The Property Gap: Private Ownership, Trespass, and the Form/Function Mismatch

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Abstract

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 exits 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.
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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 NORMATIVARBITRARINESS
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 right of any other individual in the universe”\(^\text{1}\); 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.”\(^\text{2}\) Despite, and perhaps because of, the quite

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This Article has benefited from responses received at the faculty workshops at Hebrew University Faculty of Law and Bar Ilan University Faculty of Law. I would like to thank the participants in these occasions. I would also like to thank Einat Albin, Michal Alberstein, Ori Aronson, Adi Ayal, Abraham Bell, Ilan Benshalom, Eric Claeyts, Hanoch Dagan, Tsilly Dagan, Adam Hofri, Shalom Lerner, Shahar Lifshitz, Daphna Lewinsohn-Zamir, Ronit Levin-Schnur, Ofer Malkae, Jacob Nussim, Ram Rivlin, Tehila Sagi, Re’em Segev, and Haim Shapira.
1 WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND *1 (1979) (1766).
2 KARL MARX, On the Jewish Question, reprinted in KARL MARX: SELECTED WRITINGS 16-17 (Lawrence H. Simon ed., 1994). Whereas Blackstone focuses his attention on property only, Marx’s observation is part of a larger attack on the liberal concept of rights. It could therefore be thought that the gap between the right at stake and its underlying values is a defining feature of rights as such, but not distinctively of property. I focus on property because, on my view, it poses the most difficult...
melodramatic and exaggerated wording used, 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 objects). 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, might run out of justification, but, nonetheless, exercise the especially powerful draw characteristic of rights on others, who are non-owners.4

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.

challenge to defending rights against the critique that they exceed the functions or values they have been designed to serve. Indeed, two prominent attempts to defend basic rights by bridging the so-called gap between rights and their functions have naturally focused on fundamental rights such as freedom of speech and religious liberty. Joseph Raz has sought to bridge the gap by justifying rights in terms of their beneficial effects on society, rather than merely on the individual right-holder. See JOSEPH RAZ, Rights and Individual Well-Being, in ETHICS IN THE PUBLIC DOMAIN 29, 36-43 (1994). While this instrumental justification may surely be appropriate for a right to free speech (as Raz powerfully argues in id. at 39), it is not at all clear how it can work with respect to private ownership—the charge of normative arbitrariness picks out the worry that overprotecting ownership necessarily comes at the expense of society. The second attempt, made by deontologists, emphasizes the “value of the form of inviolability.” Thomas Nagel, Personal Rights and Public Space, 24 PHIL. & PUB. AFF. 83, 96 (1995). Like Nagel, Frances Kamm insists “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). But her account is self-consciously restricted to “some rights,” with her stock example being freedom of speech. Id. Here, too, it is far from clear whether an argument of this sort could be extended to capture private ownership (rather than, perhaps, a limited use-right).

5 I develop this analytical account of ownership in Avihay Dorfman, Private Ownership, 16 LEGAL THEORY 1 (2010).

4 Could this gap be merely an inevitable side-effect of having an institution of private property? Perhaps it may be thought that the gap in question reflects a second-best choice to stabilize the law of private property by setting out a duty of exclusion, the everyday operation of which self-consciously does not match precisely the background functions served by the right of exclusion. It might be pragmatically undesirable if legal enforcement of property rights would involve constant appeal to theoretical arguments—philosophical, economic, etc.—about the functions of these rights and about the application of these arguments to the specific facts of the case at hand. On this view, the gap is quite understandable and, in fact, even required to avoid transforming the settlement of property disputes into a notorious craft of ad hoc balancing and a-systematic reasoning by courts. This worry, however, is misplaced. To begin with, pragmatic considerations are surely important, but they cannot bear the entire burden of persuasion concerning the justification of the gap, especially when the stakes are so high. It is one thing, for example, to settle on a rigid requirement of writing in certain land transactions (and to enforce it even if it can be shown that the party failing to comply with the requirement in question thought very carefully before granting her right to another person); quite another to design our private property institution the overprotective way it is simply because it renders the enforcement of property rights more systemic and less ad hoc. More importantly, fear of ad hoc-ness is not only insufficient to support a systemic bias in favor of right-holders; it is also groundless, since it gets the issue at stake backwards. Precisely because there are good reasons not to allow duty-holders to refer back to background justifications of the property right they seek to overcome, we ought to construct the right in a way that reduces to the minimum the pressure to so refer. The solution is not to embrace the gap unreflectively, simply for the sake of smoothing out the everyday operation of property’s overprotective laws. Rather, it is to find an alternative form of protecting, rather than overprotecting, ownership. I address two such forms below: harm-based right to exclude and use-tracking exclusion. See infra texts accompanying notes 37-39 & 104-13, respectively.
Classical liberal champions of equal freedom such as John Locke and Immanuel Kant have begun their respective accounts of property rights in a state of nature by arguing for the necessity of a property right securing the freedom-to 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. 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.

Another way to put this point, now switching to the familiar language of contemporary property theory, is to observe that while the owner holds the (arguably) legitimate right to use her object, to the exclusion of others, she can also exclude simply for the sake of excluding others with no necessary reference to use, including potential use, at all. Thus, the argument that seeks to ground the legal protection of ownership in the good of setting and pursuing ends using an object—the values associated with use—embarrassingly ends up protecting more than is actually required. To this extent, the form of protecting ownership is not reducible to the

5 Cf. J. W. Harris, Property and Justice ch. 11 (1996) (discussing and rejecting accounts that cast natural property rights in terms of “full-blooded ownership”).
6 Leading modern Lockes 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 Lockeian Theory of Rights 222-306 esp. 230, 282 (1992); Gopal Sreenivasan, The Limits of Lockeian Rights in Property 95-119, esp. 97-101 (1995).

The Kantian account of property 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 barley.” Korsgaard is accordingly careful to acknowledge that Kant’s argument “if it works, does not establish the necessity of “private property” in any 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 a compelling interest of agents in freedom-to could 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 (March 2010) (unpublished manuscript) and in infra text accompanying notes 119-27.

