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THE LAW OF PREMISES LIABILITY IN AMERICA:  
ITS PAST, PRESENT, AND SOME  
CONSIDERATIONS FOR ITS FUTURE

*Robert S. Driscoll\**

INTRODUCTION

In 1968, the California Supreme Court took what was a relatively stable area of the law, that of premises liability, and thrust it into the national legal debate over the nature of the tort system.<sup>1</sup> Whereas the state courts had up until *Rowland v. Christian*<sup>2</sup> followed a system of liability deeply rooted in the common law, California's decision signaled a new direction for the ownership of land. The traditional system had defined landowner duties based on the status of the entrant; assigning higher duties to those there by consent and lower duties to those who trespassed.<sup>3</sup> The *Rowland* standard, however, essentially removed this special protection for landowners from the normal rules of negligence and imposed a standard of reasonable care, only considering the status of the entrant as one of many factors in making the determination.<sup>4</sup> What was once a fairly uniform system across the states became fractured as some courts followed *Rowland*,<sup>5</sup> others rejected it,<sup>6</sup> and still others sought a middle ground.<sup>7</sup> Further, in some

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

2 *Id.*

3 *See infra* Part I.A.

4 *See infra* Part I.B.

5 *See infra* note 46.

6 *See infra* note 63.

7 *See infra* note 64.

states, the legislatures passed statutes to explicitly overturn decisions in their courts moving to a unitary standard of reasonable care.<sup>8</sup>

The confusion and diversity among the states provides commentators with an opportunity to assess the current state of the law of premises liability and also to look back at its roots in the common law. As courts search for reasons and justifications for or against the *Rowland* standard, a reexamination of the path that got the system to where it is today is wise. Indeed, it may be the case that *Rowland* represented a wrong turn and the current reaction against it could return the legal system to a more acceptable state.

Part I of this Note will examine the system of premises liability as defined in various state courts and the Restatement (Second) of Torts, as well as describe the tripartite system's erosion in the early and mid-twentieth century and its possible revival today. Part II looks back at the judicial roots of the tripartite system and connects it with the founding principles of the nation. These principles, which ultimately produced the Declaration of Independence and the Constitution, were not only pertinent at the federal level but also animated the American system of property at the state level. Part III examines the law of trespass, and one of its numerous exceptions, the attractive nuisance doctrine, in light of the roots of the tripartite system. I argue that early twentieth-century courts moved away from the original justification behind the doctrine and this in turn has bred much of the confusion complained of in twentieth-century opinions and scholarship. Finally, Part IV argues that the common law system of trespass is still highly relevant, even in today's society, and that courts would do well to observe the category to protect property rights. I also argue that the *Rowland* standard of unitary care represents a departure from certain rule of law values which are vital to our legal system.

Courts should think carefully about the original justifications for a tripartite system of liability since the practical outcomes of these ideas are still desirable today. The system as a whole is consistent with the fundamental principles upon which this country was founded. Practically, the system is designed to secure to landowners the free possession and use of their property while at the same time imposing reasonable duties that arise out of the landowner's relationship with the rest of society.

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8 See *infra* notes 55-57, 62-63 and accompanying text.

## I. THE COMMON LAW SYSTEM

### A. *The Modern Tripartite System of Premises Liability*

The common law system of premises liability defines a landowner's responsibility to others on his land by using a tripartite system based upon the visitor's relationship with the landowner. These distinctions, which stretch far back into English common law, are "an absolutely rigid line. There is no half-way house, no no-man's land between adjacent territories. When I say rigid, I mean rigid in law."<sup>9</sup> The owner owes the highest duty of care to the invitee. There is some disagreement in the literature about what exactly defines an invitee: some argue that if the land has been held open to the public in such a way as to imply an invitation, then anyone entering becomes an invitee; whereas others argue that the concept of an invitee only encompasses business relationships.<sup>10</sup> This ambiguity is reflected in the Restatement (Second) of Torts which defines an invitee as not only one who enters the land "for a purpose for which the land is held open to the public," but also as a "business visitor" who comes upon the land for a purpose connected in some way with "business dealings with the possessor of the land."<sup>11</sup> Since the invitee has been invited onto the land by the landowner, whether implicitly or explicitly, the landowner has a duty of "reasonable care for his safety."<sup>12</sup> Thus, he must not only warn the invitee of conditions which may exist and cause harm, but also protect him against those dangers of which the invitee "knows or has reason to know, where it may reasonably be expected that he will fail to protect himself notwithstanding his knowledge."<sup>13</sup>

A licensee, however, is a "person who is privileged to enter or remain on land only by virtue of the possessor's consent."<sup>14</sup> To licen-

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9 Robert Addie & Sons (Collieries), Ltd. v. Dumbreck, [1929] A.C. 358, 371 (H.L.) (appeal taken from Scot.) (opinion of Viscount Dunedin).

10 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 27.1, at 130 & nn.8-9 (2d ed. 1986). In an influential article, William Prosser argued that over the years, the courts have mistakenly moved away from the idea of an invitee as anyone who enters land that was thrown open to the public in favor of the narrower conception of a business visitor. He argued: "[T]he duty of the occupier toward his 'invitee' was not, in its inception, a matter of a quid pro quo for a benefit conferred or hoped for. It rested rather upon an implied representation of safety, a holding out of the premises as suitable for the purpose for which the visitor came . . ." William L. Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573, 585 (1942).

11 RESTATEMENT (SECOND) OF TORTS § 332 (1965).

12 *Id.* § 341A.

13 *Id.* § 341A cmt. a.

14 *Id.* § 330.

sees, the landowner owes a duty of reasonable care if "he should expect that they will not discover or realize the danger" and "they do not know or have reason to know of the possessor's activities and of the risk involved."<sup>15</sup> Once the landowner has informed him of these dangers, 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 to justify him in incurring the risks involved."<sup>16</sup> Perhaps counter-intuitively, the licensee category normally encompasses visitors who are there for social reasons, including invited guests of the owner, and they thereby receive less protection than do invitees.<sup>17</sup>

The final category at common law is perhaps the best known—that of a trespasser. The Restatement defines a trespasser as one "who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise."<sup>18</sup> Though there without any right, a landowner may not inflict deliberate harm on an innocent trespasser.<sup>19</sup> "Deliberate shootings or setting traps to capture such individuals create a near automatic liability."<sup>20</sup> In terms of unintentional behavior, the landowner owes very little care to a trespasser. He must only act to avoid willful and wanton misconduct which "falls on the scale of wrongdoing somewhere between the intentional infliction of harm and gross negligence."<sup>21</sup> The traditional justification for such a rule stems from the trespasser's wrongdoing:

When they enter where they have no right or privilege, the responsibility is theirs, and they must assume the risk of what they may encounter, and are expected to look out for themselves. Such has

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15 *See id.* § 341.

16 *Id.* § 341 cmt. a.

17 Some commentators have criticized this distinction. *See* 5 HARPER ET AL., *supra* note 10, § 27.11, at 215–18, which calls attention to the "semantic difficulty" it has caused. Prosser justifies the distinction by comparing the social guest to a member of the landowner's family: "[T]he guest understands when he comes that he is to be placed on the same footing as one of the family, and must take the premises as the occupier himself uses them, without any preparations made for his safety . . ." Prosser, *supra* note 10, at 604.

18 RESTATEMENT (SECOND) OF TORTS § 329 (1965).

19 *See* *Bird v. Holbrook*, 130 Eng. Rep. 911, 913 (C.P. 1828).

