COMMENT

BREAKING THE LAW AND GETTING PAID FOR IT: HOW THE THIRD RESTATEMENT OF TORTS SYNTHESIZES TWO DISTINCT STANDARDS OF CARE OWED TO TRESPASSERS

INTRODUCTION

In 1968 the California Supreme Court took an unprecedented step in premises liability law when it decided *Rowland v. Christian*.[1] In *Rowland*, the California Supreme Court abolished the traditional common-law categories that had divided entrants onto another's land into three groups: invitees, licensees, and trespassers. Up to this point, these categories had determined a landowner's liability for harm done to people on her land.[2] The court replaced these status-based categories with a unitary standard of reasonable care under the circumstances.[3] Under this standard, a landowner is liable to any person injured on her premises as long as the plaintiff can prove that the landowner breached the reasonable care standard and caused the plaintiff's injuries.[4] The court's decision in *Rowland* had consequences not just in premises liability suits, but in terms of the philosophical debate about the role of the courts and the legislature, the role of judge and jury, and whether the law's long-standing deference to a landowner's rights would give way to the rights of an injured plaintiff.[5]

1. 443 P.2d 561 (Cal. 1968).
2. *Id.* at 567–68.
3. *Id.* at 568.
4. *Id.*
5. The Illinois Court of Appeals described this tension in justifying a "frequent trespass" exception to the rule in Illinois that landowners only owe trespassers a duty to avoid willful or wanton misconduct:

> [This exception has] developed because of the concern that human safety ought to be more important than the landowner's interest in unrestricted freedom to use his own land as he sees fit. This view is especially prevalent in cases in which the burden on the landowner and the expense in taking precautions to prevent harm are not great. If that burden is very slight, and if the risk of harm to the trespasser is correspondingly very great, some commentators have found good reason to hold the landowner liable for injuries sustained on his land by the trespasser. . . . This duty is imposed because the burden of looking out for trespassers is not great.

This Comment will examine case law and statutory provisions governing premises liability, both from jurisdictions that have adopted a unitary standard of care that *includes* trespassers, and from jurisdictions that have adopted a unitary standard of reasonable care but have *excluded* trespassers from its scope. The exploration of these cases will focus particularly on the exceptions to the general rule that courts in each state have fashioned. Faced with applying a duty of reasonable care to all trespassers, some courts and legislatures have limited the duty owed to trespassers who had come on to the land with a criminal intent or for a recreational purpose. Likewise, in jurisdictions that only impose a duty on landowners to avoid willful or wanton misconduct toward trespassers, courts have imposed a higher standard of reasonable care in certain situations, such as when the trespasser is a child, when the trespasser is on the land because of "private necessity" (as when the trespasser is fleeing for his life from a gunman), or when the trespasser frequently goes onto the landowner's premises.[6] Thus, courts both expand a landowner's duty to trespassers and restrict it, depending on the underlying premises liability standard.

Using the case law from these jurisdictions, I will argue that the sections in the Third Restatement of Torts detailing duties owed to trespassers combine these two seemingly diametrically opposed approaches to the scope of landowner liability. Though the Third Restatement seems to articulate an approach to trespasser recovery more similar to a unitary standard where trespassers, along with invitees and licensees, are owed a duty of reasonable care, its approach also resembles the case law in states that exclude trespassers from their unitary standard of reasonable care.[7] Thus, in effect, I argue that the Third Restatement, while not adopting any of the current state approaches to determining what duty a land possessor owes trespassers on her land, finds a balance between both of the current unitary-standard approaches. Because of this synthesis, should courts apply the Third Restatement's duty of reasonable care (tempered by exceptions for flagrant trespassers and natural conditions on the land), their decisions will resemble the most well-reasoned cases out of jurisdictions that have already

Nelson v. Ne. Ill. Reg'l Commuter R.R. Corp., 845 N.E.2d 884, 888 (Ill. App. Ct. 2006) (internal quotation marks omitted) (quoting Miller v. Gen. Motors Corp., 565 N.E.2d 687, 690–91 (Ill. App. Ct. 1990)).

6. *See, e.g.*, Lee v. Chi. Transit Auth., 605 N.E.2d 493, 498–99 (Ill. 1992) (invoking the "frequent trespass" doctrine); Benamon v. Soo Line R.R. Co., 689 N.E.2d 366, 370 (Ill. App. Ct. 1997) (recognizing the existence of the "private necessity" exception, though refusing to apply it on the facts of that case); Rodriguez v. Norfolk & W. Ry. Co., 593 N.E.2d 597, 607 (Ill. App. Ct. 1992) (listing traditional common-law exceptions to the willful and wanton standard applied to trespassers).

7. RESTATEMENT (THIRD) OF TORTS §§ 51–52 (Council Draft No. 8, 2008) [hereinafter THIRD RESTATEMENT].

adopted a unitary standard of reasonable care, whether including or excluding trespassers.[8]

I. A BRIEF HISTORY OF PREMISES LIABILITY LAW

For many years before *Rowland*, courts used a categorical, "tripartite" system to decide landowner liability cases.[9] Under this system, entrants onto another person's land are classified as either invitees, licensees, or trespassers. Invitees are those that have been invited onto the land, either explicitly or implicitly, by the landowner. Landowners owe invitees a duty of reasonable care, which includes warning them of conditions on the land that may cause harm.[10] Licensees, on the other hand, are entrants who are "privileged to enter or remain on land only by virtue of the possessor's consent."[11] Landowners must inform licensees of any dangers of which they are aware and which they would "expect [the licensee] not [to] discover or realize." However, if given this warning, a landowner has fulfilled his basic duty of reasonable care.[12] From that point on, the licensee "has all that he is entitled to expect, that is, an opportunity for an intelligent choice as to whether or not the advantage to be gained by coming on the land is sufficient

8. The Third Restatement has taken a markedly different approach to expressing the state of current premises liability law than either the First or Second Restatement did. While the Third Restatement has striven for simplicity, as far as possible, the Second Restatement, in particular, attempted to catalog the myriad intricacies of rules, exceptions, and exceptions to the exceptions. Graham Hughes voiced this critique, though directed at the First Restatement, in his 1959 article: "The tangled state of the law with regard to trespassers in United States jurisdictions is revealed in the gallant but inevitably unsuccessful attempt of the *Restatement of Torts* to achieve a synthesis." Graham Hughes, *Duties to Trespassers: A Comparative Survey and Revaluation*, 68 YALE L.J. 633, 648 (1959). Hughes goes on to suggest that "[p]erhaps no better job could have been done in digesting the existing law. But one can hardly forbear to inquire whether such an attempt was worthwhile, unless of course it is understood as a deliberate exposure of chaos for the purpose of encouraging reform." *Id.* at 649. While Hughes's invectives were aimed at the First Restatement, his comments turned out to be not just descriptive but prophetic as well, as the Second Restatement reflected the growing intricacies and confusion endemic to premises liability law. Whether the Second Restatement's treatment of premises liability led to the *Rowland* revolution or simply the sheer confusion of the tripartite standard itself, Hughes's analysis has continued to ring true over the years.

9. Many still do. *See* THIRD RESTATEMENT, *supra* note 7, § 51 cmt. a. For an analysis of the history of the tripartite system as well as the shift away from that system to a unitary standard of care, see generally Michael Sears, Comment, *Abrogation of the Traditional Common Law of Premises Liability*, 44 U. KAN. L. REV. 175 (1995).

10. Robert S. Driscoll, Note, *The Law of Premises Liability in America: Its Past, Present, and Some Considerations for Its Future*, 82 NOTRE DAME L. REV. 881, 883 (2006).