7 Hanoch Dagan has recently argued that the concept of inclusivity is just as central to a system of private property as exclusivity is. Hanoch Dagan, Property: Values and Institutions ch. 2 (2011). With Dagan, I do not deny that inclusion may be just as important as exclusion. In fact, in contrast to exclusion- or exclusivity-based property theorists, my characterization of private ownership as authority relations emphasizes that both exclusion and inclusion are but surface manifestations of the unusual normative powers of owners to fix—to include, exclude, and so on—the standing of others in relation to objects. My disagreement with Dagan is on the different question of whether private ownership simpliciter (what Dagan would call ’the property institution of fee simple absolute’) captures the conceptual and moral center of private property in a modern, liberal society. For more on this disagreement (viewed from a slightly different angle) see infra text accompanying notes 51-56.
functions or purposes served by it. It necessarily gives rise to the overprotection of owners. This deficiency, it important to note, is conceptual, rather than empirical. The worry is not just that there would be too many instances in which exclusion overprotects use (although it surely is a worry also), but rather that there is built into the form of ownership a commitment on behalf of the law to overprotection.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 gaping distortion between the form and the functions of the right to private ownership is much discussed in connection with the scope of the duty to respect ownership, especially the duty against committing trespass against the property of another. There, the form/function gap manifests itself in the puzzling rigidity of this duty. Indeed, it requires deference to the judgment of an owner concerning permission to enter or restriction on entrance despite the fact that the functions at stake—say, freedom or well-being—do not require the deference. This can be the case where these values are simply not at stake at all so that a competing use by non-owners is not in fact inconsistent with the owner's plan to use the object.9 Alternatively, the demands of these values are, on balance, far less compelling than the competing ones.10

But the charge of normative arbitrariness is not in the first instance a feature of the broad scope of application of the duty to defer to owners.11 Rather, this charge stands against and is entailed by the very structure of private ownership—the idea that freedom-to-use is sustained by granting owners freedom from non-owners. That the challenge is principally one of the structure, rather than the scope, of ownership's authority carries an important implication: that overcoming the charge of normative arbitrariness by closing the form/function gap cannot be made good simply by pointing to a variety of legal doctrines (such as private necessity) that effectively limit the scope of the authority exercised by owners.

Certain modern Lockeans, who are aware of the logical gap between the Lockean argument for freedom-to and common law's protection of freedom-from, proceed by identifying a variety of limitations on the prima facie tort of trespass that reduces the

8 Although my discussion focuses almost entirely on common law property, the problems 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.”)
10 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 After all, the fact that owners cannot exercise their normative powers to require others not to stare at their luxurious gardens does not render the normative arbitrariness of the rights of owners any less real. The same conclusion is true even in less extreme cases of scope limitation—consider the numeros clausus principle, restricting the scope of ownership's authority to grant only those property rights that take several publicly recognized forms (such as easement, mortgage, lease, and few others).
de facto protection of ownership to a right exclusively to use an object, rather than a right to exclude as such. To the extent it purports to eliminate the gap, this approach is doomed to fail. To begin with, some of the doctrines modern Lockeans invoke involve sensational cases of non-owners facing “great jeopardy to more urgent interests in preserving life or preventing the total destruction of property.” Others focus on extraordinary settings (such as aerial trespass). Only few, if any, apply to ordinary cases, by which I mean everyday situations such as when I refuse to let you cross through my empty field (where I once used to grow watermelons) on your way to a nearby friend. For these reasons, the mismatch between the form and function of private ownership is too ubiquitous in the lived experience of property to cancel out by resorting to what is best perceived as exceptional limitations on ownership’s otherwise unusual authority over non-owners with respect to external objects. More dramatically, even assuming for the sake of the argument that the duty to defer to owners’ authority is viewed through a universe of exceptions, defenses, privileges, and remedies that successfully eliminate all traces of property overprotection, the charge of normative arbitrariness may not be put to rest. Again, the problem is one of structure, rather than of scope; leaving the former intact perpetuates, and therefore reinforces, the arbitrariness associated with the form/function gap. Indeed, the form of protecting ownership is the source of normative arbitrariness. The very existence of this form, rather than its scope of application, is that which creates an opening for owners to exercise their authority to fix others’ normative standings without reference to enhancing their own freedom or well-being through the use of objects. No additional limitation on the scope of ownership’s authority can shut this opening off; by implication, no such limitation can alone—viz., without revising the form itself—prevail over the charge of normative arbitrariness. This is just another way to express the notion mentioned above that there is built into the form of protecting ownership a commitment on the part of the law to overprotection.

13 Id. See also Eric R. Claeys, Virtue and Rights in American Property Law, 94 CORNELL L. REV. 889, 941 (2009) (observing that “[t]here have always been exceptions to this rule (private necessity), of course, and the law continues to develop new ones (airplane overflights).”) (internal citations omitted).
14 Other examples of exceptions to the strict liability tort of trespass are anti-discrimination norms in public accommodation settings and, in some jurisdictions, good-faith encroachers whose mistake is partly due to negligence on the part of the owner-encroachee. See Raab v. Casper, 51 Cal.App.3d 866, 872 (1975).
16 This conceptual truth about the form/function gap is (also) clearly evident in past and present struggles over the contours of the private property institution in various settings. The opening mentioned in the main text above 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 PENALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 55-63, esp. 56-57 (2010). For an illuminating historical analysis of water rights against the backdrop of the form/function gap, see DAVID B. SCHORR, PROPERTY RIGHTS, DISTRIBUTIVE JUSTICE AND THE ORIGINS OF PRIOR APPROPRIATION (forthcoming 2011).
17 The revisionist solution to the charge of normative arbitrariness requires that the right of owners be adjusted so as to track more precisely its underlying values (or functions). I take up one version of this solution below.
Although I shall discuss the revisionist approach below, it should be recalled that my ambition in this paper is to develop an account of common law’s lived experience of private ownership—that is, ownership that, due to the unusual authority vested in owners over non-owners, gives rise to the form/function gap. This account seeks to make sense of an entitlement to exercise, in some cases and in some measure, a normative power to exclude others, regardless of whether exclusion is in fact needed to sustain any actual or potential use (however broadly defined). 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, but rather to one particular, and most troubling, instantiation thereof, which is to say despotic sovereignty. The revisionist approach, after all, does not so much explain this, as it explains it away, by defending a narrower conception of ownership’s authority and so a narrower trespass tort duty on the part of non-owners to defer to owners. Accordingly, I shall now seek to take stock of a prominent explanation of the form/function gap. I shall then develop a novel approach, claiming that the form of ownership, properly conceived, does not give rise to a gaping distortion between the right and the functions it purports to serve.

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, with reference to whether exclusion is in fact required to sustain the owner’s ability to deploy her object in legally permissible ways. Instead, the argument emphasizes that a general right to exclude non-owners produces the best results in terms of securing use by owners at a wholesale level. 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. 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,”

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

19 The locus classicus is Morris R. Cohen, Property and Sovereignty, 13 CORNELL L.Q. 8 (1927).

20 It is despotic, once again, even when owners almost always (as it happens) exercise their rights to exclude only for the purpose of using their objects. Ownership’s authority carries despotic overtones because of the very possibility that owners could, if they so wished, exclude for no such purpose (and for no other good reason).


22 J. E. PENNER, THE IDEA OF PROPERTY IN LAW 73 (1997) (emphasizing the importance of keeping duties in rem, such as a duty to exclude oneself from another’s object, “simple”).
since it requires the specification of the “many different uses one can make of one’s property.”

