow when the cases rely on a single political morality than when (as in current tort law) different cases and scholarship embrace different foundations. In addition, labor-based morality generates prescriptions about property that are relatively hard-edged. These hard-edged rules may be and have been applied consistently across a wide range of property torts. The simpler the substantive prescriptions, the easier it is to track interplays between substantive right and tort structure.

Let me supply an extremely compressed restatement of a common-denominator, labor-based justification for property rights. In this justification, legal property rights are justified by their tendencies to secure to members of the political community their natural rights to labor. Here, “natural rights” must be understood against the backdrop of an egoistic morality. In principle, this morality is grounded in human flourishing. In practice, however, this morality encourages legal decision makers to focus on the lowest and most urgent aspects of flourishing. Government actors are competent enough to determine


12 I suspect that many different respectable political moralities justify the main features of both trespass torts and the necessity privilege along similar and overlapping grounds. I also suspect that there is more disagreement (and less overdetermination) about adverse possession and the duties of land owners to nonowners in negligence. I allude to some of these complications in discussing negligence in section VII.C, below, but for the most part I avoid them for ease of exposition.

whether particular actions contribute to their or others’ “Subsistence and Comfort,”14 but they are usually incompetent to settle citizens’ disputes about different comforts.15 By focusing on a natural right to labor, this morality declares that tort law and other conventional rules are judged by how well they secure nonconventional moral interests to those interests’ claimants. By describing those interests in terms of the rights, the morality encourages claimants to protect their own interests by asserting them spiritedly.

In this context, “labor” refers to planned activity, intended and reasonably likely to generate for the laborer subsistence or improvement. (Henceforth, I will refer to such goods as “self-preservation and -improvement” when context requires distinction, and “prosperity” or “benefit” when it does not.) In relation to an external resource, the right to labor on the resource means the right to “use” the resource “beneficially” or “productively.”16 Property rights are justified because they give proprietors the priority and security they need to labor to further their plans for using resources beneficially.

Labor theory imposes four separate correlative constraints on the nonconventional right to claim property for labor. To enjoy a labor-based claim over a resource, a laborer must actually “make use of” it “to any advantage of life before it spoils.”17 (I call this requirement the responsibility not to waste.) The laborer must also mark the resources he appropriates so others know not to appropriate them, by “put[ting] a distinction between

16 See Blackstone, Commentaries, 2:*2-*3 (finding a “foundation in nature or in natural law” for the right to use property for “such things as [man’s] immediate necessities required.”).  
them and common.”18 (I call this requirement “claim-marking.”) A laborer must defer to others’ interests in acquiring and consuming resources “as will keep [them] from extream want, where [they have] no means to subsist otherwise.”19 (This requirement, which I call here the “necessity”20 proviso, confirms how labor theory prioritizes self-preservation over self-improvement in its many forms.) Last, because every citizen’s right to labor is equal to every other’s, the “sufficiency limitation” requires each citizen to leave others enough and as good opportunities to appropriate and use resources for their own prosperities.21

These non-conventional foundations justify any conventional system that seems practically likely to enlarge citizens’ opportunities to labor beyond the opportunities they would have in an unorganized community. Here, Locke and seminal Anglo-American jurists largely agreed on a practical and rough empirical judgment: The best way to encourage concurrent labor in relation to land is to endow proprietors of land with broad rights of exclusive control, possession, and managerial discretion over the future uses of their lots. (I will refer to this collection of rights here as “control rights.”)

Such control rights free proprietors to make long-term investments into, and far-reaching transformations of, their lots. So transformed and managed, land can generate on the order of 100 times more life benefits than it could when used temporarily by

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individuals foraging off of it while exercising usufructs.\textsuperscript{22} Such control rights do not violate the sufficiency proviso—at least, not as long as the political community institutes a reliable currency and open markets for labor and commerce. Under such conditions, people who do not possess land themselves may acquire the goods they could have appropriated from land by working, or by producing goods with other resources, and then trading pay or their own products for produce from land. Although such control rights do entitle proprietors to deny others’ claims to use owned resources, that control is the price to be paid to secure to proprietors the practical discretion they need in order to produce. The control also embodies labor theory’s preference not to rate directly against one another competing claims by different claimants to use a single asset for different life-improving goals.

Even if broad control rights are justified indirectly by use- or labor-based foundations, however, in principle the justification is too indirect unless the rights seem practically likely to implement the foundational rights. This connection breaks down if a non-proprietor has a genuine claim based on the necessity proviso. It also breaks down when if a particular proprietor violates the nonwaste responsibility—e.g., if he lets “the Grass of his Inclosure rot[] on the Ground, or the Fruit of his planting perish[] without gathering.”\textsuperscript{23} Broad control rights may also be badly drawn. If legal control rights assign proprietors broad control, but do so in a manner that does not clearly delineate what those proprietors own, the legal rights may undermine property’s claim-marking function. Unclearly-marked rights may provoke unnecessary disputes between proprietors and other claimants on land, and they may frustrate beneficial commerce.

\textsuperscript{22} Locke, \textit{Two Treatises}, v.II, § 40, p.296. Hence Locke’s contrast between the king of a native American tribe and a day laborer in England. See id. v.II, § 41, p.296-97.
\textsuperscript{23} Locke, \textit{Two Treatises}, v.II, § 38, p.295.
Next, positive law may justifiably qualify legal control when doing so seems practically likely to enlarge the likely uses most proprietors will make of their lots. Because control rights are indirect means to encourage productive labor on land, they may be qualified when doing so seems practically likely to enlarge citizens’ underlying interests in laboring. If a city requires all home owners to lay sidewalks according to specifications it sets, it limits those owners’ uses of the ground beneath the sidewalks, but it also expands their liberties of action by enlarging their capacities to travel.24

Last, labor-based morality requires legal decision makers to use prudence and consequentialist reasoning. Although principles like “control rights,” “waste,” “sufficiency,” “necessity,” and “clear marking” all have some content, it takes practical judgment to determine which apply in a particular repeat act-situation. If several apply, it takes further judgment to prioritize them rightly in relation to one another. In many situations, these principles may not require any single one rule. Positive law may need to implement one of several plausible choices much as a general norm protecting personal safety requires legislators to choose a speed limit. Legal decision makers must identify the “established laws of liberty” most likely “to secure protection and encouragement to the honest industry of Mankind,”25 but that prescription requires them to exercise practical judgment.

