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Rape Is Trespass

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Abstract: By furnishing new blackletter on battery, assault, and false imprisonment, *Restatement (Third) of Torts: Intentional Torts to Persons* provides illustrations of what the medieval writ of Trespass once remedied. All three causes of action restated in this Restatement derive from the trespass writ, as do other modern doctrines that fall under intentional torts to persons. This article, hewing to the tradition that the law of trespass provides redress for direct, unmediated, and wrongful boundary-crossing, argues that sexual penetration unwanted by the person penetrated is trespass. If rape is trespass, then consequences follow for the law of torts as well as crimes.

Keywords: rape, trespass, common law, self-defense, possession, property, Restatement (Third) of Torts: Intentional Torts to Persons, intentional torts

The great medieval writ that once furnished recourse for direct interferences pervades *Restatement (Third) of Torts: Intentional Torts to Persons*, even though its name, Trespass, appears there only occasionally. Three modern-day intentional torts launch this Restatement: battery, assault, and what the *Third Restatement* in an earlier draft had called wrongful confinement, its more familiar name being false imprisonment.[1] These three torts occupy the common law category of trespass to the person. Section 6 of this Restatement continues the resemblance between an old writ and new blackletter in another way: it covers intentionally inflicted emotional harm only through a cross-reference to a different publication, *Restatement (Third), Torts: Physical and Emotional Harm*, rather than include it here among other intentional affronts that hurt people. Like trespass to the person, *Restatement (Third) of Torts: Intentional Torts to Persons* has never explicitly included intentional infliction of emotional harm as among the invasions for which it offered a legal remedy.

Restatement (Third) of Torts: Intentional Torts to Persons differs from old school trespass in its modern form, however, in that it omits two additional

1 RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS, Preliminary Draft No. 4 (Mar. 6, 2017) xiii–xiv (reviewing coverage).

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harms that the trespass writ included. The two modern tort causes of action that protect these interests are trespass to chattels, which covers interferences with moveable property, and trespass to land. *Restatement (Second) of Torts* had included them,[2] but the American Law Institute taxonomy now classifies trespass to chattels and trespass to land under Property rather than Torts.[3] One can understand this move. Battery, assault, and false imprisonment all require intent, which happens to be a topic of great interest to the chief Reporter of this Restatement.[4] Liability for trespass to land and trespass to chattels, both intentional torts that involve property, is less intent-ish—stricter than liability for trespass to the person—in that property-tort defendants need not have known when they acted that they were interfering with anyone's possessory interest. Thus the choice to divide the five "surviving children" of Trespass as a writ into two groups, the three derived from trespass to the person covered in *Restatement (Third) of Torts: Intentional Torts to Persons* and the other two, which originated in trespass to property, now relocated to *Restatement (Fourth) of Property*, is cogent.

Unity among the five Trespass torts nevertheless still exists. Consider the truism, well defended in contemporary property scholarship and frequently repeated in American judicial decisions, that the foundational attribute of property is an entitlement to exclude.[5] That entitlement also informs and explains trespass to the person as a wrong. Battery, assault, and false imprisonment all offend against self-possession.[6] *Restatement (Third) of Torts: Intentional Torts to Persons* manifests indirect agreement with this proposition by providing eight sections on consent, as many as it uses to cover its three trespass-to-the-person torts. Consent matters to this Restatement because individuals' prerogative to

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2 RESTATEMENT (SECOND) OF TORTS § 158 (1965) (trespass to land); *id.*, § 217 (trespass to chattels).

3 E-mail from Christopher Robinette to Anita Bernstein, Oct. 17, 2016.

4 *See* Kenneth W. Simons, *Does Punishment for "Culpable Indifference" Simply Punish for "Bad Character"? Examining the Requisite Connection between Mens Rea and Actus Reus*, 6 BUFFALO CRIM. L. REV. 219 (2002); Kenneth W. Simons, *Rethinking Mental Sates*, 72 B.U. L. REV. 463 (1992).

5 Kaiser Aetna v. United States, 444 U.S. 164, 179–89 (1979); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); Jonathan Glick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 U. PA. L. REV. 917 (2017); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

6 *Cf.* Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENV'L L. & POL'Y REV. 491–93 (1997) (arguing that race-based environmental detriment, which harms both persons and property, falls within battery and trespass to land); Lightning Oil Co. v. Anadarko E&P Onshore, LLC, – S.W. 3d – (Tex. May 19, 2017) (observing that "a trespass is not just an unauthorized interference with physical property, but also is an unauthorized interference with one of the rights the property owner holds").

exclude others matters *qua* prerogative. Excluding another person is always optional for a self-possessor or a possessor of land and chattels, never mandatory. We might volunteer for a slap on the face, or the sudden appearance of a lurching ghost in a haunted-house amusement, or to get tied up in bed. No battery if we agree: no assault, no false imprisonment. As torts people like to say in Latin, to the willing there is no injury.

Willingness to accept a slap on the face or *Boo!* from a hologram or erotic bondage is not the tort default, however. Neither is consent to intimate penetration. The law through its doctrines of trespass says that every crossing into a locus of possession that the possessor does not approve cannot lawfully occur. In parallel to how parties to a contract make law bilaterally to limit and govern themselves, possessors of geographic spaces make law *uni*laterally to limit and govern access that a prospective entrant may seek. Prospective visitors ask a possessor for indulgence from the outside. Literally or figuratively, they knock on a door, and they must accept rejection from the possessor if they get it. Kind or unkind, reasonable or unreasonable, wealth-maximizing or not, a No answer to their petition to enter is the law.

"There is nothing," William Blackstone famously proclaimed, "which so generally strikes the imagination ... as the right of property," and property is "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[7] Some scholars have rolled their eyes at "sole and despotic dominion," contending that Blackstone might have exaggerated what he believed,[8] or intended to be received less (or more?) than literally.[9] Even those theorists who endorse power for property owners "in total exclusion of the right of any other individual in the universe" probably have to concede the need for an exception or two, such as a qualified privilege of necessity. Yet the prerogative of a land possessor to refuse entry holds strong in the United States, as recent decisional law and scholarly writing continue to demonstrate.[10]

If all persons share the same rights under the common law that Blackstone's "one man" holds and exercises, then all persons may say no to incursions into what they possess, and what they possess includes their bodies. Their refusals

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7 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, *2.

8 Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 U. CINN. L. REV. 67, 73 (1985); David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES IN L. 103, 105 (2009).

9 Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 604 (1998).

10 Published within the last year are Palmer v. Atlantic Coast Pipeline, LLC, – S.E. 2d - (Va. 2017); Carrillo v. My Way Holdings, Inc., 389 P.3d 1087, 1093 (N.M. 2016) (adverting to a common law right); Glick & Parchomovsky, *supra* note 5.

must be honored in the law, including the law of intentional torts. Although an individual never has any legal entitlement to receive sexual penetration from another person at her behest, what she chooses with respect to an offer of it outranks "the right of any other individual in the universe." She has dominion over entry into her own sexual interior. No one else shares control of this locus.

