THE STATUS OF TRESPASSERS ON LAND

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INTRODUCTION

Shortly after *Rowland v. Christian* held that possessors of land owe all entrants, including trespassers, a unitary standard of reasonable care,[1] I published a sharp critique of the decision.[2] I did not argue that all trespassers are undeserving or that the general standard of reasonable care is unworkable. After all, even the pre-*Rowland* regime identified circumstances in which possessors owed trespassers duties of care,[3] and the reasonableness standard works in many other negligence contexts.[4] Instead, I complained of the fact that the California Supreme Court did not make a sufficiently clean break with the traditional idea that possessors owe

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1. Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968). The California Supreme Court referred to the formal categories of entrants to land as "contrary to our modern social mores and humanitarian values. [These categories] obscure rather than illuminate the proper considerations which should govern determination of the question of duty." *Id.*

2. *See* James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 512–14 (1976).

3. *See* RESTATEMENT (SECOND) OF TORTS §§ 333–39 (1965) (recognizing three types of trespassers—constant trespassers, known trespassers, and trespassing children—that are exceptions to section 333's general rule that possessors of land owe no duty of reasonable care to trespassers).

4. For example, the reasonableness standard works well in those cases involving

> the individual conduct of "the man in the street" in his arm's length relations with others in the society . . . . Given the nontechnical nature of . . . these cases, the moralistic, flesh-and-blood qualities of the reasonable man have provided an adequate vehicle with which to bring a semblance of order to the task of addressing the polycentric question of what modes of conduct individual members of society have a right to expect from one another.

Henderson, *supra* note 2, at 478; *see also id.* at 478–82 (discussing how courts have managed the negligence concept by relying on the reasonable-man test and the lay jury); *cf.* James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1534 (1973) ("But courts are not suited to the task of establishing specific product safety standards in the course of applying general reasonableness tests to determine the adequacy of allegedly defective products brought before them.").

trespassers little or nothing by way of investments in care.[5] I argued that as long as courts were going to continue to attach normative weight to a plaintiff's status as trespasser, they would need a rule structure to support adjudication of the defendant-possessor's duty of care.[6] Thus, if the *Rowland* court had simply held that possessors owe all trespassers a duty of reasonable care, I would not have objected on legal-process grounds.[7] But the court went on to say that triers of fact could continue to weigh the status of trespasser-plaintiffs in determining whether they were entitled to recover.[8] Thus, by attempting to have it both ways—by purporting to abandon the formal categories of entrants but continuing to allow their status to be taken into account informally—*Rowland* gave trial courts a roving commission to deal with trespasser-plaintiffs in a discretionary, essentially lawless fashion.

At the end of my article criticizing *Rowland*, which clearly ran against a strong tide of scholarly praise for the decision,[9] I predicted that *Rowland* and a number of other then-recent decisions greatly increasing the power of judges and juries to use their discretion to

5. *See* Henderson, *supra* note 2, at 512–13.

6. *See id.* at 511–13 ("As long as society continued to view the relationship between land possessor and entrant as deserving of special consideration, the formal rules governing possessors' liability were a necessary prerequisite to the adjudicability of negligence cases involving the plaintiff's entry on land. . . . Purporting as it does to retain the substance of the prior law, while abandoning its form, the [*Rowland*] decision epitomizes what I have characterized as the retreat from the rule of law." (footnote call numbers omitted)).

7. *See id.* at 512 ("Certainly there would be little basis for objection on process grounds if the California court in *Rowland* had concluded that the 'modern social mores and humanitarian values' to which it refers have progressed to the point that the relationships between possessors and entrants are no longer special—*i.e.*, are no different from the relationships which generally obtain between strangers in our society acting at arm's length.").

8. *See* Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968) ("The proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and . . . the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability . . . .").