11. RESTATEMENT (SECOND) OF TORTS § 330 (1965).

12. Driscoll, *supra* note 10, at 883–84.

to justify him in incurring the risks involved."[13]

In contrast to the standard of care owed licensees and invitees, under the traditional categories, trespassers are owed a much lower duty. Trespassers are defined as those who "enter or remain on land in the possession of another without the possessor's consent or other legal justification."[14] In general, landowners only have a duty to avoid harming trespassers through the landowner's willful or wanton misconduct.[15] To be characterized as "willful or wanton," the severity of a landowner's conduct must "fall on the scale of wrongdoing somewhere between the intentional infliction of harm and gross negligence."[16]

Although categories can simplify a court's decision about the appropriate standard of care a landowner owes trespassers on her land, their use has far-reaching and disparate consequences for other aspects of the judicial process. Dividing plaintiffs on the land into categories allows courts to decide more cases as a matter of duty, dismissing them at the summary judgment stage, before a jury gets a chance to rule on the merits of a claim brought by an injured, and often sympathetic, plaintiff.[17] As a result, strict categories that prohibit courts from considering the individual facts of a case when making an initial duty determination often lead to unjust outcomes, given the circumstances surrounding the plaintiff's entry onto the

13. RESTATEMENT (SECOND) OF TORTS § 341 cmt. a (1965). For a discussion of the difference between licensees and invitees at the time the Second Restatement was drafted, see Fleming James, Jr., *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605 (1954).

14. THIRD RESTATEMENT, *supra* note 7, § 50(a), (d) (defining trespassers and nontrespassers).

15. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 58, at 397 (5th ed. 1984).

16. GLEN WEISSENBERGER ET AL., THE LAW OF PREMISES LIABILITY § 2.3 (3d ed. 2001).

17. *See* Dilan A. Esper & Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265, 282 (2006) ("Duty doctrine, properly deployed, assigns to judges the decidedly legal task of articulating the law—of stating *general* norms for the guidance of conduct."); *id.* ("Breach doctrine, properly deployed, assigns to juries the task of evaluating conduct when the reasonableness of that conduct is subject to legitimate disagreement, and when the resolution of that disagreement will not lead to the making of general law."). Consider the following benefits of allowing juries to decide more premises liability cases:

> The benefit of allowing more cases to reach the jury is thought to be three-fold. First, meritorious cases that would have been denied due to the "mechanistic jurisprudence" of the common law are allowed under the new rule. . . . Second, [a unitary standard] allows the jury to employ "changing community standards" in assessing a landowner's duty. . . . Finally, a change to a standard of reasonableness under the circumstances . . . [allows] the jury [to] address the increasingly more complicated fact patterns that modern society creates, without having to resort to confusing, complicated, and inequitable exceptions to the common law classifications.

Sears, *supra* note 9, at 185.

land or the culpability of the defendant landowner in creating or maintaining the dangerous conditions. With their clear preference for defendants, the traditional categories allowed courts to protect a landowner's "rights" and, ultimately, encourage land ownership.[18] The tripartite system was

> created to disgorge the jury of some of its power by either allowing the judge to take the case from the jury based on legal rulings or by forcing the jury to apply the mechanical rules of the [system] instead of considering the pertinent issue of whether the landowner acted reasonably in maintaining his land.[19]

However, "no duty" rulings erode the traditional negligence standard that pervades tort law—substituting one judge's concept of reasonable care for a jury's.[20] Going even further, opponents of a categorical system argue that dismissing suits based on a finding of "no duty" implicitly values inanimate property over human life.[21]

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18. Driscoll, *supra* note 10, at 891–96. Driscoll observes that America's Founders viewed property as "a mixture of natural right, to which each individual was entitled regardless of government, and positive law, which secured to each person the right to acquire, possess, and use property of different kinds." *Id.* at 893. Driscoll also notes the origins of this belief in the English legal system, embodied by William Blackstone, who believed that "[an] absolute right, inherent in every Englishman, is that of property." *Id.*; *see also* Nelson v. Freeland, 349 N.C. 615, 623, 507 S.E.2d 882, 887 (1998) (discussing the history of the "common-law trichotomy," noting that it "emanated from an English culture deeply rooted to the land; tied with feudal heritage; and wrought with lords whose land ownership represented power, wealth, and dominance") (quoting John Ketchum, *Missouri Declines an Invitation to Join the Twentieth Century: Preservation of the Licensee-Invitee Distinction in* Carter v. Kinney, 64 UMKC L. REV. 393, 395 (1995)).

19. *Nelson*, 349 N.C. at 623, 507 S.E.2d at 887.

20. According to Esper and Keating,

> [b]ecause negligence law's norm of reasonableness calls on our shared moral sensibility, it is more fair for a plurality of reasonable persons to settle reasonable disagreements over the adequacy of a defendant's care after full development of relevant facts and arguments than it is for judges to settle such disagreement before the facts are developed and the arguments aired.

Esper & Keating, *supra* note 17, at 282.

21. Esper and Keating argue that

> [f]ree use of property . . . [is] being given priority over the physical integrity of persons. . . . No rational person values her money more than her life. The implicit moral logic . . . of [the] "no duty doctrine"—"my life is more important than my money, but my money is more important than your life"—is utterly untenable. If democratic political morality insists on anything, it insists on the equal value of each of our lives. And rightly so.

Id. at 271–72. For further discussion of the values implicated by common-law classifications, see Smith v. Arbaugh's Rest., Inc., 469 F.2d 97, 101 (D.C. Cir. 1972), which states the following:

> The prestige and dominance of the landowning class in the nineteenth

Furthermore, critics argue that using the traditional tripartite categories inherently entrenches a system favoring those with economic means, as rulings for landowners were traditionally rulings for a party with wealth and status.[22]

Although courts historically favored these common-law categories, within the latter part of the twentieth century a movement began to replace these categories with a more workable standard, not just in America, but also in England, where much of American premises liability law has its roots.[23] The common-law categories held sway both in America and in England until 1957[24] when Great Britain's parliament enacted a statute that abolished the distinction between licensees and invitees, but left the duties owed to trespassers untouched.[25]

Just two years later, the United States Supreme Court followed suit in *Kermarec v. Compagnie Generale Transatlantique*, refusing to apply the licensee-invitee distinction in the admiralty law context.[26] In rejecting the traditional categorical standard, the Court articulated concerns that continue to animate courts' premises liability decisions today. Describing the current state of the law, the Court said:

> In an effort to do justice in an industrialized urban society . . . modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which

century contributed to the common law's emphasis on the economic and social importance of free use and exploitation of land over and above the personal safety of those who qualified as trespassers or licensees. Today, the preeminence of land over life is no longer accepted. *Human safety may be more important than a landowner's freedom.* "A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose."

Id. (emphasis added) (quoting Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968)).

22. Driscoll, *supra* note 10, at 895–96 (noting that "[d]evices such as primogeniture put unreasonable restrictions upon the right [to] use and transfer [land] and thus reflected 'feudal and unnatural distinctions' that [America's Founders thought] should be expunged from the positive law").

23. *Id.* at 885–91. For a historical summary of premises liability law in England, see Hughes, *supra* note 8, at 649–63.

24. Originating in England, categories of entrants onto land first appeared in American jurisprudence in 1865. *See* Driscoll, *supra* note 10, at 891.

25. Occupier's Liability Act, R.S.B.C. ch. 31, §§ 5–6 (1957) (Can.), *cited and discussed in* Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 130, 135 (R.I. 1975).

26. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630–31 (1959).

> the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards "imposing on owners and occupiers a single duty of reasonable care in all the circumstances."[27]

Despite the Court's prescient analysis, the movement toward a unitary standard stalled after *Kermarec* until 1968, when the California Supreme Court handed down the *Rowland* decision.[28] In *Rowland*, California became the first state to abolish all duty distinctions based on an entrant's status.[29] The court's rationale echoed many of the criticisms of categorical duty determinations articulated in *Kermarec*. Instead of using distinctions between entrants on land that "are not justified in the light of our modern society" and that are difficult and complex to apply, the court in *Rowland* reasoned that other factors should determine a land possessor's duty.[30] These factors include "the closeness of the connection between the injury and the defendant's conduct, the moral blame attached to the defendant's conduct, the policy of preventing future harm, and the prevalence and availability of insurance."[31] Relying on section 1714 of the California Civil Code, which states that "[e]veryone is responsible . . . for an injury occasioned to another by his . . . want of ordinary care or skill in the management of his . . . property,"[32] the court declined to continue to "carve further exceptions out of the traditional rules" and instead applied a "reasonable man" standard.[33]

While the court in *Rowland* set out to equalize plaintiffs' access to a fair trial by abolishing *all* of the common-law categories, in the years after *Rowland* other states took a more moderate approach. These states abolished the distinction between invitees and licensees, but retained the rule that a landowner would not owe any duty to a trespassing plaintiff.[34] These states generally reasoned that "property owners have a basic right to be free from liability to those who engage in self-destructive activity on their premises

27. *Id.* (quoting Kermarec v. Compagnie Generale Transatlantique, 245 F.2d 175. 180 (2d Cir. 1957) (Clark, C.J., dissenting)).

28. Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

29. *Id.* at 568. It is significant, though, that the facts in *Rowland* turned on the difference between licensees and invitees. While it is easy to see how treating licensees and invitees differently does not make sense, it is a harder argument to include trespassers under a unitary standard of care. *See id.* at 562–63.

30. *Id.* at 567.

31. *Id.*

32. CAL. CIV. CODE § 1714(a) (Deering 2005).

33. *Rowland*, 443 P.2d at 568–69.

34. *See* THIRD RESTATEMENT, *supra* note 7, § 51 cmt. a.

without permission" and found that the standard of care traditionally afforded under the common law—that the landowner refrain from willful or wanton misconduct that would harm the trespasser—was sufficient to protect a trespasser's interests.[35] In the forty years since *Rowland*, twenty-six states have chosen to retain the traditional categories, as opposed to eight that have followed *Rowland*'s approach, including trespassers in their standard of reasonable care.[36] The remaining sixteen states fall somewhere in between these extremes. Though most commentators argue that the trend is moving back toward the traditional categories, it is not clear whether that will continue.[37]

The Third Restatement of Torts takes a third, and different, approach to the question of what duty a landowner owes trespassers on her land. Addressing a muddled and divisive area of the law, the Third Restatement strikes a middle ground between the two approaches taken in unitary-standard jurisdictions, rather than picking one approach over the other.[38] Thus, as California, New York, and other states have done, the Third Restatement calls for a unitary standard under which landowners owe a duty of reasonable care to licensees and invitees, as well as trespassers.[39] However, unlike these most "progressive" of states that have no stated exceptions to the unitary standard of care,[40] the Restatement

35. Tantimonico v. Allendale Mut. Ins. Co., 637 A.2d 1056, 1061 (R.I. 1994) (articulating some of the reasoning that is typical in jurisdictions that have adopted a unitary standard of reasonable care under the circumstances but continue to hold land possessors only to a willful or wanton misconduct standard toward trespassers).

36. *See* THIRD RESTATEMENT, *supra* note 7, § 51 cmt. a.

37. *See* Phillip John Strach, *Too Far Too Fast? The North Carolina Supreme Court Eliminates the Common Law Distinction Between Invitees and Licensees in* Nelson v. Freeland, 77 N.C. L. REV. 2377, 2400 (1999) (noting that "within the past twelve to fifteen years, the trend actually has been to 'uphold the traditional common law categories'" (quoting *Tantimonico*, 637 A.2d at 1060)).

38. While the Restatement series was primarily intended as a summary of the law, it has increasingly come not just to describe but also to articulate its own position in areas where the law is truly unclear. A cynical view of this trend labels the Restatement as a prescription of the law under the guise of a description of it. John H. Marks, *The Limit to Premises Liability for Harms Caused by "Known or Obvious" Dangers: Will it Trip and Fall Over the Duty-Breach Framework Emerging in the Restatement (Third) of Torts?*, 38 TEX. TECH L. REV. 1, 2 (2005). Of course, the Restatement's "rules" are merely persuasive authority and only have as much sway over the state of the law as judges choose to give them.

39. THIRD RESTATEMENT, *supra* note 7, § 51.

40. Though California's statutory exception to a unitary standard as applied to trespassers is discussed more thoroughly later in this Comment, see *infra* notes 63–64 and accompanying text, it is worth noting at this point. This statutory exception for trespassers who are on the land and who committed or intend to commit a crime carves out a very narrow exception to the unitary reasonable care standard that has only been applied in two published cases.

explicitly excludes what it calls "flagrant" trespassers.[41] Although the Restatement leaves the definition of "flagrant trespasser" to each jurisdiction, it does suggest that in the case of 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 use and possession of the land" the landowner "should not be subject to liability for failing to exercise the duty of reasonable care owed to others on the land."[42] The Restatement goes on to enumerate several relevant considerations in this reasonable care analysis, including

> [whether the trespasser entered] the land with a malicious motive or . . . commit[ted] an intentional wrong to the land possessor or the possessor's family or property while on the land, . . . the extent of the [land] possessor's efforts to prevent trespass, such as through fencing or posting, and whether the entrant defied or made repeated entries.[43]

According to the Third Restatement, landowners owe flagrant trespassers only a duty not to willfully or wantonly harm them.[44]

In comparing cases from jurisdictions that have different legal standards with respect to determining the duty owed to trespassers, my intent is to note the differences in these laws and how the outcomes of cases decided under them remain remarkably consistent, despite the underlying differences in the legal standards used. The similarities in the ultimate outcomes suggest that courts deciding cases under the current standards have reached a consensus about the right *result* when deciding whether to impose liability on a landowner for a trespasser's injuries, if not yet how to get there. It follows, then, that what is needed in this area is clarity in the form of a simple and straightforward set of laws that synthesizes the intent and rationale of the courts that have struggled to define the scope of premises liability in their jurisdictions.

See Calvillo-Silva v. Home Grocery, 968 P.2d 65 (Cal. 1998); L & B Real Estate v. Superior Court, 79 Cal. Rptr. 2d 759 (Ct. App. 1998); *see also* THIRD RESTATEMENT, *supra* note 7, § 52 cmt. a.

41. THIRD RESTATEMENT, *supra* note 7, § 52.

42. *Id.* § 52 cmt. a.

43. *Id.*

44. *Id.* § 52. The current Reporters for the Third Restatement, Michael D. Green and William C. Powers, Jr., offer some explanation as to their reasoning behind excluding flagrant trespassers from this duty of reasonable care. They note that in jurisdictions like California that have adopted a unitary standard of reasonable care, landowners have two lingering concerns: first, that they may be liable to unforeseeable trespassers and, second, that they may be liable to trespassers who come onto their property to commit a crime. *Id.* § 52 cmt. a. Thus, the Third Restatement has provided that, in cases of criminal trespassers, the duty to avoid willful and wanton conduct will attach instead. *Id.* § 52.