As a self-possessor, she may refuse access to her body—and especially to her vagina—for good reason, for no reason, and out of a motive of which she might be or ought to be ashamed: snobbery, prejudice, distraction, laziness, meanness, baseless resentment. The law unequivocally supports her veto of sexual intercourse regardless of where her refusal originates. Similar to the land possessor who answers only to his whims when deciding to reject a visitor, the possessor of an intimate orifice has a near-absolute entitlement to bar anyone from the geography of herself. She is also entitled to obtain recognition in the form of criminal punishment of an intruder who enters against her will. Rape, a term I use here to mean sexual penetration unwanted by the penetrated person, is trespass in the old sense of the word as a writ: a direct, unmediated, and wrongful boundary-crossing.

I say that a self-possessor "may refuse access to her body—especially to her vagina" to emphasize two points about this entitlement. First, any unwanted touching is an invasion in which the law might take an interest, but some invasions matter more than others. In discussing the nearly absolute entitlement to refuse sexual penetration, I will have occasion to describe rape as exceptionally unwanted and exceptionally invasive. Second, I characterize the invaded body as female even though the person penetrated might not be a woman or identify as one. Men share equally in the entitlement to refuse sexual penetration for any reason or no reason. "Especially to her vagina" is a phrase nonetheless worth including because the full personhood of women, unlike that of men, has been controversial in the law. Apparently it needs advocacy.

Individuals are entitled to cash damages when they suffer unwanted sexual penetration, and—less directly related to an intentional torts Restatement but at the heart of rape as trespass—they may also kill an invader to fend it off. This option resembles self-defense but is even stronger than that strong privilege. Until the late eighteenth century, persons convicted of homicide in defense of their lives had to hope for pardon rendered in form by the King, signed by the Chancellor as dispenser of equity.[11] While only a pardon could help the defender who killed to save his own life, the common law for many centuries deemed homicide justifiable to prevent theft and robbery.[12] This hierarchy informs

11 Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 570 (1903).
12 *Id.*

understanding of rape as an instance of trespass. Persons who kill in defense of land and chattels avail themselves of a privilege that has deeper roots in the common law than the privilege to kill in defense of human life. Rape need not put life at risk to justify death for the assailant. As something that threatens a property-like interest, this danger receives an especially venerable level of vigilance from the common law of trespass.

Moreover, as a jurisprudential proposition the legal entitlement to kill a rapist compares favorably with other privileged applications of force. Understood as defending something distinct from her life, the responses used to fend off rape are at least as valid under the common law as actions taken to fend off any other kind of invasion. No good reason supports ranking the interest that a person has in the sexual integrity of her body lower than the interest a person has in the boundary around her land or chattels. Pertinent distinctions between one's property and one's body favor the body. Land and chattels can be alienated, repudiated, and conveyed from oneself, but a body stays with its inhabitant from birth to death. Discontent with our chattels and land can be eased by exchanging them for money or something else, but we must live with the bodies we have whether we like them or not: no matter how wealthy we are, we can never trade ours for a better one. Persons with only a modicum of sentience are aware of where the boundaries of their bodies begin and end. They need surveys and explanations—hearsay, in effect—before they can know the perimeter of their land. They cherish their geographic spaces and the objects they own, but they cherish their bodies more.

Just as distinctions between land and chattels on one hand and the body on the other favor the body with respect to the importance of this interest, exceptions to the nearly absolute entitlement of a land possessor to refuse entry are less compelling for unwanted sexual penetration. A person who enters the land of another without permission might have a privilege of customary license that defeats a trespass claim against him. Oliver Wendell Holmes, Jr., noting that English common law had provisioned a "strict rule" entitling land possessors to reject visitors as they pleased, also recognized what he called a license for visitors to enter unenclosed, uncultivated land, a license "implied from the habits of the country."[13] In the contemporary version of customary license, mail carriers and door-to-door canvassers can enter land uninvited without committing a tort thereby. But customary license can never excuse or justify unwanted sexual penetration. Societies have an interest in the rendering of useful services and transitory communications, but none in forcing a person to

13 McKee v. Gratz, 260 U.S. 127, 135 (1922).

tolerate a penis or finger inside her mouth or vagina when she does not want this penetration. In addition to having no value beyond the wish of the penetrator, sexual boundary-crossing transmits risks of health and safety.[14] Even digital penetration can be dangerous. Mail carriers and Girl Scouts who sell cookies, by contrast, endanger no one by their entry.[15] Similarly, the qualified privilege to enter land without permission to take shelter during an emergency[16] has no counterpart in the sexual realm. Necessity does not exist when all an entry can accomplish is friction-satisfaction for the penetrator or impregnation undesired by the person invaded. Socially privileged individuals certainly have felt entitled to penetrate other people regardless of what these objects of their attention desired, and the law as applied has not often stood in their way: but this result is a failure of law, not a principled exception to "sole and despotic dominion."

The contention I make in this Article, if heeded, would alter what those who experience or are threatened with unwanted sexual penetration receive from the law. Such persons typically gain no civil recourse for what they suffered. Civic education does not inform them that they may justifiably use deadly force to ward off rape. They have not collected damages for this injury via constitutional tort actions against units of government. Jurisdictions that recognize common law criminal trespass do not apply this recognition to this instance of it. (Governments criminalize rape in statutory law, but women who complain of this invasion face judge-made barriers to conviction that express skepticism about the truth of what they said—a stance very different from the law's response most of the time when a possessor objects to an invasion.)

If rape is trespass, what then follows for *Restatement (Third) of Torts: Intentional Torts to Persons*, a work in progress as this Article goes to press? I identify no need for new blackletter here, nor any changes to the positions this Restatement has taken on doctrinal controversies related to intentional torts. Rape in this Article falls uncontroversially under the current blackletter prohibition of "contact [that] is offensive to a reasonable sense of personal dignity," and

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14 For women in particular. The Centers for Disease Control has published a list of the ways that "women disproportionately bear the long-term consequences" of sexually transmitted disease. Among them: "The lining of the vagina is thinner and more delicate than the skin on a penis," and symptoms are more difficult for a woman to identify at an easy-to-treat early stage because they can be invisible or appear normal. CDC Fact Sheet, 10 Ways STDs Impact Women Differently from Men, Apr. 2011 https://www.cdc.gov/std/health-disparities/stds-women-042011.pdf

15 *See* Florida v. Jardines, 569 U.S. 1, 6 (2013) (Scalia, J.) ("Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters.").

16 Ploof v. Putnam, 71 A. 188 (Vt. 1908).

thus will be actionable per this Restatement,[17] as is in American courts generally,[18] under the rubric of battery. For the sake of framing, however, I suggest that introductory material, or a passage in the Reporters' Notes, could acknowledge the other two modern torts that descend from the writ of Trespass. Saying explicitly that trespass to land and trespass to chattels are now covered in a different Restatement would underscore this inclusion. Siting these possession-focused torts in *Restatement (Fourth) of Property* reinforces themes of autonomy and dignity that the Reporters of *Restatement (Third) of Torts: Intentional Torts to Persons* have found central.[19]

1 Civil recourse for trespass

Judicial decisions about unwanted entries into land show the breadth of what a person who experiences unwanted penetration may protest in court and how easy it is to fulfill the elements of this claim. To be liable under the common law of trespass, intruder-defendants need not have intended to harm the person they invaded, nor to offend her self-possessory rights;[20] they need only have intended the act that the plaintiff experienced as an unwelcome entry or attempted entry.[21] Mistaken beliefs on their part that she welcomed or accepted penetration do not defeat her claim for damages. Dan Dobbs sums up the cause of action as a clearly delineated "yes-or-no kind of tort. If the defendant has committed an act equivalent to an intentional entry and the plaintiff is a possessor, then, prima facie, a trespass has occurred."[22]

To be actionable, this type of unwanted penetration also need not have inflicted an injury of monetary value. As a categorical wrong it exists regardless of the quantifiable hurt it may or may not cause. Plaintiff thus qualify for nominal and even punitive damages.

