

## 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,<sup>1</sup> I published a sharp critique of the decision.<sup>2</sup> 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;<sup>3</sup> and the reasonableness standard works in many other negligence contexts.<sup>4</sup> Instead, I complained of the fact that the California Supreme Court did not

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<sup>1</sup> See 443 P.2d 561 (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 . . . [that] obscure rather than illuminate the proper considerations which should govern determination of the question of duty.” *Id.* at 568.

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

<sup>3</sup> The Restatement (Second) of Torts recognizes 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. See Restatement (Second) of Torts §§ 334–39 (1965).

<sup>4</sup> 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 society . . . [g]iven 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.” See Henderson, *Expanding the Negligence Concept*, *supra* note 2, at 478–82 (discussing how courts have managed the negligence standard by relying on the reasonable man standard and the lay jury). *Cf.* James A. Henderson, Jr., *Judicial Review of Manufacturers’ Conscious Design*

make a sufficiently clean break with the traditional idea that possessors owe trespassers little or nothing by way of investments in care. 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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

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*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.”).

<sup>5</sup> See Henderson, *Expanding the Negligence Concept*, *supra* note 2, at 511, 513 (“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 of 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.”).

<sup>6</sup> 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.”).

<sup>7</sup> See *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968) (“Once the ancient concepts as to the liability of the occupier of land are stripped away, *the status of the plaintiff relegated to its proper place in determining such liability*, and ordinary principles of negligence applied, the result in the instant case presents no substantial difficulties.”) (emphasis added).

scholarly praise for the decision,<sup>8</sup> I predicted that *Rowland* and a number of other then-recent decisions greatly increasing the discretionary power of judges and juries to use their discretion to “do the right thing” would not stand the test of time.<sup>9</sup> As the Reporters’ Note to §51 of the proposed Restatement (Third) indicates, my prediction has essentially proved true.<sup>10</sup> Of states that have considered the issue of trespasser entrants, only a minority have adopted a unitary standard of reasonable care.<sup>11</sup> 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

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<sup>8</sup> See, e.g., Edwin Ursin, *Strict Liability for Defective Business Premises—One Step Beyond Rowland and Greenman*, 22 U.C.L.A. L. REV. 820 (1975); Comment, *Torts—Occupier’s Liability—Invitee, Licensee, Trespasser Distinction Abolished in California*, 23 ARK. L. REV. 153 (1969); Comment, *Torts—Negligence—Premises Liability: The Foreseeable Emergence of the Community Standard*, 51 DEN. L.J. 145 (1974); Comment, *Occupier of Land Held to Owe Duty of Ordinary Care to All Entrants—“Invitee,” “Licensee,” and “Trespasser” Distinctions Abolished: Rowland v. Christian*, 44 N.Y.U. L. REV. 426 (1969); Note, *A Re-Examination of the Land Possessor’s Duty to Trespassers, Licensees and Invitees*, 14 S.D. L. REV. 332 (1969).

<sup>9</sup> See Henderson, *Expanding the Negligence Concept*, *supra* note 2, at 525 (“When that day arrives, and the torts process has finally been replaced by some more efficient and honest (albeit ‘dehumanized’) mode of compensating victims of accidents, we shall have more than enough leisure time to sit and ponder the wisdom of the parable of the goose and the golden egg.”).

<sup>10</sup> Only seven states in addition to California (Alaska, Hawaii, Louisiana, Montana, Nevada, New Hampshire, and New York) currently maintain an unqualified unitary standard that includes trespassers. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 51 reporters’ note to cmt. a (Council Draft No. 8, 2008), at 57–63 (and among these, it is not clear that Louisiana’s standard treats criminal trespassers the same). Sixteen other states and the District of Columbia have adopted a standard that treats all non-trespassers to land with one standard and trespassers with a different standard. See *id.* Thus, although the § 51 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 is hardly “unitary.” See *id.* Further, the Colorado courts attempted to adopt a unitary standard, but the Colorado legislature restored a status based system in 1990. See *id.* at 57.

<sup>11</sup> See *id.* at 57–63 (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).

duties owed to trespassers.<sup>12</sup>

My purpose in this Essay is not simply to say “I told you so.” Instead, I aim to criticize the new Restatement’s reliance in §52 on the concept of “flagrant trespasser” 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 their discretion think it is appropriate. Now, I realize that §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.<sup>13</sup> But §52 may also be read as a proposed end-solution.<sup>14</sup> 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 §52 recognize, the phrase at issue suggests a spectrum from “mild

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<sup>12</sup> Forty two jurisdictions currently apply the traditional trespasser rule structures with small variation. *See id.* Further, New Jersey applies a “hybrid” system that does not clearly fall within either a traditional system or a unitary system. *See id.* at 61.

<sup>13</sup> *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 52 cmt. a (Council Draft No. 8, 2008), at 95 (“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.”).

<sup>14</sup> *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.”).

and ordinary trespassers” to “flagrant and egregious trespassers.”<sup>15</sup> 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.<sup>16</sup> 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)<sup>17</sup> the very idea of an entrant knowingly coming on the land of another necessarily implies a willful invasion of, and implicit disrespect for, the possessor’s right to exclusive possession. 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

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<sup>15</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 52 cmt. a, at 94.

<sup>16</sup> 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.”); see also *id.* (“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 . . .”).