A simple and straightforward (though different) standard, I argue, is what the Third Restatement has set forth. The Restatement's rule, on its face, looks more like the standard applied in jurisdictions like California and New York, which have included trespassers in the unitary standard of reasonable care.[45] However, a close analysis of Illinois and Massachusetts law, where trespassers have been excluded from a duty of reasonable care,[46] reveals that the legal standards in these jurisdictions share more similarities than differences with the Restatement standard. The consistent outcomes in these cases, decided by different courts and under different legal standards, suggest two related ideas. First, in the case of pure unitary-standard states (like California), the Restatement's explicit exceptions to the general duty of reasonable care will not impede the ease of "no duty" determinations in clear-cut cases. Second, in states that only allow trespasser recovery when an exception to a willful or wanton misconduct standard can be found, application of the Restatement's standard will enable courts to reach the same results using more straightforward reasoning.

II. JURISDICTIONS ADOPTING A UNITARY STANDARD OF REASONABLE CARE AND INCLUDING TRESPASSERS

Eight states have adopted a unitary standard of reasonable care under the circumstances and have included trespassers in that standard.[47] Of these eight, the only state that has developed a substantial body of case law construing the doctrine is California.[48]

Three cases, in particular, out of California get at the substance of the unitary standard as it applies to trespassers.[49] These cases, though decided under a different standard than that articulated in the Third Restatement, were decided in a way consistent with the Restatement rule.

In *Mark v. Pacific Gas & Electric Co.*, the California Supreme

45. *See* discussion *infra* Part II on these jurisdictions.

46. *See* discussion *infra* Part III on these jurisdictions.

47. These states are: Alaska, California, Hawaii, Louisiana, Montana, Nevada, New Hampshire, and New York. THIRD RESTATEMENT, *supra* note 7, § 51 cmt. a, tbl.

48. New York has handled eight cases involving premises liability claims by trespassers; however, all but two of these cases have turned on the court's application of a recreational use statute, not on the application of the unitary standard set forth in *Basso v. Miller*, 352 N.E.2d 868 (N.Y. 1976), the New York case that abolished distinctions in duty owed to licensees, invitees, and, purportedly, trespassers. Louisiana has decided one case under the unitary standard. All of the other states have no case law applying the unitary standard to trespassers.

49. Other cases involving a landowner's liability for injury to trespassers are decided based on recreational use statutes rather than on the standard articulated in *Rowland*.

Court applied its newly minted unitary standard to a case involving a trespasser.[50] The case was brought to recover for the wrongful death of a college student who was electrocuted when he attempted to unscrew a light bulb from a street lamp that had fallen within ten inches of a fire escape located outside of his bedroom window.[51] Even though the student was technically a trespasser on the power company's property (the street lamp), the court held that the power company owed him a duty of reasonable care.[52] The court based its holding on the foreseeability of the harm (as the student had called the power company several times to ask it to restore the lamp to its original location) and the absence of warnings given by the power company that unscrewing the light bulb was a hazardous activity, even though it knew that the decedent had unscrewed the bulb twice before.[53] Though, ultimately, the court did not decide the case in favor of the student, in overruling the trial court's grant of an involuntary nonsuit against the plaintiff based on a "no duty" determination, it did find that the question of negligence should at least be presented to a jury.[54]

In *McWhorter v. Chase Manhattan Mortgage Corp.*, the California Court of Appeals found that a landowner did not breach his duty of reasonable care but, as in *Mark*, decided the scope of the landowner's duty based on the foreseeability of the harm that befell the plaintiff.[55] In that case, the plaintiff, a neighbor of the landowner-defendant, entered his neighbor's yard, drained the algae-filled swimming pool on the premises, and later fell into the pool, breaking his hip and arm.[56] The court noted the factors enumerated in *Rowland* that a court should balance in determining whether a duty of reasonable care exists under a unitary standard:

> [The] foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury

50. 496 P.2d 1276, 1279–81 (Cal. 1972).
51. *Id.* at 1277–78.
52. *Id.* at 1279–81.
53. *Id.* at 1281.
54. *Id.*
55. No. F036038, 2001 WL 1565322, at *2 (Cal. Ct. App. Dec. 10, 2001). The court couches its discussion of liability in *McWhorter* as if it were deciding the matter on the basis of duty. However, the court seems both to articulate a "reasonable man" standard with respect to a landowner's duty to trespassers (consistent with *Rowland*) and to apply this standard to the question of breach. Thus, the court's application of the reasonable care standard belies its contention that the landowner owed "no duty" to the trespasser in this case. Instead, the court's analysis points to its acceptance of the *Rowland* standard. Indeed, the court quotes language from *Rowland* in articulating the "proper test to be applied to the liability of the possessor of land," namely "whether in the management of [the landowner's] property he has acted as a reasonable man in view of the probability of injury to others." *Id.* at *2–3.
56. *Id.* at *1.

> suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.[57]

Because the kind of harm the plaintiff experienced—falling into an empty pool—was not a reasonably foreseeable consequence of allowing a pool to become algae-filled, the court held that the defendant owed no duty to the trespassing plaintiff to protect him from the kind of harm for which he was attempting to recover.[58]

Finally, in *Calvillo-Silva v. Home Grocery*, the California Supreme Court applied a statutory exception to the unitary care standard and, in so doing, delineated the boundary line between flagrant and nonflagrant trespassers, an idea now codified in the Third Restatement.[59] *Calvillo-Silva* involved a trespasser-plaintiff who was injured during his attempt to rob a convenience store.[60] As he was fleeing the scene, a store employee shot him in the back, rendering him a paraplegic.[61] In denying recovery because the store owed the plaintiff no duty, the court affirmed an exception to the unitary standard of reasonable care for trespassers, a limit that was imposed on California courts by statute.[62] At the same time, the court calmed the general fear, prevalent since *Rowland*, that a unitary standard would allow trespassers on the landowner's property to commit a crime and to recover for their injuries.[63]

These cases comport with the Restatement's proposed standard of care owed to trespassers. As in *Mark*, whether a duty of reasonable care was required would not be determined by the status of the plaintiff under the Restatement since the decedent was not a flagrant trespasser and was not injured by a natural condition. A court following the Restatement standard would have the flexibility to impose a duty on the defendant power company, as the California

57. *Id.* at *2.
58. *Id.* at *3.
59. 968 P.2d 65, 72 (Cal. 1998).
60. *Id.* at 69–70.
61. *Id.* at 68–69.
62. *See* CAL. CIV. CODE § 847 (Deering 2005). The statute "limits the liability of an owner of any estate or other interest in real property for injuries that occur upon the property during or after the injured person's commission of any one of 25 enumerated felonies." *Calvillo-Silva*, 968 P.2d at 72. Section 847, "by its own terms, however, . . . does not limit the liability of an owner . . . for willful, wanton, or criminal conduct, or for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity." *Id.*
63. It is clear from the legislative history of section 847 of the California Civil Code that the legislature was afraid of the possibility of criminal trespasser recovery after *Rowland*. *See, e.g.*, *Calvillo-Silva*, 968 P.2d at 71–73 (discussing the legislative history of the statute).

