TO INSPECT AND MAKE SAFE: ON THE MORALLY RESPONSIBLE LIABILITY OF PROPERTY OWNERS

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In United States tort law, there are two general approaches to determining when a property owner is to be held liable for damages to entrants on his land. Twenty-four states follow common law tradition, which distinguishes between trespassers, invitees (business visitors), and licensees (social guests) (Cupp Jr. 2010, fn. 2). A "reasonable duty of care," often including a duty to warn of danger as well as a duty to inspect and make safe, is taken to obtain in the case of the latter two, but not always in the case of trespassers.[1] Call this the *traditional approach*.

In 1968, the landmark California Supreme Court case *Rowland v. Christian* (1968) introduced a second approach. At issue in *Rowland* was a social guest who injured himself on a faucet. Miss Christian, the defendant, was aware of the dangerous condition of the faucet and failed to warn James Rowland, the plaintiff, of the danger. In finding for the plaintiff, the court established a precedent that regarded the three-fold distinction between trespasser, invitee, and licensee as non-dispositive, and suggested a singular approach that imposes a duty of reasonable care on land

[1] There is a good deal of variation here. First, on some versions, a higher duty applies to invitees than to licensees. Second, different jurisdictions treat the legal duty itself differently. The Arizona Supreme Court, in *Siddons v. Business Properties Development Co.* (1998) cited the *Restatement (Second) of Torts § 360*, concluding that a landlord who has dominion and control over some land has a duty to inspect and make safe the area. The duty to inspect and make safe is a special kind of a duty of care. Typically, a duty of care is said to exist when there is a special relationship between plaintiff and defendant, such as a family or employment relationship, or through contract. This privity requirement, however, was eased in *MacPherson v. Buick Motor Co.* (1916) in the United States and in *Donoghue v Stevenson* (1932) in the United Kingdom with respect to product liability, where a general duty of care was said to exist between a product manufacturer and end users of a product despite the existence of several intermediaries and the fact that no contract existed between end users of a motor vehicle or between consumers of ginger beer and the manufacturers.

possessors regardless of whether entrants are social guests, business visitors, or trespassers.[2] In the ruling, Justice Raymond E. Peters wrote for the majority:

> 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. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty. (*Rowland v. Christian* 1998)

This approach—call it the *nondiscriminatory approach*—initially saw a great deal of acceptance. Throughout the 1970s, it was adopted by one jurisdiction after another. By the 1980s, however, we witnessed a halt to its expansion. Indeed, the ruling in *Rowland* was subsequently superseded in California by legislation expressly seeking to protect property-owners against certain kinds of trespassers claiming liability.[3]

There is currently no clear front-runner between traditional and nondiscriminatory approaches in jurisdictions across the United States, and neither side seems to be gaining ground. One reason for this, we suspect, stems from the kind of argument typically offered by champions of the nondiscriminatory approach. The standard line seems to be that the traditional approach is motivated by concerns about moral responsibility, but that moral responsibility is irrelevant to liability; either liability doesn't concern responsibility at all or (the more common line) concerns not

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[2] The ruling insisted that the standard common law negligence approach was correct, and that trespass should not always function as a defense against liability.

[3] See s. 847 of the California Civil Code. ("(a) An owner, including, but not limited to, a public entity, as defined in Section 811.2 of the Government Code, of any estate or any other interest in real property, whether possessory or nonpossessory, shall not be liable to any person for any injury or death that occurs upon that property during the course of or after the commission of any of the felonies set forth in subdivision (b) by the injured or deceased person." at http://www.leginfo.ca.gov/cgi-bin/displaycode?section=civ&group=00001-01000&file=840-848)

moral but "outcome" responsibility—agents "own" the damages caused by their property.[4] Often, economic or other pragmatic reasons for holding property-owners liable for damages for which they are outcome responsible are then cited.[5] Indeed, many seem to accept the view that liability is merely an economically or pragmatically justified convention—an outgrowth of legal schema, perhaps—which suggests that there *could* only be such pragmatic justifications for holding owners liable.[6] Call this view *conventionalism about liability*.

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[4] For discussion of outcome responsibility, see, for example, Ripstein (2001, 47). ("Consider one of the most familiar manifestations of outcome responsibility, the case in which one person injures or inconveniences another, and apologizes. As Honoré notes, one may well have reasons to apologize for things for which one is outcome responsible even where there is no issue of either fault or legal liability. If I bump into you on the street, and you drop your package, I have reason to apologize even if, as it turns out, you were the one who appeared from between parked cars without any notice.")