II. THE UNCONSENTED-ENTRY PARADIGM

Although principles of natural rights and labor make prescriptions about land possession’s general character, they make no corresponding prescriptions about what specific doctrines will help embody that character. Tort is one of several fields helping to

specify property rights. Tort hones in the proper content of such rights by a series of approximations. I will classify such approximations as consisting of five separate strategies.

The first strategy is quite general: to identify a paradigm for the control rights proprietors deserve to enjoy over land. In trespass and other related land-use tort doctrines, that paradigm is supplied by the unconsented-entry test. Blackstone explained how this test implements labor-based moral interests. Once

the right of meum and tuum, or property, in lands [is] established, it follows as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil: every entry therefore thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression.26

The individual natural right to "use" land (i.e., to use it to benefit human life) supplies a moral foundation for property in land. Given land's use potential, however, land owners27 deserve substantive interests not only in their use of land but also in their "occupation" of it. That "occupation" means control rights—as Blackstone confirms by assuming that "occupation" must be "exclusive" and "sole."

The unconsented-entry paradigm and Blackstone's account of it provide extremely concrete and powerful illustrations of the relation between rights and corrective structure in tort. To begin with: Tort is structured assuming that there exist substantive moral rights logically prior to tort law, and that these rights "seem to merge entitlements to do, have, omit or be something with claims against others to act or refrain from acting in certain ways."28 Blackstone's account of the control owners deserve in land confirms as much.

26 Blackstone, Commentaries, 3:*209.
27 Blackstone refers to "owners" here, and I will in the remainder of this easy for ease of exposition. That said, many of the land-use torts protect not only absolute owners but also tenants and other proprietors with present possession.
Blackstone justifies owners’ having an entitlement (a Hohfeldian liberty\textsuperscript{29}) to do things—occupy the land, to direct its use without outside interference, and to enjoy benefits resulting from such use. He also justifies their having claims (a Hohfeldian claim-right) against others—to be free from interference with use-choices made in the legitimate exercise of the liberty. Yet the autonomy declared by this latter claim-right runs no farther than appropriate to secure the normative interests justifying the autonomy—for Blackstone, the normative interest in “use,” or productive labor.

Next: Blackstone’s account of trespass provides a paradigmatic example of what a “tort” is in relation to such rights. A paradigmatic tort is one that “most vividly captures and illuminates what it is that makes a tort a tort.”\textsuperscript{30} “Torts” consist of civil wrongs to rights as just explained, where the wrongs do not arise out of a violation of a contract.\textsuperscript{31} Because a mere unconsented entry is a trespass, the wrong in trespass lies neither in the land owner’s economic losses nor in his property damage but in the interference with his rightful autonomy over his land. The centrality of autonomy to trespass makes vivid and illuminates how torts protect autonomy generally. Alternately, tort may be described as being layered on and implementing three-way accountability relationships, between two parties and a range of act-situations implicating their interests.\textsuperscript{32} Trespass embodies the accountability relationships implicit in the saying, “Good fences make good neighbors.”

Some readers may doubt the justice in such relationships. After all, Blackstone’s unconsented-entry paradigm seems to accentuate the “relation ... between an owner and a

\textsuperscript{29} See Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,” 23 Yale L.J. 16 (1913), 30-44.
\textsuperscript{30} Coleman, “Epilogue,” 22; see Coleman, The Practice of Principle, 32.
\textsuperscript{31} See Goldberg & Zipursky, Torts, 1-5, 6-7; Scott Hershovitz, “Two Models of Tort (and Takings),” 92 Va. L. Rev. 1147 (2006).
\textsuperscript{32} Coleman, “Epilogue,” 12.
thing,” and to eliminate the relation “between the owner and other individuals in reference to things.”

True, some passages of Blackstone—especially his description of property as “sole and despotic dominion”—give color to this perception. Both conceptually and normatively, however, any one owner’s property in land is part of a package deal.

Normatively, if labor-based morality is reasonably persuasive, it is just to force individuals to refrain from asserting their sufficiency-based claims on one person’s land if they are given ample opportunities to labor for their own prosperities on other tangible resources. So property scholars and tort conceptualists make a conceptual mistake if they complain that trespass creates an “analytical mismatch” between a land owner’s legal rights and his and others’ normative interests in the use of land.

Conveyancing laws make it possible to acquire land. Lease and contract law make it possible to rent land within non-owners’ means. Rules establishing a currency and regulating commerce and employment regulations make it possible to generate prosperity by work and savings. Welfare entitlements supply a backstop. Normatively and empirically, one may question whether, in English or American economies, these and other similar legal entitlements have given land non-owners sufficient opportunities to labor. Conceptually, however, hard-edged trespassory rights do not need to embody sufficiency claims if these entitlements do so and do so adequately.

34 Blackstone, Commentaries, 2:*2.
36 Or, perhaps, as long as legal decision makers in the English and American legal systems have believed that trespassory legal rights have been part of a package adequately accommodating all citizens’ substantive sufficiency interests, and their grounds for so believing have been reasonable enough to pass a laugh test.
Last, Blackstone’s unconsented-entry paradigm defines the rights trespass presumes backhandedly, in reference to wrongs by non-owners. It would be tedious to list all of the legitimate uses owners might make with their Hohfeldian liberty to determine the uses of their lots. It would be even more tedious to enumerate all the potential duty-holders obligated not to interfere with those uses—let alone all the activities by non-owners that might jeopardize those uses. It is far more economical to declare that owners of land hold an \textit{in rem} claim-right to be free from unconsented entries. It is even more economical for tort to declare that right by focusing on the correlative \textit{in rem} duty: Any non-owner commits a wrong if she enters an owner’s close without his consent.

### III. Affirmative Defenses

Now, the unconsented-entry paradigm does not supply a direct rule for legal decision making. The paradigm declares the basic contours of the accountability relationship between an owner and others in relation to his land. In specific disputes, the test institutes a rebuttable normative presumption. The other four strategies by which tort implements property rights all respond to that presumption.

The second strategy is to use affirmative defenses to override the unconsented-entry test, when positive-law control is not likely to give owners and non-owners their due interests (respectively) in controlling and accessing land for beneficial uses. Assume that, in a recurring land-use dispute, one of the four responsibilities or provisos associated with labor-based property defeats the justification for control rights. Assume also that this dispute occurs relatively infrequently, but just often enough to deserve its own doctrine. In such conditions, it is reasonable to leave the \textit{prima facie} case for trespass broad and encompassing, and then use affirmative defenses to winnow out the (relatively few) false
positives caught in that case. If one takes tort’s rights-protecting function as paramount, land owners’ substantive property rights are not specified by the prima facie case for trespass in isolation; they are specified instead by the “interplay among [prima facie] rules” in and “positive defenses” to trespass.