Supreme Court did.[64] Likewise, in *McWhorter*, where the court's duty analysis turned on foreseeability, a court relying on the Restatement's articulation of duty owed to trespassers could easily find that no duty attached because of the circumstances of the trespass rather than the status of the plaintiff. As for the California Supreme Court's ruling in *Calvillo-Silva*, the Restatement recognizes the criminal trespasser as the *most* flagrant of all trespassers, one who would clearly be excluded from a duty of reasonable care under the flagrant trespasser exception.[65] It would be difficult to imagine any court deciding this question differently, regardless of the standard for flagrancy it chose to apply.

When California courts have wrestled with the *Rowland* standard as applied to trespassers, they have handed down opinions that reach the same result the Restatement would suggest on the same facts. This similarity in outcome demonstrates that a unitary standard that includes exceptions, as the Restatement's standard does, can successfully describe the law in a state that has adopted a unitary standard with no exceptions. The compatibility of the Restatement standard with California decisions also demonstrates that a standard with a little more guidance for courts than California's standard is at least as effective in reaching appropriate results as is a blanket unitary standard of reasonable care.

III. JURISDICTIONS ADOPTING A UNITARY STANDARD OF REASONABLE CARE AND EXCLUDING TRESPASSERS

Although sixteen states have, in name, adopted a unitary standard that excludes trespassers, a vast majority of these states do not have an extensive or even, in some cases, an existent body of case law applying this standard.[66] However, the courts in Illinois

64. *See, e.g.*, THIRD RESTATEMENT, *supra* note 7, § 52 cmt. a. According to the Reporters,

> This section does not provide a precise line on the continuum of trespassory conduct between ordinary and flagrant trespassers. Burglars and others who are on the land to commit a crime against the land possessor are no doubt flagrant trespassers. Children who accidentally stray onto their neighbor's property while engaged in outdoor play are not. Where the line is placed between these two is, however, not definitively resolved in this Restatement. Different jurisdictions may place different weight on the importance of protecting the rights of land possessors, including their right to exclusive possession of real property, and balancing that concern with the trade off between administrative convenience in employing bright-line rules with the flexibility afforded by standards.

Id.

65. *See id.* § 52 cmt. b.

66. See, for example, Tennessee, where there are no cases citing or applying the adoption of the unitary standard as set forth in *Hudson v. Gaitan*, 675 S.W.2d 699, 703 (Tenn. 1984); Wisconsin, where the same is true of its seminal premises liability case, *Antoniewicz v. Reszcynski*, 236 N.W.2d 1, 11

and Massachusetts have struggled more than others with premises liability law and have been challenged by the facts of the cases before them to apply it equitably and predictably.[67] As a result, in these two states more case law has developed on these issues than in other jurisdictions.[68] The case law from Illinois and Massachusetts shows courts struggling to balance protecting a landowner's rights, on one hand, and allowing an injured plaintiff to recover damages when she has clearly been wronged, on the other. The courts in these two jurisdictions are typical of courts attempting to apply a unitary standard that excludes trespassers in that they evince a willingness, born of necessity, to develop exception after exception to the willful or wanton misconduct standard in order to achieve just results in individual cases. As a result, the law in these states regarding what duty a landowner owes trespassers on his land is more muddled and uncertain than in other jurisdictions, a concern the Third Restatement addresses.

After examining the law in these states, I will compare their standards to the Third Restatement's articulation of the law. In doing so, it will become clear that, though different from the California standard, the standard in Illinois and Massachusetts, and in other states that exclude trespassers from the duty of reasonable care, can also be accurately represented in the Restatement's articulation of the standard of care owed to trespassers.

A. Illinois

Illinois's premises liability jurisprudence is grounded in statutory law. The Premises Liability Act, passed in 1984, abolished the common-law distinction between invitees and licensees in Illinois and adopted a standard of reasonable care under the circumstances to all those *lawfully* on another's land.[69] However, the Act retained the traditional distinction between licensees or invitees and trespassers and applied a lower standard of care to

(Wis. 1975), which stands alone as case law on the issue; Wyoming, where *Clarke v. Beckwith*, 858 P.2d 293, 296 (Wyo. 1993), the case abolishing common-law categorical distinctions, has been treated as if it did not exist.

67. *See* discussion *infra* Part III.A–B.

68. A Westlaw search as of November 2008 found twenty cases deciding what duty a land possessor owed a trespasser in Illinois and ten in Massachusetts as opposed to three in Kansas, two in Maine, and one in Nebraska.

69. 740 ILL. COMP. STAT. ANN. 130/2-2 (West 2002) ("The distinction under the common law between invitees and licensees as to the duty owed by an owner or occupier of any premises to such entrants is abolished. The duty owed to such entrants is that of reasonable care under the circumstances."). The Premises Liability Act goes on to provide that "[a]n owner or occupier of land owes no duty of care to an adult trespasser other than to refrain from willful and wanton conduct that would endanger the safety of a known trespasser on the property from a condition of the property or an activity conducted by the owner or occupier on the property." *Id.* 130/2-3.

those *not* lawfully on the landowner's property—a duty to avoid willful or wanton misconduct.[70]

The Premises Liability Act reaffirmed the common-law exception to the willful or wanton misconduct standard when the trespasser is a child, but Illinois courts have developed numerous other exceptions to this standard over the years as well. The Illinois Court of Appeals summarizes these exceptions in *Rodriguez v. Norfolk & Western Railway Co.*: "[F]irst, where the trespasser is a child; second, where the trespasser's presence on the premises has been discovered; and third, where habitual acquiescence by the land owner and tolerance is so pronounced that it is tantamount to permission so that the trespasser becomes a licensee," known as the "permissive use" exception.[71]

More recently, Illinois courts have further expanded the recognized exceptions to the lower standard of care that the Premises Liability Act fixed for trespassers. For example, in *Benamon v. Soo Line Railroad Co.* the court recognized a "private necessity" exception when the trespasser enters the land possessor's property "for the purpose of advancing or protecting his own interests," such as for safety reasons.[72] Likewise, the court in *Nelson v. Northeast Illinois Regional Commuter Railroad Corp.* recognized a "frequent trespass" exception when "the landowner knows, or should know, that trespassers habitually enter its land at a particular point or traverse an area of small size."[73] Other clarifications of the law have come by statute. For example, in a reaffirmation of the willful or wanton standard, Illinois statutorily limits recovery by all-terrain vehicle ("ATV") driver-trespassers in suits against landowners and establishes a willful or wanton misconduct standard for landowner conduct or omissions in these cases.[74]

Considering the general rule, that a landowner only owes

70. *Id.* 130/2 to -3.

71. 593 N.E.2d 597, 607 (Ill. App. Ct. 1992).

72. 689 N.E.2d 366, 370 (Ill. App. Ct. 1997). The plaintiff in *Benamon*, a boy injured by a passing train, argued that his conduct should fall under the private necessity exception because he ran onto railroad property to hide among the girders of a railroad overpass in an attempt to protect himself from a gang of boys that had been chasing him and would have found out where he lived if he had not hidden from them in the overpass.

73. 845 N.E.2d 884, 888 (Ill. App. Ct. 2006). In *Nelson*, the court held that the land possessor railroad owed the trespassing plaintiff a duty of reasonable care because the railroad knew or should have known that children habitually crossed its tracks because there was a worn path across its property.

74. 625 ILL. COMP. STAT. ANN. 5/11-1427(g) (West 2008); *see also* Morris *ex rel.* Morris v. Williams, 834 N.E.2d 622, 627–28 (Ill. App. Ct. 2005) (applying section 11-1427(g) to relieve the landowner "of a duty to ATV riders to guard against or warn of a dangerous condition on his leased property").

trespassers a duty not to willfully or wantonly injure them, in light of the rule's numerous exceptions, presents a clearer picture of the factors that Illinois courts find important in evaluating these cases. A big-picture look at premises liability law in Illinois reveals a law that is much more complicated than the Restatement standard and, thus, seemingly very different from the Third Restatement's approach. However, the jurisprudence regarding trespassers that emerges from this line of cases reveals a shared idea about what scope of duty is just in particular premises liability cases and, thus, an underlying similarity to potential outcomes under the Restatement rule.