9. *See, e.g.*, Edmund Ursin, *Strict Liability for Defective Business Premises—One Step Beyond* Rowland *and* Greenman, 22 UCLA L. REV. 820, 822–23 (1975); Thomas A. Daily, Recent Case, *Invitee, Licensee, Trespasser Distinction Abolished in California*, 23 ARK. L. REV. 153, 156 (1969); Carl E. Edwards, Jr. & Richard J. Jerome, Comment, *Premises Liability: The Foreseeable Emergence of the Community Standard*—Mile High Fence Co. v. Radovich, *175 Colo. 537, 489 P.2d 308 (1971)*, 51 DENV. L.J. 145, 155–57 (1974); Peter J. Horner, Jr., Comment, *A Re-examination of the Land Possessor's Duty to Trespassers, Licensees, and Invitees*, 14 S.D. L. REV. 332, 346–48 (1969); Comment, *Occupier of Land Held to Owe Duty of Ordinary Care to All Entrants—"Invitee," "Licensee," and "Trespasser" Distinctions Abolished:* Rowland v. Christian *(Cal. 1968)*, 44 N.Y.U. L. REV. 426, 426–29 (1969).

"do the right thing" would not stand the test of time.[10] As the Reporters' Note to section 51 of the proposed *Restatement (Third) of Torts* indicates, my prediction has essentially proved accurate.[11] Of states that have considered the issue of trespasser entrants, only a minority have adopted a unitary standard of reasonable care.[12] Rather than accept the roving commission that *Rowland* tried to thrust upon them, a majority of courts have retained the traditional rule structures governing the duties owed to trespassers.[13]

My purpose in this Article is not simply to say "I told you so." Instead, I aim to criticize the new *Restatement (Third)*'s reliance in section 52 on the concept of "flagrant trespasser"[14] on essentially the same ground that I criticized *Rowland* more than three decades ago. As I will explain, the modifier "flagrant" in this context conveys a sense that those trespassers are undeserving of being treated reasonably. On this view, the drafters are saying essentially the same thing that *Rowland* said—the fact that a plaintiff-entrant is an unprivileged trespasser may tip the balance normatively in favor of the defendant-possessor, depending on whether the judge or jury in its discretion think it is appropriate. I realize that section 52 and its comments may be read as conceding that a more formal rule structure regarding trespassers will be needed eventually and that the phrase "flagrant trespasser" acts as a place saver until the various state courts work out their own formal solutions.[15] But

10. *See* Henderson, *supra* note 2, at 525 ("Once the negligence-under-all-the-circumstances lottery is seen for what it is, the expense and inefficiency associated with it will make a wide range of alternatives socially attractive.").

11. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 reporters' note cmt. a, tbl. (Council Draft No. 8, 2008).

12. In addition to California, only Alaska, Hawaii, Louisiana, Montana, Nevada, New Hampshire, and New York maintain a truly unitary standard, and the Louisiana courts have left open the question of what standard to apply to criminal trespassers. *Id.* Although the Colorado courts attempted to adopt a unitary standard, the Colorado legislature restored a status-based system in 1990. *Id.*

13. Forty-two jurisdictions currently apply the traditional trespasser-rule structures with minor variations. *See id.* Counted among them are the District of Columbia and the sixteen states that have one standard for all nontrespassers to land and another standard for trespassers. *Id.* Although the section 52 comments classify these jurisdictions as applying a unitary standard that excludes trespassers, a standard that treats different entrants to land with different standards of care can hardly be said to be "unitary." *See id.* Finally, New Jersey applies a "hybrid" system that does not clearly fall within either a traditional system or a unitary system. *Id*.

14. *See id.* § 52.

15. *See id.* § 52 cmt. a ("This Chapter . . . does not attempt to define flagrant trespassers or prescribe the precise line on the continuum that distinguishes ordinary trespassers from flagrant trespassers. . . . [because] some jurisdictions may prefer bright-line rules that are more certain of application and therefore more easily administered than case-by-case determinations based on all of the circumstances.").

section 52 may also be read as a proposed end solution.[16] On either reading, the concept of flagrant trespassers is inadequate, either as a solution to be applied by triers of fact on a case-by-case basis or as a guide for future lawmaking.