Now, the indirect mode of justifying the right to exclude need not be a version of rule-consequentialism. 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. This impression is vividly illustrated by his saying that “rights purely to exclude or purely to use interact naturally” and that, because the right to use picks out a rather broad definition of ‘using’ all rightful exclusions can be broadly characterized as serving the interest or purpose of putting a thing to use.

That said, the indirect thesis could escape rule-consequentialism only insofar as it mistakenly assumes a sufficiently tight connection between the interest in using an object and the exclusion of others from that object. To be sure, this is not an empirical mistake (as when some 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 uses may be made by owners of their objects. Accordingly, the justification of the right to exclude in terms of protecting the right to use leaves unaddressed, and so unexplained, the law's indifference 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

23 Id. at 72. See also Henry E. 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.”).

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

25 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) (hereinafter: Smith, Mind the Gap); Smith, supra note 21, at 130, 145 (criticizing “fine-grained analysis” of law for hyperrealist and technocratic tendencies and defending a “broader-gauged economic analysis”).

26 Id. at 70 (arguing that “use' refers to a disposition one can make of something that is purposeful and can be interfered with by others.”).

27 Id. See also A. M. Honoré, Rights of Exclusion and Immunities against Divesting, 34 TULANE L. REV. 453, 463-64 (1960) (same).

28 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.

29 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 overprotects it.
whatesoever with sustaining the right to use. This connection figures nowhere in the prima-facie case of trespass; nor does it give rise to a defense on the part of the trespasser. 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. 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 that deferring to owners is, at least in the long run, necessary to sustain our complex scheme of social coordination in and around external objects (which, ultimately though indirectly, secures the realization of freedom or efficiency).

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

To begin with, the indirect thesis moves too quickly from a basic premise—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. 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). The failure is to defend an additional additional

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31 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 of 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 & 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.”).

32 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.”).

33 See supra text accompanying notes 12-17.

34 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 70 (5th ed. 1984); 3 BLACKSTONE, supra note 1, at *209 (noting that “every entry therefore thereon without the owner's leave, and especially if contrary to his express order, is a trespass”).

35 This awareness is empathetically demonstrated in Smith, Mind the Gap, supra note 25.
(implicit) premise, according to which the costs of circumscribing the right to exclude so as to track more precisely the need to protect the owner's use far exceed the costs of overprotecting use through the tort of trespass. At the very least, this showing must explain why a principle of use- or interference-tracking exclusion would be prohibitively costly. On this alternative, there is no need to specify in advance the different uses to which an owner can put an object. Rather, all that is required is a duty of non-interference, that is, of not pursuing plans involving the object of another which are incompatible with those set by the owner.

A duty of this kind is no mere analytical conceit, to be sure. It already figures in some jurisdictions, notably in many jurisdictions in the United States, in respect to trespass to chattels. There, a duty-holder is not liable for using another's chattels as such. Liability depends, rather, on the occurrence of a setback, such as harm or dispossession, to the interest of the owner in enjoying her object uninterrupted. On this trespassory model, there is no need to specify in advance the kind of uses to which an object may be put to use (and so it does not imply impracticality and excessive bureaucratic regulations). And it is therefore not clear why the indirect thesis cannot settle on a 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 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.

In other words, the resort to rule-consequentialism, to the extent that this form of consequentialism is coherent to begin with, is substantially incomplete. It is one thing to defend the form/function gap by reference to rule-consequentialism; quite

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36 Cf. Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 C ORNELL 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.”).


38 RESTATEMENT (SECOND) OF TORTS § 217 (1965).

39 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 v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970)) 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, 153-62 (2010).

40 For a celebrated attack on rule-consequentialism see DAVID LYONS, *FORMS AND LIMITS OF UTILITARIANISM* (1965). The account of the form/function gap that I shall develop in due course does not turn on rule-consequentialism at all.
another to show that the current rule of protecting ownership by creating this gap
strikes, or even begins to strike, the right equilibrium between short- and long-term
considerations (whatever they are). The indirect thesis, as just explained, is unable to
make this showing.

Second, the next shortcoming of the indirect thesis stems from its very structure,
which is at odds with the \textit{categorical character} of rights (such as the right to
property) and duties (such as the duty to defer to the judgment of owners).\textsuperscript{41} To begin
with, rights and duties are not merely placeholders for what we—owners and non-
owners—have \textit{most reason} to do; instead, they figure in our lived experience in the
form of freestanding requirements.\textsuperscript{42} But the indirect thesis grounds the right and
duty of exclusion \textit{not} in the necessity of protecting the right to use, for the latter right
(as mentioned above) requires a right and a duty of exclusion akin to the use-tracking
account. Instead, they are grounded in considerations of what is best overall for the
purpose, say, of sustaining freedom or promoting efficiency in and around the
institution of private property. In that, the indirect thesis departs substantially from
the core deontic intuition about rights and duties as defining a set of requirements that
are irreducible to extrinsic considerations (such as the interests in freedom or
efficiency). This departure is particularly troubling since the right and duty of
exclusion invite the charge of normative arbitrariness precisely because they do not lend
themselves naturally to these considerations, but nevertheless command
usually strong protection, i.e., overprotection, in the form of ownership. This
conclusion reflects the broader, and familiar, observation that (act- and rule-)
consequentialism cannot generally account for the distinctiveness of rights in our
moral and legal lived experience.\textsuperscript{43} 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.\textsuperscript{44} The point is that these
considerations cannot but fall short of grounding no less than a \textit{right} to exclude, \textit{tout
court}.

\textsuperscript{41} For more on the categorical character of rights and duties and, more generally, on the distinction
between right- and value-jurisprudence, see JÜRGEN HABERMAS, \textit{BETWEEN FACTS AND NORMS} 253-266
(William Rehg trans., 1996). Note that it is not necessary for my argument to claim that \textit{all} rights,
by virtue of being rights, must have a categorical 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, \textit{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 as the right (of ownership or property, more generally) does not merely
protect welfare or interest.

\textsuperscript{42} 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.

\textsuperscript{43} See, e.g., ROBERT NOZICK, \textit{ANARCHY, STATE, AND UTOPIA} 28-33 (1974); RONALD DWORKIN,
\textit{TAKING RIGHTS SERIOUSLY} xi, 184-205 (1978); SAMUEL SCHEFFLER, \textit{EQUALITY AND TRADITION} 69
(2010). The notion that rights often feature a categorical character is not unique to deontologists, to be
sure. Joseph Raz, a leading value theorist, 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. For discussion, see \textit{supra} note 2. As I explained
above (\textit{id.}), it is not clear whether this way of accounting for the categorical character of property rights
(or of some such rights) can work.