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17 RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS, T.D. No. 2, § 3 (Mar. 10, 2017).

18 Ellen M. Bublick, *Tort Suits Files by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 71 (2006). Working with a narrower definition of rape that requires "force and/or violence," one court declared that "all rapes are necessarily batteries," independent of whether this type of bodily contact is offensive. Paul v. Montesino, 535 So. 2d 6, 7 (La. App. 1988).

19 *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 3 (defining battery); *id.*, § 7, illustration 4 (referring to the embarrassment of being physically exposed).

20 DAN B. DOBBS, THE LAW OF TORTS 99 (2000).

21 Snow v. City of Columbia, 409 S.E. 2d 797 (S.C. App. (1991).

22 DOBBS, *supra* note 20, at 96.

Two famous decisions, separated by hundreds of years, illustrate this breadth. In the fifteenth-century Thorns Case, a man committed actionable trespass when he stood on his own land trimming a hedge, because this trimming caused thorns to land on the plaintiff's property.[23] In *Jacque v. Steenberg Homes, Inc.*, decided in the late twentieth-century United States, the Wisconsin Supreme Court upheld a six-figure punitive damages award, plus one dollar of nominal damages, to a married couple after a truck traversed their snow-covered field without their approval, harming the land not one whit.[24] Judges continue to repeat an old common law maxim that the law does not concern itself with "de minimis," meaning anything that is trivial,[25] but also will order intruders to pay cash for their shallow, fleeting, and transitory entries into land. That decisions like *Jacque* and the Thorns Case are scarce does not come from any ambiguity in trespass doctrine—both are uncontradicted—but rather from land possessors' apparent disinclination to complain in court.

Except when invasions cost them money; here decisional law is profuse. Possessors of land who attribute a monetizable or otherwise concrete injury to an invasion get welcomed warmly in the courts. Actual harms, including diminutions in sale value, that result from a trespass to land are recoverable. So are repair costs in excess of the lost value of the land, as is the rental value of geographic space that a defendant wrongfully occupied.[26] The remedy of "mesne profits," feudal in origin and still alive in common law jurisdictions, permits a possessor to collect the value of land enjoyed by an occupant that had no legal right to be there.[27] Mesne profits are not damages but an entitlement to collect something more than damages. Persons who experience a trespass to their land can also receive monetary recompense for their emotional distress.[28] In short, the common law extends to land possessors who suffer incursions that they don't want every category of financial redress that it recognizes.

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23 Hulle v. Orynge, King's Bench, 1466 (Y.B.M 6 Edw. IV, folio 7, placitum 18).

24 563 N.W. 2d 154 (Wis. 1997).

25 For my views on this maxim, see Anita Bernstein, *Civil Rights Violations = Broken Windows:* De Minimis Curet Lex, 62 FLA. L. REV. 895 (2010).

26 DOBBS, *supra* note 20, at 112–15 (reviewing remedies).

27 Green v. Biddle, 21 U.S. 1, 3 (1823); Swordheath Properties Ltd. v. Tabet, [1979] 1 WLR 285. For more recent judicial recognitions of mesne profits, see Sherman Storage, LLC v. Global Signal Acquisitions II, LLC, 360 P.3d 340 (Idaho 2015) (rejecting a claim for mesne profits on the ground that the plaintiff did not prove them); DuBose v. McAteer, – So. 3d – (Ala. App. 2017) (noting the filing of a complaint seeking this remedy).

28 DOBBS, *supra* note 20, at 113–14.

Remedies for this invasion extend beyond money. Tort law is in general disinclined to provide equitable relief, but a land possessor can gain an injunction against a trespass that continues or appears likely to recur. Case law reports injunctive relief for land-possessor plaintiffs in England, Canada, and the United States,[29] although some American states regard the remedy as drastic and from there make it hard to win.[30] In Massachusetts, a land possessor can get an injunction against a trespass even if the invasion caused no injury, the invading defendant acted in good faith, and the cost of ceasing the trespass would greatly exceed the cost to the possessor of letting it continue.[31] Judges considering an injunction against a trespass, wrote the California Court of Appeal, ought to start "with the premise that defendant is a wrongdoer, and that plaintiff's property has been occupied." Possessory rights are at stake, and so even "doubtful" claims for injunctive relief "should be decided in favor of the plaintiff."[32]

2 Privileges to defend against trespass

Overlapping privileges—self-defense, defense of property, and defense of habitation—come together to express justification for a particular intentional infliction of harm: bodily hurt imposed on another to defend against invasion.[33] Justification sends one of the common law's most clarion messages. As a criminal law doctrine it gives the privileged person a round of applause—even though a human being may be lying dead on the ground, silenced from telling his side of the story. Defender-defendants who acted with justification have earned not only acquittal but approval. When homicide is deemed justifiable, Blackstone wrote, "the slayer is in no fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame."[34] Justification defeats liability in tort as well as common law, even though the related defense of excuse does not[35]; and unlike another

29 Sheppard Envelope Co. v. Arcade Malleable Iron Co., 138 N.E.2d 777, 782–83 (Mass. 1956); Pile v. Pedrick, 31 A. 646 (Pa. 1895); Delorme v. Cusson, 28 Can. Sup. Ct. 66 (1897), Anchor Brewhouse Developments v. Berkley House Ltd., [1987] EGLR 172.

30 Anthony Z. Roisman & Alexander Wolff, *Trespass by Pollution: Remedy by Mandatory Injunction*, 22 FORDHAM ENVT'L L. REV. 157, 184–99 (2010).

31 *Id.* at 177.

32 Christensen v. Tucker, 250 P.2d 660, 665 (Cal. App. 1952).

33 J. David Jacobs, *Privileges for the Use of Deadly Force against a Residence-Intruder: A Comparison of the Jewish Law and the United State Common Law*, 63 TEMP. L. REV. 31, 43 (1990).

34 4 BLACKSTONE, *supra* note 7, at *182.

35 John C. P. Goldberg, *Inexcusable Wrongs*, 103 CALIF. L. REV. 467, 485 (2015).

defense that tort law does recognize, private necessity, the privilege of justification is absolute rather than qualified.[36]

Though it relates to all the overlapping privileges, the entitlement to hurt another person to defend against rape falls most clearly into self-defense. Blackstone observes that homicide done "in defense of the chastity either of oneself or relations" is justified in both Roman and English law. Moreover, Blackstone continues, English law justifies homicide by a woman of "one who attempts to ravish her."[37] Rape as trespass in this respect has been uncontroversial in the United States, where defenders charged with homicide regularly prevail when the threat they defended against was rape. American courts have reversed convictions when the self-defense instruction that the judge gave the jury did not say clearly that rape is serious enough to justify the killing of an assailant:[38] A general statement from the trial judge about the privilege of self-defense does not suffice. Self-defense thus of itself justifies killing a person for the sake of preventing rape.