[5] One argument is that, in general, benefits and burdens ought to be balanced. Thus, when we grant property rights to individuals, we do not give them a windfall of benefits; the benefits are balanced by liability for harms brought about by one's property. In other words, ownership is a kind of benefit which justifies our imposition of a special kind of burden, the duty to inspect and make safe. See Benditt (1982, 214). ("There are several other sorts of cases in which courts have found grounds for imposing liability for failures to act. Prosser reports that duties have been imposed where there is a relationship between plaintiff and defendant which is economically advantageous to the latter; the thought is that the expected benefit justifies imposing a special duty. A related class of cases involves duties imposed on the owners and occupiers of land, on the theory that the enjoyment of land ownership carries with it certain burdens especially, to use the land in such a way that others aren't harmed (for example, the attractive nuisance rule), which includes taking steps to prevent even naturally caused harms." [footnote omitted])

[6] "[O]nce one grasps negligence law's tolerance of bad compliance luck, one can appreciate that tort law is a law of wrongs in name only; that the notion of wrong at work here is so distinct from standard usage that it is better not to think of tort as a law of wrongs at all" (Goldberg and Zipursky 2007, 1126).

Perhaps the most dominant explanatory, rather than normative, theory of tort law is economic analysis. On this view, the purpose or function of tort laws is to minimize the sum total of the cost of possible accidents as well as the costs of attempting to avoid them. For a useful overview of the different theories of tort law, including the economic analysis, see Coleman and Mendlow (2010).

It does indeed seem clear that the traditional approach is often defended by appeal to intuitions about moral responsibility. We think it is a mistake, however, to hold that liability doesn't have anything to do with moral responsibility. Indeed, the primary purpose of this paper is to motivate and defend a novel view of *morally responsible liability*—of when owners *qua owners* are morally responsible for damages caused by their property.

To be clear, our claim is not that the traditional approach is correct. Rather, we are suggesting that those who wish to champion the nondiscriminatory approach would be wise to acknowledge the existence of morally responsible liability. Having acknowledged this, theorists leave themselves room to debate whether legal liability should track morally responsible liability, or whether there are reasons to hold persons legally liable even when they are not morally responsible for the damages in question.[7] We suspect that those who champion the nondiscriminatory approach to tort law will find that their justifications for departing from morally responsible liability are easier to swallow if it is explicitly recognized that this is indeed a departure.

One reason this strategy is likely to have remained largely unpursued up until now is that there simply is no good account of morally responsible liability. So far as we can tell, there are only three views on the relationship between moral responsibility and liability present in the literature (indeed, sometimes merely implicitly), each of which faces serious challenges, as we show in §1. We then introduce (end of §1) and defend (§2) a new (and, we think, superior) account of morally responsible liability. In §3, we respond to an objection. Again, our motivations here are two-fold: First, we take our view on the nature of morally responsible liability to have independent theoretical value. Second, we hope that our work will serve to refocus the legal debate: Once the question of

[7] Or, of course, to *not* hold them legally liable even when they *are* morally responsible for the damages in question.

whether there is morally responsible liability is settled (there is), the right question to ask is whether and to what extent such liability should inform tort law.

1. Existing Accounts

The first view on the relationship between moral responsibility and liability, as suggested by conventionalism about liability, is that there *is* no such relationship. There are a number of reasons to be suspicious of this view. For one thing, intuitions about moral responsibility do and will likely continue to influence tort law. Consider, for instance, Richard L. Cupp Jr.'s explanation of the aforementioned California legislature's divergence from the *Rowland* precedent:

> Although the *Rowland* court was perceptive in critiquing the complex and rigid rules that previously characterized land possessor liability standards, it went a bit further than many members of the public were willing to travel by extending a duty of due care even to "bad guy" trespassers. As illustrated by California's enactment of Civil Code section 847, society's rough sense of justice favored disallowing such claims in most circumstances, and that rough sense of justice trumped *Rowland*. The *Restatement (Third)*'s flagrant-trespassers approach recognizes the disconnect between this aspect of *Rowland* and societal values that has become increasingly apparent over time. The *Restatement (Third)*'s approach promotes honoring general but strongly felt moral distinctions that society holds dear rather than seeking to engineer a standard that may not have sufficient grounding in the reality of torts law. (Cupp Jr. 2010, 43)

Cupp's claims are bolstered by the public's reaction to *Bodine v. Enterprise High School*—the most famous of the "bad guy" trespasser cases—in which a student fell through the skylight of his high school while trying to steal a floodlight, and subsequently successfully sued the school for his quadriplegia.[8] Most people seem to share the intuition that there is something wrong with holding the school liable for the student's injuries.