<sup>17</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 196–97 (1965) (dealing with public and private necessity to enter land).

necessarily reflect disrespect for the possessor's right to possess.<sup>18</sup> And aside from the question of privilege, the question of what a trespasser does (or plans to do)<sup>19</sup> while on the land may suggest different answers to whether it is fair to impose on the possessor a duty of reasonable care. 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.<sup>20</sup> 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

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<sup>18</sup> 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 they intend to trespass, but not much. That said, their action is not socially desirable and reflects obvious disrespect for the land possessor's exclusive right 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.

<sup>19</sup> Comment a. to § 52 suggests that intent of the trespasser may be one way to distinguish between flagrant and ordinary trespassers. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 52 cmt. a (Council Draft No. 8, 2008), at 96 (“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 § 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 him or herself? Further, how can courts prove malicious motive, or lack thereof?

<sup>20</sup> See *id.* at cmt. a, 96–97 (Under § 52, 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).

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 for reasons other than the boundary-crossing as such. But to make that admission reveals the essentially discretionary, (and I would argue, lawless) nature of the delegation of judicial authority. Under such a regime, based on whether the entrant is a “bad guy” under all the circumstances, judges and juries would be free to decide on whim in dealing with trespassers on the basis of whether the decision maker feels a particular trespasser is, all things considered, deserving of due care.

It will be observed that the notion of flagrant trespasser/undeserving trespasser as the drafters use it is essentially a non-instrumental, fairness-based norm. Comment *a* to §52 says it would be “unfair” to allow bad guys to insist on reasonable care<sup>21</sup>; Comment *h* says it would be “unjust.”<sup>22</sup> I do not quarrel with these assertions. Instead, what I find puzzling is that §52(b) recognizes an exception to these fairness norms for helpless flagrant trespassers on a ground that seems entirely efficiency-based. 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 §52(b) he suddenly becomes deserving of protection when, to the

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<sup>21</sup> *Id.* at cmt. a, 95 (“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).

<sup>22</sup> *Id.* at cmt. h, 102 (“... it 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).

possessor's knowledge, he becomes helplessly imperiled. 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 much lower cost (by simply not trespassing).<sup>23</sup> In that context, recognizing exceptions to the general no-duty rule for special circumstances where the possessor's protecting the trespasser is a least-cost, efficient solution are transparent and the Restatement (Second) identifies those circumstances.<sup>24</sup> But under the flagrant trespasser regime, where the no-duty rule is clearly rooted noninstrumentally in principles of fairness and justice, an efficiency-based override is puzzling. At the very least, a Comment to §52(b) ought to recognize these implications and deal with them straightforwardly. Thus, not only is §52's concept of flagrancy inappropriate as a means of distinguishing among morally deserving and undeserving trespassers, but §52(b) introduces further confusion by invoking a helpless-trespasser override that seems clearly to be based on instrumental, efficiency grounds.<sup>25</sup> According to §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

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<sup>23</sup> See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 173 (4th ed. 1992) (possessor of land has no duty to trespassers because trespassers can prevent injuries at lower cost by simply not trespassing).

<sup>24</sup> See *supra* note 3.

<sup>25</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 52(b) (Council Draft No. 8, 2008), at 94 ("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 they are imperiled and helpless. And, likewise, assuming the land possessor did not wantonly or intentionally cause the trespassers imperiled state in the first place, they are no more wanton or intentional simply because the trespasser becomes imperiled and helpless. Thus, much like the last clear chance rule, the duty imposed by § 52(b) seems only mildly based on fairness grounds.

ALI does not want to return to the traditional, pre-*Rowland* approach of formally recognizing specific categories of deserving trespassers;<sup>26</sup> and also assuming that an across-the-board unitary reasonableness standard is unacceptable;<sup>27</sup> 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.”<sup>28</sup> 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.<sup>29</sup>

A term like “reprehensible” would also make clear that some further rule structure is necessary to allow trial courts to sort out these cases fairly and consistently, within the rule of

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<sup>26</sup> *See id.* at reporters’ memorandum, xiii (“[W]e have opted for what we think is the better approach, a unitary standard . . .”).

<sup>27</sup> *See id.* (“Accepting a unitary standard nevertheless left the question of whether it would be applicable to trespassers. . . . Those who enter the land without the consent of the possessor present a clash between tort and property principles. We have attempted to accommodate that conflict in § 52 . . .”).

<sup>28</sup> *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 51(a) (Council Draft No. 7, 2007), at 27 (“A culpable trespasser is a trespasser on land possessed by another whose entrance on 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.”).

<sup>29</sup> *See id.* at reporters’ memorandum, xv (“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).

law as I articulated it in my law review piece thirty years ago.<sup>30</sup> 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 §52 reveal the contours of some of the more important elements of such an “undeserving trespasser” structure.<sup>31</sup> I do not believe that the drafting problems would be enormous or insurmountable.

### **Conclusion**

The current draft of §52 of the Restatement (Third) Torts asserts that unprivileged trespassers may be located on a spectrum from “ordinary” to “flagrant” on the basis of the extent, or degree, of the trespasser’s invasion of the possessor’s right to exclusive possession. I don’t 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 of 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 “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. I believe the Restatement (Third) should supply such a structure, or at least offer clearer guidelines for lawmakers to work one out.

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<sup>30</sup> See Henderson, *Expanding the Negligence Concept*, *supra* note 2.

<sup>31</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 52, cmts. a–b, h, illustrations 1–3 (Council Draft No. 8, 2008), at 94–99, 101–03.