Other privileges in the overlapping set—labeled the castle doctrine, defense of habitation, and defense of premises—permit the infliction of force as a response to intrusion into a geographic space. The seventeenth-century jurist Edward Coke had a couple of opportunities to expand on the castle metaphor. Serving as Attorney General in *Semayne's Case*, Coke observed that "the house of everyone is to him as his castle and fortress,"[39] and later, in his *Institutes of the Laws of England*, Coke said that a man's house is his castle.[40] Mr. Semayne of *Semayne's Case* had wanted to enter a house under the mundane circumstance of pursuing satisfaction for a debt—he tried to get in and was turned away—but the prerogative articulated by the phrases "castle doctrine" and "defense of habitation" applies more grandly. It approves deadly force when a person has invaded or is about to invade the defender-possessor's home.

Defenders of their habitation may kill "even when there is no threat, real or perceived, of death or serious bodily injury,"[41] adds the criminal law theorist Stuart Green. The magnitude of carnage that this privilege approves seems grossly larger than the value of what a possessor seeks to defend. For the

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36 Ben Depoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090, 1100 (2011).

37 4 BLACKSTONE, *supra* note 7, at *181.

38 Barker v. Yukins, 199 F.3d 867, 873 (6th Cir. 1999); State v. Martinez, 30 N.M. 178 (1924); Romero v. State, 663 S.W. 2d 121 (Tex. App. 1983).

39 77 Eng. Rep. 195 (1604).

40 EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINALL CAUSES 162 (1644).

41 Stuart P. Green, *Castles and Carjackers: Proportionality in the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 3–4.

entitlement to make sense, the harm of an invasion into a home has to be understood as more significant than a threat to property alone.

Five possible rationales could support the breadth of this privilege, Professor Green continues. First, one could say that all entries into a dweller's premises are deadly threats, or may be presumed to be deadly. Second, the home may be a locus of unique vulnerability. Third, the property interest in a home could be especially strong. Fourth, writes Green, "an intrusion into one's premises involves a threat to one's privacy, dignity, and honor, analogous to the threat present in crimes such as rape and kidnapping, against which defensive deadly force is considered justified." Lastly, the prospect that invasions into property and premises will be met with deadly force has value as deterrence.[42] None of these rationales in isolation convinces Green that deadly force in defense of premises is proportional, but he concludes they may be compelling enough in the aggregate to offer justification.

What they do support is a broad privilege of homicide to stop a person from raping oneself. Green's cluster of reasons for a privilege in defense of premises says explicitly (in rationale #4) that an individual has a privilege to kill in defense against rape. But the list does not stop there. Consider all the other Green justifications for this application of deadly force—starting with the first, invasion as deadly threat. A large fraction of victims of rape and attempted rape, probably more than half, perceive the assault as a threat to their lives when it happens.[43] Asked in a 1980s survey about rape as a general matter, women told researchers they believed rapists kill at least 25 percent of their victims and that a majority of rape victims suffer severe physical injury.[44] Their numbers did not align with the data—the odds of being killed and seriously injured during or after a rape were estimated at the time at 3 percent and 8 percent respectively[45]—but this much apprehension falls within reason. Inflicting or attempting unwanted sexual penetration shows, at a minimum, indifference to safety. Victims might plausibly also infer an intent to do them harm. Invading a home, by contrast, manifests an agenda to steal what can be scooped up quickly and then leave. Home invaders might have a different goal or two, but hasty burglary is their most likely motive. Occupants of the home know or should know that much. Unwanted entry into inhabited premises cannot be said to cause individuals more fear for their lives than unwanted sexual penetration.

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42 *Id.* at 37.

43 DEE L.R. GRAHAM ET AL., LOVING TO SURVIVE: SEXUAL TERROR, MEN'S VIOLENCE, AND WOMEN'S LIVES 75 (1994).

44 MARGARET T. GORDON & STEPHANIE RIGER, THE FEMALE FEAR 9 (1989).

45 *Id.*

As for the second rationale, which finds a privilege to kill on the ground that one's home is a locus of unique vulnerability, the comedian Wanda Sykes offered a pertinent comment in a standup monologue about the omnipresence of rape. "Just think about it," she began. "You get home from work, it's getting late, and you're like, I'd like to go for a jog ... but it's getting too dark. Oh! I'll just leave it at home!" Sykes called her sketch Detachable Pussy.[46] Leave "it" at home, for safety's sake, because the vagina is a locus of more vulnerability than even the home.

On to Green's third rationale. To say that the property interest in one's home is uniquely strong sounds like an assertion and nothing more, but the assertion explains rape well. In addition to the "privacy, dignity, and honor" noted in the next rationale, rape threatens a victim with risks of sexually transmitted disease and pregnancy. Safety from these threats has to be a strong interest, if anything is. As for deterrence, the last of Green's rationales, rape could use more of it. The scholar of self-defense law Mary Anne Franks observes that "men's violence against women is far more common, less justified, and more destructive than women's violence against men," and argues that the law ought to achieve deterrence through the conscious actions of female defenders. "Society would be better off," she concludes, if "women's justified violence against men [were] encouraged, protected, and publicized."[47] Encouraging, protecting, and publicizing violence by women against men to ward off rape would, according to one meta-review of the literature, have the beneficial consequence of reducing the incidence of this crime: Studies suggest that although only about a quarter of women faced with a threat of rape respond with forceful resistance, their doing so makes attempts less likely to succeed and does not increase the risk that the defender will be injured.[48]

American case law on self-defense does encourage violence, although women do not benefit from this support. The simplest way to stop assailants from causing harm without harming them is to flee. Retreat does not always succeed, especially if the assailant has a firearm; but deadly force can also fail a defender. Differing from their counterparts across the Atlantic, American judges approve deadly force even when the defender was not in his home and could have escaped the danger by fleeing. English common law never did. The Second Restatement of Torts reviewed criminal and tort decisions on self-defense to report exceptional generosity in the United States on the question of retreat. Its

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46 Wanda Sykes - Sick and Tired - Detachable Vaginae, YouTube (Jun. 11, 2007), https://www.youtube.com/watch?v = R8FfFwtL91Q

47 Mary Anne Franks, *Men, Women, and Optimal Violence*, 2016 U. ILL. L. REV. 929, 929.

48 Sarah E. Ullman, *A 10-Year Update of "Review and Critique of Empirical Studies of Rape Avoidance,"* 34 CRIM. JUSTICE & BEHAV. 411, 413–14 (2007).

survey of case law found that a majority of American jurisdictions approve the use of deadly force when the defender is not in his home. Few judges have tried to say why. "In many parts of the country, the ideal of social manhood has included as one of its prime requisites courage and dignity," speculated William Prosser, author of this part of the Second Restatement. "The interest of the actor in his personal dignity has been regarded as of greater importance than the social interest in the prevention of deadly affrays."[49]

Sauce for "the actor" is apparently not sauce for the actress. Even though American judges (assuming Prosser sized them up correctly) think that retreat is an undignified response to a threat, retreat continues to dominate advice about how to manage the risk of rape in ordinary life. Rape-prevention tips recommend that women keep their intake of alcohol to a prudent minimum, stay out of public places that might be dangerous, refrain from getting into cars or isolated rooms with strangers, and be ever ready to avoid and flee. Hampering one's movements and opportunities to lessen the risk of being attacked is a comprehensive retreat that goes further and deeper than running from a one-off confrontation. If a female recipient of this advice were to protest it as contrary to what Prosser called courage and dignity, she would sound absurd for having missed the part about requisites of social manhood.