20 RICHARD A. EPSTEIN, TORTS § 12.3, at 314 (1999).

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

always been the point of view of the common law, with its traditional regard for the rights of private ownership of property.<sup>22</sup>

Once this basic law of relationships between landowners and trespassers has been established, the rest of trespass law deals with exceptions to the rule entitling certain trespassers to greater duties of care.<sup>23</sup> Most of these exceptions deal with situations in which the landowner knows or has reason to know that members of the public constantly trespass, knows or has reason to know of a specific trespasser on the land, or with trespassers who are children.<sup>24</sup>

### B. *The Abolition of the Tripartite System in the Twentieth Century*

Despite its roots in the common law, the tripartite system of premises liability began to erode in the first half of the twentieth century and eventually came under full-fledged attack. The distinctions first fell in the country of their birth, when England passed the Occupiers' Liability Act of 1957.<sup>25</sup> The statute had the effect of entirely eliminating the distinction between an invitee and licensee from English law.<sup>26</sup> The American Supreme Court was quick to follow suit in federal admiralty law. Joseph Kermarec was visiting a friend and member of respondent's crew on board the *S.S. Oregon*, docked in New York City, when he fell descending the staircase while disembarking.<sup>27</sup> While generally ship owners owed a duty of reasonable care to any aboard a vessel who were not members of the crew, the Court in *Kermarec v. Compagnie Generale Transatlantique*<sup>28</sup> took up the question of "whether a different and lower standard of care is demanded if the

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22 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 58, at 393 (5th ed., 1984) [hereinafter PROSSER AND KEETON] (citation omitted).

23 *Id.* § 58, at 395.

24 See RESTATEMENT (SECOND) OF TORTS §§ 334-339 (1965).

25 5 & 6 Eliz. 2, c. 31.

26 *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 n.10 (1959). The Occupiers' Liability Act states that the law affects "any invitation or permission [the occupier] gives to another to enter or use the premises . . . and as his visitors are the same . . . as the persons who would at common law be treated as an occupier and as his invitees or licensees." Occupiers' Liability Act, 1957, 5 & 6 Eliz. 2, c. 31 § 1(2). Thus, the Act would not apply to traditional "trespassers" as they do not receive an invitation or permission. It was not until 1984 that the Occupiers' Liability Act changed the common law for trespassers. The updated Act applies to any person "other than [the occupier's] visitors" and the owner owes a duty of care if he knows or should know of a dangerous condition, he knows or should know the trespasser is in the vicinity of the danger, and the danger is one which the owner can help to protect against. Occupier's Liability Act, 1984, 5 & 6 Eliz. 2, c. 3, § 1.

27 *Kermarec*, 358 U.S. at 626.

28 358 U.S. 625 (1959).

ship's visitor is a person to whom the label 'licensee' can be attached."<sup>29</sup> In making such a determination, the Court found that it ought to be "free from inappropriate common-law concepts."<sup>30</sup> Noting that the distinctions came from "a culture deeply rooted to the land" which also "traced many of its standards to a heritage of feudalism," the Court believed that the needs of a modern, urban society were demonstrably different.<sup>31</sup> Practically speaking, the distinctions had "bred confusion and conflict" which the Court characterized as a "semantic morass."<sup>32</sup> Given the contrast between modern society and the feudalism of medieval England as well as the practical difficulties the Court saw in administering the categories, it held that ship owners would owe to everyone on board "the duty of exercising reasonable care under the circumstances of each case."<sup>33</sup>

The Supreme Court's decision not to extend the categories into admiralty law was taken a step further by the California Supreme Court in *Rowland v. Christian*.<sup>34</sup> Instead of simply refusing to implement the system in a new area of law, the court completely abolished the categories in California. Defendant Nancy Christian was a tenant of an apartment and knew that the knob on her bathroom sink was cracked and had informed her landlord of the condition.<sup>35</sup> Plaintiff James Rowland, her social guest, was not told of the dangerous condition in the bathroom and severely injured himself when the knob cracked.<sup>36</sup>

The court began its analysis by noting that California Civil Code Section 1714 at the time established a basic duty of reasonable care in all situations in the state.<sup>37</sup> Thus, starting the analysis with the duty of

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29 *Id.* at 630.

30 *Id.*

31 *Id.*

32 *Id.* at 631.

33 *Id.* at 632.

34 443 P.2d 561 (Cal. 1968).

35 *Id.* at 562-63.

36 *Id.* Though this case has become famous for its abolition of the categories, it is worth noting that even under the tripartite system Rowland likely would have recovered damages. As a social guest, he was a "licensee" and thus Christian had a duty to warn him of any dangerous conditions of which she knew. Having failed in her duty, she would likely be held liable. See EPSTEIN, *supra* note 20, § 12.11, at 331 (noting that "*Rowland* abolished the licensee/invitee distinction on facts that would have allowed the licensee to recover under the older common law rules"). The fact that the court uprooted the entire system here suggests that a deeper animosity to the rules had been brewing in the legal world which caused the abolition, rather than an accidental effect arising from a desire to do justice to a sympathetic plaintiff in an individual case.

37 *Rowland*, 443 P.2d at 563-64.

reasonable care, an "exception" could only be made if "clearly supported by public policy."<sup>38</sup> Drawing on the logic of *Kermarec*, the court noted:

It has been suggested that the special rules regarding liability of the possessor of land are due to historical considerations stemming from the high place which land has traditionally held in English and American thought, the dominance and prestige of the land-owning class in England during the formative period of the rules governing the possessor's liability, and the heritage of feudalism.<sup>39</sup>

Implicit in such a statement is that any notion of property law traceable to the feudal period has no place in modern law with its greater regard for "human safety."<sup>40</sup> Any attempt to apply "ancient terminology" to "modern society" will necessarily result in "complexity and confusion."<sup>41</sup> Going further than the Occupiers' Liability Act of 1957, the court concluded that liability would depend on whether the landowner "has acted as a reasonable man in view of the probability of injury to others," while the plaintiff's status as a licensee, invitee, or trespasser would be only one factor in the liability inquiry and no longer controlling in any case.<sup>42</sup>

The common theme running through the erosion and eventual abolition of the tripartite system is the necessity for a modern society to move past feudal vestiges in the law. The "modern consensus" is that the "dominance and prestige of the landowning class in England during the formative period of this development" led directly to a system of classifications "bound up with the values of a social system that traced much of its heritage to memories of feudalism."<sup>43</sup> As early as

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38 *Id.* at 564.

39 *Id.* at 564-65.

40 *Id.* at 565; accord PROSSER AND KEETON, *supra* note 22, § 58, at 395 ("These [exceptions to the common law system] have developed in many states because of an increasing feeling that human safety is generally of more importance than the defendant's interest in unrestricted freedom to make use of his land as he sees fit . . .").

41 *Rowland*, 443 P.2d at 567.

42 *Id.* at 568.

43 See HARPER ET AL., *supra* note 10, § 27.1, at 131-32. While it is beyond the scope of this note to examine this argument in any depth, it seems odd to apply it to America's adoption of the tripartite system. The literature commonly traces its introduction in America to the case of *Sweeney v. Old Colony & Newport R.R. Co.*, 92 Mass. (10 Allen) 368 (1865). At that time, Massachusetts was a budding industrial area without strong ties to the feudalism referred to by the "modern consensus." See, e.g., JAMES MCPHERSON, *BATTLE CRY OF FREEDOM* 95 (1988) (noting that in the area of textile manufacturing, "[t]he city of Lowell, Massachusetts, operated more spindles in 1860 than all eleven of the soon-to-be Confederate states combined"). Indeed, northern industrial states were just ending a war against a southern agrarian economy more



1923, Professor Green argued that the tripartite system had settled in before the negligence system had taken hold and thus, in essence, was grandfathered into the law. He argued, "the controlling cases were decided before the theory of negligence had so largely supplanted the earlier notion of responsibility. It is wholly out of harmony with our general theory of tort liability. If it is to be regarded as settled law, it has become so by default."<sup>44</sup> A less sympathetic view is offered by Professor Henderson. He believed that the common law system was threatened, and ultimately replaced, by "first, the mounting social pressures favoring compensation of accident victims as an end in itself; and second, the growing tendency in modern legal thought to view formality of any kind as an unnecessary impediment to achieving justice in every case."<sup>45</sup>

### C. *The Tripartite System Post-Rowland*

Whatever the origins of the tripartite system, *Rowland* set off a firestorm in local tort law. Immediately following the *Rowland* decision, a number of state courts set about totally abandoning the tripartite system of premises liability.<sup>46</sup> The Hawaii Supreme Court dismissed the established distinction in a perfunctory two-page opinion, arguing that the "common law distinctions between classes of persons have no logical relationship to the exercise of reasonable care for the safety of others."<sup>47</sup> Similarly, the New York Court of Appeals simply stated that the distinctions "need no longer be made," relying on

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closely related to the English feudal system and it would seem inconsistent for their courts to begin adopting laws congenial to this economic model. Nevertheless, the argument of this Note is that regardless of its origins, the tripartite system (and in this case the laws applying to trespassers), is still viable for modern society and ought not be expunged from the law.