WHY THE FLAGRANT-TRESPASSER CONCEPT IS INADEQUATE

As the comments to section 52 recognize, the phrase at issue suggests a spectrum from mild and "ordinary" trespassers to egregious and "flagrant" trespassers.[17] Individual trespassers in particular cases are to be located on the spectrum according to the degree to which their entry invades the possessor's right to exclusive possession.[18] And yet the concept of trespass admits of no such differentiation by degree. Putting questions of privileges aside (which, by the way, are traditionally resolved by rule structures[19]), the very idea of an entrant knowingly coming onto the land of another necessarily implies a willful invasion of, and implicit disrespect for, the possessor's right to exclusive possession.[20] Like being pregnant, that core aspect of being a trespasser is not a matter of degree. Stated a bit differently, there is no such thing as an unprivileged trespass that does not implicitly reflect disrespect for the possessor's right to possession. Thus, whenever an unprivileged trespasser knowingly crosses a boundary, he has invaded the possessor's *right to possession* regardless of the fact that he intends to do no harm while he is there.

To be sure, the different question of whether an unpermitted entrant is otherwise privileged to enter does provide a basis for distinguishing among trespasser-entrants. When necessity forces an actor to trespass to save his life, for example, crossing the boundary does not necessarily reflect disrespect for the possessor's right to possess.[21] And aside from the question of privilege, the

16. *See id.* ("Others may prefer to adopt more general standards that allow the fact finder to take into account all of the facts and circumstances of the case to make a more just determination.").

17. *See id.*

18. *See id.* ("[T]his Section . . . . leaves to each jurisdiction employing the concept to determine the point along the spectrum of trespassory conduct at which a trespasser is a 'flagrant' rather than an 'ordinary' trespasser. . . . The idea behind distinguishing particularly egregious trespassers for different treatment is that their presence on another's land is so antithetical to the rights of the land possessor to exclusive use and possession . . . .").

19. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 196–97 (1965) (dealing with public and private necessity to enter land).

20. *But see* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 cmt. a (Council Draft No. 8, 2008).

21. For example, a person who trespasses onto land merely to admire a beautiful view invades the land possessor's exclusive right to possess the land. This trespasser reflects some very minimal level of moral turpitude insofar as he intends to trespass, but not much. That said, his action is not socially desirable and reflects obvious disrespect for the land possessor's exclusive right

question of what a trespasser does (or plans to do) while on the land may suggest different answers to the question of whether it is fair to impose on the possessor a duty of reasonable care.[22] One who trespasses onto occupied property in order to harm the possessor or his property, in my opinion, deserves, from a moral perspective, less protection than one entering obviously vacant land for a brief time merely to admire the scenery.[23] But the *trespass*, *as such*, as it relates to the possessor's *right to exclusive possession*, *as such*, is the same in either instance and does not depend on the entrant's attitude toward the entry. Thus, the entrant who trespasses to admire the scenery may have utter contempt for the notion that the possessor has the power to bar the entry, and the entrant intent on harming the possessor may regret very much the necessity of entering the property in order to inflict personal injury. But neither entrant has sufficient respect for the other's right to possession to deter him from crossing the boundary.

Thus, to assert that the *trespass itself* is more flagrant in the case of the "bad-guy" trespasser is simply not accurate. What the drafters must be read as intending is that the "bad-guy" trespasser is less morally deserving of protection for reasons other than the boundary crossing as such.[24] However, to make that admission reveals the essentially discretionary (and I would argue, lawless) nature of the delegation of judicial authority. Under such a regime, judges and juries would be free to decide on whim whether they feel that a particular trespasser is, all things considered, deserving of due care.

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of possession as it is wholly gratuitous—there are market alternatives, and the trespasser could have simply obtained the land possessor's permission to enter the land. In contrast, one who enters land to save his or her life in the face of a large storm by, for example, huddling behind a stone wall, does not reflect this same level of disrespect. This entry to land is not gratuitous and has no market alternatives but is driven by necessity. In fact, if given the opportunity, the entrant to land would undoubtedly pay for the right to enter the land and stay alive.