It also seems clear that in certain other cases, we *do* hold owners *qua owners* morally responsible for damages. If a branch from your tree falls on your neighbor's car, you may well be

[8] The case was actually settled out of court.

required by law to compensate your neighbor for the damage.[9] Yet many would agree that if you refused to pay, you would not merely be violating a law (*malum prohibitum*); rather, you would be doing something morally wrong (*malum in se*) because you are morally responsible for the damage to your neighbor's car. Apparently, it is your status as owner that explains this. Thus, moving from the practical to the theoretical, insofar as we take our intuitions regarding moral responsibility to provide any insight into the nature of such responsibility, this suggests that in some cases owners *qua owners* really are responsible for damages caused by their property. This is further reason to regard it as a mistake to insist that moral responsibility is irrelevant to liability. It seems wrong, at least on the face of things, to hold someone liable for something they are not morally responsible for. Invoking other kinds of responsibility can seem like a trick; and ignoring responsibility altogether seems to fly in the face of our intuitions concerning what liability is about.

Another seemingly natural view is that being morally responsible for damages caused by one's property is just part of *what it is to be* an owner. For instance, on John Locke's theory of initial acquisition, a part of oneself enters that which one comes to own through labor on a previously unowned object. As a natural extension of this theory, one might suggest that because our property is an extension of ourselves, harm caused by our property is akin to harm caused by ourselves. Call this the *intrinsic* view.

The problem for conventionalism about liability was that it failed to recognize cases where we hold owners *qua owners* morally responsible. The problem for the intrinsic view is that it fails to recognize cases where we *don't*. Again consider *Bodine*. If being morally responsible for damages were simply part of what it is to be an owner, then we should presumably acknowledge that the school is

[9] See Benditt (1982, 214). ("Whereas the usual rule regarding natural conditions on one's property (such as falling rocks) that threaten harm to others is that there is no duty to inspect and make safe, the rule in urban areas seems to be changing, so that if, on one's property, there is a tree next to a city street, one must inspect it and take steps to prevent an unsafe tree from injuring passersby.")

morally responsible for the student's injuries. Of course, one might point out that the student's actions could be outweighing that responsibility, but that doesn't seem to be what's going on; we suspect most people would share our intuition that the school isn't morally responsible *at all*.

What these problems for both conventionalism about liability—on which owners *qua owners* are never morally responsible—and the intrinsic view—on which they *always* are—suggest is that the correct view of morally responsible liability must be more nuanced; it must recognize that moral responsibility for damages is not a given for owners, but that nevertheless in certain circumstances owners *qua owners* may be morally responsible for damages.

There is another view, however, similar to the intrinsic view, that may fare better with respect to the nuanced nature of morally responsible liability. While the debate over whether "property" is sufficiently meaningful and coherent or is an "essentially contested" concept is not over,[10] A.M. Honoré (1961) has captured what many believe to be the best account of what property amounts to. According to Honoré, ownership consists of eleven "standard incidents." These incidents are:

> 1. The right to possess: to have exclusive physical control of a thing;
> 2. The right to use: to have an exclusive and open-ended capacity to personally use the thing;
> 3. The right to manage: to be able to decide who is allowed to use the thing and how they may do so;
> 4. The right to the income: to the fruits, rents and profits arising from one's possession, use and management of the thing;
> 5. The right to the capital: to consume, waste or destroy the thing, or parts of it;
> 6. The right to security: to have immunity from others being able to take ownership of (expropriating) the thing;

[10] For reasons to think it is "the most ambiguous of categories" see Tawney (1978, 136). ("Property is the most ambiguous of categories. It covers a multitude of rights which have nothing in common except that they are exercised by persons and enforced by the state. Apart from these formal characteristics, they vary indefinitely in economic character, in social effect, and moral justification.") For a more charitable analysis, see Waldron (1985). See also, Eleftheriadis (1996).

> 7. The incident of transmissibility: to transfer the entitlements of ownership to another person (that is, to alienate or sell the thing);
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> 8. The incident of absence of term: to be entitled to the endurance of the entitlement over time;
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> 9. The prohibition on harmful use: requiring that the thing may not be used in ways that cause harm to others;
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> 10. Liability to execution: allowing that the ownership of the thing may be dissolved or transferred in case of debt or insolvency; and,
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> 11. Residuary character: ensuring that after everyone else's entitlements to the thing finish (when a lease runs out, for example), the ownership returns to vest in the owner.[11]

It is not entirely clear whether Honoré meant one or more of these incidents to explain why owners can be held liable. Insofar as he did (or one wished to read his view this way), it seems it would best fit under incident nine: the prohibition on harmful use. If we understand "harmful use" broadly enough, such that it includes any use (even just leaving one's property alone) that leads to harm, this might well capture liability. Furthermore, the view might be adjusted to capture our intuitions regarding cases like *Bodine*. One might suggest, for instance, that "harmful use" only includes uses that are reasonably expected to harm, and since we can reasonably expect people not to trespass, harms that befall trespassers don't count.