\textsuperscript{44} I remain less confident, however, as to whether economic cost-benefit analysis can do so
successfully.
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. The indirect thesis, one may say, takes indirectness to heart when—in addition to grounding exclusion indirectly in the right to use—it marshals an indirect structure of property obligation, giving rise to duties running from duty-holders to the legal practice as a whole. On this view, right-holders are being reduced to the position of mere beneficiaries of the duty. This view is reflected in the insistence of proponents of the indirect thesis on the fundamental primacy of the owner-thing relation (the thingness of property, as it were), at the expense of the relational character of property rights as establishing normative relationships between persons with respect to objects. More dramatically, this view is best expressed in admissions which state that duties of non-interference are akin to in-rem duties, owed to “the plurality of property holders” or to “a large and indefinite class of holders of [property] rights.”

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. 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

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46 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.
47 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, supra note 3, at 23-25.
48 PENNER, supra note 22, at 27.
50 See generally Dorfman, supra note 3, at 10-12; Dorfman, supra note 45, at 8-10.
classic private law duty) runs directly to them, being owed to and owned by them, rather than mediated by the social practice of property (or tort for that matter).

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

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

51 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 PENNER, supra note 22, at 74. 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 trespass 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, 210-11 (2010).
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. On the account I shall outline presently, the mystery of the special normative power vested in private ownership and the trespassory duty of deference it commends may be solved once a right-formalist approach is sought.

As I shall seek to show, ownership (and trespass) takes a social form. My account, it is important to note, takes a distinctively different approach to the question of the connection between property and society than several influential accounts have so far pursued. Generally, such accounts begin from property arrangements that supervene on thicker forms of social engagement. Familiar examples are the employment setting in Joseph Singer’s article on the reliance interest in property; co-ownership and other social activities in Penner’s writings; psychological and social attachments to land in Eduardo 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. 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. 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. Thus, I do not claim that ownership right and trespassory duty sustain or produce socially valuable outcomes (although they may occasionally do so)

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52 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) and Gregory S. Alexander, The Social-Obligation Norm in American Property Law, 94 CORNELL L. REV. 745 (2009), respectively.


54 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, supra note 7, at 45.

55 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, supra note 3, at 25-34.
or, for this matter, individually valuable ones. 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.

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). To be sure, the need for coordination is not distinctive of property. A parallel story can be told with respect to other, partly overlapping, spheres of interaction such as those pertaining to bodily integrity and to promissory relations (corresponding to the legal practices of tort and contract, respectively).

At any rate, private property is one such scheme that responds to the need for property coordination. By selecting a private property scheme, society vests in private persons some measure of authority to fix the normative standing of others in relation to an object. But apart from this skeletal characterization of a private property scheme, there remains substantial room to fill in the details, including some of the most fundamental of them such as the functions and values served by this scheme.

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56 By individual values I especially refer to an influential approach that emphasizes the effective hold that some objects may have on the personhood of their owners. See Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957 (1988). On this Hegelian approach, some external objects (such as one’s marriage ring) may be constitutive of who one is not just externally—viz., as other persons conceive of one—but also internally—viz., as one understands oneself in terms of a temporally-extended person. Just as my emphasis on the social form of ownership and trespass, as I observed in the main text above, does not supervene upon preexisting thick relations, say, between spouses or members of a close-knit society, it does not depend on the psychological role of any particular object in the ethical development of one’s own identity. Thus, my account can, in principle, apply to both self-constituting (“personal”) and non-constituting (“fungible”) property. I further demonstrate the critical distance between my account and the personhood thesis in infra notes 79, 111, 130.

57 For this reason, my account also differs from David Lametti’s insistence on the role of objects in determining the nature and shape of private property rights and duties. See David Lametti, The Concept of Property: Relations Through Objects of Social Wealth, 53 U. TORONTO L.J. 325, 344, 353 (2003). I do not deny, of course, that the telos of certain specific objects may, sometimes and in some measure, be constitutive of the legal norms governing its use and control (as when the object is a heritage building, which is one of Lametti’s stock examples, in which case the authority of the building’s owner to fix others’ normative standing is somewhat circumscribed).

58 By mentioning these other spheres of action (and especially contract), I do not mean to imply that property and contract are indistinct or, at best, quantitatively different. That question lies beyond the scope of the present argument. Elsewhere, I argue that, in fact, property and contract are qualitatively different. See Dorfman, supra note 45.

59 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.
scheme and its precise scope of application. It would be wrong to suppose that because private property causally arises in connection with a need for social coordination, this need, whatever it is, also determines the scheme’s shape and point, either in full or even in part. This last normative task requires, among other things, the creation of property right and duty forms—in principle, they can span a broad spectrum of proprietary rights and duties ranging from usufruct to exclusive use and, ultimately, to private ownership (in the robust sense referred to throughout my argument). As I shall now seek to show, focusing especially on the form of the trespassory duty which correlates to private ownership, the form under discussion expresses a basic liberal commitment to a society of free and equal persons. This special form does not, of course, rule out the policy and principled goals commonly attributed by functionalists to ownership and trespass. It insists, however, that whatever goals they seek to promote, they do so in a distinctively social way: they demand that duty-holders recognize right-holders as commanding respect for their different ends, simply because these are their own ends.

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 acts 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. Therefore, part of living together in a society with others is that, all else being equal, we are required to assume that the act or object of another provides a proxy for her

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60 I self-consciously leave the question of the desirable scope of the legal practice of private property unspecified—for example, need it include intellectual property, moveables, or perhaps only some immoveables? Indeed, my account only seeks to establish that the coordination of human relations with respect to some (non trivial) external objects must be governed by private ownership. As I explain elsewhere (in connection with a related issue), the scope question cannot be sought for single-mindedly as though it can be fixed theoretically, by which I mean pre-politically. See Dorfman, supra note 3, at 25-34; Avihay Dorfman, Property and Collective Undertaking: The Principle of Numerus Clausus, 61 U. Toronto L.J. 467, 489-501 (2011) (hereinafter: Dorfman, Property and Collective Undertaking). On this view, it is part of the conditions of its legitimacy that the scope of the practice (and the scope of the private ownership right itself) be self-given by those subject to it.

61 The idea of a spectrum (ranging from “mere property to “full-blooded ownership” and giving rise to respective “trespassory rules”) is elaborated in HARRIS, supra note 5. There is also 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 Dorfman, Property and Collective Undertaking, supra note 60.

62 Can’t this formal argument be thought purely instrumental or functional after all? I think not. The suspicion in question is that the value of a society of free and equals cannot be distinguished from the functional justification for creating private ownership as a means, say, to promoting well-being. On my account, however, the value that inheres in the social form of private ownership is that which makes possible the promotion of the well-being of free and equal persons.