Let me illustrate with two representative defenses to trespass. The necessity privilege basically embodies and recognizes in law the moral necessity proviso attached to labor claims. Of course, the owner’s control rights and the necessitous entrant’s liberty of access need to be harmonized. Necessity doctrine does so, and reasonably so. The privilege gives priority to the entry only if the entrant faces a bona fide threat to his self-preservation, and the privilege lasts only as long as the threat. The privilege also requires the entrant to use the owner’s property with reasonable care, and to hold the owner harmless for any damage caused by his temporary commandeering of the property.

Adverse possession supplies a complete defense to trespass when a defendant occupies a plaintiff’s land adversely (i.e., with intent to appropriate it), exclusively, notoriously, and continuously for the applicable limitations period. Many elements of adverse possession determine subsidiary legal details relatively remote from the doctrine’s core justifications. On labor-based foundations, however, those justifications are to enforce the two responsibilities labor rights attach to ownership: to mark claims of ownership, and

38 See, e.g., Ploof v. Putnam, 71 A. 188, 189 (Vt. 1908); see Dennis Klimchuk, “Property and Necessity,” in Penner & Smith ed., *Philosophical Foundations of Property Law* [manuscript on file with author].
not to waste owned resources. If a title owner “neglects to assert his rights in the manner
provided by law,” he confuses the occupier and his neighbors, he confirms he is not using
his land beneficially in any sense, and he must then “accept the result of his own folly and
negligence.” Such a negligent title owner then legitimizes the adverse possessor’s having
a claim, marked by long and notorious occupancy, to own land “improved by his labor, and
enriched by the ‘sweat of his brow.’”

When necessity and adverse possession specify property rights, they also do so
backhandedly. Adverse possession converts a wrong into a non-wrong; when completed,
an adverse possession ceases to be a prima facie trespass and becomes a legitimate
Putnam, Ploof, his family, and his boat all were injured when he tried to tie the boat to
Putnam’s dock during a storm and Putnam’s servant pushed the boat away from the dock.
Logically, the most important question was whether the storm threatened Ploof and his
family enough that they deserved a temporary power to commandeer the dock.
Doctrinally, however, the parties backed into that question by accusing each other of
dueling trespasses. Ploof sued Putnam for trespass to chattels. Putnam pleaded defense of
property; this defense implicitly accused Ploof of trespass to land. Necessity came into
the case because it was Ploof’s ground for demurring to Putnam’s defense. Consistent with
the rights-protective account, necessity norms resolved the parties’ dispute. Consistent

41 Oliver v. Pullam, 24 F. 127, 131 (C.C.N.C. 1885).
42 Ransom H. Tyler, A Treatise on the Remedy by Ejectment and the Law of Adverse
Enjoyment in the United States: Embracing in Full the Statutory Policy of the Several States, in
Respect to the Action for the Recovery of Real Property (Albany, NY: William Gould & Son,
1876), 854; see Eric R. Claeys, “Locke Unlocked: Productive Use in Trespass, Adverse
43 See Ploof, 71 A. at 188-89.
with the wrong-correction account, those norms did so in the normative background. The court learned what it needed to know to decide whether Putnam or Ploof had a stronger right as each proved its accusation that the other had committed a wrong.

IV. CONFORMING THE PRIMA FACIE TORT TO THE UNDERLYING SUBSTANTIVE RIGHT

The third strategy by which tort implements substantive property rights is by configuring the prima facie case for a tort to conform to the paradigm suggested by the underlying right. Trespass to land illustrates: In trespass, an unconsented entry is the prima facie test.

One can confirm the same point by studying doctrinal elements not required in trespass. The tort most familiar to practitioners—negligence—has a harm element; trespass to land does not. Trespass’s rights-based character protects autonomy as means to secure underlying interests in laboring. In the absence of extenuating circumstances, even the mere entry onto land unduly threatens the secure use justifying owner control. That is why it is “an elementary principle, that every unauthorized, and therefore unlawful entry, into the close of another, is a trespass.”

Treatise writers also like to classify torts as strict, intentional, or fault-based. In practice, most trespasses are deliberate or the product of (careless) turn-a-blind-eye mistakes. Yet trespass litigation can settle which of two parties with designs on a lot has better possession or title. Even if a defendant trespasses innocently and carefully, his mere entry may threaten significant damage to the land or activities on it. It is far easier for an owner (or his insurer, or his creditors) to monitor whether entrants are on his land than whether they are on it carelessly or deliberately. If “[t]he chief characteristic of ownership

44 Subject to exceptions recounted in the next Part.
is th[e] right to complete dominion,” such that “[t]he line of a man’s private domain, like the boundary line between nations, is not to be crossed without permission.”46 then even innocent-but-mistaken trespasses are culpable. The need for “dominion” over property creates a strong presumption that trespass liability be strict.

Because trespass is a strict tort, commonsensical “fault”—intentional, knowing, or careless scienter—plays only a secondary role. Commonsensical fault aggravates the wrong in a trespass. Such fault may expose an already-liable defendant to punitive damages. It may disentitle that defendant from pleading undue hardship if the plaintiff prays for an injunction.47 But the trespass is wrongful without such aggravation; “[g]ood faith [should] not excuse [a defendant] … , the law requiring him at his peril to ascertain what his rights are, and not to invade the possession, actual or constructive, of another.”48

By the same token, although trespass’s strict character settles liability for accidents caused in the course of trespasses, trespass is not an “accident” tort. All torts declare and protect rights; trespass declares and secures rights of exclusive control over land. Trespass holds defendants “civilly liable for the consequences which directly flowed from their unauthorized” trespasses,49 no matter how unforeseeable those consequences are,50 because those consequences partially constitute the wrongs to owners’ rights. So trespass determines liability for accidents, but only incidentally, in the course of securing rights.

Trespass’s strictness makes it seem wrong or strange to many scholars. Readers who find trespass’s strictness normatively unpersuasive should keep in mind that nothing

about trespass’s conceptual structure requires it to be a strict tort. A political community could institute control rights narrower than the rights explained in Parts I and II, and use explicit fault-based scienter requirements to limit owners’ rights under positive law. Other scholars may assume that strict torts are inconsistent with corrective justice. Not so. _Pure_ strict liability is inconsistent with corrective justice, but strict liability in trespass to land is neither pure strict liability nor inconsistent with corrective justice. Corrective justice requires rectification of wrongs to owners’ legitimate substantive rights. Understood in proper context, corrective justice says nothing about the content of those substantive rights, it assumes that some logically-prior political morality has specified those rights, and it layers corrective duties over logically-prior substantive duties correlative to those rights. As long the unconsented-entry paradigm fairly represents the situations in which a non-owner unjustly interferes with an owner’s rightful exclusive control, the _prima facie_ case for trespass embodies a moral relation of fault—even though that case lacks an express requirement of fault.