Unfortunately, some theorists have objected specifically to Honoré's inclusion of the ninth incident in his theory. For instance, Jeremy Waldron (1988, 49) objects that prohibitions against harming have no essential connection with property or ownership. Waldron writes: ". . . these prohibitions are better regarded as general background constraints on action than as specific rules of property (let alone as specific incidents of *private* property)." When it comes to whether or not you can shove a knife between someone's shoulder blades, it is irrelevant whether you have property in that knife. Including such a duty in the conception of ownership seems redundant.

[11] This summary is taken from Breakey (2013).

In response to this sort of worry, Honoré raises concerns about making the analysis of property too "one-sided" by recognizing only the privileges, and ignoring the duties, that come with ownership.[12] We find this unpersuasive. First, putting our cards on the table, we are independently attracted to the idea that ownership *is* a pure privilege, and thus that such "one-sidedness" is entirely appropriate. Second, and more ecumenically, whether or not we should include *some* duties in our understanding of ownership, surely it is still the case that including the prohibition on stabbing someone with your knife would be redundant. Not only is it wrong to stab someone with a knife you don't own, but owning the knife surely does nothing to alter the seriousness of the wrong. It would be patently bizarre for someone to condemn Paul, saying: "Paul stabbed Mary! And, what's more, he did so with *his knife!*" (Indeed, if anything, we might think it was worse if he did so with hers!)

Our concern, though, is liability. Consider a case where instead of stabbing her deliberately, vibrations from a passing truck cause Paul's knife to fall and stab Mary. We might well hold Paul morally responsible in that case (depending, perhaps, on how precarious the knife's position was, and how frequently trucks pass his property). Importantly, if we did hold Paul morally responsible, it seems that this might well be because the knife was *his*.[13] Thus, it seems that the force of Waldron's

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[12] Honoré (2006, 134) writes: "Yet the duties that go with ownership ('limitation rules'), for example the landowner's duties towards those who come onto his land, are a feature of the institution of ownership in all modern (and one may suspect nearly all ancient) societies. The law of nuisance is treated as a species of 'property-limitation', because premised on the assumption that, but for the restriction, the owner would be free to act in a certain way, for instance to emit smoke from his own land so as to lessen his neighbour's enjoyment. This branch of the law imposes restrictive duties on landowners. So to say that 'duties (are not) intrinsic to ownership interests' is to focus on the privileges rather than the responsibilities of an owner to an extent that makes the analysis one-sided. The same is true of expropriation rules such as liability to execution and forfeiture… Why are these rules not 'intrinsic' to ownership?"

[13] Even if the knife were not his, we might hold him responsible—say, if he were the one who left it in that position. The point is just that ownership of the knife might well be sufficient to render Paul morally

objection flags when we read the ninth incident such that it captures such cases of liability. If we understand "harmful use" narrowly, such that it includes only things like intentional stabbings, Waldron seems correct that there is a general background obligation that makes its inclusion in our conception of ownership redundant. But understood in this way, the ninth incident fails to capture most cases of liability. If, on the other hand, we understand "harmful use" broadly enough to capture cases like the one where Paul's knife falls on Mary, the force of Waldron's objection is limited. *Some* instances of the ninth incident—e.g., Paul's duty not to stab people with this knife—will be independent of ownership. But others—e.g., Paul's duty to make sure that this knife doesn't fall and injure anyone—seem connected to ownership after all, and thus including them as part of our conception of ownership might not be redundant. In this way, an account like Honoré's might provide a basis for morally responsible liability while avoiding Waldron's concern.

We are not satisfied with this answer, however. One major concern is explanatory power. Saying that certain duties are simply part of what it is to be an owner isn't very helpful, especially where there is contention. If someone denies that there is such a duty, we may well end up talking past one another, slamming our fists on the table as we champion our disparate conceptions of property. What's more, we still need an account of "harmful use" that captures all and only those cases where we find owners to be morally responsible for damages caused by their property, and we worry that any such view would be implausible or ad hoc. We doubt our story above about reasonable expectation would stand up to much scrutiny (we might well reasonably expect that some people are going to act immorally and trespass) and we doubt there are better contenders.

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responsible, presumably because it is the owner's duty to make sure the knife isn't lying about in a precarious position. Suppose, for instance, that it was a previous guest who left the knife in that position; Paul might still be held responsible.