63 Of course, language is included.

64 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 KEETON ET AL., supra note 34, at 113 (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.”).
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. 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 about executing 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

65 The idea of engagement in engaging with other persons can be thought of as a range property: one extreme on this range features simple forbearance cases capturing one extreme on this range (e.g., I bypass your unfenced land on my way to your neighbor); the opposite end involves cases in which nonowners literally address owners by negotiating permission to use their respective premises. Between these extremes there exist cases whereby owners give mixed signals (authorizing and refusing entry simultaneously), and thus forcing interested nonowners to engage in deliberation concerning the most reasonable understanding of the owners’ judgments with respect to the permissibility of using the latter’s objects. One class of cases in point deals with misunderstandings with respect to the scope of invitation into an owner’s premises. Another class of cases involves more radical misunderstanding; that is, as to whether an invitation has been issued to begin with. I discuss these classes of cases in the process of discussing an implicit, though pervasive fault principle that, as my analysis shows, underlies the law of trespass in Avihay Dorfman & Assaf Jacob, The Fault of Trespass (February 2011) (unpublished manuscript).

66 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 INQUIRES L. 59 (2011).
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.

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 accepting the judgment of whichever person is in authority to fix her normative standing to the building. This becomes (or purports to become) the guide to conduct. The building, the mere object, mediates between the judgment of the authority and the attitude (of considerateness) on the part of the passerby.67 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 the building is a restaurant), the owner may fix the normative standing of the pedestrian in relation to the building as an invitee, rendering it permissible to enter the place (but not to sleep there, for example).68

67 Both Penner and Lametti also emphasize that objects mediate between duty- and right-holders, but their respective conceptions of mediation are entirely different to my own. On Penner's view (on which Lametti draws), objects are more like screens that block any normative connection between duty- and right-holders—this is precisely why he thinks property gives rise to an indirect structure of obligation (owed to the practice as whole, rather than to the right-holder). See PENNER, supra note 22, at 29; Lametti, supra note 57, at 344-45. As I argue above and elsewhere, it is a mistake—conceptual as well as normative—to move from the first premise of this view (that objects mediate between duty- and right-holders) to the conclusion that objects allow, and perhaps require, property law to do away with the directional structure of normative relations that generally characterize private law. See supra text accompanying notes 50-51; Dorfman, supra note 45.

68 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 (1979) (“A landowner's permission for a picnic on his land will normally not be taken to give consent to a picnic at three o'clock in the morning or to a drunken bawl.”).
Certainly, correctly discharging the duty to infer the relevant judgments from an action or object relies heavily on mastering local conventions concerning the relevant signals, as it were, that words, actions and inactions, and objects communicate. Some cases may prove more difficult for duty-holders than others. These will likely involve words, acts, and objects communicating mixed signals. Consider a passerby seeking to use the toilet in a nearby bookstore. He has a reason (indeed, a duty) to figure out the owner’s judgment with respect to his normative standing to the store and, in particular, to using the toilet; in short, the owner's decision concerning the scope of the invitation. 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. Thus, as part of living together respectfully, we are committed through the tort system to regard one another as free and equal precisely by assuming that, all else being equal, activity and external objects are proxies for the points of view of others.

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 is therefore in order to provide a more precise characterization of its place within the architecture of the trespassory duty.

See, e.g., Wartman v. Swindell, 25 A. 356 (N.J. 1892); Verdoljak v. Mosinee Paper Corp., 531 N.W.2d 341, 345 (Wis.Ct.App. 1995) (noting that owner authorization to enter “may be implied from custom, or when the owner’s conduct is such as would warrant a reasonable person having knowledge thereof to believe that the owner had given consent to come upon the premises.” See generally KEETON ET AL., supra note 34, at 113 (“The defendant is entitled to rely upon what any reasonable man would understand from the plaintiff’s conduct.”). See RESTATEMENT (SECOND) OF TORTS § 332 cmm. l (1965); DAN B. DOBBS, THE LAW OF TORTS § 234 at 602 (2000) (discussing the “scope of invitation” doctrine).

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

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).
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 view) the extent to which these judgments reflect or otherwise embody the interest or right of the right-holder in order for them to be accommodated into the duty-holder’s activity.

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

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

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

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73 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.

74 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.

75 But recall the caveat made in supra note 66.

76 Of course, there are external limitations on what one can be legally required to endorse. For example, consider racial discrimination in public settings or the exercise of free speech in a private
Consider *Jacque v. Steenberg Homes, Inc.* by illustration. There, the defendant harmlessly crossed through the plaintiffs’ snow-covered land in order to deliver a mobile home to a nearby landowner despite prior “adamant protests” by and “repeated refusals” from the plaintiffs. The crossing took place far enough from the plaintiffs’ sight that they could not even have noticed or felt invaded in any meaningful way and, so, without implications of loss of autonomy, privacy, or even the causation of annoyance. It turned out, as both the Court of Appeals and the Supreme Court of Wisconsin indicated, that the reason the plaintiffs refused to grant the defendant permission to cross harmlessly on any terms—including in return for a consideration—was their fear of losing legal control over parts of their land by prescription. And this reason is not just unreasonable, but rather clearly mistaken in every possible sense, factually and legally speaking. Nevertheless, the duty against trespassing demands, on pain of punitive damages, that duty-holders defer to the judgment of the right-holder, and so pursue it as their unmediated guide to conduct. 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 property setting (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.

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77 563 N.W.2d 154 (Wis. 1997).
78 *Id.* at 156 & 157, respectively.
79 *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.”). For this reason, property scholars who seek to defend *Jacque* on autonomy or privacy grounds miss the point that this is not a case of home invasion. A similar conclusion applies to explaining *Jacque* on the basis of the personhood-constituting service of personal property. Cf. Radin, *supra* note 56, at 992. Whereas a home can (though not of necessity) count as personal property in the sense that it is partly constitutive of the homeowner’s own identity, it seems superficial to stretch this intuition to capture Steenberg’s harmless trespass which took place relatively far away from the Jacque home itself. To be sure, the Jacque couple may experience after-the-fact feelings of invasion (including, in particular, to their personhoods as embodied in each and every square foot of their land), but they may have similar negative emotional reactions when people, standing outside the Jacque property, stare at their land. These last two setbacks do not seem to be determinative to the Jacque’s interest in identity formation or preservation.

80 *Jacque,* 563 N.W.2d 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”).
81 *Id.* 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,* 201 Wis.2d 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.”)
82 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.
83 Punitive damages, as opposed to compensatory damages, are set sufficiently high to preclude efficient trespass. The *Jacque* court awarded $100,000 in punitive damages on top of a one-dollar award in nominal damages.
the right-holder as standing—providing for onself. 84 There are, of course, exceptional circumstances (such as private necessity) in which this rule is partly or wholly abandoned, but these aside, the prima facie case of trespass to property gives rise to the permission-to-enter question only. 85

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

B. The Grounds of Deference and Respectful Recognition
The peculiar form of deference in the sense of accommodating the judgment of another person into one's own practical affairs does not require that persons be motivated to 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.