My use of “fault” here may prompt another objection: If “fault” is pliable enough to cover a careful, innocent, and mistaken trespass, my use of the term must be incoherent or idiosyncratic. This objection may hold trespass to expectations informed by negligence, which has an express “fault” requirement. If so, that reaction just goes to show that too many tort scholars confer on negligence an undeserved “imperialism,” attributable to the fact that most reported torts cases sound in negligence. The objection may also hold the “fault” in trespass to expectations about fault that stress subjective state of mind—like

52 Peter Cane, _Tort Law and Economic Interests_ (New York: Clarendon Press, 2d ed. 1996), 11. For further elaboration, see _infra_ Part VII.
criminal law’s.53 But “fault” operates as a general concept throughout many fields of law and social interaction, as a mid-level conception in criminal law, and then again as a mid-level conception in tort. The general concept can be coherent even if each of the two mid-level conceptions differs from the other to accommodate salient differences between their fields of application. In criminal law, “fault” focuses on subjective state of mind because that field focuses on rights-invasions with strong public repercussions. Such repercussions arise most often when rights-aggressors act with especially aggressive or humiliating intentions. (For that reason, trespass’s rules about punitive damages and the undue-hardship defense reinforce in civil law priorities more central to criminal law.) To a far greater degree than criminal law, tort specifies the content of substantive rights. As not only land torts but also speeding laws confirm, quite often, rights cannot be enjoyed unless they are clearly defined and marked. To get that clarity, both in property and in civil traffic law must sometimes prohibit conduct that is subjectively well-meaning but objectively beyond bright-line markers. In both fields, it is correspondingly reasonable to classify innocent violations of the objective duties in each field as “faulty.”

Whether one agrees with this account normatively, trespass doctrine supplies powerful confirmation that judges do appreciate it conceptually. If one wanted to make trespass track criminal law-like conceptions of fault, the easiest way to do so would be to graft a subjective intent requirement onto the \textit{prima facie} case for trespass. The \textit{Restatement of Torts} does in fact classify trespass as an intentional tort.54 But take a case in which a trespassing defendant appropriates resources from the plaintiff’s land carefully

\footnotesize{53} See Larry Alexander & Kimberly Ferzan, “Confused Culpability, Contrived Causation, and the Collapse of Tort,” \textit{in this volume}, SSRN draft p.4-17.\footnotesize{54} See \textit{Rest. (Second) of Torts} § 158(a) (1979).
and mistakenly believing the land is his own,\textsuperscript{55} he causes property damage specifically intending not to do so,\textsuperscript{56} or he trespasses mistakenly and the trespass enables a third party or an extraordinary natural force to damage the property.\textsuperscript{57} In criminal law, the defendant in the first hypothetical is not culpable, and the defendants in the latter two hypotheticals are only minimally culpable. In the civil law, however, in all three hypotheticals the defendant is culpable. In each, the plaintiff deserved secure control over his land, the defendant upset that control, and the plaintiff's losses flow directly from the defendant's invasion of his control rights. No surprise, then, that in civil trespass judges “gut the traditional concept of intentional harm,”\textsuperscript{58} so that “intent” becomes indistinguishable from the voluntariness a person displays in the course of acting.\textsuperscript{59} So even when trespass is recast to fit preconceptions about fault from commonsense usages or criminal law, judges recast the revisions—to keep trespass focused on protecting property rights.

V. HARM-BASED EXCEPTIONS TO RIGHTS-BASED TORTS

Similarly, tort scholars sometimes “wonder why trespass to land does not ... have a harm requirement,” especially seeing as trespass to chattels does.\textsuperscript{60} A trespass to chattel may be defined as a direct interference with a plaintiff’s possession of a chattel, in a manner that causes the plaintiff harm.\textsuperscript{61} Cognizable “harms” include proof that the chattel

\textsuperscript{55} See Maye v. Yappen, 23 Cal. 306 (1863).
\textsuperscript{56} See Brown, 355 S.W.2d at 747.
\textsuperscript{57} See, e.g., Southern Counties Ice Co. v. RKO Radio Pictures, 39 F. Supp. 157, 159 (S.D. Cal. 1941).
\textsuperscript{59} See, e.g., Cleveland Park, Inc. v. Perry, 165 A.2d 485, 488 (D.C. App. 1960) (“intent to do the physical act which released the harmful force”); Rest. (Second) of Torts § 163 cmt. b (1979).
\textsuperscript{60} Goldberg & Zipursky, Torts, 248.
was damaged, that the owner was dispossessed of it, or that he lost its use for a significant duration.\textsuperscript{62} Yet there is no compelling reason why trespass to land must be symmetrical to trespass to chattels—not for pure symmetry’s sake, not to embody corrective justice, nor to make trespass to land more like criminal law or negligence. As the same scholars acknowledge, “each tort involves the violation of a norm that specifies how one must treat others in light of certain important interests.”\textsuperscript{63} These scholars do not consider why distinctions between different forms of trespass might reasonably accommodate salient differences between the likely uses and management of land and chattels.

Compare a paradigmatic trespass to land against what the \textit{Restatement (Second) of Torts} portrays as a paradigmatic non-trespass to a chattel—a dispute in which a child pulls on the ears of a dog that doesn’t belong to her.\textsuperscript{64} The dog, like most chattels, is movable; the land is not.\textsuperscript{65} Land cannot be brought into common spaces like sidewalks or highways. Dogs can—and then create obstacles or risks of accidents for others. Land cannot be moved easily out of the way of others’ dangerous conduct; dogs can.\textsuperscript{66}

To accommodate the differences between ownership of the land and the dog, tort deploys a fourth strategy to approximate substantive property rights: Qualify \textit{prima facie} rights-based torts, better to calibrate the autonomy embodied in the rights to encourage