In any case, we think we can do better. Indeed, we think the seeds of a better view can be found in the works of Honoré and Waldron. Begin with some comments from Honoré specifically on liability:

> An important ground of duty is that the agent, by a positive act, has intervened or proposes to intervene in the world in such a way as to do harm, or create or substitute a new risk of harm, or increase existing risk to others. The agent then often has a duty to minimise the risk of harm, or, if it has occurred, to mitigate it by means that may be either positive or negative, usually both. . . .
>
> A second ground is that the agent occupies a position or office or fills a role that may require him to act positively. Parents, friends, employers, managers, *owners and possessors of property* . . . have duties of this sort and are guilty of omission if they fail to discharge them. The legal liability of innkeepers, common carriers, and possessors of land fall under this heading. In contrast with the previous risk-creating type of situation, the person who has a duty to act need not have created the danger himself. For instance, it seems reasonable that a landowner on whose premises a fire starts, but who did not start it himself, should take steps to put it out. (Honoré 1999, 55 and 57, emphasis added, footnote omitted)

We agree with Honoré's proposal of a moral duty conditional on increasing risk to others. And we agree that this is a duty that seems to follow from ownership. But we disagree with the disjunctive nature of his analysis. Honoré seems to think that there is a duty that comes either from (a) acting so as to increase risk (among other things) or (b) filling certain roles—relevantly, that of owner. We argue, instead, that filling the role of owner typically leads one to increase risk to others, and thus that there is really a singular basis for the duty in question.[14]

It is not hard to see how this view also relates to Waldron's, making good on his insight that, in many cases at least, the duties associated with ownership are instances of general background duties, rather than duties intrinsic to ownership itself. We amend Waldron by recognizing that, in some cases, the duties in question are *conditional* duties—specifically, here, a duty of care conditional on acting so as to increase risk, making it more likely that others will be harmed.

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[14] Interestingly, we actually came to this view before discovering that Honoré himself discusses risk as a condition for the relevant duty.

To see how such conditional duties work in general, and how they might follow from a role without being intrinsic to it, consider one of Honoré's other examples of a role or office: parenthood. Parents are frequently taken to have special duties of care with respect to their children. One explanation—apparently, the sort Honoré champions—is that these duties are part of *what it is to be* a parent. But this is implausible. After all, if I put my child up for adoption, I may no longer have these duties, though I remain the child's parent (at least insofar as we are discussing biological parenthood[15]). It is hard to see how this could be if these duties were *constitutive* of being a parent. A more plausible explanation, it seems to us, is that parenthood by *default* entails another relation—what we might call *guardianship*. And it *is* constitutive of being a guardian that one has certain duties of care with respect to one's wards. Thus, certain duties follow from biological parenthood by default, though they are not part and parcel of *being a parent*.

Again, we believe that something similar holds for ownership. Being morally responsible for the harms caused by one's property is not constitutive of being an owner. Rather, being an owner leads one to meet the conditions from which such responsibility *does* follow (in most, if not all, cases): taking ownership of an object *increases risk* to others. We turn now to our defense of this claim.

2. Risk, Moral Responsibility, and Ownership

John is doing research on the effects of a certain chemical on the lifespan of fish. Luckily, John lives on the frontier, and nearby there is an unowned piece of land with a lake full of fish. John decides to dump some of the chemical into the lake and there conduct his research. As John well knows, this chemical is poisonous to humans.

[15] To be fair, Honoré doesn't specify "biological" parenthood, and thus might be using the term to refer to guardianship. Nevertheless, the example serves to illustrate the relevant possibility.

Contrast the case of John with the case of Bill. Bill also lives on the frontier, not far from an unowned piece of land with a lake. Bill's dog recently passed away after drinking tainted water, and so Bill has started carrying around a test kit and testing water sources before drinking from them. One day, passing by the lake near his home, Bill decides to stop for a drink. Luckily for Bill, he has his test kit with him because, as he soon discovers, the lake water is tainted.

Assume that both John and Bill know that there are other people living in the area who might make use of the lake. Many, we think, would maintain that both John and Bill ought to warn others about the water's being contaminated. Nevertheless, we suspect most would be quicker to hold John morally responsible were someone to drink the water and become ill. In Bill's case, this seems less clear. We might think that it would be good for Bill to put up a sign, but it is not obvious to us that he may be held responsible for the harm that results from his not doing so. (For instance, if Bill were in a rush to get somewhere; we might excuse his not stopping to put up a sign, certainly more than we would John's.)

The relevant difference between John and Bill is that John's actions explain the presence and the extent of the danger in question, while Bill's do not. Assuming it was permissible to create this danger in the first place, it seems to us that John has a duty of care: He ought to do what he can to ensure that the danger does not affect anyone. Bill, on the other hand, is merely *aware* of a pre-existing danger. This awareness may generate some moral demand, but it is not the same as the demand placed on John.