84 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).
85 See supra text accompanying notes 12-17, 31-32, 34. 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.” KEETON ET AL., supra note 34, 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 being 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. 86 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. 87 But even when there exists a perfect overlap between the social 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 86

86 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.

87 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 another. See, e.g., Richard Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 735 (2006).
what activity to pursue, fixes these benefits and, for that reason, determines unilaterally how much respect is owed to the right-holder.

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. 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.” 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. 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.”

By contrast, there is a strong intuitive sense according to which true respect for persons as such can be had only inssofar 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

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88 E.g., HARRY FRANKFURT, Equality and Respect, in NECESSITY, VOLITION AND LOVE 150 (1999) (“Respect, therefore, entails impartiality and the avoidance of arbitrariness.”). See, more 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.”).

89 IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 4:421 (Mary Gregor trans., 1998).

90 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.

91 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 purpose and its success conditions. 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.
terms of the constraints actually are. As mentioned above, this is precisely what is meant by saying that deference grounded in respect for other persons involves suppressing one’s own judgment and opening up to the unmediated judgment of another person, thus “see[ing] the world ... from that person’s point of view.”

Respecting persons on their own terms and being respected in this way by others is deeply embedded in the lived experience of becoming a person—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 of the developing child, to his or her point of view. It commences with a strong sense of parents and educators being in control of, and thus being obligated to respect, the child by setting for her the terms of the respect. As Tamar Schapiro has observed, “children ... make direct moral claims ... to have their interests protected and their needs met.” 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.

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.

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 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.

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92 As I noted in supra notes 66 & 76, 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 about forcing duty-holders into self-disrespect.
93 BERNARD WILLIAMS, IN THE BEGINNING WAS THE DEED 103 (Geoffrey Hawthorn ed. 2005).
95 Tamar Schapiro, What is a Child?, 109 ETHICS 715, 715 (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.”). Cf. PETER F. STRAWSON, FREEDOM AND RESENTMENT 9 (1974).
96 Schapiro, supra, at 729.
97 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
B.2. The Social Form of Respecting Persons as Such

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

Begin with the social underpinnings of respect for persons. Persons are reasoning creatures, negotiating the world by forming their own judgments about what to do and what to believe. This is not merely a reflection about human minds and actions, but also a basic modern ideal of critical rationality often cashed out in terms of self-sufficiency—“the maxim of always thinking for oneself.” The judgments made by individuals reflect distinct points of view from which self-sufficient people come, separately, to appreciate and, indeed, experience others (among other things). But although they literally make possible our experience of one another, these points of view might also isolate us (socially speaking) from those captured by their lens. For they are our own, personal points of view, mediating what actually lies out there according to our judgment of what is there. Thus, attending to others’ claims using our own points of view does not, after all, amount to appreciating them as such—that is, as persons constituting their own independent judgments about the world of action and thought. Rather, in insisting on pursuing them exclusively through our own points of view, what we come to appreciate is those judgments of ours (about what others’ demands require of us) that are made by reference to, rather than by, others. And this is precisely why our points of view, although allowing rational creatures such as we are to negotiate the world, might isolate us from others.

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.

98 See, e.g., WILLIAMS, supra note 93, at 103; JOHN RAWLS, A THEORY OF JUSTICE 337 (1971); HABERMAS, supra note 91, at 100; STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT 127 (2006).


100 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
However, by attending to the judgments of others, a person can overcome the separateness involved in experiencing the social world exclusively from his own point of view. Indeed, by taking the judgments of others as guides to conduct, one can identify with the points of view of others, even if only in the weak sense of acknowledging them as freestanding constraints, and not just with one's own peculiar conception of these judgments and the demands they may place on oneself. Isolation, therefore, can be replaced by society once persons are disposed, in some measure, to accord the point of view of their fellow creatures unmediated recognition. This form of being with others is therefore irreducibly social, since (to repeat) it involves suppressing one's own judgment and opening up to the judgment of another simply because she is a person and it is her judgment.

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

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 take the opposite approach: to show that this gap is a defining feature of the social form of ownership (and trespass). On the right-formalism approach I developed above, the charge of normative arbitrariness is fully addressed by 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 individualistic, because it does not require deference to the judgment of another. The individualistic bent of altruism is best exemplified through cases of benevolent, but unjustified paternalism.

101 See JOSEPH RAZ, THE MORALITY OF FREEDOM 53 (1986) (noting that an authority is normally justified and in this way can garner its legitimacy insofar as a person “is likely better to comply with the reasons which apply to him (other than the alleged authoritative directive) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.”).

102 For a sketch of the limits of respect, see supra note 92.

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functions served by ownership (including by ownership’s form) do not exhaust the explanation of the ownership’s good.

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

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

103 I say including by ownership’s form in recognition of a functionally motivated account of ownership (and trespass) form. On this account, the form serves 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.

104 I shall mostly draw on Larissa Katz, Exclusion and Exclusivity in Property Law, 58 U. TORONTO L.J. 275 (2008) (hereinafter: Katz, Exclusion and Exclusivity) to reconstruct a 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, Ownersh ip and Social Solidarity: A Kantian Alternative, 17 LEGAL THEORY (forthcoming 2011) (manuscript at 18-19) (arguing that, on her account, “nonowners can make some choices about someone else's property that advance their own purposes without at the same time interfering with owners' freedom.”).

105 Katz, Exclusion and Exclusivity, supra, at 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 104 and in the main text below (text accompanying notes 107-13), the former is the most plausible reading of Katz’s account.

106 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, Exclusion and Exclusivity, supra note 104, at 300-01.

107 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. Id. at 300. While the observation in this example strikes an intuitive cord,
The most straightforward implication of moving from ownership’s form being the authority to fix the normative standings of others, to the authority being the ability to put an object to use, pertains to the object of the deference on the part 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.

The critical distance between deference to use and to judgment can be cast into sharp relief by considering a dispute between owners and non-owners over the question of inconsistent uses. This case (of what counts as an inconsistent use) is crucial to the use-tracking approach, because inconsistent uses determine the contours of ownership and the trespassory duty it prescribes. Suppose an owner-farmer refuses permission to a neighbor who wishes to train horses on her empty field during the summer (viz., she grows watermelons from September until May only). This is because horses squash and compress the soil under which they run, permanently damaging the soil. Or so the owner worries (perhaps unreasonably, but sincerely and, therefore, not maliciously). 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 the activity of training a horse may fall perfectly in line with the actual, potential, and background uses to which the owner has put the field, even though it amounts to disregarding her point of view, in violation of the recognition conception of respect. The duty of deference, on the use-tracking approach, takes its object to be the use made by the owner, objectively characterized. And what

Katz’s attempt to extend this intuition to the case of Jacque is less convincing for the reason I mentioned above. See supra text accompanying notes 77-83.