\textsuperscript{63} Goldberg & Zipursky, \textit{Torts}, 2.
\textsuperscript{64} \textit{Restatement (Second) of Torts} § 218 cmt. e, illus. 2 (1979). The hypothetical comes from the facts of Glidden v. Szybiak, 63 A.2d 233 (N.H. 1949).
\textsuperscript{65} It is reasonable to design trespass to chattels law assuming it applies only to moveable chattels. Immovable chattels are usually deemed to be legal accessories to real estate by operation of the \textit{ratione soli} and fixture rules. See Cooley, \textit{The Law of Torts}, 426-32; Claeys, \textit{Acquisition, Accession}, manuscript p.47-53.
\textsuperscript{66} See Richard A. Epstein, “\textit{Intel v. Hamidi}: The Role of Self-Help in Cyberspace?,” \textit{1 J.L. Econ. & Pol'y} 147 (2005), 150.
the pursuit of the substantive interests that autonomy is expected to serve. There are exceptions in both trespass to land and trespass to chattels, but the exceptions confirm the rules. There are rights-based trespass to chattels—for chattels that are immovable. If a company sells gas regulators for utility customers to install on gas pipes, tort and remedy doctrine will presume that the unconsented attachment of the regulator to the pipe creates the “harm” requisite for a property tort. Since the gas pipes are immovable, if there is any possibility that the regulators may cause explosions it is practically likely that only “sole control” gives the utility company an adequate “right of protecting itself from loss caused by interference.”

And in trespass to land, sometimes doctrine qualifies the *prima facie* case for recurring land-use disputes. In early American law, hunters had easements to traverse private land as long as the land was not occupied, they did not remain on the land any longer than necessary to hunt, and they caused no property damage. During the nineteenth century, courts and legislators instituted limitations on suits involving cattle trespasses. The limitations excused accidental and harmless trespasses by cattle—but not deliberate or property-damage-causing trespasses. In the twentieth century, courts limited *prima facie* trespass causes of action for overflights; land owners could no longer sue for trespass at altitudes above the floors set for airflight by regulation, and they could sue beneath those floors only when overflights caused actual damage to their lots. Each

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69 Lazarus v. Phelps, 152 U.S. 81, 86 (1894); see *Rest. (Second) of Torts* § 504 (1979).
of these rules diminishes owners’ control over their lots. In the right socioeconomic conditions, however, owners receive reciprocating advantages in the beneficial uses of others’ land—for sustenance (hunters’ rights), for pasturage (cattle), or for travel and commerce (by air). Still, in each of these qualifications the unconsented-entry paradigm helps focus the tradeoffs and limit the scope of any exception. It is practically reasonable to force owners to waive their claim-rights to blockade innocuous entries if they are simultaneously endowed with reciprocal liberties to enter others’ lots to hunt for sustenance, to graze livestock, or to fly. These implied reciprocal bargains break down when trespasses generate actual property damage or (as in cattle cases) when non-owners trespass aggressively.

As do property-based affirmative defenses, harm-based intentional property torts implement property prescriptions backhandedly. In trespass to chattels doctrine, black-letter sources declare that owners hold an interest in the “inviolability” of chattels. Such declarations make harmless contacts wrongful. That wrong-declaration entitles chattel owners to exercise legal self-help powers to recapture or protect those chattels. At the same time, because chattels doctrine requires proof of harm, harmless contacts are not legally wrongful so as to trigger trespass liability. That qualification subtly authorizes non-owners to clear others’ chattels out of their own ways. Harm-based trespasses to land declare that non-owners have rights of access and use in relation to others’ lots of land. Like the defenses in Ploof, however, trespass doctrine does not directly declare that non-owners have usufructs; it gets to the same result by declaring that a non-owner commits no

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71 Rest. (Second) of Torts § 218 cmt. (e) (1979).
trespass—no wrong—when he enters another’s land in the course of conduct justified by a relevant harm-based exception.

VI. PROPERTY FOUNDATIONS AND TORT IMPLEMENTATION

Some readers may wonder whether, when tort law structures prima facie torts, it always implements property prescriptions as automatically as I have suggested by my examples in the last two Parts. In easy cases, yes; in hard cases, no.

The formalism exhibited in the last two Parts helps keep simple cases that should not but could readily be made complicated. Assume that a defendant discharges water underneath a land-owning plaintiff’s property. The land suffers no damage until substantially later, when the plaintiff releases the water by accident while driving support piles into his soil. The defendant’s water emission constitutes one of many run-of-the-mill threats to the owner’s secure control over and future use of his land. Since the plaintiff installed support piles after the defendant emitted water, however, it would not be difficult to argue that the plaintiff is reciprocally, jointly, and proximately responsible for his own losses.⁷²

Tort law’s normative structure filters out this argument. In tort, “causation” means moral causation. Each party is responsible (only) for losses caused by its violations of the relevant accountability relationship. So in a trespass dispute, causation and damage doctrines inquire which party was violating the property rights of the other. In the pile-driving example, it follows almost automatically that the “trespass was the proximate cause, legally, the sole cause, for the innocent act of the owner in driving piles cannot be

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used as a shield by defendant any more than could the innocent acts of the bystanders in the squib case.”

In hard cases, however, every novel question in a property-tort dispute provides another opportunity to specify the scope of substantive property rights along a different margin. In such marginal cases, property norms create presumptions or preferences for certain ranges of results without automatically requiring any particular result. Let me illustrate using a recent case on trespass, Jacque v. Steenberg Homes, Inc. Steenberg Homes needed to deliver a mobile home to meet a delivery date in a purchase contract. Thanks to a blizzard, the most direct route to the delivery address was blocked by snow, in drifts of seven feet at some spots. Steenberg Homes wanted to circumvent the drifts by towing the mobile home across a field on the Jacques’ lot and behind their house. Although company staff tried to bargain with the Jacques, they refused and said “it was not a question of money; [they] just did not want Steenberg to cross their land.” The Jacques had lost property to adverse possession and prescription claimants in the past, and they probably refused Steenberg Homes’s request in the (legally-mistaken) belief that a crossing license would have given the company grounds for asserting adverse possession. A Steenberg Homes assistant manager ordered employees to cross the field anyway, telling employees, “I don’t give a ---- what [Mr. Jacque] said, just get the home in there any way you can.” Steenberg Homes employees towed the mobile home across the Jacques’ field, committing no significant damage to the field in the process. After employees called and

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73 Chicago v. Troy Laundry Machinery Co., 162 F. 678, 679 (7th Cir. 1908) (referring to Scott v. Shepherd, 96 Eng. Rep. 525 (K.B. 1773)).
74 563 N.W.2d 154 (Wis. 1997). The following discussion accords with but adds considerable specification to my previous treatments of Jacque, in Claeys, Jefferson Meets Coase, 1407-09; Eric R. Claeys, “Property 101: Is Property a Thing or a Bundle?”, 32 Seattle U. L. Rev. 617 (2009), 640-41.
told the assistant manager that the crossing was complete, he “reacted by giggling and
laughing.”