44 Leon Green, *Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility in Tort*, 21 MICH. L. REV. 495, 511 (1923).

45 James A. Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 511-12 (1976) (footnote omitted) (arguing that cases like *Rowland* threaten the tort system of liability by pursuing substantive aims without considering the realities and limits of any system of legal liability).

46 See *Smith v. Arbaugh's Rest., Inc.*, 469 F.2d 97, 99-100 (D.C. Cir. 1972); *Webb v. City and Borough of Sitka*, 561 P.2d 731, 732-34 (Alaska 1977); *Mile High Fence Co. v. Radovich*, 489 P.2d 308, 314-15 (Colo. 1971), *superseded by statute*, COLO. REV. STAT. § 13-21-115 (2005); *Pickard v. City and County of Honolulu*, 452 P.2d 445, 446 (Haw. 1969); *Ouellette v. Blanchard*, 364 A.2d 631, 634 (N.H. 1976); *Basso v. Miller*, 352 N.E.2d 868, 871-73 (N.Y. 1976); *Mariorenzi v. Joseph DiPonte, Inc.*, 333 A.2d 127, 133 (R.I. 1975), *partially overruled by* *Tantimonico v. Allendale Mut. Ins. Co.*, 637 A.2d 1056, 1061-62 (R.I. 1994).

47 *Pickard*, 452 P.2d at 446.

England's abandonment as well as *Rowland* and *Kermarec*.<sup>48</sup> Other practical justifications include preventing "confusion and judicial waste" as well as allowing the jury to apply "changing community standards to a landowner's duties";<sup>49</sup> changing the "rigid common law" which added "confusion" to the law and thus was "no longer desirable in modern times";<sup>50</sup> and a more general desire to "bring the common law into accord with present day standards of wisdom and justice rather than to continue with some outmoded and antiquated rule of the past."<sup>51</sup> Even as late as the mid-eighties, some influential commentators claimed that "this special privilege [of judging a landowner's liability based on the status of the entrant] is receding; it remains here to trace the current developments of this recession."<sup>52</sup>

However, consistent with Mark Twain's famous quip that "the reports of my death are greatly exaggerated," the tripartite system has not disappeared from state law and has instead seen some resurgence. In fact, two of the early cases which abandoned the system completely, *Webb v. City and Borough of Sitka*<sup>53</sup> and *Mile High Fence Co. v. Radovich*,<sup>54</sup> saw their rulings overturned at least in part by an act of the legislature.<sup>55</sup> The Colorado Legislature initially attempted to do so by passing section 13-21-115 in 1986. However, the Colorado Supreme Court struck down the provision for violating equal protection because "[t]he effect of this classification scheme of duties is to impose on landowners a higher standard of care with respect to a licensee than an invitee."<sup>56</sup> The legislature revised the classification scheme to impose "on landowners a higher standard of care with respect to an invitee than a licensee, and a higher standard of care with respect to a licensee than a trespasser."<sup>57</sup> In Rhode Island, the Supreme Court

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48 *Basso*, 352 N.E.2d at 871-72.

49 *Mile High Fence*, 489 P.2d at 311-12.

50 *Webb*, 561 P.2d at 732.

51 *Mariorenzi*, 333 A.2d at 133 (citing *Funk v. United States*, 290 U.S. 371 (1933)).

52 HARPER ET AL., *supra* note 10, § 27.3, at 147.

53 *Webb*, 561 P.2d 731

54 *Mile High Fence*, 489 P.2d 308.

55 See *Univ. of Alaska v. Shanti*, 835 P.2d 1225, 1228 n.5 (Alaska 1992); *Bath Excavating & Constr. Co. v. Wills*, 847 P.2d 1141, 1145 & n.8 (Colo. 1993).

56 *Gallegos v. Phipps*, 779 P.2d 856, 862 (Colo. 1989).

57 COLO. REV. STAT. § 13-21-115 1.5(c) (2005). Though the legislature also stated that "by amending this section [it] is not reinstating the common law status categories as they existed immediately prior to *Mile Hi* [sic] *Fence v. Radovich*" the effect of the hierarchy is basically the same. *Id.* § 13-2-115 1.5(e). The legislature could have been acting overcautiously given the court's discussion in *Gallegos* that the reason the Colorado legislature passed the new law was to return to a pre-*Mile High Fence* regime because the burden was unfairly shifted from landowners to trespassers. See *Gallegos*,

overruled *Mariorenzi v. Joseph DiPonte, Inc.*<sup>58</sup> as it applied to trespassers. The court held in *Tantimonico v. Allendale Mutual Insurance Co.*<sup>59</sup> that two trespassing motorcyclists who collided while negligently riding their bikes could not recover against the landowner, thus overturning *Mariorenzi's* abandonment of all three categories.<sup>60</sup> The court declined to comment, however, on the question of invitees and licensees, thus implying a dichotomy between trespassers and invitees/licensees.<sup>61</sup> Even California's legislature saw fit to scale back the *Rowland* decision. The California Civil Code provides that a landowner is not liable for the death or injury of any person on his property in the course of or after the commission of certain enumerated violent felonies.<sup>62</sup>

These courts and legislatures are not alone in their full or partial reversal of a *Rowland*-like unitary standard of care. A near majority of states have actually rejected a unitary standard and still apply the tripartite system.<sup>63</sup> Further, many state courts have preserved the trespasser distinction while merging licensee and invitee into one category.<sup>64</sup> The *Rowland* trend may have stopped completely. At best, the status of the law remains uncertain and the relative calm could signal either a rest stop along the way, or a movement back towards the tripartite system, or some version thereof. However, the latter seems to be more plausible. As recently as 2002, the Iowa Supreme Court noted that "[g]iven the fact that only one court in the last twenty-seven years has abandoned the common law trespasser rule, the so-called 'trend' to adopt a universal standard of care for premises liability has clearly lost momentum."<sup>65</sup> This loss of steam could "re-

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779 P.2d at 861 & n.6. This would be curious especially because the court also stated that "it is unquestionably within the legislature's purview to enact legislation which modifies or abrogates decisions of this court so long as the legislation is constitutional." *Id.* at 861.

58 333 A.2d 1056 (R.I. 1994).

59 637 A.2d 1056 (R.I. 1994).

60 *Id.* at 1056-57, 1062.

61 *Id.* at 1062.

62 CAL. CIV. CODE § 847 (West Supp. 2006).

63 See *Lohrenz v. Lane*, 787 P.2d 1274, 1276 n.10 (Okla. 1990); see also Vitauts M. Gulbis, Annotation, *Modern Status of Rules Conditioning Landowner's Liability Upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R. 4th 294, § 4, at 310 (1983 & Supp. 2006) (listing cases in which the injured person's status as an invitee, licensee, or trespasser was determinative).

64 E.g., *Nelson v. Freeland*, 507 S.E.2d 882, 892 (N.C. 1998) (holding that though the court will "eliminate the distinction between licensees and invitees by requiring a standard of reasonable care toward all lawful visitors," it "will retain a separate classification for trespassers"); see also Gulbis, *supra* note 63, § 3(b), at 307-10.