22. Comment *a* to section 52 suggests that intent of the trespasser may be one way to distinguish between flagrant and ordinary trespassers. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 cmt. a (Council Draft No. 8, 2008) ("A somewhat broader rule might extend the definition of flagrant trespasser to those who enter the land with a malicious motive or who commit an intentional wrong to the land possessor or the possessor's family or property while on the land, in addition to those who commit crimes."). But measuring a trespasser's intent presents a whole host of its own problems. For example, how would section 52 treat the trespasser who enters land with the intent to commit a crime but then has a change of heart, turns around to leave, and just before exiting the land injures himself? Further, how can courts prove malicious motive or lack thereof?

23. *See id.* § 52 cmt. a, illus. 1–2 (noting that the trespasser who trespasses onto property to harm the possessor is a flagrant trespasser and the trespasser who enters vacant land to admire its scenery is an ordinary trespasser).

24. *See id.* § 52 cmt. a.

It will be observed that the notion of flagrant trespasser, as the drafters use it, is essentially a noninstrumental, fairness-based norm. Comment *a* to section 52 says it would be "unfair" to allow "bad-guy" trespassers to insist on reasonable care;[25] comment *h* says it would be "unjust."[26] I do not quarrel with these assertions. Instead, what I find puzzling is that section 52(b) recognizes an exception to these fairness norms for helpless, flagrant trespassers on a ground that seems entirely efficiency based.[27] Thus, even though the "bad-guy" trespasser does not morally deserve protection because of what may be his deplorable motives for coming onto the property in the first place, under section 52(b) he suddenly becomes deserving of protection when, to the possessor's knowledge, he becomes helplessly imperiled.[28] I have trouble following this logic. Under the traditional approach, the basic norm that possessors do not owe trespassers a duty of reasonable care seems to be based, at least in part, on the inefficiency of requiring a possessor to protect difficult-to-foresee entrants who could protect themselves at a much lower cost simply by not trespassing.[29] In that context, one can easily recognize the special circumstances where exceptions to the general rule are justifiable as least-cost solutions. The *Restatement (Second) of Torts* identifies those circumstances.[30] But under the flagrant-trespasser regime, where the no-duty rule is clearly rooted noninstrumentally in principles of fairness and justice,[31] an efficiency-based override is puzzling. At the very least, a comment to section 52(b) ought to recognize these implications and deal with them straightforwardly. Thus, not only is section 52's concept of flagrancy inappropriate as a means of distinguishing among morally deserving and undeserving trespassers, but section 52(b) introduces further confusion by invoking a helpless-trespasser override that seems clearly to be based on instrumental, efficiency grounds.[32]

25. *Id.* ("The policy justifying the lesser duty owed to flagrant trespassers is protection of the rights of private-property owners, which would be *unfairly* diminished if possessors are subject to liability to flagrant trespassers based on ordinary negligence." (emphasis added)).

26. *Id.* § 52 cmt. h ("[The limited duty to flagrant trespassers] is based on the principle that it would be *unjust* to require a negligent land possessor to compensate a person whose presence on the land was flagrantly offensive to the rights of the possessor." (emphasis added)).

27. *See id.* § 52(b).

28. *Id.*

29. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 176 (7th ed. 2007) (explaining that a possessor of land has no duty to trespassers because trespassers can prevent their injuries at a lower cost by simply not trespassing).

30. *See supra* note 3.

31. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 cmt. a (Council Draft No. 8, 2008).

32. *See id.* § 52(b) ("Notwithstanding Subsection (a), a land possessor has a duty to exercise reasonable care for flagrant trespassers who reasonably appear to be: 1) imperiled; and 2) helpless or unable to protect themselves."). The imperiled trespasser is no less flagrant simply because he or she is imperiled

According to section 52(b), even morally undeserving trespassers somehow become morally deserving when, through no fault of the possessor, they *really* need help.