In *Guenther by Guenther v. G. Grant Dickson & Sons, Inc.*, the Illinois Court of Appeals denied recovery to a thirteen-year-old girl who was injured on the defendant's private property while riding her ATV.[75] The girl claimed that the defendant was negligent in allowing foliage to grow over a path.[76] The court found this argument unpersuasive, basing its decision on the age of the plaintiff, her familiarity with the trails (as she frequently trespassed there), and the fact that certain dangers, like foliage obstructing one's view, "under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of any age."[77] Likewise, the Illinois Court of Appeals denied recovery in *Morris ex rel. Morris v. Williams* to a thirteen-year-old joyriding in a farmer's soybean field.[78] The boy was intentionally trying to destroy a patch of soybeans that the farmer had left to mark a ditch and was riding his ATV at thirty miles per hour despite the "No Trespassing" signs on the premises.[79] One of the concurring justices thought the teenager's behavior was so flagrantly violative of the land possessor's rights that sanctions should be imposed.[80]

Both of these cases would have come out similarly if the Illinois Court of Appeals had applied the Restatement's articulation of the law. In *Guenther*, the allegedly negligent omissions by the landowner were natural conditions (foliage growing over a path)—one of the two stated exceptions to a land possessor's duty of reasonable care under the Third Restatement's formulation.[81] Furthermore, requiring landowners to trim the foliage that grows on every path through their land would certainly be "antithetical to the rights of the land possessor to exclusive possession of the land," thus falling under the definition of a flagrant trespasser for the Restatement's purposes of excluding them from a duty of reasonable

75. 525 N.E.2d 199 (Ill. App. Ct. 1988).
76. *Id.* at 200–01.
77. *Id.* at 201 (citing Cocoran v. Vill. of Libertyville, 383 N.E.2d 177 (Ill. 1978); RESTATEMENT (SECOND) OF TORTS § 339 cmt. j (1965)).
78. 834 N.E.2d 622 (Ill. App. Ct. 2005).
79. *Id.* at 625, 628.
80. *Id.* at 628 (McCullough, J., specially concurring).
81. THIRD RESTATEMENT, *supra* note 7, § 52 cmt. d.

care.[82] Likewise, in *Morris*, not only was the trespassing child likely a flagrant trespasser under the Restatement standard, he was also attempting to recover for harm caused by a natural condition. In addition, the child's "malicious motive" in entering the land—his intent to destroy the land possessor's soybeans[83]—would have been a sufficient basis to find that his entrance onto the land was egregiously violative of the land possessor's rights under the Restatement standard.

While these cases demonstrate the willingness of Illinois courts to find *against* trespassers in certain instances, these same courts have at times articulated a desire to allow *more* recovery for nonflagrant trespassers than the black letter of the Illinois Premises Liability Act would allow. Thus, though substantively contrary to the decisions limiting landowner liability, these decisions also bring Illinois premises liability law closer to the Third Restatement standard than the Premises Liability Act, standing alone, would suggest. By creating additional exceptions to the willful or wanton misconduct standard, Illinois courts have increasingly liberalized the duty owed by landowners to nonflagrant trespassers.

One of these exceptions was first articulated in *Lee v. Chicago Transit Authority* where the Illinois Supreme Court held landowners to a reasonable care standard when they "know of or [can] reasonably anticipate the presence of a trespasser in a place of danger."[84] Applying this newly recognized exception, the court held that a land possessor owed a duty of reasonable care to an intoxicated man who was electrocuted on the defendant's right of way by a street-level power rail, located only six-and-a-half feet from a public sidewalk, even though the man had passed several "Danger" and "Keep Out" signs in his path.[85] Like the holdings in *Guenther* and *Morris*, the court's decision in *Lee* matches up with the Restatement's articulation of the law. Anticipation of the presence of a trespasser in a place of danger is another way of saying the trespasser was not flagrant—that he did not enter the property with malicious motives or intrude too egregiously on the landowner's property rights. There is little about the plaintiff's actions in *Lee* that could be characterized as "sufficiently egregious" to the land possessor power company's rights when the trespasser had only wandered six-and-a-half feet from a roadway on which he was lawfully traveling.

The Illinois Court of Appeals recognized another inequitable

82. *Id.* § 52 cmt. a.

83. *Morris*, 834 N.E.2d at 628 (McCullough, J., specially concurring).

84. 605 N.E.2d 493, 499 (Ill. 1992). The court noted in passing that it would look favorably upon an abolition of the separate classification for trespassers, so that they would be subsumed under a general standard of reasonable care, but left that major change up to the legislature. *Id.*

85. *Id.* at 497–502.

application of the willful or wanton duty of care to trespassers in *Salazar v. Crown Enterprises, Inc.*[86] While the court did not itself carve out another exception to the duty owed to trespassers, finding that role should be left to the legislature, it raised strong policy arguments to support such an exception, going so far as to "urge the legislature (or the supreme court) to consider such a duty."[87] In *Salazar,* a homeless man was murdered in a dilapidated apartment complex that the land possessor knew was the site of criminal activity.[88] Under the Restatement standard, the court's inclination to hold for the plaintiff in this case would have been possible, as he was neither a flagrant trespasser nor one injured by a natural condition on the land. In fact, the Restatement rule would have allowed the Illinois Court of Appeals to hand down a decision that comported with public policy as well in that it would have allowed the court to discourage land possessors from keeping their property in a state of disrepair.

B. Massachusetts

Like Illinois, Massachusetts holds landowners to a reasonable care standard with regard to entrants onto their land but does not extend this standard to trespassers. Massachusetts has far fewer recognized exceptions to the general rule of liability to trespassers than Illinois. But while Illinois and Massachusetts courts apply different exceptions, the outcome of premises liability cases in both states would be the same under either set of rules. Furthermore, although the Third Restatement's formulation is different from the law in both states, its application would produce similar outcomes as well.

Massachusetts announced its adoption of a unitary standard of reasonable care in *Mounsey v. Ellard* in 1973.[89] The Massachusetts Supreme Court reasoned that it could "no longer follow [the] ancient and largely discredited common-law distinction which favors the free use of property without due regard to the personal safety of those individuals who have heretofore been classified as licensees."[90] The court announced that landowners would be held to a reasonable person standard—at least when it came to licensees and invitees—taking into account the foreseeability of the harm, the seriousness of the injury, and the extent of the burden on the land possessor to alleviate the risk.[91] Massachusetts exempts child trespassers from the willful or wanton standard of care by statute as long as certain

86. 767 N.E.2d 366 (Ill. App. Ct. 2002).
87. *Id.* at 375.
88. *Id.* at 368–70.
89. 297 N.E.2d 43, 51–52 (Mass. 1973).
90. *Id.* at 51.
91. *Id.* at 51–52.

qualifications are met.[92] Other than that exception, Massachusetts courts base their decisions on a reasonable person standard, regardless of the entrant's status as invitee or licensee, taking into account the foreseeability of harm, the seriousness of the injury, and the extent of the burden on the land possessor to alleviate the risk.[93]