65 *Alexander v. Med. Assocs. Clinic*, 646 N.W.2d 74, 78 (Iowa 2002).

flect a more fundamental dissatisfaction with certain developments in accident law that accelerated during the 1960s."<sup>66</sup> Whatever the eventual outcome, it appears for now that the post-*Rowland* experiments have given many courts "a renewed appreciation for the considerations behind the traditional duty limitations toward trespassing adults" which makes them skeptical of unilaterally "jettison[ing] years of developed jurisprudence in favor of a beguiling legal panacea."<sup>67</sup>

## II. THE JUDICIAL ROOTS OF THE TRIPARTITE SYSTEM IN AMERICA

This newfound skepticism of jettisoning long-established legal principles provides courts with an opportunity to reexamine the intellectual and judicial foundations of the tripartite system as it came to be known in America. It is possible that the hasty departure from these rules was ill-advised, if only because their practical outcomes were desirable policy regardless of the origins of the system. There are, of course, serious arguments that the traditional law of premises liability leads to undesirable results.<sup>68</sup> However, it is still worthwhile to look back into the early cases in America to see the original justifications for the tripartite system in order to understand how that system operated and what it can teach us about premises liability law today.

### A. *The Origin of the Tripartite System in America*

The tripartite system first made its appearance in American courts in the Massachusetts case of *Sweeny v. Old Colony & Newport Railroad Co.*<sup>69</sup> in 1865. There, the defendant kept a right-of-way on its land over which it had allowed the public to pass so long as they did not interfere with the movement of trains. However, it also kept a flagman at the crossing to help the public cross safely. On the day of the accident, the flagman signaled to the plaintiff to stop. After the plaintiff asked if he might proceed, the flagman signaled that he could. As he crossed the tracks on his wagon, the plaintiff saw a train headed toward him. He jumped from the wagon and had his legs crushed; although it was found at trial that he would not have been

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66 PROSSER AND KEETON, *supra* note 22, § 62, at 433.

67 *Id.* § 62, at 434.

68 *E.g.*, WEISSENBERGER ET AL., *supra* note 21, § 6.8, at 175 ("The negligence formula encourages defendants to allocate to accident prevention an amount roughly equal to the foreseeable accident costs. The traditional status-based rules of premises liability encourage defendants in some cases to let accidents happen when they could have been prevented at a cost less than the foreseeable accident costs.")

69 92 Mass. (10 Allen) 368 (1865).

injured had he stayed in the wagon.<sup>70</sup> The Supreme Judicial Court upheld the lower court's verdict for the plaintiff.<sup>71</sup>

In announcing its decision, the court first declared the underlying premise of duty in tort law: "All the cases in the books . . . turn on the principle that negligence consists in doing or omitting to do an act by which a legal duty or obligation has been violated."<sup>72</sup> Thus, the court continued, a landowner has no duty in law to a trespasser because "[t]he owner of the land is not bound to protect or provide safeguards for wrongdoers."<sup>73</sup> Tort law assumes that landowners have the right to use their land as they see fit, which advances the policy interests of free labor and industriousness. Free use of one's land, in turn, benefits society as a whole by making the land and its fruits more valuable.<sup>74</sup> The tort rule against allowing trespassers to recover protects this important right of landowners by ensuring that wrongdoers cannot force landowners to structure their use around a potential physical invasion. Licensees, "who come there solely for their own convenience or pleasure and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied" must take the license and all its "concomitant perils."<sup>75</sup> Though the court does not expressly use the word "invitee," it describes another class of entrants as those who have come on the land because the owner "has held out [an] invitation, allurements or inducement, either express or implied, by which they have been led to enter thereon."<sup>76</sup> To these entrants, the owner must keep his premises in a safe and suitable condition because he has expressly invited them, as a member of the public, onto the land and "he thereby assumes an obligation that they are in a safe condition, suitable for such use."<sup>77</sup> Since the landowner has chosen to use his land in such a way as to invite others onto it, he thereby assumes a reasonable duty for their safety, as opposed to when a trespasser wrongfully comes upon land not open to the public. Thus, the court classified the plaintiff as an invitee because the defendant had taken certain steps that demonstrated to the public that the right of

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70 *Id.* at 369-70.

71 *Id.* at 372.

72 *Id.* This also seems to undermine Professor Green's argument that reduced landowner liability only gained a foothold in the law prior to the acceptance of negligence principles. See Green, *supra* note 44, at 511.

73 *Sweeny*, 92 Mass. (10 Allen) at 372.

74 See *infra* text accompanying notes 89-92, 96-98.

75 *Sweeny*, 92 Mass. (10 Allen) at 372-73.

76 *Id.* at 373.

77 *Id.* at 374.

way was open and for their use, including laying a plank down to ease transport over the tracks and maintaining a flagman at the crossing.<sup>78</sup>

### B. *Property in an American Republic*

The tripartite system of property law is consistent with the way the Founders viewed property. To these early republicans, property was 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.<sup>79</sup> The concepts of “no duty” to a trespasser and lower duty to invitees put into effect a version of that theory of property by ensuring that landowners were not required to compensate plaintiffs to whom they owed no duty. At the same time, the Founders believed that a system of private property with civil laws preventing interference by others increased the industriousness of the country and promoted the long-term good of everyone in society.<sup>80</sup>

American notions of property law had roots in the thought of William Blackstone who believed that “[t]he third absolute right, inherent in every Englishman, is that of property.”<sup>81</sup> The right, inhering in each person, was inviolable: “In vain may it be urged, that the good of the individual ought to yield to that of the community . . . . [T]he public good is in nothing more essentially interested, than in the protection of every individual’s private rights, as modeled by the municipal law.”<sup>82</sup> Two points can be made about Blackstone’s notion of an absolute individual right to property. First, it comports well with the notion of the tripartite system as protecting individual rights. The Ohio Supreme Court made this point, arguing:

In such cases the maxim *sic utere tuo ut alienum non loedas* is in no sense infringed. In its just legal sense it means “so use your own property as not to injure the *rights* of another.” Where no right has been invaded, although one may have injured another, no liability has been incurred. Any other rules would be manifestly wrong.<sup>83</sup>

Since individuals have rights in their property, they are only liable if they have injured the rights of another. The tripartite system assigned the rights of individuals based on their status as entrants upon

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78 *Id.* at 375–77.

79 *See infra* notes 84–88 and accompanying text.

80 *See infra* notes 89–92 and accompanying text.

81 WILLIAM BLACKSTONE, 1 COMMENTARIES \*138.

82 *Id.* at \*139.

83 *Pittsburgh, Fort Wayne, & Chi. Ry. Co. v. Bingham*, 29 Ohio St. 364, 369 (1876).

the land. Trespassers, being wrongdoers (even if innocently), are not entitled to any protection; whereas invitees and licensees gain some right to be on the land by virtue of consent. Second, Blackstone is somewhat confusing because he characterizes the right as "absolute." While it is true that he believes there is an absolute right prior to government to property, this right is qualified and protected by the positive law. Thus, citizens are entitled "to the regular administration and free course of justice in the courts of law" and to petition "the king and parliament for redress of grievances" whenever their rights are violated.<sup>84</sup>

The notion of property as a natural right was largely accepted by the founding generation that produced the Declaration of Independence and the Constitution. James Madison—the "Father of the Constitution" and author of the Bill of Rights—wrote that the notion of property "embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.*"<sup>85</sup> For Madison, the concept of property was meant in both a narrow and broad sense; it encompassed not only physical objects but also one's own beliefs and opinions. "In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights."<sup>86</sup> The protection of property as a natural right, in this case meaning real property, depended upon the positive law.

This interrelation between property as a natural right and as a positive right was integral to identifying just what characteristics defined "property." James Wilson wrote that property exists in three different degrees: "The lowest degree of this right is a right merely to possess a thing. The next degree of this right is a right to possess and to use a thing. The next and highest degree of this right is a right to possess, to use, and to dispose of a thing."<sup>87</sup> In Wilson's mind, positive law succeeded to the extent that it secured to each person the ability to possess, use, and dispose of a "thing." Since one of the functions of government is to secure to each person these rights, "civil society is obligated to secure not only the right to own property, but all of the

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84 BLACKSTONE, *supra* note 81, at \*144. For more on the confusion associated with Blackstone's treatment of property rights, see Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367, 370 (1991) (noting the confusion "between the natural and positive law aspects of property").