What would I recommend in place of the flagrant-trespasser concept? Assuming that the ALI does not want to return to the traditional, pre-*Rowland* approach of formally recognizing specific categories of deserving trespassers,[33] and also assuming that an across-the-board unitary reasonableness standard is unacceptable,[34] I would suggest two modifications. First, I would replace the modifier "flagrant" with a word such as "undeserving" or "reprehensible." These adjectives more candidly signal that it is not the entry without permission, as such, that is different from one case to the next, but rather the moral standing of any given trespasser to insist that the possessor invest in precautions on his behalf. An earlier draft of these provisions used "culpable" in place of "flagrant."[35] I would have preferred that term over "flagrant," but my suggested terms carry, more straightforwardly than even "culpable," the idea that some trespassers do deserve protection from the possessor.[36] In any event, terms such as "culpable" or "reprehensible" evoke notions of moral fault—employing either of these modifiers in place of "flagrant," which functions more as a factual description of the trespasser's conduct rather than a normative one, would make it clear that some further rule structure is necessary if trial courts are to sort out these cases fairly and

and helpless. And likewise, assuming the land possessor did not wantonly or intentionally cause the trespasser's imperiled state in the first place, the trespasser is no more wanton or intentional simply because he or she becomes imperiled and helpless. Thus, the duty imposed by section 52(b) seems to be only loosely based on fairness.

33. *See id.* ch. 9 reporters' memorandum ("[W]e have opted for what we think is the better approach, a unitary standard . . . ."); *cf. supra* note 3 and accompanying text.

34. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM ch. 9 reporters' memorandum (Council Draft No. 8, 2008) ("We have attempted to accommodate [the] conflict [between tort and property principles] in § 52, which carves out a class of trespassers—those whose trespass [are] in flagrant disregard of the land possessor's right of exclusive control—and provided a lesser duty owed to those trespassers.").

35. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51(a) (Preliminary Draft No. 6, 2007) ("A culpable trespasser is a trespasser on land possessed by another whose entrance on the land is sufficiently egregious to be antithetical to the rights of the land possessor to exclusive possession and control of the land such that the land possessor should not be subject to liability for failing to exercise the ordinary duty of care owed others present on the land.").

36. *See id.* ch. 9 reporters' memorandum ("A critical distinction . . . is between 'benign trespassers' and 'culpable trespassers.' The idea is that there are some trespassers whose presence on the land is so offensive to the rights of the land possessor that the land possessor should not be required to compensate the trespasser . . . . *Some trespassers are not of this ilk, and this Chapter adopts a duty of reasonable care as to them*." (emphasis added) (citation omitted)).

consistently, within the rule of law, as I articulated in my law review piece thirty years ago.[37]

My second suggestion would be to supply the necessary rule structure, either by providing clearer guidelines for state lawmakers to follow in building such a structure, or by setting out the preferred structure, leaving courts free to adjust it over time. The proposed comments and illustrations to section 52 reveal the contours of some of the more important elements of such an "undeserving trespasser" structure.[38] I do not believe that the drafting problems would be enormous or insurmountable.

CONCLUSION

The current draft of section 52 of the *Restatement (Third)* asserts that unprivileged trespassers may be located on a spectrum from "ordinary" to "flagrant" on the basis of the extent or degree of their invasion of the possessor's right to exclusive possession. I do not think this works. All trespassers invade the right to possession to the same extent by entering without permission; the difference between them and privileged entrants is a difference in kind, not degree. What the drafters really want is to give trial courts discretion to treat unprivileged trespassers differently based on differences regarding *why* those trespassers came onto the land—morally relevant differences that entitle some trespassers, but not others, to insist that possessors invest resources to protect them from harm. Thus, I would replace the term "flagrant" with "undeserving" or "reprehensible." Moreover, as I explained thirty years ago, some sort of rule structure will be necessary to support trial courts' efforts to distinguish among unprivileged trespassers. Granting that the *Restatement (Third)* provides the beginnings of such a structure, I would have preferred that it supply lawmakers with clearer guildelines, or at least employ terminology that leaves no doubt as to the real basis upon which such distinctions should be made.

37. *See* Henderson, *supra* note 2, at 468–69.

38. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 cmt. a & illus. 1–2 (Council Draft No. 8, 2008) ("A specific rule might . . . provid[e] that a flagrant trespasser is one who commits a crime of a certain severity while entering or upon the land. A somewhat broader rule might extend the definition of flagrant trespasser to those who enter the land with a malicious motive or who commit an intentional wrong to the land possessor . . . while on the land, in addition to those who commit crimes.").