The jury awarded the Jacques nominal damages of $1, no compensatory damages
for property damage, and punitive damages of $100,000. The punitive-damage award was
set aside by the trial court, but the Wisconsin Supreme Court ordered the award
reinstated.\(^75\) To support punitive damages, the supreme court needed first to establish that
the Jacques had a rights-based cause of action for Steenberg Homes’s harmless trespass.
The court concluded that the Jacques were entitled to such an action because Steenberg
Homes’s trespass was intentional. Such a trespass, the court asserted, “causes actual harm
to the individual [owner], regardless of whether that harm can be measured in mere
dollars.”\(^76\)

In what follows, I will illustrate how a labor-based approach would have focused the
Wisconsin Supreme Court’s reasoning about whether the Jacques deserved a rights-based
claim in trespass. Even though the court reasoned primarily in a utilitarian framework, it
relied on labor- and rights-based precedents about trespass\(^77\) and focused on several of the
policies a labor-based approach would deem salient. A labor-based approach would not
automatically require that the Jacques be entitled to a rights-based cause of action. If land
owners are not entitled to causes of action for harmless trespasses in hunters’ access,
cattle-trespass, or overflight disputes, the Jacques were not entitled to exclude Steenberg
Homes just by asserting “it was not a question of money.” That assertion just begged the

\(^75\) Jacque, 563 N.W.2d at 157.
\(^76\) Jacque, 563 N.W.2d at 161.
\(^77\) See Jacque, 563 N.W.2d at 160 (quoting Diana Shooting Club v. Lamoreaux, 89 N.W. 880,
886 (Wis. 1902), to declare “[e]very person[‘s] constitutional right to the exclusive
enjoyment of his own property for any purpose which does not invade the rights of another
person”).
question, and so would any argument grounded solely in dignity or autonomy. In labor-based terms, a responsible decision maker would need at least to consider whether, on facts like those presented in *Jacque*, the autonomy granted by the unconsented-entry test might not secure the normative interests that autonomy usually furthers—individual interests in labor, necessity, and sufficiency.

Labor-based norms would institute some starting presumption in favor of the Jacques’ enjoying autonomy. Although the unconsented-entry paradigm operates as a metaphor, not as a declaration of policy, it does embody several property-related indirect-consequentialist presumptions. As in the tunnel example just discussed, the rights-based approach freed the Jacques from needing to insure against accidental property damage not caused by their own activities. Separately, the rights-based approach conserves and reinforces all the advantages that clear boundaries provide in a wide range of land-related transactions.

That said, the presumption for the rights-based approach *is* rebuttable, and the norms that structure legal property rights help identify the legal reasons that count as acceptable grounds for rebuttal. In labor-based terms, owner control deserves to be suspended if the non-owner is commandeering property to deal with a necessity. In *Jacque*, it was not Steenberg Homes’s fault that the regular delivery route was blocked by snow. In addition, owner control should be overridden if the owner’s use-claims seem far weaker than the entrant’s. Hunters’-access defenses embody this limitation, by protecting the hunter when the owner is absent and the land suffers no damage. In *Jacque*, a harm-based approach could have recognized that the Jacques’ stated grounds for refusing access were unfounded, and that Steenberg Homes was trying to complete a useful contract.
Nevertheless: If tort law construed necessity claims in too free-wheeling a fashion, or if it granted harm-based exceptions too often, it might undermine some of the indirect-consequentialist benefits property supplies. Ordinarily, labor-based property norms prescribe that legal decision makers ought not to balance against each other the intended land uses of one particular owner and another particular non-owner. Necessity lets non-owners plead their rights of self-preservation against owners’ claims of control and exclusion—but trespass doctrine stops trespassers from arguing that their planned uses are likelier to improve their lives than the owner’s current use is improving his. In *Jacque*, the Jacques were actually occupying their lots (like land-occupying owners immune from hunters’ claims of access). They were also were “using” the field behind their home in some productive sense—even if only to enhance their aesthetic enjoyment of their home. So even if the Jacques’ stated grounds for refusing to grant a crossing license were mistaken, they were “using” the field beneficially enough that it would be reasonable to err on the side of protecting their and other owners’ interests in control and use. Meanwhile, Steenberg Homes did not face a life-threatening or property-destroying necessity; it could have waited to deliver the home.

Separately, ordinarily, property law and policy protect owners against deliberate and/or malicious trespasses. The law secures owner control and use by deterring and condemning deliberate or turn-a-blind-eye attempts to sabotage either. Steenberg Homes precipitated the confrontation; the Jacques had made clear *before* the day of the confrontation that they did not want to license a crossing and the company tried to move
the home anyway. The company was also vicariously responsible for the contempt its assistant manager displayed toward the Jacques when he ordered the crossing. It was thus not unreasonable for the Wisconsin Supreme Court to distinguish between mistaken and deliberate trespasses, as cattle-trespass doctrine does. No surprise, then that (in utilitarian jargon) the court professed to find decisive society’s “interest in punishing and deterring intentional trespassers[, to] preserv[e] the integrity of the legal system” and to discourage private vengeance by landowners.

To be clear, the Wisconsin Supreme Court could have used necessity precedents or harm-based trespass precedents without undermining a labor-based approach. But holdings like these would have strained such an approach. The policies made salient in a labor-based approach create a presumption for rights-based trespass. Those policies identify legitimate reasons for departing from that presumption. They institutionalize general trade-offs between the presumption and the departures. These are the means by which a substantive morality rights supplies a foundation for legal reasoning in a close tort case. If tort scholars find the Jacque court’s concern for property extreme, they would do well to consider that most moralities that justify trespass doctrine as it exists in legal practice show more concern for the integrity of exclusive control than one would get from, say, the all-the-circumstances-reasonableness analysis typical in negligence. In any case, these disagreements are normative, not conceptual; different normative approaches could have been implemented using necessity or harm-based trespass.