After *Mounsey*, other Massachusetts courts extended this reasonable care standard to trespassers in certain situations.[94] Two of the cases that held a landowner to a higher standard of care involved the application of the Massachusetts child trespasser statute, mentioned above, which provides that "[a]ny person who maintains an artificial condition on his own land shall be liable for physical harm to children trespassing thereon."[95] The statute enumerates certain conditions that must weigh in favor of the child trespasser in order for the exception to take effect and preempt the willful or wanton misconduct standard generally applicable to trespassers:

> (a) the place where the condition exists is one upon which the land owner knows or has reason to know that children are likely to trespass, (b) the condition is one of which the land owner knows or has reason to know . . . will involve an unreasonable risk of death or serious bodily harm to such children, (c) the children because of their youth do not discover the condition or realize the risk involved . . . (d) the utility to the land owner of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and (e) the land owner fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.[96]

The plain language of the statute itself mirrors the Restatement in excepting from its scope injuries resulting from natural conditions on the land. Furthermore, the statute aligns with the Third Restatement's treatment of child trespassers specifically. The Restatement, while not explicitly holding land possessors to a duty of reasonable care for child trespassers, notes that the willful or wanton standard applied to flagrant trespassers is flexible.[97] While

92. MASS. ANN. LAWS ch. 231, § 85Q (LexisNexis 2000).

93. *Mounsey*, 297 N.E.2d at 52.

94. *Mounsey*, like *Rowland*, was decided on facts that turned on the distinction between licensees and invitees. What to do about trespassers was an afterthought for the court in *Mounsey* and was only definitively resolved in later cases involving trespassers. *See generally id.*

95. MASS. ANN. LAWS ch. 231, § 85Q; *see also* Soule v. Mass. Elec. Co., 390 N.E.2d 716, 718 (Mass. 1979).

96. MASS. ANN. LAWS ch. 231, § 85Q.

97. THIRD RESTATEMENT, *supra* note 7, § 51 cmt. *l*. The Reporters note:

> Thus, there may be the rare child who not only fits the model of an immature, innocent, and impetuous youth contemplated by section 339

not ruling out the possibility that a child's trespass on another's land could be flagrant, the Restatement notes that many children will be owed a higher standard of care because of their immaturity.[98]

The Massachusetts Supreme Court applied the statutory child trespasser exception in *Soule v. Massachusetts Electric Co.*, where the court found that the defendant power company owed a duty to a trespassing eight-year-old who climbed up an electrical tower from an access point only three feet off the ground.[99] The court found a distinct difference between "a child, lawfully playing in a public place, who is injured when 'trespassing' on a fixture belonging to another, and a burglar, who after unlawfully invading another's private property is hurt by some condition found thereon."[100]

Similarly, in *Jackson v. Leary*, the superior court denied the defendant's motion to dismiss and held that the defendant landowner owed a duty of reasonable care to a thirteen-year-old boy who was hurt while using the defendant's ramp to execute bicycle jumps.[101] The court reasoned that the boy did not fully appreciate the danger inherent in jumping off the ramp and so was protected by the Massachusetts child trespasser statute.[102] Neither the plaintiff in *Soule* nor the biker in *Jackson* could properly be classified as a flagrant trespasser under the Third Restatement standard because neither one understood the nature of his trespass, intended to violate the land possessor's rights, or failed to leave after receiving a warning.[103] Furthermore, their injuries were caused by artificial, rather than natural, conditions on the defendants' land and thus would not trigger the lower willful or wanton misconduct standard reserved for flagrant trespassers.[104]

> of the Second Restatement but whose entrance onto the land occurs with sufficient violence to the land possessor's rights that the child might also come within the scope of section 52, comment b, which defines flagrant trespassers. In such a case, sections 51 and 52 are sufficiently flexible to permit a court to resolve the tension between employing a duty of reasonable care or denying it, in the most appropriate fashion.

Id. In analyzing some of the potential relevant factors, the Reporters explain:

> That some of the persons likely to be exposed are children who are particularly vulnerable because of their immaturity is relevant to the extent of the precaution required of the land possessor. . . . A child trespasser who is aware of a danger and unreasonably confronts it may have his or her damages reduced, but recovery is not barred under this Section.

Id.

98. *Id.*
99. *Soule*, 390 N.E.2d at 717–18.
100. *Id.* at 722.
101. Jackson v. Leary, No. 921158, 1993 WL 818727, at *1 (Mass. Super. Ct. Oct. 15, 1993).
102. *Id.* at *4.
103. THIRD RESTATEMENT, *supra* note 7, § 52.
104. *Id.* § 52 cmt. d.

Two other cases out of Massachusetts add to this comparison of a unitary standard that excludes trespassers and the Restatement rule. In these cases, however, the courts found the plaintiffs were *not* owed a duty of reasonable care by the landowners. In *Schofield v. Merrill*, the Massachusetts Supreme Court found that the owner of an abandoned quarry was not liable to a twenty-three-year-old who dove into one of the quarry's pools, struck a rock, and was severely injured.[105] The court reviewed the state's exclusion of trespassers from the otherwise-applicable standard of reasonable care, basing its decision to continue to exclude trespassers from a duty of ordinary care on the social values and customs that define reasonably prudent conduct.[106] The court found that "landowners of ordinary prudence [do not] customarily exercise care for the safety of adult trespassers."[107] In another case involving a trespassing seventeen-year-old, the court found that the defendant manufacturing company owed the plaintiff no duty when the plaintiff had forcibly broken into the defendant's factory and, once inside, fell into a vat of glue.[108] The court reasoned that

> the [dangerous] condition was not one which [the plaintiff] failed to appreciate because of his youth. Neither was the kind of conduct engaged in foreseeable in the sense of imposing upon [the defendant] a direct obligation to do more to protect individuals such as [the plaintiff] from falling into a vat of glue inside a locked and darkened facility surrounded by a eight-foot-high fence that was chained and padlocked.[109]

The effect of these cases is to exclude from recovery those who would fall under the category of "flagrant" trespassers by employing a case-by-case, factual determination that only the defendant's willful or wanton misconduct results in liability. The plaintiff in *Leger* was the quintessential flagrant trespasser—one who was on the land possessor's property to commit a crime—here, intentional and reckless trespassing or possibly something worse, as his forcible entry suggests. And while *Shofield* is a closer case, it could be argued under the Restatement's rubric that the plaintiff's intentional trespass into the heart of the defendant's land could qualify as antithetical enough to the landowner's rights to exclusive possession and control to qualify as flagrant. In either case, the Third Restatement's articulation of the duty of care owed to trespassers aligns with that used by Massachusetts courts and by the state's legislature.

105. 435 N.E.2d 339, 340 (Mass. 1982).
106. *Id.* at 341–42.
107. *Id.* at 342.
108. Leger v. Bemis Bro. Bag Co., No. 915694, 1993 WL 818773, at *1 (Mass. Super. Ct. Nov. 1, 1993).
109. *Id.* at *5.

IV. IMPLICATIONS BEYOND PREMISES LIABILITY LAW

Regardless of the approach taken, the same ancillary issues persist surrounding the balance struck by each state between a rigid rule (with exceptions) and a more flexible standard. We have seen the tension between statutory mandates that purport to simplify premises liability law, while in fact creating more questions for courts that find a simple rule too narrow in scope to encompass all situations and all plaintiffs. The weight of the common-law tradition has been difficult to discard in this area.