We suggest the following reading of the above situation: Agents are subject to a general, *conditional* moral duty of care. The condition (or at least one condition) for this duty is *increasing risk*. That is, when an agent does something that either creates or augments existing danger, that agent has a moral duty to compensate for the risk of injury to the best of his ability. So, by contaminating the lake, John increases the risk of becoming ill to persons in the area, and therefore has a duty to

ensure that this does not happen; he may therefore be held responsible (morally and perhaps compensatorily) if it does. This is, of course, much the same as what Honoré suggested in the passage above.

Compare the cases of John and Bill with the case of Patricia: One day, Patricia is standing on a bridge between two cliffs. Two people are walking along in the canyon far below. Looking ahead, Patricia sees that there are large boulders teetering on the edge of each cliff, one on either side. If either of these boulders should fall, Patricia can tell, it will crush one of the two people walking below (the western boulder will crush the person walking on that side; the eastern the other). Patricia does not know either of the people walking below; indeed she knows nothing about them at all beyond that they are in peril, and that they are too far away for her to warn them.

Most, we think, would agree that if she can, Patricia has a moral reason to try to stop the boulders from falling and crushing the people below. We take it for granted that such a reason exists. Suppose now that we are given a new piece of information: Patricia *owns* the land to the east (and thus the eastern boulder) but not the land to the west. Our interest is in whether, were the boulders to fall and kill the people in the valley, Patricia's level of moral responsibility would differ between the two. It seems to us that it would: Patricia would be morally responsible for the death caused by the eastern boulder more so than for the western, and this is because the former is *her* boulder.[16]

In the first case, we maintain that the explanation for why John bears more responsibility than Bill is that it is John's actions that explain why the lake water is more dangerous than before, whereas Bill is merely *aware* of that danger. The analogous suggestion, then, would be that Patricia is

[16] Of course, we might also hold her responsible for the western death. Suppose she could have easily prevented it from falling and just stood there laughing. But it should be clear that this is a different basis for responsibility than the one we are talking about, which is present or not independently of her ability to help in that moment.

morally responsible for a death caused by the eastern boulder more so than for a death caused by the western because it is her taking ownership of the eastern that explains why it is more dangerous than before (whereas she is merely aware of the danger posed by the western's instability). Indeed, this is precisely what we maintain. The obvious question, then, is in what sense Patricia's taking ownership led to this increase in risk. It would be one thing if, in taking ownership of the boulder, Patricia rocked it back and forth. But we've suggested no such thing; indeed, for all we know Patricia has never physically interacted with the boulder at all!

To see why we nevertheless maintain that Patricia's property rights *do* lead to increased risk to others, consider one further case: Imagine that there is a time bomb sitting in the middle of a room. Luckily, the bomb is quite easy to disarm; all one has to do is press the big red "DISARM" button. Unluckily, someone has put up a force-field around the bomb, so no one can get to it to press that big red button. Even more unluckily, the force-field is unidirectional. If the bomb goes off, the force-field will not contain the blast.

We have—and hope you will share—the following intuition about this case. If the bomb goes off and harms someone, the person who put up the force-field will bear some moral responsibility for the harm in question. This seems true regardless of whether the person manufactured or armed the bomb. Our explanation is that in putting up the force-field, one increases risk to others. Of course, bombs are dangerous anyway. But before the force-field went up, the bomb was less—indeed, perhaps, minimally—threatening. After all, all one needed to do was press that big red button and the danger would be gone!

Ownership, we maintain, can be conceived of as such a force-field. When I come to own something, I create a duty of non-interference in others; they are not permitted to interact with my property without my say-so. Of course, there is no literal force-field; my ownership of something

doesn't *physically* prevent you from interacting with it. But you are prevented in the sense that doing so has become *immoral.*

Now, suppose that what I own is in some way dangerous, or at least has the capacity to be. Think back to Patricia. One of those boulders is on public land. Anyone (including the person at risk, down in the valley) could, at any time, have gone to make sure that the boulder up there was safely rooted, that there was no risk of its falling onto unsuspecting passersby. But thanks to Patricia's property rights, the same is *not* true of her boulder. Only Patricia is morally permitted to interact with her boulder (without permission), and thus only Patricia was in a moral position to inspect and make safe.[17] This leaves others in a vulnerable position, and it seems to us that Patricia has an obligation to compensate for this position—she herself gains a duty to inspect and make safe. Should she fail to do so, she is morally responsible for any resultant damages.

On our view, then, morally responsible liability is not part of ownership itself. Rather, cases of holding owners (morally responsibly) liable are instances of a more general kind of case—one in which an agent meets the conditions of a conditional duty of care.[18] The relevant condition is that

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[17] Of course, if the risk were immediate and great enough, we might think that others' duty of non-interference is outweighed, but this does not seem to affect the main point, especially since her property rights also affected people's ability to (morally) find out whether there was a danger in the first place!