Courts agree that a person need not retreat before he resorts to homicide in self-defense inside his home. Underlying this articulation of the castle doctrine is a premise that persons inside their homes have already retreated. They have chosen to nestle in what Coke called their *tutissimum refugium*, their safest refuge.[50] They have nowhere else more fundamental for shelter.

The castle doctrine teaches that vulnerability gives individuals *more* prerogative. Weakness is doctrinal strength: Contrary here to its reputation for conservatism, here the common law looks out for the little guy in his non-literal castle. One example of soaring rhetoric from the common law's eighteenth-century heyday appears in a warrantless-search decision where the Supreme Court quoted words attributed to a peer named William Pitt. In 1763 Pitt, the Earl of Chatham, rose on the floor of Parliament to declare that the "poorest man may in his cottage bid defiance to all the forces of the Crown." The man's hovel "may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!"[51]

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49 RESTATEMENT (SECOND) OF TORTS § 65, Self-Defense by Force Threatening Death or Serious Bodily Harm, Reporter's Note (1965).

50 *See supra* note 39 and accompanying text.

51 Miller v. United States, 357 U.S. 301, 307 (1958).

The Earl of Chatham presumably did not intend to comment on unwanted sexual penetration as trespass. But what he thundered about the poorest man in his cottage has to also apply to rape as experienced by anyone. (Assuming, of course, that a woman is a person.) The King with all his forces must stay out of a flimsy structure that gets penetrated all the time by English weather. Why? Pitt did not say. He must have thought the reason self-evident. Any acceptance of a castle or ruined-tenement metaphor necessarily agrees that the possessor of a body may also "bid defiance" to anyone who seeks entry into herself against her wishes, regardless of whether she can achieve her defiance-bidding with force.

Now, nondeadly force. Responding to invasion with relative gentleness may seem trivial when contrasted to death penalty that the law might approve, but it deserves attention as complementary to the prerogative to blow an invader away. Although the law does not permit homicide or the infliction of a severe wound to protect land outside a home or mere chattels,[52] it cheerfully permits possessors to detain, grab, scratch, menace, trip up, and otherwise lightly inhibit anyone whose action challenges their ownership of a thing or a geographic locus. They may proceed swiftly, without reflection or hesitation, and as long as they refrain from killing or wounding severely, they may take actions that inflict more harm than necessary to accomplish their purpose. *Restatement (Third) of Torts: Intentional Torts to Persons* unites in one section an entitlement to engage in conduct that would otherwise constitute battery, assault, or false imprisonment in other to defend land or personal property.[53] It identifies the wrong that the actor defends against as "intrusion"—no more and no less. That the person at the receiving end of force crossed a boundary is enough to make otherwise tortious conduct lawful.[54] A similar rule governs trespass to chattels. Recaption, the privilege that permits infliction of force for the sake of retaking moveable property, is strikingly generous to possessors—and over the centuries it grew more generous to defenders, rather than more restrained.[55]

The common law thus offers encouragement and support for an array of possessors' goals. When it approves killing and wounding severely in self-defense and extends this capacious entitlement to defenders of premises, it tells boundary-

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52 Rollin Morris Perkins & Ronald N. Boyce, Criminal Law 1148 (3d ed. 1982).

53 Restatement (Third) of Torts: Intentional Torts to Persons, Preliminary Draft 4 (Mar. 17, 2017), at 179.

54 *Id.*

55 Cynthia Hawes, *Recaption of Chattels: The Use of Force Against the Person*, 12 Canterbury L. Rev. 253 (2006).

crossers who threaten possessory interests that they may have to pay what can be characterized as the ultimate price. When the law approves nondeadly force to protect an interest in property alone, in contrast to human life or habitation, it appears more moderate. Invaders ought to appreciate the lightness of any condoned blow. But nondeadly force is not nothing. It is condoned without judicial process, or a chance to be heard, or any judicial requirement that what the invaders experience be in proportion to what they threatened. When a complaint about it reaches decisional law, somebody suffered. Some lawyer—a prosecutor in a criminal case; a plaintiff's lawyer if the claim is pleaded in tort—deemed the defender's action deserving of time in court. Non-severe injuries do not kill, but they hurt. Characterizing them as justified means that individuals must suffer physical pain and the pecuniary loss that might accompany it without recourse.

If the law forbade deadly force all the time, even in self-defense or defense of habitation, then it would neglect or derogate the interest that persons hold in their life and health and home. But if it permitted only deadly force, never the nondeadly kind, then a different neglect or derogation would occur. "Use maximum force or no force at all" as a legal rule tells defenders they sometimes may kill without penalty, but it also limits their options. By recognizing a range of harmful bodily contacts in the overlapping privileges related to self-defense—from a slight scratch of barbed wire to a shotgun blast to the head, whatever a possessor reasonably needs—the law puts itself in the shoes of persons who own property and their own selves. It cares less about the needs and interests of boundary-crossers.

The Supreme Court put a self-possessor front and center in *Caetano v. Massachusetts*, a 2016 decision that vacated a criminal conviction.[56] Jaime Caetano had accepted a stun gun from a friend who offered it to her for self-defense against an abusive ex-boyfriend. Caetano never fired the stun gun, but she brandished it when the ex-boyfriend menaced her, and was convicted of the Massachusetts crime of possession of an electrical weapon.[57]

Concurring in the judgment, two Justices approved a line of thought propounded by Eugene Volokh in a law review article and relayed to the Court in an amicus brief:[58] The Second Amendment right to bear arms includes a right to bear this particular nondeadly arm. *Caetano* ruled that the Supreme Judicial

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56 136 S.Ct. 1027 (2016).

57 Mass Ann. Laws ch. 140, § 1315 (Lexis Nexis 2017).

58 Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199, 203 (2009); Brief of Arming Women Against Rape & Endangerment, et al. as *Amicus Curiae* in Support of Petitioner, Caetano v. Massachusetts, 136 S. Ct. 1027 (2016) (No. 14-10078).

Court of Massachusetts had erred when it refused to apply the Second Amendment to a stun gun on the ground that this weapon was unknown in 1789.[59] The mistake of this ruling, according to the Volokh view as adopted by the concurrence, originates not only in bad originalism but more fundamentally in a failure to understand self-defense.

This privilege must be broad enough to give a defender-possessor what she requires. Not everyone is capable or desirous of killing an assailant, and the government may not force a person to choose between either homicide or a feeble response when she can defend herself effectively with "a weapon already in widespread use across the Nation."[60] Human beings in their variety have varied self-defense needs, in other words, and they may do what they have to do to guard against a dangerous invasion.

3 Criminal trespass, and what it says about rape

Trespass used to unite what American law now divides into civil and criminal law,[61] and in its modern form the law occasionally supports prosecutions for criminal trespass. The need for a criminal version of this wrong is much diminished in what Guido Calabresi has called our "age of statutes."[62] Numerous jurisdictions have done away with common law crimes altogether; and where common-law crimes persist they are harder to administer than the statutory sort. A penal code helpfully spells out elements and penalties, and interpretive principles guide their application in court.