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79 Jacque, 563 N.W.2d at 160.
VII. MAKING ACCIDENT TORTS COMPLEMENT RIGHTS-BASED TORTS

A. The Relation Between Accident Torts and Trespass

Thus far, we have focused primarily on how moral opinions about property inform trespass and its defenses. These doctrines focus on the act-situations most likely (or so labor-based morality used to assume) to threaten owners’ moral rights to the secure control over and use of their land. Yet many other act-situations may threaten those same rights incidentally. Which takes us to the last main strategy by which tort implements and specifies property rights: to make sure that accident-based torts specify and secure substantive rights consistently with the policies declared and enforced in the relevant rights-based torts.

In land-use disputes, this strategy is implemented not only in one subject-specific tort (nuisance) but also in the two backstop torts, negligence and strict liability. All three fields qualify the unconsented-entry paradigm to achieve the same goal as harm-based trespass doctrine. As one nuisance case explained, such qualifications are “as much for the advantage of one owner as of another; for the very [harm to property] the one complains of, as the result of the ordinary use of his neighbour’s land, he himself will create in the ordinary use of his own.”81 To demonstrate this suggestion fully, one would need to study nuisance,82 land-based strict liability,83 and negligence comprehensively. For reasons of

space and focus, I will focus here only on negligence, which probably seems to most readers the doctrine most inconsistent with my claims thus far.

B. Harm and Property in Negligence

Negligence seems to confound my hypothesis that property torts are protective. Trespass is a strict and rights-based tort, but a land owner who suffers property damage not caused by a trespass must prove actual harm\textsuperscript{84} and the defendant’s negligence.\textsuperscript{85} Trespass strongly presumes that the victims of ongoing encroachments deserve protection by injunctions.\textsuperscript{86} If a land owner is exposed to a negligently-caused risk of accident, by contrast, it is strongly presumed that he may \textit{not} sue until he suffers actual property damage. If he does suffer accidental property damage, the law then presumes that he may recover monetary relief for his damage but not obtain prophylactic injunctive relief against the same damage going forward. Is negligence really protecting property rights if it protects land owners’ legal rights less vigorously than trespass does?

Negligence reasonably adapts control rights to the act-situations it covers. In land-use disputes, negligence serves as the last possible backstop. Trespass regulates risks of accidents created by entries by persons or large objects. Nuisance regulates risks created by non-trespassory but still regularly-invasive pollution. Traditional land-based strict liability regulates risks arising from trespassory explosions, flooding, and other severe accidents, when these risks are greater than the risks incidentally created by beneficial land uses common in the locale. If both parties’ activities are generally legitimate and beneficial, and if neither activity imposes on others unusual risks of accident for the

\begin{itemize}
  \item \textsuperscript{84} In negligence, nuisance, or strict liability.
  \item \textsuperscript{85} If neither nuisance nor land-related theories of strict liability apply.
  \item \textsuperscript{86} See e.g., Baker v. Howard County Hunt, 188 A. 223 (Md. Ct. App. 1936).
\end{itemize}
neighborhood, all local owners’ use interests are enlarged if they are all required to
sacrifice the power to get prophylactic injunctive protection against any possible property
damage. As one leading nuisance case explained:

[I]n a case of conflicting rights, where neither party can enjoy his own
without in some measure restricting the liberty of the other in the use of
property, the law must make the best arrangement it can between the
contending parties, with a view to preserving to each one the largest
measure of liberty possible under the circumstances.87

In this and other similar cases, courts rely on property-based norms to specify and limit the
remedies available to plaintiffs with prima facie nuisance claims. To implement the same
substantive property prescriptions in negligence,88 tort institutes a harm requirement and
the law of remedies institutes a general presumption against prophylactic injunctive
relief. 89

Some readers may find it incoherent or damning for a theory of moral rights to limit
positive-law rights to accommodate “broad considerations of public welfare” or “courts’
institutional capacities and constraints.”90 This is a normative argument, not a conceptual
one, but it is a weak argument. Respectable contemporary political theorists find it
“irrational, crazy,” to suggest that a moral theory could justify a claim that we have certain
rights without considering the consequences the existence of such rights would entail.91 As
Part I explained, labor-based morality certainly permits and encourages indirect-
consequentialist reasoning how best to secure rights. Now, labor-based morality

87 Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658, 667 (Tenn. 1904).
88 And also in land-related traditional strict liability.
Jules L. Coleman & Jody Kraus, “Rethinking the Legal Theory of Rights,” 95 Yale L.J. 1335
(1985), 1340-52.
reconciles labor-based rights to a relatively focused understanding of public welfare—to all citizens’ enjoying “the largest measure of liberty possible in the circumstances.” Even so, it does manage coherently to specify and protect rights while considering “public” consequences.

Separately, some readers may believe that negligence gives negligent tortfeasors an entitlement to pollute.92 This view makes a conceptual mistake, for it “completely misrepresents the normative guidance” of negligence.93 In a land-use dispute, even if the defendant’s primary activity was otherwise morally legitimate, a judgment of negligence declares that he commits a wrong by having managed carelessly a risk of accident that caused a neighbor actual damage. Negligence refrains from awarding prophylactic protection or stronger damages to facilitate the free exercise of property rights. Since the defendant is condemned “negligent,” however, it would be a mistake to construe that qualification as a permission or approval to inflict the damage that triggers the judgment.

C. Duty and Property in Negligence

As Parts IV and V showed, trespass’s prima facie elements are parasitic on logically-prior substantive property rights. The same parasitic relation applies in negligence as well. To be sure, negligence doctrine makes the parasitic relationship harder to see. Negligence encourages legal decision makers to consider individualized factors too numerous to consider in detail here. Before decision makers apply negligence principles to all these individualized considerations, however, they must put the considerations in context within

an accountability relationship. In negligence doctrine, the duty element supplies the focal
point where decision makers determine which accountability relationship to apply. Other
disputes will implicate different norms about bodily safety, accurate reputations, and so
forth; property owners’ rights and duties will parasitize on controlling property norms.

To illustrate, I will focus here on the case law regulating land owners’ duties of care
to non-owners, primarily from the period when labor-based morality determined these
duties. The relationship between property right and negligence duty is illustrated well by
_Buch v. Amory Manufacturing Co._, well-known for its warning that the Good Samaritan
principle does not apply to legal negligence. In _Buch_, an eight-year-old boy trespassed onto
the premises of a mill where his older brother worked; he crushed his hand in a machine
his brother was trying to teach him to operate.94 Assume, as the New Hampshire Supreme
Court did, that the labor- and control-based property norms should determine the mill's
accountability to Buch. Those norms entitled Amory Manufacturing to a Hohfeldian liberty
generally to direct “the conduct of [its] business and management” within its own
premises. While Buch was trespassing, it followed, he held a correlative no-right in relation
to the possibility that the mill might ignore his safety. In negligence terminology, the
easiest way to declare that the mill has a liberty and Buch a no-right is to declare that the
mill owes Buch no duty of care. As long as Amory Manufacturing and its agents did
“nothing, let [Buch] entirely alone, in no manner interfere[d] with him, he [could] have no
cause of action against them for any injury that he may [have] receive[d].”95 Although this
reasoning may seem formal, substantively, it applies an indirect-consequentialist

94 44 A. 809, 809-10 (N.H. 1898).
95 _Id._ at 810.
presumption: It unduly constrains an owner’s secure control over property to expect him to protect trespassers from accidents on his property.