85 JAMES MADISON, *Property*, NAT'L GAZETTE, Mar. 27, 1792, reprinted in 6 THE WRITINGS OF JAMES MADISON 101, 101 (Gaillard Hunt, ed., 1906).

86 *Id.*

87 2 JAMES WILSON, *The History of Property*, in THE WORKS OF JAMES WILSON 483, 483 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896).

legitimate attributes commonly associated with ownership,"<sup>88</sup> such as the ones Wilson describes.

This protection afforded to private property is not based on an abstract appeal with no concept of consequences or practical outcomes, however. Instead, the Founders recognized that securing private property would benefit individuals and society. Both Jefferson and Madison in particular, "put the protection of common law property claims in positive terms—that is, in light of the good they fostered: industriousness and the development of human faculties."<sup>89</sup> Men are more likely to work the land and make it productive if their possession and use is secure against others.<sup>90</sup> Further, as Madison's essay on property demonstrates, when people are secure in their opinions they will inevitably refine and enlarge them through "free communication" with others.<sup>91</sup> More specifically, the goods which result from private property "include self-preservation, the preservation of one's family, and the wealth needed to practice other virtues that require some minimum of material support."<sup>92</sup>

### C. *The Link Between Natural Property Rights and the Tripartite System*

Introducing a system of property laws consonant with republican principles of natural justice was not an automatic occurrence. Certain aspects of the British common law reflected commitments to the feudal past at odds with the free possession, use, and transfer rights which defined the concept of property in a thing. The task of the founding generation in the years after the ratification of the Constitution was to form "a system by which every fibre would be eradicated of antient or future aristocracy; and a foundation laid for a government truly republican."<sup>93</sup> Devices such as primogeniture put unreasonable restrictions upon the right of use and transfer and thus reflected "feudal and

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88 Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1568 (2003).

89 Kmiec, *supra* note 84, at 383.

90 See WILSON, *supra* note 87, at 495 ("By exclusive property, the productions of the earth and the means of subsistence are secured and preserved, as well as multiplied.")

91 MADISON, *supra* note 85, at 101.

92 Claeys, *supra* note 88, at 1568.

93 1 THOMAS JEFFERSON, *Autobiography*, in THE WRITINGS OF THOMAS JEFFERSON 1, 68 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1982). Incidentally, this also demonstrates that the foundations of nineteenth-century property law lay in an attempt to bring old institutions in accordance with republican principles. This is a further argument why later developments in the law of premises liability were not mere relics of a feudal past, but consistent with American principles. See *supra* note 43 and accompanying text.



unnatural distinctions"<sup>94</sup> that should be expunged from the positive law.

The theoretical justification for a positive law regime of individual property rights came mainly from John Locke. A substantial portion of Locke's *Second Treatise of Government* is devoted to property, its definition, and the goods which it secures. Since each person has "a right to their preservation," each must somehow obtain the necessities of life from the natural world if he is to survive and be concerned with other goods beyond those basic necessities. Thus, "[w]hatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*."<sup>95</sup> Individual human labor not only allowed men to provide for their own needs, but also greatly increased the value of nature to others, for

he who appropriates land to himself by his labour, does not lessen, but increase the common stock of mankind: for the provisions serving to the support of human life, produced by one acre of inclosed and cultivated land, are (to speak much within compass) ten times more than those which are yielded by an acre of land of an equal richness lying waste in common.<sup>96</sup>

If men are secured in their property they are able to increase the common stock of mankind through labor on a smaller parcel of land than if that land were in common, lying ungoverned and unappropriated. The excess produced by such labor is not only good for the mere "support" of men, but also for the "comfort of their being" and their mutual "convenience."<sup>97</sup>

Far from bearing the marks of the feudal past, Locke's thought was deeply republican and consonant with principles of individual rights and self-government. Individual control over land is superior to large tracts controlled by powerful lords, which are not cultivated but kept for their own pleasure in a state of nature. "[N]umbers of men are to be preferred to largeness of dominions" since this would lead to productive labor for the greater good.<sup>98</sup> Indeed, "the great art of government" is "by established laws of liberty to secure protection and encouragement to the honest industry of mankind."<sup>99</sup> Locke thus rec-

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94 JEFFERSON, *supra* note 93, at 69.

95 JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 27, at 19 (C. B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

96 *Id.* § 37, at 23. Locke later says that "ninety-nine hundredths" of the value of a thing is owed to labor; with the rest remaining to nature. *Id.* § 40, at 25.

97 *Id.* § 26, at 18.

98 *Id.* § 42, at 26.

99 *Id.*

ognized, even prior to Blackstone, the dual nature of property rights. Whereas the law of nature, prior to all government, "makes the deer that *Indian's* who hath killed it" because it is the "common right of every one,"<sup>100</sup> positive laws are still necessary to more fully secure those rights. While those living in the state of nature still have equal rights, those "who have made and multiplied positive laws to determine *property*, this original law of nature" are counted among the "civilized part of mankind."<sup>101</sup> This superiority is not derived from any inherent superiority of one race to another; rather, the advantage is derived from positive laws of government which are more fully able to enforce the right that each individual has by nature.

Viewed in the context of the natural right theory of the Founding, the tripartite system is designed to secure to each landowner the use and enjoyment of his own property while at the same time imposing specific duties that arise out of his relationship with the rest of society. The laws of civil society cannot give to every man a license to act irresponsibly towards others and thus no one may willfully or wantonly injure another even if that other is a trespasser.<sup>102</sup> Aside from that basic condition of good living in society, a landowner enjoys liberty to dispose of his land as he may wish—not only for his own good, but also for the long-term good and productivity of society. The positive law, as Locke argued, must "encourage" men to use their land productively.<sup>103</sup> This is done, according to James Wilson, by securing the highest rights that one can have in property: possession, use, and disposition of a "thing."<sup>104</sup> Men must be able to count on the law to vindicate their right in their property. Without such assurances, individuals will be discouraged from actively engaging in developing their property (in this case, land) since the acts of another could deprive them of such labor permanently. This is the situation that exists in a pure state of nature with little or no government and explains why land, without a system of good laws, is often used inefficiently or not at all.

The special status given to landowners as opposed to individuals in a normal action for a tort arises not from the feudal past, but rather a republican vision of property rights that respects individual labor

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100 *Id.* § 30, at 20.

101 *Id.*

102 *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck*, [1929] A.C. 358, 365 (H.L.) (appeal taken from Scot.) (opinion of Hailsham, L.C.) (indicating that the landowner is only liable if there is "some act done with the deliberate intention of doing harm to the trespasser").

103 See *supra* text accompanying note 99.

104 See *WILSON*, *supra* note 87, at 483.

and industriousness. The tripartite system, then, attempts to reconcile the need to provide encouragement to individuals in a free society with the need to provide for the protection of everyone's equal rights. When one actively induces the public to come upon his lands, thus making entrants invitees, he is essentially guaranteeing that his land is as safe as would be required if the land was common to society. A standard closely analogous to reasonable care applies. To one with a more limited license, a licensee, the landowner essentially establishes that his land is still "private" in nature and thus a full duty of care does not apply. Instead, he must only warn of hidden dangers in order to make the licensee understand the state of the property and risks he is taking by entering. The trespasser, however, is perhaps the most vital category. A landowner cannot have a duty to someone who has no right. To say otherwise would be to give wrongdoers a veto over the use of land by the owner and thus harm his right to own, possess, and use real property.<sup>105</sup>

### III. TRESPASS AND THE ATTRACTIVE NUISANCE EXCEPTION

#### A. *The Common Law Roots of Trespass*

The tripartite system, though brought to America in the mid-nineteenth century, was largely consistent with the founding notion of private property rights. This is most evident with respect to "trespassers." Blackstone defined trespass as "no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property."<sup>106</sup> The law views trespass as a harm because of the high regard for the private holdings of individuals, "[f]or every man's land is in the eye of the law inclosed and set apart from his neighbours. . . . And every such entry or breach of a man's close carries necessarily along with it some damage or other . . . ."<sup>107</sup> Thus, if a trespasser has no right to go upon another's land, the owner has no duty to provide for his safety except to restrain from injuring him willfully or wantonly, just as he would owe this duty to any other person regardless of circumstances. The early cases and treatises did focus on the actual wrong of the trespasser, whereas later in the nineteenth century as the concept of tort law and duty evolved, the concept shifted into the duties of a land-

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105 See RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 10 (8th ed. 2004) ("[Trespass] is designed to protect the [landowner's] interest in the exclusive possession of land and its improvements.").