That said, criminal trespass is still alive and still informs the law of unwanted sexual penetration. It is also pertinent to a Restatement named Intentional Torts to Persons, whose chief Reporter happens to be a scholar of criminal law.[63] Whereas unintentional torts, now filed under negligence and strict liability, tend to be mundane—slip and falls, automobile collisions—intentional torts jar the landscape. Uninsurability and damages rules make them cheaper in the aggregate than accidents, but they can invade victims more deeply. Their origin in a purposeful human agenda (only rarely

59 Commonwealth v. Caetano, 26 N.E. 3d 688, 692 (Mass. 2015).

60 *Caetano*, 136 S. Ct. at 1033.

61 David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*. 76 B.U. L. Rev. 59, 59 (1996).

62 Guido Calabresi, A Common Law for the Age of Statutes (1982).

63 *See, e. g.*, Kenneth W. Simons, *Is Strict Criminal Liability in the Grading of Offenses Consistent with Retributive Desert?*, 32 Oxford J. Leg. Stud. 445 (2012); Kenneth W. Simons, *Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact*, 9 Ohio St. J. Crim. L. 487 (2012).

"substantial certainty" about the outcome of an act, the alternative way for intent to be present) means that often intentional torts, even today when the line between civil and criminal responsibility is clear, look and feel like crimes.

Courts in jurisdictions that recognize criminal trespass maintain that only a minority of trespassory invasions can be prosecuted as crimes. Using Latin to advert to the common-law pedigree of this distinction, they explain that although "vi et armis," the phrase that a plaintiff once needed to recite for a trespass writ in a private action, might sound violent—the "vi" syllable in common reflects a shared etymology—this requirement is slight in contrast to "manu forti" or "[with] strong hand," the standard for criminal trespass, which expects the state to allege worse disruption than mere *vi et armis*.[64] Courts have most often phrased their more demanding criterion for criminal in contrast to civil trespass as "a breach of the peace,"[65] but they have also used "a riot or forcible entry,"[66] "the high-handed invasion of the actual possession of another,"[67] and "a demonstration of force ... calculated to intimidate or put in fear."[68] "To make a trespass indictable," wrote the North Carolina Supreme Court in the middle of the nineteenth century, the possessor must be "induced to surrender and give up the possession, because resistance would be useless. Unless this degree of force is resorted to, the trespass is a mere civil injury."[69]

Unwanted sexual penetration meets these judge-made descriptors of what is in effect an aggravated or extreme trespass. Being raped, worrying about being raped, and experiencing the aftermath of rape amount to breaches of the peace in the sense of disrupting order and regularity in the lives of victims and potential victims. Applicability of the "riot" criterion can be questioned when one accepts the *Commentaries* definition of riot as a common law crime—"where three or more actually do an unlawful act of violence,"[70] said Blackstone— but it is no barrier to treating rape as criminal trespass. Riot as a criterion comes from

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64 City of Cape Girardeau v. Pankey, 224 S.W. 588, 589 (Mo. 1949); Dean v. State, 285 A.2d 295, 298 (Md. App. 1971).

65 Bouie v. City of Columbia, 378 U.S. 347, 358 (1964); Original Fayette County Civil & Welfare League, Inc., v. Ellington, 309 F. Supp. 89, 95 (W.D. Tenn. 1970); State v. Sheldon, 629 A.2d 753, 759 (Md. App. 1993).

66 State v. Wheeler, 3 Vt. 344, 347–48 (1830).

67 Johnson v. Hawkeye Commercial Men's Ass'n, 152 N.W. 561, 562 (Iowa 1915).

68 Dildy v. State, 147 S.W. 92, 92 (Ark. 1912).

69 State v. Ross, 49 N.C. 315, 316–17 (1857).

70 BLACKSTONE, *supra* note 7, at *1464.

a decision focused on trespass "to land or goods,"[71] a lesser interest for a possessor than the interior of her body. More fundamentally, this criterion is phrased as an alternative to forcible entry rather than a separate doctrinal requirement by itself, and rape typically is an instance of forcible entry. As for "resistance would be useless," the phrase used by the North Carolina Supreme Court, it describes what many victims interviewed in research studies reported about how they felt at the time of the crime.[72]

Criminal trespass as breach of the peace might at first glance appear not to fit one subset of unwanted penetration: cases where the victim was unaware of the penetration until after its occurred. Yet common law courts have long held that sexual intercourse with an unconscious woman is rape even when the defendant did not cause the victim to be unconscious.[73] Here the concept of criminal trespass improves understanding of this wrong. If possessors hold a nearly absolute prerogative to forbid entry into what they possess, then *a fortiori* they are entitled to an opportunity to consider this prospect before it happens. A person cannot choose to exercise her common law prerogative to refuse sexual penetration when she is unconscious. Unless she approved this penetration in advance—that is, before relinquishing consciousness, in anticipation of the near future and with trust of the person to whom she gave permission—the prospective penetrator has to wait for her awareness to return before he may apply to enter. Trespass law teaches that the default is No, not Yes. Visitors must keep out unless a possessor welcomes their entry, as Felix Cohen famously observed in his description of property as a prerogative to exclude:

> *To the world:*
> *Keep off X unless you have my permission,*
> which *I may grant or withhold.*
> *Signed: Private Citizen*
> *Endorsed: The State* [74]

Upgrading this invasion from civil to criminal makes sense in the context of unconscious self-possessors vulnerable to rape, because the threat is so

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71 *Wheeler*, 3 Vt. at 347.

72 The late sociologist Pauline Bart gathered significant data on point in the 1980s. *See* PAULINE B. BART & PATRICIA O'BRIEN, STOPPING RAPE (1986); Kim Lane Scheppele & Pauline B. Bart, *Through Women's Eyes: Defining Danger in the Wake of Sexual Assault*, 39 J. SOC. ISSUES 63 (1983).

73 Alison C. Nichols, Note, *Out of the Haze: A Clearer Path for Prosecution of Alcohol-Facilitated Sexual Assault*, 71 N.Y.U. ANN. SURV. AM. L. 213, 220 (2015) (observing that Commonwealth v. Burke, 105 Mass. 376, 379 (1870) cites "half a dozen English cases" for this proposition).