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.
objectivity requires, in general and in particular, is a question that does not turn on the point of view of the owner. 109

A non-owner, on this view, does not need to adjust, let alone pursue, the judgment of an owner in order to deploy the latter's object lawfully. Instead of attending to an owner on the owner's own terms, it is sufficient for the non-owner to convince the court that, the judgment of the owner notwithstanding, his purported use does not exert substantial pressure toward conflict with the (actual, potential, or background) uses made by the owner. This is an appeal, in other words, for the court to take the point of view of the non-owner, rather than that of the owner, with respect to the correct characterization of the owner's use and to the possibility of inconsistent uses. 110 This form of deference remains firmly individualistic and, therefore, falls short of the demands of true respect—it allows non-owners to determine the terms on which they may come to respect others. 111

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.

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 109 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. Or, 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 the operation of the 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 of the object, respectively. 110 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). 111 The Personhood theory of property fails to ground a trespassory duty of deference, too. This is so, I shall argue, even given that (for the sake of the argument) the field in question counts as a personhood-constituting property for its owner. Indeed, as Radin insists, the personhood theory is no mere subjective preference-based justification of ownership right or trespass duty. Rather, it rests on an objective value of being a full-blown person. Radin, supra note 56, at 968. In the horse-training example, the owner may surely feel violated by the trainer’s invasion of her field. But this is just a subjectivist, preference-based argument, which Radin would repudiate; the right way to proceed, on the personhood approach, is to ask whether the owner is entitled—has reasons to—feel violated under these circumstances. And it is not clear why an owner’s groundless refusal to allow another harmlessly to use her empty field could give rise to a duty of trespass grounded in the (objective) good of personhood.
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.  

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

This conclusion—that on the use-tracking approach, the social forms of trespass and ownership make no difference to the explanation and justification of 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 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 that it cannot be reduced to the qualitatively different demand placed on non-owners by the use-tracking approach—that is, to refrain from deploying the property of another in ways that, 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

112 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.

113 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 the application of ownership’s authority.
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.\textsuperscript{114} 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.

V. THE NECESSITY OF THE GAP AND ITS PRACTICAL IMPLICATION FOR EQUALITY

The account developed in these pages carries important practical implications for society's pursuit of equality.\textsuperscript{115} Indeed, although my account has so far cast private ownership in terms of a thin ideal of social solidarity, it also opens the door for a thicker, liberal egalitarian commitment to solidarity and non-subordination. My present ambition is merely to identify, rather than pursue, this conception—the latter task deserves a paper of its own. Its centerpiece, as I shall observe below, is that the necessity of the form/function gap entails that, for the purpose of alleviating inequality, private ownership is not only a problem, but (in part) also the solution. On my account, there can be no alternative but for a society of free and equal persons to provide private ownership rights (in the robust sense explored in these pages) to all persons. To this extent, my account takes seriously—viz., turns on its head—the historical (and notorious) connection once made between private ownership and the right to vote (or to full citizenship, more generally). The moral importance of private ownership, on my account, exerts pressure toward inclusion into the practice of private property and, hence, into the society of free and equal persons.

It will prove helpful to proceed against the backdrop of two rival approaches to the nature of the connection between private property and justice—that is, those defended by progressive property scholars, on the one hand, and by modern Kantians, on the other.\textsuperscript{116} Both approaches take seriously the massive inequality of resources and of opportunities that the institution of private property promotes, embraces or, at minimum, allows to stand.\textsuperscript{117} One way in which progressivists have been responding to this reality is by advocating the reduction of ownership's scope of authority; hence

\textsuperscript{114} 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 compelling reasons, external to property, to deviate from ownership’s social form).

\textsuperscript{115} Of course, it carries other implications as well; I shall leave them to another occasion. Two of them merit brief introduction. First, the proposed account does not consider how the recognition conception of respect bears on the doctrine governing original acquisition of ownership. Second, my account renders vivid the normative grounds for striking a qualitative distinction between eminent domain and private taking (and between public and private norms of property regulation, more generally). Although the state has compelling reasons to defer to ownership’s authority in many cases, the ideal of respectful recognition between free and equal members of society does not apply directly to the state in the same manner that it does with respect to persons.

\textsuperscript{116} For an elaborated critical discussion of these two approaches, see DAGAN, supra note 7, at 62-69.

\textsuperscript{117} Geregory S. Alexander et al., A Statement of Progressive Property, 94 C ORNELL L. REV. 743, 744 §4 (2009); RUPSTEIN, supra note 6, at 279, 282, 292; WEINRUB, supra note 6, at 817 (observing the “systemic difficulty that [private] property poses for innate right”).
freeing more physical spaces and, more generally, making available more resources for nonowners to exploit at the expense of owners. For instance, some progressivists support an ambitious expansion of common law’s private necessity doctrine to include cases of economic need and other forms of inequality including in circumstances that are not reducible to life and death emergencies.  

Some modern Kantians, by contrast, respond to poverty and, more generally, inequality by acknowledging a set of duties on the part of the state to support the poor through taxes and through carving out sufficient public space for individuals to pursue their ends. Roughly speaking, these duties may be grounded in the thought that both access to and enjoyment of certain material resources are preconditions for the very possibility of sustaining, against the backdrop existence of private property, the rightful condition of equal freedom. Freedom, in turn, is understood as an expression of the rational capacity to make and execute plans without being subordinated to the choice of another (as when my ability to visit a friend would depend on securing prior authorization to cross through another’s land or, more fundamentally, on your charitable contribution to allow me to seek health care or education). An important implication of the state’s duty to provide for public space, on this approach, is to provide an elaborate system of publicly accessible resources (such as public roads, parks, market-places, and more) so that the basic freedom to set and pursue ends of one’s own would be made equally available for all (the poor included). Accordingly, the rightful provision of public space—“roads to freedom”—can implicate the state in the business of converting privately owned lands (and perhaps other resources) into collective ownership run by public authorities. Moreover, since the provision of public spaces is necessary but insufficient to allow persons to enjoy their capacity of self-determination (after all, where will they sleep?), there also arises the state obligation to provide the means necessary for setting and pursuing ends—these may range from food and shelter to health care and public education. This obligation to support the poor by securing their ability to pursue some, rather than any, self-determined ends mandates a redistribution scheme which “must be provided through taxes.”  

Thus, progressivists and Kantians, because they begin from opposite substantive views of justice and equality, pursue different methods of responding to inequality. The former allows for a more comprehensive effort in the sense of reforming private law doctrines and principles, rather than merely public law ones, in the service of

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118 PEÑALVER & KATYAL, supra note 16, at 153-54; Alexander, supra note 52, at 806 (noting that “providing all persons, including poor people, with reasonable access to basic modes of recreation and relaxation would materially contribute to the goal of being capable of living lives worth living.”).