At a more visceral level, the common-law system's frequent preference for landowners' property rights at the expense of an entrant's physical well-being clearly creates tension between the tripartite and unitary systems.[110] As the now-famous *Rowland* decision stated:

> A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because [of his status on the land] . . . and to focus upon the status of the injured party . . . in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values.[111]

Although twenty-four states have been able to buy these arguments when it comes to differentiating between licensees and invitees, seventeen have chosen *not* to do the same for trespassers.[112] Some of the strongest arguments in support of a unitary standard as to licensees and invitees are diluted when it comes to trespassers. This is partly a result of the semantic and technical reality that it is not as difficult for a jury (or a judge) to differentiate between a trespasser, the definition of which is fairly intuitive, and a licensee or invitee, as it is to distinguish between a licensee and an invitee, both technical terms outside of a layperson's experience.[113] Thus, on

110. Most cases that have seriously considered adopting a unitary standard of reasonable care (or reverting back to a tripartite system, as in Colorado) have discussed this aspect of debate. *See* COLO. REV. STAT. § 13-21-115(3) (2006); Mile High Fence Co. v. Radovich, 489 P.2d 308, 311 (Colo. 1971); *see, e.g.*, Wood v. Camp, 284 So. 2d 691, 691–92 (Fla. 1973); Jones v. Hansen, 867 P.2d 303, 310 (Kan. 1994), Moody v. Manny's Auto Repair, 871 P.2d 935, 942 (Nev. 1994); *see also* THIRD RESTATEMENT, *supra* note 7, § 51 cmt. a, tbl. (listing the standard of care used in each state's premises liability law, as well as the exception or inclusion of trespassers within that standard for states that have adopted a unitary standard of reasonable care).

111. Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968); *see also Jones*, 867 P.2d at 307 (considering the argument that "the present common-law classifications are rigid and mechanical in application and overly protective of property interests at the expense of human safety").

112. THIRD RESTATEMENT, *supra* note 7, § 51 cmt. b.

113. Though a trespasser is *easier* to differentiate from a licensee or invitee, the differentiation can still be difficult, as the cases involving trespasser-plaintiffs show. The "trespassers" in these situations are often not the kind of

a practical level, courts may have found it easier to jettison the legal distinctions between licensees and invitees than those between trespassers, on the one hand, and licensees and invitees, on the other. Semantics aside, however, the core question of how to balance a landowner's property rights against an entrant's physical well-being remains unresolved. The number of courts that have excluded trespassers from a duty of reasonable care suggests that the emphasis on the preeminence of modern society's "social mores and humanitarian values" may, in fact, be specious—when we deny a trespasser recovery for physical injuries, we are not judging his injuries to be any less serious than those sustained by a licensee or invitee. Rather, we are judging his *actions*—the severity of the trespass itself—and reducing his recovery accordingly.[114]

Discussions surrounding the proper role of judge and jury, articulated in the context of the adoption or rejection of a unitary standard, involve premises liability law in the larger debate on these issues. Though as a society we have moved away from the idea that lay juries, comprised of landless peasants, would act "to protect the community at large and thereby reign in the landowner's sovereign power over his land,"[115] we have not completely moved away from status-based rules, perpetuated by the traditional common-law categories.[116] Even some of the jurisdictions that have adopted a unitary standard have, remarkably, continued to be wary of entrusting juries with liability decisions when a trespasser is

trespassers whose presence would be inimical to a landowner's rights. Neither are they the kind of trespassers that come to mind at the mention of the word. The plaintiffs are people like a teenager hiding around train tracks to escape school bullies (Benamon v. Soo Line R.R. Co., 689 N.E.2d 366, 369 (Ill. App. Ct. 1997)); a college student attempting to unscrew a light bulb from a street lamp outside his bedroom (Mark v. Pacific Gas & Elec. Co., 496 P.2d 1276, 1278 (Cal. 1972)); or a homeless person taking shelter in an abandoned building (Salazar v. Crown Enterprises, Inc., 767 N.E.2d 366, 368 (Ill. App. Ct. 2002)).

114. For the prime example of a court turning its back on an injured plaintiff because of the severity of the trespasser's conduct, see Calvillo-Silva v. Home Grocery, 968 P.2d 65, 81 (Cal. 1998), where the court denied recovery to a man rendered a paraplegic during his trespass—the robbery of a convenience store. Looking at the "value of human life" rationale for a unitary standard through the lens of *Calvillo-Silva*, it is difficult to argue that "modern society" has come to value, unequivocally, human life or physical well-being above a landowner's property rights.

115. Sears, *supra* note 9, at 176.

116. Prosser and Keeton state the common law's protection of landowners' rights:

> The possessor of land has a legally protected interest in the exclusiveness of his possession. In general, no one has any right to enter without his consent, and he is free to fix the terms on which that consent will be given. Intruders who come without his permission have no right to demand that he provide them with a safe place to trespass, or that he protect them in their wrongful use of his property.

KEETON ET AL., *supra* note 15, § 58, at 393 (citations omitted).

involved.[117] Opponents of a unitary standard argue, along the lines of tort reformers, that allowing more cases to be decided by juries will result in larger verdicts and, correspondingly, higher insurance premiums and a rise in the number of suits brought.[118] Proponents of a unitary standard point to the historical role of the jury in the American legal system,[119] while simultaneously noting checks on the jury system and pointing to cases decided reasonably under a unitary standard.[120] These discussions in the premises liability context both animate the debate on judicial decision making in the tort law context and elucidate the arguments surrounding the division of power between judge and jury in our judicial system as a whole.

CONCLUSION

The Third Restatement's treatment of trespassers in premises liability law emerged out of doctrinal differences between states as to what duty of care a land possessor should owe to a trespasser on her land. While the differences between states that exclude trespassers from a reasonable care standard and those that include them seem substantial, an examination of these states' case law shows that the differences are not as great as they would seem. The duty of care that the forthcoming Restatement imposes with regard to trespassers seizes on these similarities to develop a workable standard that is, on the one hand, based on the unitary standard twenty-four states have chosen to adopt, and on the other, flexible enough to encompass the jurisprudence of states that have maintained more traditional premises liability standards when it comes to trespassers. The flagrant trespasser and natural conditions exceptions to a landowner's duty of reasonable care synthesize a number of common-law exceptions that were instituted as equitable but had become confusing. Application of the Restatement's trespasser duty standard will allow courts to reach just results without having either to slog through the exceptions to the trespasser rule or send to juries cases that should be "no duty" determinations.

The Restatement thus allows judges to decide clear cases, while

117. It is still the case that, when it comes to the most sacred of landowner rights, the right to keep trespassers off of one's land, courts do not trust juries to protect another's land as if it were their own. The court in *Nelson v. Freeland*, 349 N.C. 615, 624, 507 S.E.2d 882, 888 (1998), suggests that courts' reluctance stems from a fear, similar to the one that originally spawned the tripartite standard, that "plaintiff-oriented juries . . . will impose unreasonable burdens upon defendant-landowners."

118. Sears, *supra* note 9, at 196.

119. *Id.* at 194–95 (listing no duty and attenuated causation, not proximate cause, as "effective means of controlling the jury").

120. *See, e.g.*, CAL. CIV. CODE § 847 (Deering 2005); Calvillo-Silva v. Home Grocery, 968 P.2d 65 (Cal. 1999).

sending closer ones to a jury with the rubber stamp of a duty of reasonable care but the reality of an unlikely determination of breach. In so doing, the Third Restatement addresses one of the most contentious areas of tort law that, while highly relevant in the premises liability context, extends beyond it to all judicial "no duty" determinations. With the Restatement having struck the balance between judge and jury and duty and no duty in its discussion of premises liability, all that is left to be seen is whether courts will follow.

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