106 3 BLACKSTONE, *supra* note 81, at \*209.

107 *Id.* at \*209-10.

owner. The imposition of duties, like the legislative devices for subdividing property that Jefferson used, had to be consistent with natural justice and the natural right to property. No landowner ought to be held to account for the consequences of another's wrong action and thus the landowner would have no duty to keep his premises safe for an unexpected intruder.<sup>108</sup>

### B. *The Attractive Nuisance Exception*

The notion of no duty to a trespasser, however, was not absolute. Numerous exceptions filled the law. Indeed, it was the perceived complexity and number of these exceptions which courts cited as the reason why the tripartite system was no longer practicable.<sup>109</sup> Perhaps the exception which has been most discussed in the literature is that of "attractive nuisance." The attractive nuisance doctrine, generally speaking, provides that if a child is "attracted" onto the land by some condition, then the landowner is responsible for the safety of that child even if the child would technically be a trespasser if an adult. The Restatement emphasizes that a landowner owes a duty to a child if an "artificial condition upon the land" is in a place in which "the possessor knows or has reason to know that children are likely to trespass."<sup>110</sup> Thus, this definition of the attractive nuisance doctrine—which the Restatement refers to as *Artificial Conditions Highly Dangerous to Trespassing Children*<sup>111</sup>—emphasizes foreseeability and not attraction. As the comments explain, "the basis of the rule is merely the ordinary negligence basis of a duty of reasonable care not to inflict foreseeable harm on another, and the fact that the child is a trespasser is merely one of the facts to be taken into consideration."<sup>112</sup>

The Restatement's position on attractive nuisance doctrine comports with the way the doctrine developed into the early twentieth century, and is indeed consistent with the concept of trespass being a

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108 The 1896 case of *Sheehan v. St. Paul & D. Ry. Co.*, 76 F. 201 (7th Cir. 1896) is wrong, for example, when it says that "notice" to the defendant landowner is the reason why the law of trespass exists. *Id.* at 205. While notice is certainly a significant practical factor, and knowledge of a trespasser does impose certain duties on the landowner with respect to care, the no duty rule is derived first and foremost from the concept of right. Where there is no right to be upon another's lands, there could also then be no duty to that other.

109 See, e.g., *Rowland v. Christian*, 443 P.2d 561, 566 (Cal. 1968) (discussing the "subtleties and confusion which have resulted from application of the common law principles" as applied to landowners).

110 RESTATEMENT (SECOND) OF TORTS § 339 (1965).

111 *Id.*

112 *Id.* § 339 cmt. b.

problem of "notice" as described in *Sheehan v. St. Paul & D. Railway Co.*<sup>113</sup> "The real factor is the extent to which the presence of children is to be anticipated by the defendant."<sup>114</sup> However, the initial justification for the doctrine was much different than the stated reasons in the early part of the twentieth century. The doctrine seems to have originated in England in the case of *Lynch v. Nurdin*.<sup>115</sup> The plaintiff was a seven-year-old boy who had injured himself while playing on the defendant's wagon which was parked in the street. Another boy put the wagon in motion which caused the plaintiff to fall. As a result, the wagon ran over his leg and broke it. Though not a strict premises liability case, the court drew analogy to *Bird v. Holbrook*,<sup>116</sup> and argued for it as "decisive authority against the general proposition that misconduct, even wilful [sic] and culpable misconduct, must necessarily exclude the plaintiff who is guilty of it from the right to sue."<sup>117</sup> Thus, though the boy would normally be guilty of contributory negligence and the owner would not be liable, the court framed the case in such a way as to show that even negligence on the part of the plaintiff did not guarantee a ruling for the defendant. The only question was whether such a situation existed here. The court found one in a nascent form of attractive nuisance: "The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact."<sup>118</sup> Since the boy was only acting as boys do, he could not be said to have been acting negligently.

The doctrine entered American law as early as 1849 in Connecticut in the case of *Birge v. Gardiner*.<sup>119</sup> The defendant had erected a gate on his property. The plaintiff, a boy of seven years, while passing by, grabbed hold of the gate and shook it causing it to fall on top of him and break his leg. The court immediately found that this was not a case of trespass and put it into the realm of negligence law like the

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113 *Sheehan*, 76 F. 201; see *supra* note 108.

114 Manley O. Hudson, *The Turntable Cases in the Federal Courts*, 36 HARV. L. REV. 826, 849 (1923). Commentators in the early part of the twentieth century like Hudson emphasized a new dimension to the law of premises liability. Gone were the ideas of preexisting rights. Instead, Hudson argued that, "[t]he essential nature of the task as a problem in social engineering, is not to be escaped through a technique of logic, nor through a derivation from eighteenth century common law procedure." *Id.* at 839.

115 113 Eng. Rep. 1041 (Q.B. 1841).

116 130 Eng. Rep. 911 (C.P. 1828).

117 *Lynch*, 113 Eng. Rep. at 1044.

118 *Id.*

119 19 Conn. 506 (1849).

English court in *Lynch*.<sup>120</sup> The court found that the jury could decide whether the child, being “without judgment or discretion,” could be held accountable for his action, or whether the acts instead were caused by his “childish instinct.”<sup>121</sup>

Attractive nuisance eventually migrated more fully into the law of premises liability. In *Keffe v. Milwaukee & St. Paul Railway Co.*,<sup>122</sup> the Minnesota Supreme Court noted that “the distinction is not sharply drawn between the effect of the plaintiff’s trespass, as a bar to his right to require care, and the plaintiff’s contributory negligence, as a bar to his right to recover.”<sup>123</sup> Indeed, the distinction did not make much practical difference. Since the trespasser was a child, he “occupies a position widely different from that of an ordinary trespasser.”<sup>124</sup> The child, another seven-year-old, was sitting on the railroad’s turntable, which was unfenced and unprotected, when another child put it into motion. The plaintiff’s foot was caught and mangled and required amputation. Looking at the different natures of children and adults, the court concluded that “what an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years.”<sup>125</sup> Thus, the child was more like an adult invitee than a trespasser and the landowner owed to him a duty of reasonable care which it did not perform.

Two years earlier, the United States Supreme Court addressed a similar issue in *Sioux City & Pacific Railroad Co. v. Stout*.<sup>126</sup> Henry Stout was six years old when he and two friends found a turntable on the defendant’s property.<sup>127</sup> One of the other boys turned it, the table not being locked, and it crushed Henry’s foot. The boys had been warned in the past not to go near it, but this was Henry’s first time playing on the turntable.<sup>128</sup> Again, the child’s status as a trespasser

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120 *Id.* at 512 (“We do not decide, whether, in this case, the plaintiff was a trespasser, or not. . . . [T]his is not a case between faultless parties.”).

121 *Id.* at 511–12.

122 21 Minn. 207 (1875).

123 *Id.* at 212.

124 *Id.* at 213.

125 *Id.* at 211.