The same reasoning shapes defenses to negligence. If a railroad negligently causes damage to a farm adjacent to its tracks, black-letter law holds that the farm owes no duty of care to minimize the damage. As a matter of property policy, as long as the owner of the farm does “not interfere with nor embarrass the operation of the railroad,” his choice to use the land as a farm remains “of itself a proper use.” In property terms, if tort contributory negligence doctrine imposes a duty on the farmer to take reasonable care against spark fires, it gives rise to the “anomaly” that “property may be subject to the servitude of the wrongful use by another of his property.” To implement property norms, tort doctrine (here, contributory negligence) holds that the land owner is not required “so to use his own property that it may not be injured by the wrongs of another.”96 Property policy confers on the land owner a liberty; contributory negligence implements that liberty by declaring that the owner owes no duty to protect himself from trespassers’ harms.

Like all of the other examples considered thus far, these negligence doctrines secure property rights backhandedly. In neither Buch nor sparks cases did courts determine land-owning plaintiffs’ property rights in any general way. Courts declared property rights in the course of denying that owners owed duties that could give rise to wrongs to others or to responsibilities for their own losses. Still, in both situations, these wrong-denials accorded with and effectuated background substantive judgments about owners’ legitimate rights to determine the uses of their lots.

As trespass law can vary between rights- and harm-based models, so negligence can also vary the duty it imposes on land owners. In labor-based terms, tort doctrine may enhance owners’ likely intended uses of their lots if it precommits them to take reasonable care to protect guests helping them accomplish some shared goal. It is also reasonable to strengthen owners’ duties of care in proportion to their common interests with their guests. These are the judgments implemented (roughly) by the licensee and invitee categories.97

Readers may doubt whether my account of the property/tort interface does as well explaining the modern approach to premises liability as it does the traditional approach. Three-tier traditional premises liability has been repudiated in many situations, especially as it applies to apartments in urban areas.98 Yet my conceptual insights do not stand or fall with the labor-based approach. I have focused here on Buch and traditional premises liability because the property norms they assume and apply make it relatively easy to track the interplay between the property and tort in negligence. But judges with different property priors could use negligence to implement different substantive property interests.

For example, although Rawls’s two principles of justice almost certainly do not require any single approach toward property rights, one could interpret a system applying traditional principles of trespass and modern premises liability as the product of a Rawlsian compromise. Trespass might reasonably be viewed as implementing Rawls’s first principle. Trespass gives all owners, no matter how well or poorly advantaged, wide

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autonomy and privacy consistent with others’ enjoying the same. In most premises-liability disputes, however, the defendant owner (a landlord) is usually more advantaged than the plaintiff (a tenant, or a guest of a tenant). So modern premises liability might reasonably be viewed as implementing Rawls’s second principle, in a repeat act-situation in which the least-advantaged is likely to be the plaintiff and the better-advantaged the defendant.99

Such a reconciliation of trespass and premises liability is normative, not conceptual—but it could be implemented in tort consistent with my conceptual account. In property terms, perhaps tenants’ proprietary leasehold rights and guests’ rights of access cannot be enjoyed meaningfully without landlords’ owing stronger responsibilities than required at traditional common law to keep apartment buildings reasonably safe. The duty element in negligence provides the focal point where tort implements the stronger conceptions of proprietary responsibilities (on owners). In doing so, the doctrine backhandedly declares that tenants deserve stronger (respectively) proprietary leasehold rights, and that tenant guests deserve stronger non-proprietary interests in using apartments free from dangerous conditions. It is harder to reconcile the property rights an apartment owner holds under traditional trespass and modern premises liability than it is the rights of owners in trespass and under Buch. But the difficulty stems in part from the fact that Rawls’s principles of justice do not apply very determinately to premises liability, and in part from the fact that traditional trespass and modern premises liability work at cross purposes. Hard cases strain the limits of conceptual analysis.

CONCLUSION

If I were asked, “Is tort a law of rights-protection or wrong-correction?”, I would probably answer, “A little bit of both.” Although that answer sounds weak, I hope my argument in this Chapter has proven it right. On one hand, trespass to land and other related doctrines focus ultimately on securing to owners their due rights of control. On the other hand, those doctrines are structured not to declare control rights but to supply rectification for wrongs to those rights. Back on the first hand, however, the same doctrines do protect control rights—backhandedly, by specifying the relevant wrongs to prohibit conduct inconsistent with the rights. So then again on the second hand, positive-law tort prohibitions do declare control rights—indirectly, by using trespass, the duty element in negligence, harm requirements, and defenses to secure to owners the package of claim-rights, duties, liberties, and no-rights they deserve consistent with the controlling morality of property.

In recent philosophical tort scholarship, this interplay has been noticed, but it has not received the attention it deserves. I hope that my study here of land-use torts confirms and clarifies in what precise respects the law of torts protects rights and corrects wrongs. In particular, I hope that this study has clarified how tort law declares and implements moral prescriptions about rights. Tort’s corrective functions are written in the basic prohibitions written into torts; its protective functions need to be reverse-engineered from the implications of many related torts and defenses. But tort scholars mustn’t make same mistake as the car driver who loses his keys on the dark side of a parking lot but looks for them on the side where the light is.
Finally, although my intended contributions are descriptive and conceptual, I hope I have at least suggested why it might be reasonable for tort to protect rights by correcting wrongs. Wrong-correction is certainly not a logical way to protect rights. Yet perhaps self-interest gives most citizens the proper incentives to assert their rights—to complain only when others wrongly interfere with their free exercise of their rights. Perhaps courts are better at resolving resource disputes with two parties at a time than they are resolving those disputes systematically. And perhaps most people reason better about particulars than they do about the fundamental opinions they assume and apply when they judge particulars. And if one or more of these three assumptions is reasonable, then what seems at first blush a convoluted process is actually a very elegant accommodation to some basic limitations on human coordination.