74 Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954).

dangerous. An individual ought to be safe from unwanted penetration when she is asleep, or too drunk, or too drugged to be aware of the experience before it occurs. Even if she lost consciousness for a reason that sounds like fault on her part, such as her voluntary consumption of a substance that she possessed in violation of a codified crime, the prerogative to refuse unwanted penetration does not require virtue on the part of a possessor. Criminal law recognizes that even blameworthy persons are entitled to a modicum of order in their lives.[75]

Unwanted sexual penetration, in this view, breaches the peace because "the peace" includes orderliness that enhances human existence, a level of security that enables individuals to make plans and investments. Rape as a prospect disrupts our lives. Its disruption can be dismissed as trivial or ephemeral or inconsequential only when one has not bothered to assess it. Societies could, if they choose, tally up the costs of rape to inform what they choose to invest in prevention: Writing about the economic and social costs of crime, a category that includes but is not limited to fear of assault as experienced by individuals in the aggregate, British researchers showed in 2007 that standardized measurement technologies can price this harm.[76]

We needn't wait for these numbers to get a sense of the magnitude: we have some. A 2016 study by the Centers for Disease Control and Prevention looked at rape as a source of social harm in the United States by tallying the costs of rape in four categories: medical costs, lost work productivity among victims and perpetrators, criminal justice spending, and the fourth a miscellaneous category including victim property loss and damage. Measured over the lifetime of the more than 25 million adults in the United States who have been raped, the first two groups combine to generate a cost of literally trillions of dollars. On a total lifetime-population basis, rape costs nearly $3.1 trillion.[77]

Breach of the peace manifests also in the everyday consciousness of women. I've mentioned rape-prevention tips: the reminders, the reproaches. You always could have been more careful. Hold your keys in your hand as you walk to your car, the tip of one key pointed out of your fist ready to scratch. Never turn your head away from your drink at a bar. Don't look slutty, lest you provoke. Your heels. Your skirt. It's pervasive. An essayist writing pseudonymously in 2009 coined the phrase Schrödinger's Rapist to address every man who would ever

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75 Aya L. Gruber, *Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense*, 52 BUFF. L. REV. 433, 437 (2004).

76 Paul Dolan & Tessa Peasgood, *Estimating the Economic and Social Costs of the Fear of Crime*, 47 BRIT. J. CRIMINOLOGY 121 (2007).

77 Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 AM. J. PREVENTATIVE MED. 691 (2017).

approach her in public. Comparable to the cat in the famous thought experiment by Erwin Schrödinger, each man she encounters might or might not intend to rape her, she said, and for the sake of her safety she would proceed aware of how dangerous he might be.[78] I don't see much point in contending that rape as a social phenomenon is terrorism—the ill-defined word throws more heat than light—but it remains correct to say that an individual woman in the United States is at significantly greater risk of being raped than being hurt by a bomb. One can try to tune out the message about perpetual risk, but to the extent it gets through, equanimity is diminished.

The United States Department of State maintains a webpage labeled Women Travelers. As travelers, women might be interested in venues that commemorate or focus on women. Alternatively, they might hold ungendered preferences and simply want to visit sights and sites that draw everyone else. Click on *travel.state.gov/content/passports/en/go/women*, however, and you'll find information that omits any positive recommendation about the destination and starts with how to reduce the risk of rape. This advice from Uncle Sam likely originates in good intentions. Perhaps it increases safety. It cannot, however, deliver the peace that is present in an environment without rape. Rape as a possibility that a person ought rationally to anticipate breaches that peace.

Rape-prevention advice, whose bottom-line message tells women they can retreat from danger but never overcome it, moves beyond rhetoric to push commodities for sale. Here's a question for you about your tastes, gentle reader. Would you want to live in an apartment building with a doorman in the lobby? I wouldn't. That a doorman compromises the tenant's privacy while rendering few actual services (especially for people who can have their packages shipped elsewhere) seems obvious to me.[79] Among upper- and upper-middle income women in my relatively safe-streets city, however, the doorman building is something desired for the sake of safety, like a so-called ride-hailing app, and also—the market not yet having heeded the call from Wanda Sykes for Detachable Pussy—a gym membership in lieu of walking or running in public for exercise. These services cost money and not just money. Counterparts for women who part with scarcer dollars for what is pitched to them tacitly but unmistakably as rape insurance are more oppressive, because they cost more in marginal-dollar terms.

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78 Phaedra Starling, Schrödinger's Rapist: Or a Guy's Guide to Approaching Strange Women Without Being Maced, Shapely Prose (Oct. 8, 2009), https://kateharding.net/2009/10/08/guest-blogger-starling-schrodinger%E2%80%99s-rapist-or-a-guy%E2%80%99s-guide-to-approaching-strange-women-without-being-maced/.

79 Kindred spirits of mine are quoted in Teri Karush Rogers, *Why Some Say 'No Thanks' to a Doorman*, N.Y. TIMES, Apr. 9, 2006, § 11, at 1.

Investing in safety from street crime certainly can reduce the risk of other assaults, not just rape. And not only women choose doorman buildings and gym memberships with crime in mind. Safety is a broader category than rape-risk reduction. What makes this lifestyle or commodity version of safety relevant to rape as breach of the peace is its incremental effect. Perceiving oneself as vulnerable to unwanted sexual penetration does not displace awareness of other street crimes like robbery, (nonsexual) assault, and homicide—prospects from which women are relatively safe compared to men.[80] Instead it adds another layer of worry and distraction.

Awareness of a background risk of rape breaches the peace of labor markets that would benefit from the presence of more women. One cannot know how much the perceived risk of being raped at their workplace or while traveling to and from work discourages women from employment outside the home, but a paper by a team of Indian economists identified an effect. Their study looked at the drop in female labor-force participation in India during the years 2004 to 2010 and linked it to an uptick in crimes against women (notoriously but not only rape) during that same time.[81]

Women are missing from the workforce around the world in general, and in the United States in particular. Economists Francine Blau and Lawrence Kahn report that American female labor force participation was 75.2 percent in 2010, up only a little from the 1990 figure of 74 percent. In a ranking of 22 economically advanced countries, the United States participation rate had been sixth highest. It dropped to #17 in 2010.[82] Underparticipation by women in the workforce impedes growth in domestic economies around the world. The consulting firm McKinsey calculated that improving gender parity in the workforce would add trillions to the size of the global economy—its estimate for the years 2015–2025 was $12 trillion if each country improved as much as the fastest-improving country in their region, $28 trillion if women participated as much as men worldwide.[83] Eliminating rape would not bring all women into the workforce, of course, but it would bring in enough to boost the economy.

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80 GORDON & RIGER, *supra* note 44, at 54.

81 Tanika Chakraborty et al., Crime and Women's Labor Force Participation, http://www.isid.ac.in/~epu/acegd2014/papers/SaraniSaha.pdf listed as 2015 in http://home.iitk.ac.in/~tanika/files/resume/TanikaCV.pdf

82 Francine D. Blau & Lawrence M. Kahn, *Female Labor Supply: Why is the United States Falling Behind?*, 103 AM. ECON. REV. 251 (2013).

83 Jonathan Woetzel et al., How Advancing Women's Equality Can Add $12 Trillion to Global Economic Growth, Sept. 2015, http://www.mckinsey.com/global-themes/employment-and-growth/how-advancing-womens-equality-can-add-12-trillion-to-global-growth.

Even a slight reduction in female labor force participation attributable to rape-fear matters. While the death of employment as we know it because of automation technology continues to loom—I've shared in the fretting[84]—sectors of the domestic and global economy now lack the personnel for their entrepreneurial activities. Higher wages in theory ought to solve the problem but in practice does not, and some businesses scramble to fill the payroll. Jennifer Gordon coined the phrase "the human supply chain" to describe networks of migrant recruitment where intermediaries working at the behest of employers look for people willing to move across national boundaries for low-paying jobs.[85] The system imposes high social costs, Gordon reports. It burdens migrant workers at every step of their journey and exposes them to dangers when they arrive at a destination country like the United States. Employers suffer less from their role in the human supply chain, but they too pay for it. Workers would be more willing to take jobs, I suggest, if they felt safer from rape.