126 84 U.S. (17 Wall.) 657, 660–61 (1873). The fact pattern of this case, like *Keffe*, involves children hurt while playing on a railroad’s “turntable.” *Id.* at 657–58. For this reason, they are often referred to as the “Turntable Cases” and the attractive nuisance doctrine is called the “Turntable Doctrine.” See PROSSER AND KEETON, *supra* note 22, § 59, at 400. To see some interesting pictures of turntables through the years, visit Wendell Huffman, Folsom Railroad Block Turntable, <http://www.fedshra.org/turntable.htm> (last visited Oct. 25, 2006).

127 84 U.S. (17 Wall.) at 657.

128 *Id.* at 658.

did not matter because of the different capacities between children and adults. Citing a general principle of law and then applying it to this case, the Court found that:

It is well settled that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. . . . The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case.<sup>129</sup>

Thus, the doctrine of attractive nuisance in the mid-to-late nineteenth century stood for the proposition that children and adults ought to be treated differently because they had different capacities.

The rejoinder, of course, which is often made, is that even if children do not have the capacity to know dangerous conditions, then the responsibility for their actions falls on their parents who are the legal and natural guardians of their children.<sup>130</sup> In other words, "there is a powerful resistance to the idea that infants are subject to any special treatment in the law, for why should they be able to force strangers to bear the costs of their own necessary infirmities when they have parents and guardians explicitly charged with their care?"<sup>131</sup> On a pure cost/benefit analysis, Epstein argues that the Restatement's language is designed to "isolate cases in which the benefits generated to the child far outweigh the costs to the occupier."<sup>132</sup> Because the child is so young and parents cannot conceivably watch him at all moments, the cheapest cost-avoider becomes the landowner himself and thus "the balance of advantage shifts to require greater landowner precautions for infants than for adults."<sup>133</sup> On a more basic level, the natural right analysis so important to the tripartite system does not apply in the same way with children. According to the founding theory, "[t]hree of the characteristics that distinguish man from the other animals are his reason, his freedom, and his conscience."<sup>134</sup> Thus,

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129 *Id.* at 660.

130 *See, e.g.,* *Ryan v. Towar*, 87 N.W. 644, 649-50 (Mich. 1901) ("Admittedly the duty of incessant watchfulness and care of one's own premises is limited to young children. . . . [But why] should it extend to children upon whose parents both nature and the law impose the duty of care and watchfulness?"). As *Ryan* demonstrates, not all early courts accepted attractive nuisance as an exception to the law of premises liability.

131 EPSTEIN, *supra* note 20, § 12.5, at 318.

132 *Id.*

133 *Id.*; *see also* PROSSER AND KEETON, *supra* note 22, § 59, at 399 ("While it is true that his parents or guardians are charged with the duty of looking out for him, it is obviously neither customary nor practicable for them to follow him around with a keeper, or to chain him to the bedpost.").

134 *Clays*, *supra* note 88, at 1567.

"[m]an enjoys the power to choose his course of action"<sup>135</sup> and has rights and duties associated with his choices. Since young children have not developed their reason yet and are thus unable to make informed choices, the law must treat them differently from adults who are fully competent.<sup>136</sup>

### C. *Attractive Nuisance as Legal Fiction in the Twentieth Century*

After the turn of the century, courts began to fashion a different rationale for the attractive nuisance doctrine. Instead of being justified by the different abilities and capacities of the child as compared to a competent adult:

The basis of the liability was thought to be little more than the foreseeability of harm to the child, and the considerations of social policy which, in other negligence cases, operate to bring about a balancing of the conflicting interests, and to curtail to a reasonable extent the defendant's privilege to act as he sees fit without regard to the effects on others.<sup>137</sup>

Commentators at the beginning of the century looked with skepticism on the doctrine. It was not based on any understanding of the nature of the child, but "[p]erhaps no more palpable fiction has ever been employed in order to impose legal responsibility."<sup>138</sup> Even today the rule is heavily criticized as a "legal fiction," which gives courts the ability to depart from the "traditional rules" of premises liability to

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135 *Id.*

136 A late nineteenth-century treatise writer put it like this:

It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed; and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed, or maimed for life. Such is not the law.

1 SEYMOUR D. THOMPSON, *THE LAW OF NEGLIGENCE* 305 (San Francisco, Bancroft, Whitney Co., 1886). Thompson was referring to the 1808 case of *Townsend v. Wathen*, 103 Eng. Rep. 579 (K.B. 1808). There, the defendant baited traps on his property, near to the plaintiff's property where he kept his dogs, in order to induce them to come onto the land and be killed in his traps. In holding for the plaintiff, the court asked: "What difference is there in reason between drawing the animal into the trap by means of his instinct which he cannot resist, and putting him there by manual force?" *Id.* at 581.

137 PROSSER AND KEETON, *supra* note 22, § 59, at 401.

138 Green, *supra* note 44, at 508.



come up with a socially acceptable outcome.<sup>139</sup> The doctrine "rests upon the fanciful notion that the landowner, by maintaining the instrumentality, impliedly invites the child onto his land, and hence owes him a duty of due care under the circumstances."<sup>140</sup>

This movement away from the distinction between a child and an adult to the concept of notice placed children back within the normal system of negligence to which premises liability law was an exception. Landowners now generally owed a duty of reasonable care to children, especially when it was generally foreseeable that they would come upon the land and injure themselves. Consider how one writer proposed to apply the doctrine of reasonableness to children coming onto land:

In applying this legal standard, account must of course be taken of the use to which the land is being put, as well as of the position of the visitor on the land of the defendant, and of the extent to which the defendant knew of the intruder's presence, or anticipated it, or would have anticipated it if he had acted as an ordinary prudent man would have acted. These are not all of the factors to be considered, though they are among the most important.<sup>141</sup>

This list of factors bears striking resemblance to how the California Supreme Court framed the question of reasonableness when it abolished all the distinctions in favor of the standard tests of negligence law. When considering whether the landowner should be immune or not, the courts should not simply look to the status of the entrant but must consider other factors as well, "including 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."<sup>142</sup> Though the factors are not identical, the principle is the same: move away from the special status given to landowners towards a general duty of reasonable care.

#### IV. ANALYSIS

##### A. *Trespassers*

Elimination, or even major modifications, of the common law category of trespass can lead to anomalous results that most would con-

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139 WEISSENBERGER ET AL., *supra* note 21, § 2.9, at 22.

140 *Id.*

141 Hudson, *supra* note 114, at 845.

142 Rowland v. Christian, 443 P.2d 561, 567 (Cal. 1968).

sider unjust. For example, in *Lee v. Chicago Transit Authority*,<sup>143</sup> the Illinois Supreme Court “allowed the estate of a drunken, illiterate, trespasser, who stumbled through five warning signs, barricades, a trespass prevention system, and then electrocuted himself by urinating on a 600 volt ‘3rd rail,’ to recover \$1.5 million.”<sup>144</sup>

Of course, results such as this may be rare and perhaps do not counsel against maintaining a separate category for trespassers in premises liability law. However, most state courts have held onto the distinctions, resisting the *Rowland* abolition of all categories. Many of the courts which jumped on the *Rowland* bandwagon saw their decisions either reversed by later rulings or overturned by acts of the legislature.<sup>145</sup> Further, many courts which joined *Rowland* in merging the invitee and licensee categories into one of reasonable care, still maintained a separate category for trespassers. The Iowa Supreme Court noted that “presently six states use a negligence standard to govern trespasser liability; twenty-nine states have declined the opportunity to change their rule in such cases; and two state legislatures have reinstated the common law trespasser rule after it had been abolished by court decision.”<sup>146</sup>

There seems to be a general belief, even today, that the trespasser distinction was not only useful for feudal society, but also has something important about it which helps maintain a healthy system of private property rights. Today, more than ever, “[l]and ownership is not limited to the privileged few in modern American society; many, many persons own real property. The private ownership of land continues to be a treasured opportunity, and the interests of landowners are still deserving of consideration.”<sup>147</sup> Preventing trespassers from receiving compensation when the landowner has not acted to hurt them intentionally is consonant with a respect for private property. If the law is willing to punish a trespasser for even the most minor of transgressions,<sup>148</sup> why should it hold the landowner accountable when the trespasser is injured as a result of that transgression? Thus, “even in modern society it is significant that a trespasser does not come upon

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143 605 N.E.2d 493 (Ill. 1992).