[18] What will count as sufficiently "inspecting and making safe" will differ depending on the nature of the object, and the circumstances. It is one thing to store 1,000 firecrackers in a shed in the middle of a 40-acre rural property, quite another to store 1,000 firecrackers in a downtown high-rise apartment building. It is one thing to carry a jar of peanut butter at a camp for children with severe peanut allergies, and another to have peanut butter spread on your toast in your kitchen. It is one thing to have bleach or vinegar in your kitchen cupboard, quite another to have a vial of the H1N1 flu virus in your laboratory. And so on. As the likelihood of harm to others increases, our standard for what counts as "sufficient precautionary measures" will change. Our analysis does not require precision here. We need not settle on the exact contours of this duty of care, or what counts as meeting this duty. We also need not settle when someone is to be held liable and if, for example, a harm being unforeseeable by a reasonable person mitigates or eliminates liability. We need only point out that owners generally have this duty in virtue of ownership.

the agent has increased risk to others. The duty in question is much the same as the one Honoré recognizes. Where our account departs from his is in our insistence that, rather than being an independent basis for the duty in question, ownership simply leads one to meet the duty's general condition concerning risk.

3. An Objection

As a number of people have noted,[19] an obvious objection to our view is that, in many cases, ownership actually *decreases* risk to others. Consider, again, our force-field metaphor. We imagined a force-field around a bomb, and pointed out that this force-field might prevent people from disarming the bomb. But suppose that, initially, the bomb *was* disarmed. It seems important that the force-field also prevents people from *arming* it. In that case, it seems the force-field would *decrease* risk. Taking the metaphor home, suppose that we're really talking about *ownership* of a bomb. If I take ownership of an unarmed bomb, it follows that, so long as you respect my property rights, you are in less danger than you otherwise would be of, say, accidentally triggering the bomb (since you aren't allowed to play with it). So, the objection goes, our account cannot be correct.

We agree with everything in this objection except its conclusion. Indeed, we readily admit that taking ownership of something can decrease risk to others just as easily as it can increase it. Far from being an objection, however, we are confident that cases like this are precisely the ones that speak most strongly in favor of our view.

Suppose that I do indeed own a bomb. It is disarmed and it is inside my house. Next to it there is a large sign that says that it is a bomb and that one should not pick it up, as this might set it

[19] Our thanks to several participants at the George Mason University Workshop in Politics, Philosophy, and Economics, as well as attendees at the University of Warwick's Association for Social and Legal Philosophy conference for pointing this out.

off. (Please don't ask why this is the case.) As our objectors point out, this seems to be a case in which my ownership has decreased risk to others. This bomb is far less of a risk than it would be if it were sitting, say, unowned in the middle of the street.

But here's the rub: We are confident that most people would agree with us that if you enter my house and set off the bomb, I am not morally responsible for the harm done to you. Indeed, this is analogous to the *Bodine* case. A student was injured when he fell through a skylight while trying to steal a floodlight from a high school. He sued. We do not dispute the suit as a legal matter; as discussed earlier, we take no position here on the right approach to the law. What matters is that most people found this lawsuit outrageous, apparently because they believed the school was not morally responsible for the student's injuries.[20]

With this in mind, let us draw a distinction. Imagine, again, an object behind a unidirectional force-field. This object might be dangerous in one of two ways. First, it might be dangerous in that it can harm people outside the force-field. Second, it might be dangerous in that it can harm those who make it through the force-field. The analogous distinction in the case of ownership should be clear. We will refer to *external* harms as those harms that an object can cause even when no one interacts with the object in ways that would violate property rights in that object (should there be any). We will refer to *internal* harms as those harms that an object can cause only to persons who (or in the case where persons) interact with that object in ways that *would* violate property rights in that object (should there be any).

Given this, we contend, first, that taking ownership in an object typically increases the risk of external harms but decreases the risk of internal harms. What's more, we maintain that this explains why, in general, we think it morally appropriate to hold people liable for external harms, but not for

[20] And, again, it is not merely that the student's wrongdoing outweighs the school's. People do not think that the school is morally responsible for what happened to him *at all*. It was entirely his fault!

internal ones. If my bomb goes off and harms you as you walk by my home, I am morally responsible. If it goes off when you break in and try to juggle with it, I am not.

6. Conclusion

In this paper, we have considered the basis of our intuitions that owners *qua owners* are sometimes morally responsible for harms caused by their property. The fact that we have such intuitions is a reason to reject the claim that liability is merely legal or conventional.[21] For a number of other reasons, already discussed, we reject the claim that such liability is simply part of what it is to own something. Given this, our goal has been (following Waldron) to discover a general moral duty that explains our intuitions in these cases. The most likely culprit, it seems, is a *conditional* duty whose conditions are (at least typically) met in cases of ownership. Helpfully, Honoré proposes such a duty: The duty to inspect and make safe—a duty of care—conditional on one's having increased the risk that the object(s) in question will harm others. Unlike Honoré, however, who takes an alternate condition for this duty to be filling the role of owner, we maintain that ownership simply leads one to meet the condition mentioned—in taking ownership of a good, one decreases others' ability to (morally) inspect and make safe your goods themselves, and thus increases the likelihood that they will be harmed by it.