119 See RIPSTEIN, supra note 6; Weinrib, supra note 6, at 817-18.

120 Id. at 232.

121 This will be the case especially if most resources are privately owned by some, to the exclusion of others. Weinrib, supra note 6, at 815. The paradigmatic case is land, but it is possible to extend the argument to other resources to the extent they are necessary for sustaining the lives of truly free people (such as art and other cultural assets).

122 Weinrib, supra note 6, at 815-16; RIPSTEIN, supra note 6, at 284-286, 293-295.

123 RIPSTEIN, supra note 6, at 282.

124 I do not deny that progressivists and Kantians hold (very) different views of what counts as inequality, reflecting the distinction between a substantive and a formal ideal of equality of resources or opportunities. This otherwise significant difference, however, is of less importance to my argument, as will become clear in a moment.
alleviating inequalities. The latter restrict their efforts to discussing the state’s responsibility to sustain equal freedom by exercising eminent domain and other public law powers (especially taxation) that would help to establish sufficient public space and funds for everyone actively to enjoy their respective freedoms to set and pursue ends. This difference is certainly profound at both theoretical and practical levels. In spite of this (and various other differences), progressivists and modern Kantians hold in common a similar assumption—that inequality can be tackled by allowing nonowners to extend their practical affairs to involve the resources of others, in the case of property progressivism, or, on the Kantian approach, resources formerly held by others and now by the state (in the form of public space). More specifically, they share the view that responding to inequality is not necessarily about turning nonowners into private owners themselves. I do not mean to suggest that this transformation of status from nonowners to owners cannot be a possible side effect of the progressive and Kantian responses, my claim is that it is not the point of their respective responses. In other words, providing non-owners with private ownership rights may figure in these respective approaches’ repertoire of means of tackling inequalities, occasionally even as the most effective means of all, but it is no necessary—freestanding—part thereof.

My account, by contrast, insists that no adequate response to inequality can be had without providing private ownership rights (in the robust sense explained above) to all. Indeed, the argument from the necessity of the form/function gap I developed in these pages establishes an intimate connection between the private ownership form and an ideal of all persons standing in relations of freedom and equality to one another. However, persons cannot stand in these relations to others when they lack

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126 The other source of relief for the poor—redistribution through tax-and-transfer—need not result in the reallocation of private ownership rights; the poor, on Kant’s account, do not even hold a “right to subsistence,” but rather are the mere “beneficiaries of a duty on the part of the state.” Weinrib, supra note 6, at 818. Furthermore, the state may run public housing and other forms of public provision needed for setting and pursuing ends. The Kantian account neither insists nor holds the normative resources to insist that exercising private ownership rights as such forms a necessary component of what Kant describes as the power of the government “to constrain the wealthy to provide the means of sustenance to those who are unable to provide for even their most necessary natural needs.” IMMANUEL KANT, THE METAPHYSICS OF MORALS 101 [6:326] (Mary Gregor trans., 1996). For skepticism over the social and normative implications of the Kantian mode of redistribution and support for the poor, see DAGAN, supra note 7, at 64-69.

127 I am not sure, though, whether the Kantian account discussed in these pages can even allow this possibility at all, but this question is beyond the scope (or need) of the present argument.

128 With regard to Jeremy Waldron’s familiar distinction between specific- and general-right-based arguments (which he borrows and adapts from H.L.A. Hart), my account of the form/function gap, because it centers on respect and recognition between persons as such, supports the latter mode of justification. See JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 115-17 (1988). And with Waldron, my account supports a “radical” redistributive program, governed by “a requirement that private property, under some conception, is something all men must have.” Id. at 444. However, my account departs substantially from, and to this extent takes a more “radical” turn than, Waldron’s. On my account, to play on Waldron, “all men must have” the right to private ownership in the robust sense explained throughout these pages, rather than Waldron’s preference for “some conception” of private property. This is, once again, the general-right-based argument from the necessity of the form/function gap that I have developed in these pages. Another point of departure between the two accounts is that Waldron’s account arrives at redistributive conclusions on the basis of considerations of justice, whereas on my account, the reasons for providing private ownership to all are grounded in considerations of legitimation, not necessarily of justice. I shall leave the precise elaboration of this point—viz., concerning the connection between universal provision of private ownership and political legitimation—to another occasion.
some (non-trivial) measure of external objects to command the respectful recognition of their own points of view by others. This worry arises when some participants in the practice of private property constantly find themselves on the bestowing side of respectful recognition, but not on the receiving side. It would not be merely empty formalism, but simply a mistake, to recommend the form/function gap in a society where a few own everything and the rest nothing. Accordingly, the moral center of private ownership featuring the form/function gap exerts normative pressure on private ownership being exercised by all. Otherwise, the ability of participants of the practice of private property to stand in relations of freedom and equality to each other is strained. For this reason, state (or private law-based) provision of public access, however broadly defined and implemented, may complement but not substitute private ownership to all. Indeed, the account of the form/function gap I have developed suggests that social solidarity and non-subordination among persons call for what John Rawls has termed a “property-owning democracy,” rather than merely a welfare state.  

This way of identifying in very general terms the implications of my account for society’s pursuit of social solidarity leaves open important questions that lie beyond the scope of the present argument—for example, how many rights and what kind of objects would meet the bar to ensure the meaningful participation of each person in the legal practice of private property (as an owner, rather than merely as a non-owner); or how to account for persons’ responsibility for the effects of choice and chance on their demand to be included in (or excluded from) participation in this practice.  

129 RAWLS, supra note 98, at 274. For an elaborate discussion of the distinction between the Rawlsian notion of a property-owning democracy and the idea of a welfare state, see WILL KYMULICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 89-91 (2nd ed., 2002).  

130 As I shall argue in future work, the key to figuring out these questions should not be grounded in the kind of external object involved (which is the sole focus of Radin’s personhood approach mentioned above). Rather, it must concern the appropriate conception of respect that informs the interaction between persons with regard to an object (whatever it is). As I explained above, respect for persons as such (including, in particular, for strangers) requires deference to the points of view, rather than merely the interests or well-beings, of these persons, taken separately. But when interactions depend upon a backdrop of shared clan or caste affiliation, respect is often cast in terms of concern for the interest of another (as in the cases of spouses, fiduciary relations, or sectarian communities). See supra text accompanying notes 94-98. The existence of different conceptions of respect for others means that the implementation of the ideal of universal provision of private ownership should begin with rights with respect to objects (whatever they are) around which people typically interact qua strangers. Determining which objects meet this criterion depends on sociological and other empirical assessments of the relevant facts of the matter. My current account lacks the resources to complete this sort of study; instead, its ambition is to provide the conceptual framework to give these assessments a point to begin.  

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