Rape-risk hovers everywhere. Again, I'll focus on women. Young women in the United States in their late teens and early twenties go either to work or to college. They face a well-documented risk of rape in both settings. (A minority of them end up neither in work nor school: but alternative places for them—prisons, pre-adult marriages, institutions that house persons with disabilities—do not furnish safety from unwanted sexual penetration.) Higher education receives more attention as a locus of rape. News media describe this crime as perpetually present on campus. Keg parties, fraternities, and big-ticket men's team sports appear to generate rape, or at least accusations of rape, in a kind of perpetual motion.[86] The federal government oversees a large compliance apparatus that may enhance safety as well as awareness of campus rape.[87] Enhanced awareness, like the higher security of a doorman building, is a double-edged

84 Anita Bernstein, *Just Jobs*, 45 U. BALT. L. REV. 209 (2016).

85 Jennifer Gordon, *The Human Supply Chain*, 107 IOWA L. REV. 445 (2017).

86 On the connections among college sports, fraternities, and rape, see Eliana Dockterman, The Hunting Ground Reignites the Debate Over Campus Tape, Time, Mar. 5, 2015 http://time.com/3722834/the-hunting-ground-provocative-documentary-reignites-campus-rape-debate/.

87 The Crime Awareness and Campus Security Act of 1990, 20 U.S.C. § 1092(f), known since 1998 as the Clery Act, obliges higher educational institutions to report sexual violence on their campuses. *See* Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J. COLLEGE & U. L. 613, 632–33 (2009); Tamara Rice Lave, *A Critical Look at How Top Colleges and Universities are Adjudicating Sexual Assault*, 71 U. MIAMI L. REV. 377, 379–80 (2017) (discussing the Obama administration's 2011 "Dear Colleague" Letter, which directed institutions of higher learning to reduce the standard of proof for complaints of sexual assault and characterized sexual assault and harassment as discrimination barred by Title IX of the Civil Rights Act).

sword. It could support more informed choices about where to go to college, but also contributes to a 24/7 American breach of the peace.

Entering the workplace instead of a college campus provides no shelter from the risk of rape. Jobs available to uneducated women pay poorly and offer little recourse to an individual worker who complains about anything, sexual assault included, as rape in the agriculture sector suggests.[88] Education as a sector receives anti-rape attentions beyond what federal regulation requires: access to counseling, student-led alliances, libraries replete with information about the problem. In contrast to a tuition-paying student, a low-paid worker is pressured to meet the needs of her employer. She cannot count on sector self-interest to care about her safety from rape.

In sum, even when individuals are not themselves experiencing unwanted sexual penetration, rape pervades ordinary life in the contemporary United States. It breaches the peace even when none of the elements of this crime occur. For this reason, criminal trespass is worth thinking about in the current era of rape-regulation, when codification has superseded the common law of criminal trespass. Statutory crimes provide ample penalties for the conduct in question, but they are latecomers: criminalization of sexual assault by American legislatures continued an older response by the law to the problem of rape.

Penal codes learned from judge-written law; rape crimes codify a judge-made tradition. Remembering this origin keeps continuity and a long pedigree in mind. It unites the wrong of rape with a writ-based jurisprudence focused on the self-declared interests and boundaries of persons who possess land and chattels as a source of public peace.

4 Conclusion

Resolved: Rape is trespass. Should tort lawyers care? Though more familiar as a crime, rape is already fully actionable in tort. The intentional-tort dichotomy that classifies unwelcome bodily contact as either harmful or offensive allows courts readily to conclude that unwanted sexual penetration satisfies either adjectival criterion. A straightforward battery, in short.[89] Differing in this respect from criminal

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88 *See* "Rape in the Fields," PBS, June 25, 2013 http://www.pbs.org/wgbh/pages/frontline/social-issues/rape-in-the-fields/female-workers-face-rape-harassment-in-u-s-agriculture-industry/

Sara Obeidat, Female Farm Workers Awarded $17 Million in Florida Abuse Case, Sept. 15, 2015 http://www.pbs.org/wgbh/frontline/article/female-farm-workers-awarded-17-million-in-florida-abuse-case/.

89 *See supra* notes 17–18 and accompanying text.

law, tort delivers no additional gain or victory at the expense of a defendant when the conduct in question qualifies for a second category of wrong. Persons who suffered rape, in other words, have no material or practical need for the trespass label. Only rarely can a tort plaintiff receive more from a court than compensation, and for compensation one solitary intentional tort will serve as well as two or more. The contention I press in this Article causes no money to change hands.

And yet this contention matters, because it makes the necessary point that individuals—women very much included—possess themselves. We all hold a categorical entitlement to refuse entry into our bodies. Like the elderly Wisconsinites who in 1994 refused a request by a visitor to traverse a swath of snow-covered land for no good reason, we have support in the law of trespass for even a capricious or unkind rejection decision.[90] When we suffer sexual penetration that we do not want, we have been wronged. Tort law ought to furnish us with redress at our election.

Though *Restatement (Third) of Torts: Intentional Torts to Persons* omits trespass to land and chattels from its blackletter,[91] rape as trespass has a place in this volume, as suggested in an early précis of what this Restatement could contain by the scholar who became its chief Reporter. Eleven years ago, Kenneth Simons shared his view that although what he called "the reasonableness paradigm" is ascendant in tort, "expanding its empire," not everything that tort law makes actionable falls within the confines of reasonableness.[92] Some intentional acts are considered wrongful even when the defendant has reason on her side and the plaintiff does not. For example, Professor Simons continued, a defendant physician can be liable for having trammeled on a patient's right to refuse treatment even when this defendant's idea of how to proceed was sounder as medical practice than the patient's rejection.[93]

Carrying the point over to rape, I willingly stipulate that saying no to an offer of sexual penetration could be regrettable, ignoble, or otherwise unreasonable. Imposing one's own will in response to even a misguided rejection decision (or, in the case of unconscious persons, presuming that one's target would not object or perhaps might appreciate the experience when she wakens) and going ahead with penetration of another's body without her consent is nevertheless still trespass. "Sometimes a reasonableness paradigm," as Professor Simons reminds us in his concise case for an intentional torts Restatement, "mischaracterizes the interests at

90 Jacque v. Steenberg Homes, Inc., 563 N.W. 2d 154, 156 (Wis. 1997).

91 *See supra* note 3 and accompanying text.

92 Kenneth W. Simons, *A Restatement (Third) of Intentional Torts*, 48 ARIZ. L. REV. 1061, 1098 (2006).

93 *Id.* at 1099–1100.

stake, or mischaracterizes how they should be weighed and justified."[94] Intentional torts do not necessarily offend against reason; and the law has never required a showing of unreasonable conduct as a condition for the receipt of tort damages.

Understanding rape as trespass has one last virtue worth heeding as this Restatement takes final form, related to the overlap between crimes and intentional torts:[95] Whereas modern rape crimes are enacted by legislatures, rape as trespass—criminal trespass, I have argued—comes from the common law. Judges wrote this doctrine. Rape is Trespass thus comports with the expertise of the American Law Institute, which "continues its focus on judge-made, rather than positive, law."[96] This alignment pervades *Restatement (Third) of Torts: Intentional Torts*.

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94 *Id.* at 1099.

95 *See supra* note 64 and accompanying text.

96 Dan Tarlock, *Why There Should Be No Restatement of Environmental Law*, 79 BROOK. L. REV. 663, 666 (2014).