Finally, we addressed the worry that taking ownership can actually *decrease* risk to others, as they are no longer (morally) able to do certain things that might lead them to be harmed (e.g., do yoga next to your boulders, enter your home and play catch with a bomb, etc.). We maintain that, far from casting doubt on our account, such cases point to a distinction that captures the difference between those cases where we do and do not hold owners morally responsible for harms caused by

[21] Of course, if our intuitions lined up perfectly with the legal system, we might think that we've simply internalized that system. But, as noted, they do not.

their property. To wit, owners are held morally responsible to the extent that the harms in question are *external*—are not the result of persons' violating the relevant property rights. Where such harms are *internal*—as in the cases upon which this objection relies—we find that legal practices of holding liable conflict with our intuitions concerning moral responsibility. This provides the strongest case both for our view and against those who would hold that our moral intuitions are explained either by legal/conventional practices or by our apprehension of the nature of ownership itself.

We take our view to have independent theoretical value. What's more, we hope it will serve to further the dialectic over the right approach to tort law. Whether tort law should follow the traditional or nondiscriminatory approach is an important question, and we believe it is most usefully framed as the question of whether legal liability should track morally responsible liability. Indeed, we take this to be the case even if our particular account of the basis for morally responsible liability turns out to be incorrect. Minimally, what we hope to have made clear is that *some* account is needed that engages with moral responsibility (unlike the conventionalist account), allows for cases where owners are *not* morally responsibly liable (unlike the intrinsic account), and acknowledges (contra both Waldron and Honoré) that the responsibility in question follows from, yet is likely not a part of, ownership itself.

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References

Benditt, Theodore M. (1982). "Liability for Failing to Rescue." *Law and Philosophy* 1:391-418

Breakey, Hugh (2013). "Property Concepts." In *The Internet Encyclopedia of Philosophy*, http://www.iep.utm.edu/prop-con/.

Coleman, Jules and Gabriel Mendlow (2010). "Theories of Tort Law." In: Zalta E.N. (ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2010 Edition), http://plato.stanford.edu/archives/fall2010/entries/tort-theories/.

Cupp Jr., Richard L (2010). "In Praise of Moral Judgment: The Restatement (Third) of Torts and Flagrant 'Bad Guy' Trespassers." *Wake Forest Law Review Forum* 1:37-44.

Donoghue (or McAlister) v Stevenson (1932). All ER Rep 1; (1932) AC 562; House of Lords.

Eleftheriadis, Pavlos (1996). "The Analysis of Property Rights." *Oxford Journal of Legal Studies* 16:31-54.

Goldberg, John C.P. and Benjamin C. Zipursky (2007). "Tort Law and Moral Luck." *Cornell Law Review* 92:1123-1176.

Honoré, A.M. (2006). "Property and Ownership: Marginal Comments." In: Endicott T, Getzler J, and Peel E (eds.), *Properties in Law: Essays in Honour of Jim Harris*. Oxford: Oxford University Press, pp. 129-137.

Honoré, A.M. (1999). *Responsibility and Fault.* Oxford: Hart Publishing.

Honoré, A.M. (1961). "Ownership." In: Guest A.G. (ed.), *Oxford Essays in Jurisprudence: First Series*. Oxford: Clarendon Press, pp. 107-147.

MacPherson v. Buick Motor Co. (1916). 161 AD 906 145 NYS 1132 1914 NY App Div.

Ripstein, Arthur (2001). "Private Law and Private Narratives." In: Cane P, Honoré T, Gardner J.B. (eds.), *Relating to Responsibility: Essays in Honour of Tony Honoré on his 80th Birthday*. Oxford: Hart Publishing, pp. 37-60.

Rowland v. Christian (1968). 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561.

Siddons v. Business Properties Development Co. (1998). 191 Ariz. 158, 953 P.2d 902.

Tawney, R. H. (1978). "The Sickness of an Acquisitive Society." In: Macpherson C.B. (ed.), *Property: Mainstream and Critical Positions*. Oxford: Basil Blackwell Press, pp. 133- 152.

Waldron, Jeremy (1988). *The Right to Private Property.* Oxford: Oxford University Press.

Waldron, Jeremy (1985). "What is Private Property?" *Oxford Journal of Legal Studies* 5:313-349.