144 Eric Carlson, Case Note, *Premises Liability—The Exception that Swallowed the Rule*, 19 S. ILL. U. L.J. 217, 217 (1994).

145 See *supra* notes 55–63 and accompanying text.

146 *Alexander v. Med. Assocs. Clinic*, 646 N.W.2d 74, 78 (Iowa 2002).

147 *Id.* at 79.

148 See, e.g., *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 159–162 (Wis. 1997) (reinstating punitive damage award of \$100,000 for landowner with only nominal damages where seller of mobile home intentionally trespassed to deliver mobile home to adjacent land).

property under a color of right."<sup>149</sup> The founding concept of "right" in property law thus holds much sway even today.

### B. Reasonable Care

It is, of course, possible that even if the courts maintain a separate category for trespassers that they should apply a general standard of reasonable care to those traditionally classified as either invitees or licensees. As the Maine Supreme Court noted, "both invitees and licensees enter another's lands under color of right."<sup>150</sup> More so than with trespassers, the question becomes one of general policy considerations and the long-term consequences to the system of premises liability and negligence law. The concept of "right" is appropriately deemphasized to a certain extent because in both cases the landowner has consented, even if to a lesser extent to a licensee. Further, it seems odd that social guests, who are normally considered licensees, should receive less protection than members of the general public.<sup>151</sup>

The system as a whole, of course, still falls under more general attacks even today. One critique says that "the status approach continues to breed anomalies."<sup>152</sup> It calls attention to the case of *Mercer v. Fritts*<sup>153</sup> in which the court applied a standard of liability based on animals, rather than premises liability law, when a plaintiff was injured riding one of defendant's horses while on the defendant's land.<sup>154</sup> Under the former standard, the defendant owed a duty of reasonable care, while at the time in Kansas, landowners owed no more to social guests other than refraining from willful or wanton actions.<sup>155</sup> The anomaly, then, is that the court chose to apply the stricter standard of negligence rather than the prevailing standard for licensees. This argument, however, is not persuasive. This is not so much an anomaly as a choice of law by the Kansas courts. The outcome may have been different depending upon which standard the court chose but this

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149 *Younce v. Ferguson*, 724 P.2d 991, 994 (Wash. 1986); see also *Poulin v. Colby Coll.*, 402 A.2d 846, 851 n.5 (Me. 1979) ("We are unconvinced that the status of trespasser fails to carry continued significance in our modern society.").

150 *Poulin*, 402 A.2d at 851 n.5.

151 This of course could be remedied by a less drastic measure than abolishing the system as a whole. Instead, courts or legislatures could move "social guests" into the invitee category while maintaining the licensee category for others who are on the premises for their own purposes.

152 WEISSEBERGER ET AL., *supra* note 21, § 6.8, at 175.

153 689 P.2d 774 (Kan. 1984).

154 *Id.* at 774-75.

155 *Id.*

says nothing about the workability of the common law's status approach.

Every system of liability has problems with cases at the margins. No one system can effectively eliminate all the tough choices judges and juries face. Given this fact, it is wise to look not only at the specific results of a system of liability, but also at its effects on the tort system as a whole. Professor Henderson argues that the abolition of the common law categories is symptomatic of a larger problem in the system of torts, which has forgotten that "[t]he most basic limit of adjudication is that it requires substantive rules of sufficient specificity to support orderly and rational argument on the question of liability."<sup>156</sup> Under *Rowland* and its progeny, triers of fact are deprived of many of these substantive rules. Cases like *Rowland* have attempted to keep the substance of the law, in that they use the status of the entrant as one factor of the decision, but have abandoned the form of the common law, thus epitomizing what Henderson has "characterized as the retreat from the rule of law."<sup>157</sup> Essentially, the decision to abandon clear legal boundaries results in open-ended cases which become almost unmanageable. The standard of reasonableness is too vague to have any real meaning, making it hard to apply to individual cases because it "utterly fails to distinguish between sound and unsound approaches."<sup>158</sup>

Indeed, Professor Epstein's solution for the problems he sees with the tort system as a whole closely parallels how the common law distinctions were initially prepared and applied and are pertinent here. He would set up a system of "presumptive liability rules that govern each class of cases," but also gradually introduce "a set of excuses or justifications, each of which makes the overall system a bit more reasonable than before."<sup>159</sup> Establishing clear legal rules would bring stability, predictability, and consistency to the law of torts. This applies with equal force to the law of premises liability whereby landowners and entrants would have clearly defined duties and rights in the law. "The common law categories seize on the salient features of recurrent situations to create a series of per se rules, which are designed in the end to approximate the ideal of reasonable care under the circumstances."<sup>160</sup> The *Rowland* approach attempts to do the same thing on a case-by-case basis through a unitary standard which

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156 Henderson, *supra* note 45, at 468.

157 *Id.* at 513.

158 Richard A. Epstein, *The Perils of Posnerian Pragmatism*, 71 U. CHI. L. REV. 639, 643 (2004).

159 *Id.* at 648.

160 EPSTEIN, *supra* note 20, § 12.11, at 331.

creates more uncertainty and therefore greater costs to the system. Thus, if "the common law rules do the same job better, with less uncertainty and lower administrative costs, then those states that have opted to retain them have on balance made the sounder decision."<sup>161</sup>

The costs of a system based on "reasonableness," and in this case the particular system of premises liability, offer a compelling case for adopting per se rules as Professor Epstein argues. Nevertheless, alternative justifications, which are compatible with his analysis, present themselves from the concept of the natural right to property embraced by the Founders. James Wilson, in particular, recognized that any system of rules had to have certain characteristics to be just: "Law is called a rule, in order to distinguish it from a sudden, a transient, or a particular order: uniformity, permanency, stability, characterize a law."<sup>162</sup> One of the chief characteristics of republican government is knowledge of what duties and rights one has under the law. For our purposes, this means that the laws defining private property are fixed and knowable.<sup>163</sup> In this sense, the *Rowland* reasonableness test fails to fully secure the goods associated with stable law. Each case is decided on the facts using a number of different factors which may weigh differently in each case. This "retreat from the rule of law"<sup>164</sup> as Henderson characterized it has deleterious effects in the long run on the entire system of civil liability by eroding the "degree of stability and predictability"<sup>165</sup> that the unitary standard forgoes to achieve almost total flexibility.

#### CONCLUSION

Despite the insistence that the tripartite system of premises liability was rooted in feudal culture and is therefore no more than a relic of an ancient past, it still does and should hold sway in many states today. Regardless of any problems with its origins in an English society with land use patterns different from our own in many respects, the system is acceptable from the standpoint of property rights in the

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161 *Id.*

162 1 WILSON, *supra* note 87, at 55.

163 THE FEDERALIST NO. 62, at 349 (James Madison) (Clinton Rossiter ed., 1999) ("It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?").

164 Henderson, *supra* note 45, at 513.

165 *Younce v. Ferguson*, 724 P.2d 991, 995 (Wash. 1986).

Founding and is practical in that it secures the free use and possession of land to its owners while at the same time fairly imposing duties that arise out of the landowner's relation with the rest of society. The modern trend toward reestablishing the category of trespassers, and even the categories of invitees and licensees, demonstrates that the *Rowland* court perhaps moved too hastily away from a workable system of landowner liability because of its concerns about ancient English political systems. Modern courts will find it useful to focus not only on the duties that landowners owe to those who enter upon their land, but also the right under which the entrance occurs. This basic framework, regardless of its origins, provides a stable system of liability by spelling out reasonable guidelines upon which judges and juries can base their decisions in particular cases, thus eliminating many of the problems associated with open-ended balancing. As James Madison observed, "that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."<sup>166</sup>

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166 MADISON, *supra* note 85, at 102.

